

MacDonald v. GuarantR, Inc.

Supreme Court of New York, New York County

May 11, 2022, Decided

INDEX NO. 655050/2019

Reporter

2022 N.Y. Misc. LEXIS 2456 *; 2022 NY Slip Op 31553(U) **

[1]** RONALD F. MACDONALD, HARTWELL CONSULTING CO., Plaintiffs, - v - GUARANTR, INC., JULIEN BONNEVILLE, Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

termination, Shares, continuous period, expiration, summary judgment, consultant

Judges: **[*1]** HON. JOEL M. COHEN, J.S.C.

Opinion by: JOEL M. COHEN

Opinion

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

From March to September 2016, Plaintiff Ronald F. MacDonald provided consulting services to Defendant GuarantR, Inc. ("GuarantR") under the terms of a Consulting Agreement (Defs.' stmt. of material facts ["SMF"] ¶¶ 5, 20 [NYSCEF 92]).¹ In April of that year, GuarantR granted MacDonald 25,000 stock options (the "Option Shares") pursuant to an Option Agreement, which set the vesting start date for those Option Shares as April 1, 2016 (*id.* ¶¶ 14-15). The Option Agreement also formulated an expiration date on MacDonald's right to purchase the Option Shares: the shares "may only be exercised within three (3) months after the date of the termination of MacDonald's "Service Relationship" with

GuarantR (*id.* ¶ 19).

The question here is when MacDonald's "Service Relationship" terminated, which will determine, in turn, whether his exercise of the Option Shares was timely. The Option Agreement **[**2]** defines "Service Relationship" as "the continuous period during which" MacDonald is "engaged as a consultant by, and/or [is] engaged in another service relationship with, the Company" (NYSCEF 81 ¶ 2). GuarantR contends that **[*2]** its Service Relationship with MacDonald ended when the Consulting Agreement expired in September 2016. MacDonald, on the other hand, insists that his Service Relationship with the Company remained unbroken until, at the earliest, May 2019. Up until then, MacDonald says, he was continuously "engaged in another service relationship with" the Company, providing "behind the scenes" consulting services even though the formal Consulting Agreement had expired (Pl.'s resp. to SMF ¶ 20 [NYSCEF 102]). In the end, MacDonald purported to exercise his right to purchase the Option Shares in July 2019 (SMF ¶ 48; see NYSCEF 83 at 2-6 [Exercise Notice]). The exercise is timely under MacDonald's view of when the Service Relationship terminated; it is untimely under GuarantR's view. In the end, GuarantR did not deliver the Option Shares to MacDonald, and MacDonald sued.

Defendants seek summary judgment dismissing MacDonald's fourth and fifth causes of action (for breach of contract and tortious interference, respectively), which stem from GuarantR's refusal to deliver the Option Shares under the Option Agreement. For the reasons set forth below, the motion is granted.

DISCUSSION

A motion for summary judgment **[*3]** "shall be granted if, upon all the papers and proof submitted, the cause of action . . . shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212 [b]). "The proponent of a summary judgment motion must make a prima facie

¹Unless otherwise noted, the facts recited here are undisputed.

showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]; *Silverman v Perlbindler*, 307 AD2d [**3] 230, 230, 762 N.Y.S.2d 386 [1st Dept 2003]). Once the moving party meets this burden, "the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833, 988 N.Y.S.2d 86, 11 N.E.3d 159 [2014]). The party opposing a motion for summary judgment must "produce evidentiary proof in admissible form" (*Stonehill Cap. Mgmt., LLC v Bank of the West*, 28 NY3d 439, 448, 45 N.Y.S.3d 864, 68 N.E.3d 683 [2016]). Mere conclusions, expressions of hope, allegations or assertions are insufficient to raise a triable issue of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]).

The elements of a breach of contract claim "include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426, 913 N.Y.S.2d 161 [1st Dept 2010]).²

A. The termination of the Consulting Agreement did not necessarily terminate the Service Relationship under the Option Agreement.

The Court declines to adopt Defendants' primary argument [**4] — that "MacDonald's Service Relationship ended with the termination of the Consulting Agreement, *regardless of whether or not MacDonald continued to fashion consulting services in a more limited role thereafter*" (NYSCEF 77 at 11 [emphasis added]). This overbroad reading of the Option Agreement ignores the contract's plain language. The Option Agreement easily could have tethered the expiration of the Option Shares to the expiration of the Consulting Agreement; it did not do so. Instead, the Option Agreement defines the Service Relationship as follows:

[T]he continuous period during which you serve as a director or officer of, are employed by, engaged as a consultant by, and/or are engaged in another service relationship with, the Company or any Affiliate.

² Defendant Bonneville seeks to dismiss the tortious interference claim on the basis that no underlying breach of contract occurred.

[**4] (NYSCEF 81 ¶ 2).

What must be "continuous," in that sentence, is the "period during which" MacDonald serves in one "and/or" another of the enumerated roles. The conjunctive "and" indicates that an individual can serve in multiple roles within the same "continuous period." The disjunctive "or" signals that each role is distinct from the other: "another service relationship" must mean something distinct from "engage[ment] as a consultant," [**5] for example. Reading those terms together, if MacDonald's role with GuarantR changed — from an employee to a director, say, or from consultant to other service provider — within a "continuous period," the "Service Relationship" would still be maintained. Defendants' argument, by contrast, selectively ignores key portions of the contract language.³

B. MacDonald fails to raise a triable issue of fact about whether he was "engaged in another service relationship" in the same "continuous period."

There is not, however, sufficient evidence in the record to permit a trier of fact to find that MacDonald remained engaged in "another service relationship" with the Company for a "continuous period" after expiration of the Consulting Agreement

After September 2016, the record indicates that MacDonald's services to GuarantR were sporadic, uncompensated, and largely unsolicited. It is undisputed that MacDonald did not work [**5] full-time for GuarantR, did not keep any time records for hours he allegedly worked for GuarantR, and was not paid for any work he allegedly performed for GuarantR, despite asking repeatedly for compensation (*id.* ¶¶ 27, 34, 38).

³ Several times in their motion papers, Defendants quote incompletely from the Option Agreement. On page 5 of their memorandum of law in support of the motion, for example, Defendants state: "The Option Agreement defines Service Relationship, as that phrase is used in the Notice of Grant, as 'the continuous period during which you . . . are . . . engaged as a consultant by the Company. . .'" (NYSCEF 77 at 5). That excerpt elides the key language discussed above, in a way that alters the meaning of the provision fundamentally (see *also*, e.g., *id.* at 11 ["[T]he definition of Service Relationship . . . includes only the 'uninterrupted' and 'continuous period during which you . . . are . . . engaged as a consultant by the Company.'"]; *id.* at 13 ["Service Relationship is defined in paragraph 2 of the Option Agreement, as 'the continuous period during which you . . . are . . . engaged as a consultant by the Company. . .'"]).

MacDonald's own statements further [*6] undermine his case. In a 2017 deposition MacDonald provided in another lawsuit, he testified that he had no "active consulting clients," "formal" or "informal," at that time (NYSCEF 87 at 107). In 2018, submitting a biographical affidavit for a board seat application, MacDonald represented that his "complete employment record" with GuarantR lasted from March to September 2016 (SMF ¶ 45). And in 2019, MacDonald admitted in a draft letter that he had found "no employment" since September 2016, and "no significant consulting work" either (*id.* ¶ 47). Defendants make out a prima facie case, therefore, that "the continuous period during which" MacDonald worked in some capacity for GuarantR ended with the termination of the Consulting Agreement.

MacDonald's affidavit in opposition, in which he asserts an "ongoing, behind-the-scenes relationship" with the company after the Consulting Agreement expired, "does not raise a bona fide question of fact" (*Lupinsky v Windham Constr. Corp.*, 293 AD2d 317, 318, 739 N.Y.S.2d 717 [1st Dept 2002]; *Caraballo v Kingsbridge Apt. Corp.*, 59 AD3d 270, 270, 873 N.Y.S.2d 299 [1st Dept 2009] ["[S]elf-serving affidavits denote an effort to avoid the consequences of plaintiff's earlier testimony and are insufficient to defeat defendant's motion for summary judgment"]; see MacDonald Aff. ¶ 13 [NYSCEF 94]). That is because the statements [*7] in the affidavit conflict with MacDonald's own prior statements and other undisputed facts of the case. For instance, the affidavit states that MacDonald "continue[d]" to provide services to GuarantR "on an informal basis" once the Consulting Agreement ended (*id.*), including "advis[ing] GuarantR on operations, practices and development of products and relationships in the New York insurance and real estate industries" [*6] (*id.* ¶ 14). But these statements are at odds with MacDonald's contemporaneous testimony that he had no "active consulting clients," or "significant consulting work," "formal" or "informal," after September 2016.

MacDonald submits no evidence, moreover, that "another service relationship" was intended to encompass the kind of arrangement he supposedly had with GuarantR after September 2016 (see *Kramer v Harris*, 9 AD2d 282, 283, 193 N.Y.S.2d 548 [1st Dept 1959] ["It is not enough that a defendant deny a plaintiff's presentation in summary judgment. He must state his version, and he must do so in evidentiary form"]). Typically, "the meaning of a word in a series of words is determined by the company it keeps," so that "[a] series of specific words describing things or

concepts of a particular sort are used to explain the meaning of a general [*8] one in the same series" (*Lend Lease (U.S.) Constr. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 57, 22 N.Y.S.3d 24 [1st Dept 2015]). Here, the term "another service relationship" follows a list of working relationships that entail formal recognition, agreed-on responsibilities, and the assignment of work, not to mention compensation. MacDonald's alleged relationship with GuarantR after September 2016, even if proven, was decidedly different. It was a role without a title, without a description, and without pay.

And also without a clear end point. MacDonald avers that his "service relationship, however described, was never terminated," but as a fallback argues it may have terminated on May 15, 2019 (MacDonald Aff. ¶ 24). The alleged termination event that day — an email — does not mention terminating an existing relationship (see *id.* ["Right now there are no opened positions you **would qualify for**, but happy to keep an open dialogue to see if you could help in some capacity"] [emphasis added]; see NYSCEF 95 [copy of email]). That MacDonald now [*7] interprets this exchange as a possible termination of his "Service Relationship" only underscores the tenuous nature of the relationship as he seeks to define it.

* * * *

Accordingly, it is

ORDERED that Defendants' motion for partial summary judgment [*9] is GRANTED, and the fourth and fifth causes of action are dismissed with prejudice; and it is further

ORDERED that the parties appear for an initial pre-trial conference to discuss trial scheduling and logistics with respect to Plaintiff's remaining claims on **May 27, 2022, at 11 a.m.** in Courtroom 208.

This constitutes the Decision and Order of the Court.

5/11/2022

DATE

/s/ Joel M. Cohen

JOEL M. COHEN, J.S.C.