At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of December, 2013.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

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ISAAC SUTTON,

Plaintiff,

- against -

Index No. 503296/13

E&B GIFTWARE LLC, RAYMOND MOUHADEB, AND KATTEN MUCHIN ROSENMAN LLP,

Defendants.

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The following papers numbered 4 to 16 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	4, 7
Opposing Affidavits (Affirmations)	11, 13-14
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers Memorandum of Law	8, 12, 16

Defendant E&B Giftware LLC (E&B) moves for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing plaintiff Isaac Sutton's first, second, third, fourth, fifth, sixth, seventh, eighth and eleventh causes of action.

Sutton's primary allegation is that E&B breached the parties' Amended and Restated Consulting Agreement (Agreement)[1] by failing to pay Sutton consulting fees and bonus payments that E&B is obligated to pay him following his termination of his retention under the Agreement. In the complaint, Sutton asserts that E&B first retained him as a consultant in July 2009 (Complaint ¶ 8). Thereafter, E&B entered into a licensing agreement with a non-party, Sharper Image Acquisition, LLC, (Sharper Image) (Complaint ¶ 9). Given Sutton and E&B's desire to base a portion of Sutton's compensation on a percentage of sales of products sold under the license from Sharper Image, the parties executed the Agreement on January 30, 2012 (Complaint ¶ 10). Under the Agreement, E&B agreed to retain Sutton as an "independent contractor" consultant from January 1, 2011 through December 31, 2015 (Agreement §§ 1 and 13; Complaint ¶¶ 11-12). The Agreement identifies Sutton as "Consultant" and provides that he would receive, among other payments, a "Consulting Fee" based on a percentage of sales of products sold pursuant to the Sharper Image licensing agreement, a "Minimum Consulting Fee" of $225,000, and an annual bonus of $100,000 (Agreement §§ 3.1 and 3.4). The Agreement has a merger clause and provision requiring that it may not be modified except by a writing signed by each of the parties to the agreement (Agreement § 9).[2]

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[1] E&B has attached a copy of the Agreement to the affidavit of Tim Shine.

[2] Section 9 of the Agreement provides that:

> "This Agreement contains the entire agreement and understanding of the parties hereto relating to the subject matter hereof, and supersedes all prior and contemporaneous discussions, agreements

With respect to termination, the Agreement provides that "Consultant's retention hereunder may be terminated during the Term upon the occurrence of any one of the events described in this Section 5. Upon termination, Consultant shall be entitled only to such compensation and benefits as described in this Section 5." Sections 5.1 and 5.2 (a) and (b) of the Agreement address termination of Sutton by E&B.[3] Section 5.2 (c) of the Agreement provides that, "Consultant may terminate his retention hereunder at any time, for any reason, effective upon the date designated by Consultant upon sixty (60) days written notice to the Company" (Agreement 5.2 [c]). Section 5.2 (d) provided that, "[i]n the event that Consultant terminates his retention pursuant to Section 5.2 (c)" he would be entitled to receive his Minimum Consulting Fee and his Bonus payments through the term of the contract, but would not be entitled to health benefits or other compensation. Aside from termination by E&B and by Sutton, section 5.2 (e) of the Agreement provided that the Agreement and Sutton's retention as a consultant would terminate if the Sharper Image license agreement

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> and understandings of every nature between the parties hereto relating to the retention of Consultant by the company. This Agreement may not be changed or modified, except by an Agreement in writing signed by each of the parties hereto. The waiver of the breach of any term or provision of this Agreement shall not operate as or be construed to be a waiver of any subsequent breach of this Agreement."

[3] Section 5.1 (a)of the Amended Agreement allows E&B (identified as "The Company" in the Agreement) to terminate Sutton for cause and if Sutton was so terminated he would only be entitled to compensation and expenses accrued as of the effective date of the termination. Upon providing Sutton with 60 days notice of the effective date, section 5.2 (a) of the Agreement allows E&B to terminate Sutton for any reason. Such termination, however, would essentially allow Sutton to receive the entirety of his benefits for the term of the Agreement (Agreement § 5.2 [b]).

was terminated for any reason, and that, upon such a termination, Sutton would only be entitled to compensation accrued but unpaid as of the effective date of the termination of the Sharper Image license agreement.

Not long after entering into the Agreement, however, Sutton's relationship with E&B soured, and E&B essentially stripped Sutton of all of his responsibilities in the six month period from July 2012 to January 2013 (Complaint ¶¶ 16-19). Although E&B had initially identified Sutton as Vice President of Business Development for the Sharper Image brand, by December 2012 Sutton did not have an identified role in E&B's organizational chart (Complaint ¶¶ 21-24). In light of these changes, Sutton hired an attorney, defendant Raymond Mouhadeb, a partner with defendant Katten Muchin Rosenman LLP, to represent him in terminating the Agreement (Complaint ¶¶ 3-7 and 25).

In early January 2013, Mouhadeb telephoned Steven Brigham, E&B's Chief Executive Officer and informed Brigham of Sutton's desire to leave E&B (Complaint ¶¶ 26-27). Mouhadeb also sought to confirm whether E&B would honor the compensation terms of the agreement, and Brigham responded by stating that he was aware of the terms of the Agreement, but asked whether Sutton would consider a one-time lump sum payment in lieu of the Agreement's compensation terms (Complaint ¶¶ 27-28). Following this conversation, Mouhadeb drafted a letter, dated January 14, 2013, for Sutton to deliver to E&B (Separation Letter), in which Sutton stated that he was "separating from E&B 'effective as of today'"

(Complaint ¶¶ 29-30).[4] In the letter, Sutton also referred to the terms of payment outlined in section 5.2 (d) of the Agreement and thereafter stated that "'This separation is conditioned on the timely receipt of the above payments'" (Complaint ¶ 31).

On January 14, 2013, Sutton hand delivered this Separation Letter to both Brigham, and Tim Shine, E&B's vice president of sales (Complaint ¶ 32). After delivery of the letter, "Brigham came into Sutton's office and stated that E&B was considering giving the Sharper Image license back and was also considering filing for bankruptcy" (Complaint ¶ 33). Brigham also told Sutton to pack up his belongings (Complaint ¶ 34). Sutton thereafter packed up his belongs and returned to the office two days later to pick-up his belongings under the escort of an E&B employee (Complaint ¶¶ 35-36). When Sutton failed to receive any payments from E&B after he left, Sutton's counsel's made a demand that E&B make the payments required by the Agreement (Complaint ¶¶ 37-38). E&B responded, through counsel, that it had no intention of making any such payments because Sutton had failed to give the required notice (Complaint ¶ 39).

Based on these factual allegations, Sutton alleges eight causes of action against E&B: (1) a cause of action for a judgment declaring that the Separation Letter constituted a proper termination of Sutton's retention under the Agreement as of the first proper termination date; (2) a cause of action for specific performance requiring E&B to make payments as required by section 5.2 (d) of the Agreement; (3) cause of action for breach of contract based on the

[4] A copy of this letter is attached as an exhibit to Sutton's opposition papers.

assertion that E&B ratified the termination under the contract and/or waived any defects in the manner that Sutton terminated the notice and that, as such, E&B had breached the Agreement by failing to make the payments required by section 5.2 (d) of the Agreement; (4) a cause of action for breach of contract based on the assertion that E&B was equitably estopped from declining to make payments under section 5.2 (d) of the Agreement based on any defective notice; (5) a cause of action for a judgment, in the alternative, declaring that the failure to give 60 days notice was not a material breach of the Agreement; (6) a cause of action for a judgment, in the alternative, declaring that the Separation Letter was ineffective to terminate the Agreement and that it was E&B that terminated Sutton's retention under the Agreement; (7) a cause of action, in the alternative, for specific performance requiring E&B to pay Sutton compensation required by section 5.2 (b) of the Agreement based upon a finding that E&B had terminated Sutton without cause; (8) a cause of action for an injunction enjoining E&B from declaring a breach under the Agreement pending a notification that the Separation Letter may be deemed to constitute a breach of the Agreement and enjoining E&B from declaring a default without providing Sutton an opportunity to cure. Aside from these causes of action, Sutton demands costs and attorney's fees from E&B pursuant to the Agreement if he is the prevailing party.[5]

E&B now moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint, asserting that it has no contractual duty to pay Sutton's post-termination compensation in

[5] This claim for attorney's fees is not numbered in the complaint, but E&B has identified it as the eleventh cause of action in its motion to dismiss.

light of Sutton's failure to provide 60 days written notice of his intent to terminate the contract as required by section 5.2 (c) of the Agreement and that section 5.2 (b) of the Agreement is inapplicable because E&B did not terminate the Agreement.

Turning first to Sutton's claim to compensation under section 5.2 (d) of the Agreement, reading sections 5.2 (c) and 5.2 (d) together, the Agreement leaves no doubt that the provision of 60 days notice under section 5.2 (c) is a condition precedent to E&B paying post-termination compensation under section 5.2 (d) (*see MHR Captal Partners LP v Presstek, Inc.*, 12 NY3d 640, 645-646 [2009];*Oppenheimer, Inc. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 691 [1995]; *Stars Jewelry by A Jeweler Corp v Hanover Ins. Group Inc.*, 104 AD3d 670, 671 [2d Dept 2013]; *New Image Constr., Inc. v TDR Enterprises, Inc.*, 74 AD3d 680, 681 [1st Dept 2010]; *see also, Parking Co. of America v Wilson*, 2002 WL 387180 * 2, 2002 Tex App Lexis 1858 *4-7 [Tex App 2002] [not designated for publication]). Sutton argues that the 60 day notice component of section 5.2 (c) does not constitute a condition precedent because the mere lapse of time does not create a condition precedent (*see Oppenheim*, 86 NY2d at 690). This case, however, does not involve the mere lapse of time, since section 5.2 (d) requires compliance with section 5.2 (c) before it becomes applicable. Further, the use of the language "in the event that Consultant terminates his retention hereunder pursuant to Section 5.2 (c)" is a form of construction frequently used to establish a condition precedent (*see Israel v Chabra*, 537 F3d 86, 93 [2d Cir 2008], *certified*

question answered 12 NY3d 158, *answer to certified question conformed to* 601 F3d 57 [2d Cir 2010]).

As an express condition precedent negotiated by the parties, Sutton's failure to give 60 days notice in compliance with the Agreement cannot be excused by a finding that the Separation Letter substantially or materially complied with the contractual notice requirements (*Oppenheimer, Inc. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690-693 [1995]; *Parking Co. of America*, 2002 WL 387180 * 2, 2002 Tex App Lexis 1858 *4-7). Sutton, in his pleadings and submissions in opposition to the motion, concedes that he did not provide 60 days notice. As the court finds, as discussed below, that plaintiff has failed to provide a factual or legal basis excusing his failure to provide 60 days notice, he is not entitled to compensation under section 5.2 (d). Because Sutton is not entitled to compensation pursuant to the terms of the contract, he is not entitled to any post-termination compensation (*see McCargo v Jergans*, 206 NY 363, 372 [1912]; *Yudell v Israel & Assoc.*, 248 AD2d 189, 190-191 [1st Dept 1998]; 52 NY Jur 2d, Employment Relations § 117).[6]

Sutton's initial argument in opposing dismissal is that the Separation Letter should be deemed sufficient to require E&B to make payments under section 5.2 (d) of the Agreement through the application of rules of decision: (1) providing that a notice of termination of a contract that is premature will serve to terminate a contract after the full amount of time

[6] Nothing in the language of the complaint suggests that Sutton is claiming that E&B failed to pay him compensation earned prior to his termination.

provided in the contract for such notice has passed (*see Guasteferro v Family Health Network of Cent. N.Y.*, 203 AD2d 905, 905 [4th Dept 1994]; *Yarmy v Conte*, 128 AD2d 611, 611 [2d Dept 1987]; *Bitterman v Cluck*, 256 App Div 336, 337 [1st Dept 1939]); and (2) providing that a notice of termination that identifies an erroneous termination date of a contract will be deemed effective as of the first proper termination date (the "erroneous date rule") (*see G.B. Kent & Sons v Helena Rubinstein, Inc.*, 47 NY2d 561, 564-565 [1979]). These rules allow a party that has provided notice - albeit notice that does not comply with a contract's time requirements - to terminate the contract while providing the other party the benefits of the contract until the contract could properly be terminated (*see G.B. Kent & Sons*, 47 NY2d at 564-565; *Guasteferro*, 203 AD2d at 905; *Yarmy v Conte*, 128 AD2d at 611; *Bitterman*, 256 App Div at 337). Nothing in either rule of decision or any of the cases identified by Sutton suggests that the party providing defective notice may continue to receive the fruits of a contract's provisions after providing such defective notice, and they thus do not require E&B to pay the compensation required by section 5.2 (d).

Sutton's factual allegations are also insufficient to establish any claim that E&B waived the 60 day notice requirement or that it must be estopped from relying on the 60 day requirement. Notably in this respect, in light of the provision requiring that any modification or change in the contract be made in writing (Agreement § 9), the statute of frauds (General Obligations Law § 15-301 [1]) provides that oral modifications to the Agreement are barred unless there is partial performance or promissary estoppel (*see Richardson & Lucas, Inc. v*

New York Athletic Club of City of N.Y., 304 AD2d 462, 463 [1st Dept 2003]). Sutton, however, has failed to even allege that there was an oral agreement to modify the notice provisions of the contract to waive the 60 day requirement. Moreover, E&B's conduct in letting Sutton leave his position is not unequivocally referable to any oral agreement to waive the 60 day notice requirement (*see Eujoy Realty Corp. v Van Wagner Communications, LLC*, 73 AD3d 546, 548 [1st Dept 2010], *lv dismissed* 15 NY3d 819 [2010]; *745 Nostrand Retail Ltd. v 745 Jeffco Co.*, 50 AD3d 768, 769 [2d Dept 2008]; *Irving Faber, PLLC v Kamalian*, 16 AD3d 506, 506-507 [2d Dept 2005]). Indeed, E&B's acquiescence can just as easily be seen as a recognition of Sutton's right to quit his employment in light of the bar on involuntary servitude contained in the Thirteenth Amendment to the United States Constitution (*see* 52 NY Jur 2d Employment Relations, § 87; *Misak-Falkoff v International Business Machines Corp.*, 854 F Supp 215, 228 n 37 [SDNY 1994], *affd* 60 F3d 811 [2d Cir 1995], *cert denied* 516 US 991 [1995] *and* 517 US 1111 [1996]; *Beverly Glen Music Inc. v Warner Communications, Inc.*, 178 CalApp3d 1142, 1144, 224 Cal Rptr 260, 261 [Cal Ct App 1986]).

In the absence of any identifiable duty to speak on E&B's part, E&B's passive acquiescence to Sutton's ending his relationship with E&B likewise fails to demonstrate an intentional or affirmative relinquishment of E&B's rights, a showing necessary to make out a waiver (*see Ferraro v Janis*, 62 AD3d 1059, 1060 [3d Dept 2009]; *Oriental Buffet & Grill Inc., v Vornado Gun Hill Rd. LLC*, 33 AD3d 436, 437 [1st Dept 2006]; *Bank of N.Y. v*

Murphy, 230 AD2d 607, 608 [1st Dept 1996], *lv dismissed* 89 NY2d 1030 [1997]; *Andrews v Dolan*, 158 AD2d 569, 570 [2d Dept 1990]; *cf. 1 Model Mgt., LLC v Kavoussi*, 82 AD3d 502, 503 [1st Dept 2011]). Similarly, E&B's silence upon Sutton's leaving is not conduct that amounts to false representation or concealment of material facts necessary to make out an estoppel (*see Cape Vincent Milk Producers Co-Op Inc. v St. Lawrence Food Corp.*, 43 AD3d 606, 607-608 [3rd Dept 2007]; *Bank of N.Y.*, 230 AD2d at 608).

As noted above, Sutton makes an alternative claim that he is entitled to benefits allowed under section 5.2 (b) of the Agreement because it is E&B that terminated Sutton's retention without cause. Sutton, however, does not clearly identify any basis to find that it was E&B that terminated Sutton, especially in light of Sutton's concession that he is not relying on a theory of constructive discharge.[7] Nevertheless, notwithstanding the fact that Sutton, on his own initiative, immediately departed and provided no further services to E&B, Sutton argues that the Separation Letter did not end the relationship since the Separation Letter was conditioned on Sutton receiving the payments under the contract and that, as such, it was E&B that effectively ended the parties' relationship. Given the bar on involuntary servitude (US Const 13th Amend), E&B undoubtedly rightfully accepted plaintiff's Separation Letter and deemed Sutton's retention under the contract terminated (*see* 52 NY Jur 2d Employment Relations, § 87; *Misak-Falkoff*, 854 F Supp at 228 n 37; *Beverly Glen*

[7] A constructive discharge theory would fail in any event, since the contract did not expressly or impliedly promise Sutton that he would have any particular position with E&B (*see* Contract § 2; *cf. Marks v Cowdin*, 226 NY 138, 142-146 [1919]; *Karas v H.R. Labs., Inc.*, 271 App Div 530, 532-534 [2d Dept 1946], *affd* 297 NY 494 [1947]).

Music Inc., 178 CalApp3d at 1144, 224 Cal Rptr at 261). The Separation Letter, by failing to comply with the notice requirement of section 5.2 (c) and by conditioning the termination of Sutton's retention on the payment of compensation pursuant to section 5.2 (d), was an attempt to renegotiate new terms of separation. Given the Agreement's provision requiring any amendment or modification of the Agreement to be in writing signed by each of the parties, E&B's passive acceptance of Sutton's Separation Letter is not also evidence that it accepted Sutton's additional conditions (*see MHR Capital Partners, LP*, 12 NY3d at 646). As such, Sutton has failed to state a claim that it was E&B that terminated his retention under the Agreement or that he has any right to the compensation provided under section 5.2 (b) of the Agreement.

With respect to Sutton's eighth cause of action for an injunction, to the extent that dismissal is not already compelled by the court's reasoning discussed above, the court notes that nothing in the Agreement required E&B to notify Sutton that he was in breach of the Agreement or required E&B to provide Sutton with an opportunity to cure his defective notice (*see Antonini v Petito*, 96 AD3d 446, 447 [1st Dept 2012], *lv dismissed* 20 NY3d 1028 [2013]; *Fesseha v TD Waterhouse Inv. Servs.*, 193 Misc 2d 253, 256-257 [Sup Ct, New York County 2002], *affd* 305 AD2d 268 [1st Dept 2003]). It is further noted that Sutton had conferred with an attorney prior to delivering his Separation Letter to E&B in person and was presumably counseled regarding the consequences of his unilateral action.

Finally, E&B's motion to dismiss must be denied to the extent that E&B seeks dismissal of Sutton's first, fifth, and sixth causes of action since Sutton properly seeks declaratory relief in those causes of action (*see Minovici v Belkin BV*, 109 AD3d 520, 524 [2d Dept 2013]). As there are no questions of fact presented by the controversy, however, the court will deem E&B's motion to dismiss a request for a declaration in its favor, and enter a judgment declaring that Sutton is not entitled to any compensation or other benefits provided for under section 5.2 of the contract (*id.*).

CONCLUSION

Accordingly, E&B's motion to dismiss is granted to the extent that Sutton's request for attorney's fees and his second, third, fourth, seventh, and eighth causes of action are dismissed.[8] The motion is denied to the extent that E&B seeks dismissal of Sutton's first, fifth, and sixth causes of action. Finally, the court declares that Sutton is not entitled to any compensation or other benefits provided for under section 5.2 (b) or section 5.2 (d) of the Agreement. As the action has been discontinued against the remaining defendants, the entire action is thus disposed.

This constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.

HON. CAROLYN E. DEMAREST

[8] The ninth and tenth causes of action do not seek relief from E&B but are alleged against plaintiff's attorneys. These claims have been discontinued.