

Gorelick v Cushman & Wakefield, Inc.
2020 NY Slip Op 31298(U)
April 24, 2020
Supreme Court, New York County
Docket Number: Index No. 651664/2018
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

-----X		INDEX NO.	651664/2018
DAVID GORELICK		MOTION DATE	01/16/2020, 01/16/2020
	Plaintiff,	MOTION SEQ. NO.	002 003
	- v -	DECISION + ORDER ON MOTION	
CUSHMAN & WAKEFIELD, INC.,			
	Defendant.		
-----X			

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 121, 122, 123, 124, 125, 139, 140, 141, 142, 143, 144, 151, 155

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 126, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 145, 146, 147, 148, 149, 150, 152

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is

In this breach of contract action, plaintiff David Gorelick seeks to recover severance pay from his former employer, defendant Cushman & Wakefield, Inc.

Background

This action involves a dispute over a signed letter agreement, dated June 8, 2017 (the "Agreement"), pursuant to which plaintiff commenced his employment as Executive Managing Director, Americas Head of Retail (the "Position") with defendant on July 17, 2017. The Agreement provided that plaintiff's yearly base salary was \$350,000 and his annual target bonus was \$350,000.

On January 10, 2018, defendant informed plaintiff that his employment was being terminated without cause, effective January 28, 2018. On or about January 22, 2018, plaintiff requested from defendant a payment of \$700,000, which is comprised of plaintiff's annual salary and target bonus. Thereafter, defendant offered plaintiff \$175,000 as a severance payment, which plaintiff rejected. Plaintiff maintains that defendant's offer was not in compliance with the following provision in the Agreement ("Severance Provision"): "*If your role is eliminated* during the first eighteen (18) months of your employment, we will make a severance payment to you that is equal to your annual salary plus your target bonus. After the first eighteen months of employment, you will revert to the standard Cushman & Wakefield severance plan." (emphasis added)

Based on the foregoing, plaintiff commenced this action for breach of the Agreement. Defendant answered the complaint and asserted numerous affirmative defenses, including that plaintiff failed to mitigate his damages ("Third Affirmative Defense"). Plaintiff now moves for summary judgment on his complaint, and in the alternative, to dismiss the Third Affirmative Defense. Defendant opposes this motion and also moves for summary judgment dismissing the complaint.

Plaintiff maintains that he is entitled to summary judgment on the complaint because either plaintiff's termination triggers the Severance Provision, or defendant's failure to fill the position is akin to the elimination of that role. Defendant maintains that the term "role" is synonymous with the Position, and because the Position has not been eliminated, the Severance Provision is not applicable.

Discussion

The party moving for summary judgment “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case,” *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (citations omitted).

Where “a written agreement ... is complete, clear and unambiguous on its face[, it] must be enforced according to the plain meaning of its terms.” *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002). “However, when the meaning of the contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented which cannot be resolved on a motion for summary judgment.” *Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 193 (1st Dept 1995) (citation and quotation marks omitted).

The parties disagree over the meaning of the phrase “your role” in the Severance Provision. The parties submit competing affidavits in an attempt to prove the intent behind using the term “role” instead of “position.” During negotiations for the Agreement, plaintiff informed defendant that he would need a two-year fixed term contract. Plaintiff maintains that defendant informed him that defendant “wasn’t able to offer [him] a two-year contract, but [defendant] felt that he could get creative and make [plaintiff] comfortable by putting a severance provision in that had the same teeth as a contract.”¹

¹ Prior to the execution of the Agreement, defendant sent plaintiff an offer letter which did not contain a Severance Provision.

According to plaintiff, the Agreement memorializes these discussions. Defendant denies making these comments; rather, it maintains that it merely explained that defendant offers severance provisions to its executives.

According to plaintiff, the Severance Provision would be triggered if plaintiff was terminated within eighteen months of beginning his employment with defendant, and that on the face of the Agreement, the Severance Provision applies if plaintiff's "personal role" was eliminated. Plaintiff argues that "your role" was intended to mean plaintiff's tenure at defendant; this is purportedly further established because the Agreement did not refine "your role" as "position" or refer back to the first paragraph of the Agreement, which identified the position for which plaintiff was hired.²

According to defendant, it drafted the Severance Provision and included it in the Agreement as a compromise for not providing plaintiff with a fixed term contract. Defendant submits an affidavit of Michelle Hay ("Hay"), one of defendant's employees [human resources] who [was a part of the negotiations with plaintiff]. Hay explains: "Although I used the term 'position' elsewhere in the offer letter, I purposely chose to use the term 'role' for this provision because I wanted it to be tied to the work or function being performed rather than the job or position or the person performing the work or function." Hay Aff. ¶13 (NYSCEF 100).

² The Agreement does not define "your role." In addition to the Severance Provision, this phrase is one other time in the Agreement: "We are excited at the prospect of you joining us, and are confident that you will be challenged and fulfilled in your role with Cushman & Wakefield."

The Agreement uses the term “position” to refer to the Executive Managing Director, America Head of Retail. However, the Agreement is unclear as to whether the term “your role” is intended to be interchangeable with “position.” “Your role” is not defined in the Agreement, and may specifically refer to plaintiff individually. Based upon a review of the Agreement and all of the parties’ arguments, I find that the term “your role” is susceptible to differing interpretations; the parties’ intent cannot be determined as a matter of law, particularly in light the competing affidavits submitted on these summary judgment motions.

Plaintiff also argues that, even if the term “your role” refers to the Position, defendant’s failure to fill the position is akin to the elimination of that role, and therefore plaintiff is entitled to summary judgment. According to defendant, plaintiff was not entitled to payment under the Severance Provision because plaintiff’s role was not eliminated; rather he was terminated because he was “not a good fit.”

Defendant acknowledges that, from January 10, 2018 through October 26, 2018, defendant did not post an opening for the Position on its website, which listed other available opportunities. It is further undisputed that, as of August 22, 2019, defendant had not hired anyone to fill the Position, and defendant has neither hired a recruiter to search for a qualified candidate nor conducted any interviews of prior applicants for the Position.

Plaintiff asserts that defendant eliminated the Position and that its website, which lists current leadership positions, does not include this Position. Plaintiff further

maintains that defendant does not intend to employ anyone in the Position and has not engaged in a meaningful search to recruit and hire an individual for the Position.

Defendant argues that the Position was not eliminated and avers that, although it does not currently employ anyone else in this Position, the Position remains open and will be filled once defendant finds a qualified candidate. Defendant maintains that it has spoken to multiple individuals regarding the Position, at least one of which was interviewed.

Based upon a review each parties' submissions, including the competing affidavits, another issue of fact exists as to whether the Position was eliminated. In light of the above-discussed issues of fact, I deny summary judgment to either party for the breach of Agreement cause of action.

In the alternative, plaintiff moves to dismiss the Third Affirmative Defense, which alleges that plaintiff failed to mitigate his damages. The Severance Provision, under which defendant agreed to make a payment to plaintiff if plaintiff's "role [was] eliminated during the first eighteen (18) months of employment," is akin to a liquidated damages provision, and thus, plaintiff has no duty to mitigate damages. *See Musman v Modern Deb, Inc.*, 50 AD2d 761, 762 (1st Dept 1975) (citation omitted); *see also Am. Capital Access Serv. Corp. v Muessel*, 28 AD3d 395, 396 (1st Dept 2006); *Boyle v Petrie Stores Corp.*, 136 Misc 2d 380, 393 (Sup Ct, NY County 1985).³

³ Defendant's argument – that a severance provision only operates as a liquidated damages provision where the employment is for a fixed term – is unavailing and unsupported by caselaw.

Defendant has failed to raise an issue of fact as to whether the Severance Provision is an unenforceable penalty. In the event that plaintiff's role was eliminated within eighteen months, defendant agreed to provide plaintiff with a year of total compensation; "the fixed and agreed amount bears a reasonable relationship to the amount of probable or actual harm," and it "is not a penalty because it was a reasonable estimate at the time the contract was negotiated and executed." *Crown IT Services, Inc. v Koval-Olsen*, 11 AD3d 263, 266 (1st Dept 2004); *see also Boyle*, 136 Misc 2d at 391 (Severance provision not considered an unenforceable penalty where "[t]he amounts fixed do not exceed the total compensation provided in the five year contract" and "[b]oth parties to the contract were sophisticated and were represented by able counsel."). Plaintiff has shown that the Third Affirmative Defense lacks merit as a matter of law and is therefore dismissed.

In accordance with the foregoing, it is hereby

ORDERED that: (1) the portion of plaintiff's motion seeking dismissal of defendant's third affirmative defense is granted; (2) the remainder of plaintiff's motion seeking summary judgment on its complaint is denied; and (3) defendant's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that counsel are directed to appear for a pre-trial conference on June 24, 2020 at 2:15 p.m., or at such later date and time as may be rescheduled..

This constitutes the decision and order of the Court.

4/24/20
DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE