SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** 61

Justice

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JOEL LEITNER,

Plaintiff,

- v -

BBG, INC. and BBG HOLDCO, LLC,

Defendants.

INDEX NO. 652263/2018

MOTION DATE

MOTION SEQ. NO. 001

DECISION ON MOTION AND TRIAL

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OSTRAGER, J.:

Plaintiff filed a motion for a preliminary injunction by order to show cause on May 15, 2018 seeking to enjoin the defendants from enforcing restrictive covenant, non-compete, and non-solicitation clauses in a contract defendants claimed to have terminated for cause, as well as expedited discovery and an expedited trial. The Court scheduled an evidentiary hearing on the motion for a preliminary injunction for May 16, 2018. Thereafter, the parties stipulated to adjourn the date of the preliminary injunction hearing so that documentary and testimonial discovery could take place.

The preliminary injunction hearing commenced on June 1 and during the hearing the parties further stipulated to consolidate the preliminary injunction hearing with a plenary trial on the merits that would commence on June 22, 2018. The defendants filed an answer with counterclaims and, thereafter, an amended answer with counterclaims.

It was stipulated that the trial would resolve all claims and counter-claims. The bench trial was conducted on June 22, 25, 26, 27, and 28. The named plaintiff and three defense witnesses were extensively examined and cross examined by exceedingly capable counsel with the benefit of four binders containing a stipulated and comprehensive set of trial exhibits relevant to the case.

Plaintiff asserted that the defendants breached his contract by terminating his employment without good cause and without providing a contractually mandated notice to cure his alleged wrongdoing which plaintiff asserted was required by the operative contract between the parties. Plaintiff, while denying any wrongdoing, also sought damages for severance pay and other benefits plaintiff claims were wrongfully withheld under the terms of his employment agreement. Defendants asserted that plaintiff Leitner was fired for cause and that under his employment agreement he is bound by the restrictive covenant, non-compete, and non-solicitation provisions of his contracts. Defendants also sought a declaration that it has no further financial obligations to plaintiff as a consequence of plaintiff's termination for cause and that plaintiff is fully subject to the non-compete and other restrictions on his conduct contained in his employment agreement. Defendants have also counterclaimed for damages stemming from plaintiff's alleged breach of contract, conversion, fraud, and breach of fiduciary duty.

For the reasons that follow, the motion for a preliminary injunction is denied, the restrictive covenants, non-compete and non-solicitation provisions of plaintiff's contract are enforceable, plaintiff's stock in defendants can be redeemed at defendants' option at the price plaintiff purchased the stock, and the defendants are awarded damages of $187,577.50, in addition to pre- and post-judgment interest.

Plaintiff Leitner established a highly successful real estate appraisal and consulting business in New York known as the Leitner Group. Plaintiff was the sole owner of that entity

and the originator of virtually all of the business of the Leitner Group. On June 30, 2014, a predecessor to defendant BBG, Inc. ("BBG") known as the Butler Burgher Group, LLC ("Butler Burgher") acquired the Leitner Group for approximately $18 million and other consideration. Since plaintiff Leitner was the driving force behind the success of the Leitner Group, the transaction was predicated upon plaintiff Leitner executing an employment contract which provided Leitner with substantial compensation. Leitner's employment agreement with Butler Burgher, as well as the related purchase agreement of the Leitner Group by Butler Burgher, prohibits Leitner from competing with Butler Burgher for five years (*i.e.*, until June 30, 2019).

On July 1, 2015, Butler Burgher was, in turn, purchased by BBG for more than $40 million. BBG is owned by Silver Oak Management II, L.P. ("Silver Oak"), a private equity firm. In connection with the BBG/Butler Burgher transaction, Leitner's contract with Butler Burgher was assigned to BBG. Leitner also entered into a new Employment Agreement dated July 1, 2015 (the "Employment Agreement") with BBG. As consideration for entering into a new employment agreement with BBG, Leitner received approximately $3.3 million in additional proceeds, a portion of which plaintiff claims he was due from the initial sale of the Leitner Group to Butler Burgher. In all events, it is undisputed that Leitner received in excess of $21 million for the business of the Leitner Group and that his continued association with Butler Burgher and, subsequently, BBG was considered essential by the successive purchasers of what was the Leitner Group. The BBG Employment Agreement specifically included the non-competition restrictions at issue in this case. Leitner specifically acknowledged in his Employment Agreement with BBG that his BBG employment agreement, including the restrictive covenant imposed on him, were necessary to induce BBG to consummate the Butler Burgher/BBG transaction. (Ex. 1)

In exchange for Leitner's services, BBG agreed to pay Leitner a base salary of $750,000 per year. In addition to his base salary, Leitner was entitled to be paid certain additional identified amounts. Those amounts were:

1. Fifty percent (50%) of all fees collected from (i) work related to litigation consulting and expert testimony, and (ii) Leitner's activities related to the management of Israeli bond portfolios;

2. An annual revenue bonus for any calendar year (or on a pro-rated basis for any partial calendar year) in which the New York Office Revenue exceeded $17 million (which has never occurred in that period);

3. An annual profit bonus for each calendar year equal to 3.8% of the profits of the New York Office for the immediately preceding calendar year; and

4. The right to participate in various other benefit programs and to be reimbursed for reasonable expenses incurred in the performance of his duties.

At no time since July 1, 2015 has the annual New York Office Revenue equaled $17 million. Nevertheless, in an effort to secure Leitner's ongoing loyalty, and to respond to his numerous demands and frequent grievances, BBG maintained Leitner's base salary at $750,000. In 2016, BBG paid Leitner salary that was $178,000 more than he was contractually entitled to receive and in 2017, BBG paid Leitner salary that was $206,000 more than he was contractually entitled to receive. BBG also paid Leitner his annual bonus in 2017, even though it was not contractually required to do so. The parties have stipulated that for calendar year 2015 Leitner's W-2 compensation was $1,413,059; for calendar year 2016, Leitner was paid W-2 compensation of $1,263,189; for calendar year 2017, Leitner was paid W-2 compensation of $1,532,714; and for the period January 1, 2018 through April 30, 2018, Leitner was paid $702,113.

In consideration of all of the above, plus the considerable proceeds received as a result of two consecutive sales of his ownership interests, Leitner agreed to be bound by certain restrictive covenants in his Employment Agreement. He agreed that until the longer of (a) June 30, 2019 (a

term that originated in his 2014 agreement with Butler Burgher), or (b) two (2) years following the termination of his employment with BBG, he would not compete, directly or indirectly, with BBG by being involved in any capacity in a Restricted Business (as defined therein). Leitner further agreed that during the same period, he would not hire or solicit, or offer to hire or solicit, any officer or employee of BBG; seek to entice any officer or employee of the company to terminate their employment relationship with BBG; or seek to solicit, divert or entice away any actual or prospective customer of BBG. *Id.* All of the foregoing restrictions were supported by multiple levels of economic consideration that totaled in excess of $25 million during the period of June 2014 to April 25, 2018, the date BBG terminated Leitner's employment.

The testimony adduced at trial established that BBG gave Leitner relatively free reign prior to his termination, recognizing that Leitner was a major business producer and extremely important to the success of the BBG New York office which was staffed, to a meaningful extent, by members of the original Leitner Group. The relatively youthful BBG CFO, Chris Belknap, and the equally youthful CEO, Chris Roach – both based in Dallas, Texas – consistently attempted to avoid disputes with Leitner despite concerns about poorly documented expenses that were submitted for reimbursement and questionable business expenses, such as more than $15,000 that Leitner paid to his synagogue as capital contributions. Roach also indulged Leitner's frequent and quite extended absences from the office, some of which were health related. It is unclear whether Belknap or Roach knew that Leitner privately referred to them as "CF Zero" and "Roach." Leitner, nevertheless, made it clear to his supervisors at BBG that he believed that he was undercompensated.

In or around May and June of 2017, Leitner informed BBG that he had been engaged in discussions with Cushman & Wakefield, a real estate firm with a competing appraisal business in

its New York office, concerning prospective employment at that firm as a *real estate broker*. In that connection, Leitner threatened that if his compensation was not increased he would leave BBG and take fellow employee John DiPietra with him to Cushman & Wakefield.

Following that incident, Roach emailed a warning letter to Leitner dated June 27, 2017 (Ex. 5) which was preceded by a letter from BBG's outside counsel dated June 15, 2017 (Ex. 8) indicating that BBG could terminate Leitner for cause inasmuch as Leitner was prohibited from accepting employment in any capacity at a firm that did real estate appraisal work. The June 27 letter noted Leitner's historic and "repeated lack of willingness to cooperate with directives from the BBG executive team," and imposed a series of expectations and demands as conditions for Leitner's continued employment. Those expectations included, among others, (a) "adherence to standard BBG policies and practices for revenue and cost attribution"; (b) "cooperation with standard BBG practices for determining individual revenue attribution for new business booked within the New York office"; (c) "adherence to BBG's stated policies and practices with respect to reimbursement for travel, entertainment and other work-related expenses;" and (d) "ensuring that you do not make disparaging statements regarding other members of the BBG management team." While Leitner was free to leave BBG to be a real estate broker, Leitner recognized that he could not work for Cushman & Wakefield and he therefore withdrew his threat and ostensibly mended fences with Roach.

In late 2017 and early 2018, BBG began an investigation, led by its CEO Roach and CFO Belknap, into the manner in which Leitner had regularly caused jobs and work assignments to be structured in a manner that improperly credited Leitner with unwarranted credit and financial gain. The investigation proceeded for a period of months and included a review of internal accounting records, job records and sums paid to BBG employees, including Leitner, as well as

consultation with other employees and appraisers. Roach and Belknap concluded that Leitner's practices resulted in multiple appraisers being "shortchanged" on their commissions, as well as Leitner misappropriating funds by the manner in which Leitner had opened, structured and/or coded jobs.

The conclusions reached following the investigation, as testified to by Roach and Belknap, and more crisply summarized in the termination notice delivered to Leitner on April 25, 2018, included the following:

1. In connection with opening new appraisal jobs at times after January 1, 2017, Leitner, either acting alone or by using his influence in the New York office to control the actions of others, frequently split those jobs into two separate matters or job codes, one reflecting the appraisal work in a reduced amount and the second reflecting a consulting job where no such job existed. The structuring of jobs in this manner had the effect of diminishing the appraiser's compensation, in violation of BBG's contractual agreement with the appraiser, and in a manner inconsistent with BBG's regular policies and practices, while directing management and/or consulting fee income to Leitner where none was warranted or authorized.

2. During the same period, Leitner incorrectly set up and labeled jobs as part of the "Israeli bond portfolio" when they had no legitimate connection to that portfolio. This resulted in Leitner receiving 50% of the revenues from those jobs when he was not entitled to any commission.

3. Leitner also set up and labeled numerous standard appraisal jobs for law firms as jobs that would entitle him to litigation consulting fees when none were rightfully due. Leitner's handling of these matters had the effect of diminishing another appraiser's compensation, while also directing consulting fee income to him when he was not otherwise entitled to such compensation.

4. During the same period, Leitner also collected a management fee or consulting fee on minority interest appraisals when no such fees were otherwise called for on such jobs. Again, this had the effect of diminishing revenue otherwise due to BBG, or of diminishing the amount of compensation otherwise due to other appraisers who performed the underlying work, or both.

The steps by which Leitner accomplished these outcomes were clearly not inadvertent coding errors but were based upon multiple computer entries performed by Leitner or others acting at his direction. (Leitner disclaimed any ability to access or make entries in the central

BBG computer system known as DDS.) BBG ultimately concluded that Leitner directed at least $161,000 in excess compensation to himself during the period of January 1, 2017 through his termination, approximately $51,000 of which represents a sum that would otherwise have been due and payable to BBG as revenue to the company and approximately $110,000 which was due to other appraisers.

Roach recommended that Leitner be terminated for cause and the decision to terminate Leitner was formally adopted by the BBG Board at a meeting on April 20, 2018. The BBG Board determined that termination for cause was warranted, under the terms of Leitner's Employment Agreement, to protect the integrity and future business interests of BBG. The BBG Board determined that Leitner was not contractually entitled to any opportunity to cure, and that, in all events, when combined with Leitner's pre-existing conduct, Leitner's actions were not reasonably susceptible of cure.

BBG decided to advise Leitner of his termination on April 25, 2018 (Ex. 2) and this lawsuit followed.

As previously indicated, four witnesses testified at trial: Joel Leitner, Chris Roach, Chris Belknap and John DiPietra. The Court does not credit Mr. Leitner's assertion that he was unaware that he was improperly credited and paid by BBG $77,165.50 in management fees to which he was concededly not entitled, particularly since Leitner responded affirmatively to his assistant's frequent inquiries about whether Leitner was taking a "management fee" on engagements. Nor does the Court credit Mr. Leitner's claim to be entitled to various commissions for work that clearly appeared to the Court to be appraisal work (for which Leitner was not entitled to be compensated) improperly characterized as litigation consulting (for which Leitner was entitled to compensation). In the latter connection, the Court entirely credited Mr.

Roach's testimony that BBG has already paid in excess of $100,000 to appraisers who were shorted in their commissions by Mr. Leitner's practices. Roach further testified that BBG appraisers are largely paid on a commission basis and that BBG's investigation is ongoing and if appraisers are entitled to additional sums, BBG will repay those sums to the appraisers. Mr. DiPietra, who worked with and for Mr. Leitner for approximately 10 years has already received from BBG approximately $31,000 in appraisal commissions on which he was shorted. Significantly, Mr. DiPietra testified that he knew he was being shorted but felt he had to acquiesce in Mr. Leitner's practices because Mr. DiPeitra needed his job. Mr. DiPietra also testified credibly that Mr. Leitner created a toxic environment in the New York office constantly complaining about being undercompensated and frequently telling Mr. DiPietra he should leave BBG or Leitner would make Mr. DiPietra's life miserable. It is also noteworthy that Mr. Leitner's explanation for how his commission income increased from approximately $200,000 in 2016 to approximately $400,000 in 2017 was entirely unconvincing and gave credence to BBG's claim that Mr. Leitner was guilty of more than "clerical errors."

In short, because there were more than sufficient grounds to terminate Mr. Leitner for cause under Section 12.2(c) of his employment agreement, Mr. Leitner is not entitled to any relief and he is subject to the restrictions in his employment agreement in consideration for which BBG and its predecessor paid Mr. Leitner more than $21 million, excluding the hefty salary and perks he received from June 30, 2014 until April 25, 2018. There are no notice or cure periods in subsections 12.2(c), (d) or (e) of Mr. Leitner's employment agreement. And, even if there were, Mr. Leitner's entire post June 2017 course of conduct made his misappropriations and related conduct not reasonably susceptible to cure. "Once it becomes clear that one party will not live up to the contract, the aggrieved party is relieved from the

performance of futile acts, such as conditions precedent." *Allbrand Dis. Liquors, Inc. v. Times Square Stores Corp.*, 60 A.D.2d 568 (2d Dep't 1977). Finally, this case is entirely inapposite to cases like the New York cases collected in *In re 4 Kids Entertainment Inc.*, 463 B.R. 610 (S.D.N.Y. 2011), relied upon by Mr. Leitner, in which contractually required notices of breach must provide sufficient information for the noticed party to determine what steps were necessary to cure the alleged breaches. In this case, Mr. Leitner was terminated pursuant to a provision of his contract that did not have a required notice of breach and, in all events, the June 27, 2017 letter put Mr. Leitner on notice that the conduct for which he was terminated would constitute termination for cause. The Court finds no basis for Mr. Leitner's half-hearted assertions that BBG breached his contract for reasons unrelated to his termination.

As for BBG's counterclaims, the causes of action sounding in conversion, fraud, and breach of fiduciary duty are, in this action, entirely duplicative of Leitner's breach of the Employment Agreement. Defendants have, however, clearly established that Leitner breached Section 1.3 of the Employment Agreement. The Court finds that BBG met its burden of proof only with respect to the $110,412 it paid to appraisers who were shorted and the $77,165.50 in management fees that Mr. Leitner concedes he should not have been paid. The subjective nature of other misallocations and alleged wrongdoing precludes a finding by a preponderance of the evidence that Mr. Leitner owes BBG more than $110,412 plus $77,165.50, or $187,577.50.

Finally, the parties have stipulated that the fee shifting provision of the contract at issue will be resolved by the submission of affidavits. BBG is, of course, the prevailing party.

Accordingly, it is hereby

ORDERED that defendants/counterclaim plaintiffs BBG, Inc. and BBG Holdco, LLC recover from plaintiff/counterclaim defendant Joel Leitner, on the counterclaim for breach of

contract, the sum of $187,577.50, with interest at the statutory rate of 9% per annum from August 28, 2017 until the date of this decision and order, and thereafter at the statutory rate until entry of judgment as calculated by the Clerk, together with costs and disbursements. The Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff/counterclaim defendant Joel Leitner is restrained from violating the restrictive covenant in his employment contract for two years from the date of his April 25, 2018 termination; and it is further

ORDERED that plaintiff/counterclaim defendant Joel Leitner's claims are dismissed in their entirety.

6/29/2018
DATE

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
		GRANTED	X	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT		REFERENCE