State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 20, 2019 527059

BRYAN D. ORSER,
Respondent-
Appellant,

v

MEMORANDUM AND ORDER

WHOLESALE FUEL DISTRIBUTORS
CT, LLC,
Appellant-
Respondent.

Calendar Date: April 22, 2019

Before: Egan Jr., J.P., Mulvey, Devine, Aarons and Rumsey, JJ.

Oxman Law Group, PLLC, White Plains (Marc S. Oxman of counsel), for appellant-respondent.

Gleason, Dunn, Walsh & O'Shea, Albany (Lisa F. Joslin of counsel), for respondent-appellant.

Egan Jr., J.P.

Cross appeals from an order of the Supreme Court (Mackey, J.), entered October 24, 2017 in Greene County, upon a decision of the court partially in favor of plaintiff.

Defendant is a limited liability company that was formed in 2008 by business partners Sammy Eljamal and Leon Silverman for the purposes of, among other things, selling and distributing Shell-branded fuel to approximately 23 gasoline service stations in Fairfield County, Connecticut. In January

2012, plaintiff entered into a written employment contract with Eljamal, then a 95% owner of defendant and the manager in charge of defendant's business affairs.[1] The contract provided, among other things, that plaintiff was hired as a marketing manager for defendant for a term of three years, commencing on January 2, 2012 and ending on December 31, 2014, and was to receive, among other compensation, a $96,000 per year salary, a yearly bonus and remuneration for business travel expenses and Internet service. The business relationship between Eljamal and Silverman subsequently deteriorated and, following litigation between them with respect to the management and control over defendant's business operations, Eljamal was ultimately removed as defendant's manager and replaced by Silverman. A few days later, by letter dated July 12, 2013, defendant terminated plaintiff's employment.

In August 2014, plaintiff commenced this action against defendant for, among other things, breach of contract. Defendant answered and asserted counterclaims, alleging, among other things, that the purported employment contract was unenforceable. Following a nonjury trial, Supreme Court determined that a valid employment contract existed and awarded plaintiff partial damages, prejudgment interest and counsel fees. These cross appeals ensued.[2]

Defendant contends that Supreme Court's verdict is against the weight of the evidence, arguing that the employment contract

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[1] Silverman owned the remaining 5% interest in defendant.

[2] Although both parties appealed only from Supreme Court's October 24, 2017 decision and order, to the extent that said order was incorporated by reference in Supreme Court's subsequent May 2018 judgment, and as there is no prejudice to either party, we exercise our discretion, in the interest of justice, and deem the notice of appeal to be valid and address the merits thereof (see CPLR 5512 [a]; 5520 [c]; Signature Health Ctr., LLC v State of New York, 92 AD3d 11, 13 n [2011], lv denied 19 NY3d 811 [2012]; Lomonaco v United Health Servs. Hosps., Inc., 16 AD3d 958, 959-960 [2005]; Alessi v Alessi, 289 AD2d 782, 782-783 [2001]).

entered into between plaintiff and Eljamal is fraudulent and was fabricated nearly 2½ years after it was purportedly executed as retribution for Silverman taking over operational control of defendant from Eljamal in July 2013 and thereafter terminating plaintiff's employment. In conducting a weight of the evidence review of a nonjury trial verdict, this Court will "independently review the probative weight of the evidence, together with the reasonable inferences that may be drawn therefrom, and grant the judgment warranted by the record while according due deference to the trial court's factual findings and credibility determinations" (Frontier Ins. Co. v Merritt & McKenzie, Inc., 159 AD3d 1156, 1159 [2018] [internal quotation marks, brackets and citations omitted]; see Mary Imogene Bassett Hosp. v Cannon Design, Inc., 127 AD3d 1377, 1378 [2015]; Catskill Modular Homes of Greene County, Inc. v Hanson, 87 AD3d 790, 791 [2011]).

At trial, plaintiff testified that, since 1994, he has worked for Eljamal in various capacities and for numerous companies that Eljamal owned, working his way up from pumping gas to ultimately being hired as a marketing manager for defendant. Although plaintiff acknowledged that, prior to 2012, he had never entered into an employment contract with Eljamal, he explained that, given the animosity and litigious history between Eljamal and Silverman over their various shared business interests, he was wary of leaving his position as a maintenance supervisor at a company wholly owned by Eljamal to take a position in a company that was co-owned by Eljamal and Silverman without an employment contract in place to protect his interests. To that end, plaintiff submitted, among other things, a letter from Eljamal, dated December 12, 2011, extending him an offer of employment as a marketing manager for defendant, as well as the original employment contract that he and Eljamal subsequently executed, in each other's presence, on January 2, 2012. Although Silverman testified as to his belief that the contract was falsified in order "to extort money from [defendant]," he acknowledged that, prior to taking over as manager for defendant in July 2013, he was not involved in the day-to-day operations of the business. Other than Silverman's speculative and conclusory assertions, there is nothing in the

record to support defendant's contention that the subject employment contract was fabricated, and no evidence was offered otherwise calling into question the validity of the proffered contract. Ultimately, Supreme Court found plaintiff's testimony to be a credible and, to the extent that Silverman and defendant's other witnesses provided a conflicting narrative, this created a credibility determination to be resolved by the court. Accordingly, having weighed the evidence and giving the appropriate deference to Supreme Court's fact-finding and credibility determinations, we find ample support in the record for Supreme Court's determination that the parties entered into a valid and binding employment contract (see Matter of Gould Erectors & Rigging, Inc., 146 AD3d 1128, 1130-1131 [2017]; CGM Constr., Inc. v Sydor, 144 AD3d 1434, 1436 [2016]).

We also find that the terms of the employment contract were not ambiguous nor is it legally unenforceable as a matter of law. The determination of whether a contract is ambiguous is an issue of law to be determined by the courts by examining, among other things, the four corners of the contract, the relationship between the parties and the circumstances under which it was executed, and the language of the agreement should be given a practical construction so as to give effect to both the material provisions thereof and the intent of the parties (see Beal Sav. Bank v Sommer, 8 NY3d 318, 324-325 [2007]; Matter of New York State Workers' Compensation Bd. v Murray Bresky Consultants, Ltd, 155 AD3d 1408, 1410 [2017]; Currier, McCabe & Assoc., Inc. v Maher, 75 AD3d 889, 890 [2010]). Although plaintiff admittedly drafted the contract without the assistance of counsel, we note that the terms thereof "need not be fixed with complete and perfect certainty" (Kolchins v Evolution Mkts., Inc., 128 AD3d 47, 61 [2015], affd 31 NY3d 100 [2018]; see Cobble Hill Nursing Home v Henry & Warren Corp., 74 NY2d 475, 483 [1989], cert denied 498 US 86 [1990]). Upon review, the contract, as written, specifically sets forth the essential and material terms necessary for an employment contract, including the relevant parties, the duration of the agreement, the commencement and end date and the terms of compensation, including plaintiff's salary, bonus and holiday and leave standards. Accordingly, on the record before us, we find that

there was sufficient evidence presented for Supreme Court to conclude that the agreement was not ambiguous and was enforceable as a matter of law (see Merschrod v Cornell Univ., 139 AD2d 802, 805 [1988]).

Additionally, given the contradictory testimony offered at trial with regard to when plaintiff officially commenced working as a marketing manager for defendant, and the documentary evidence indicating that he was only added to defendant's payroll as of May 1, 2013, the proof supports Supreme Court's determination that plaintiff only established his entitlement to damages for the marketing manager position between May 1, 2013 to July 12, 2013. Contrary to defendant's assertion on appeal, in awarding damages, Supreme Court explicitly determined that plaintiff failed to submit evidence supporting his claim for overtime pay and otherwise deducted from its award those wages that plaintiff received during the relevant time period as mitigation. Further, given the contractually enumerated $38 per day rate of reimbursement for daily travel expenses provided for in the contract and plaintiff's testimony regarding additional expenses incurred, there is adequate proof in the record to support Supreme Court's award of damages with respect to plaintiff's use of his personal vehicle for business travel and the cost of Internet service during the three-month period that he was determined to be employed as defendant's marketing manager (see Blair v Ferris, 150 AD3d 1365, 1367-1368 [2017]; Austin v Barber, 227 AD2d 826, 829 [1996]).

We reject defendant's challenges to Supreme Court's evidentiary rulings. Supreme Court has broad discretion in making evidentiary rulings and, absent an abuse of discretion, such determinations will not be disturbed on appeal (see Mazella v Beals, 27 NY3d 694, 709 [2016]; O'Buckley v County of Chemung, 149 AD3d 1232, 1234 [2017]). Supreme Court properly concluded that an adverse inference against plaintiff based upon his failure to call Eljamal as a witness was not warranted, as there was no evidence presented establishing that Eljamal, as plaintiff's boss, was either under plaintiff's control or otherwise available to testify at trial (see DeVito v Feliciano, 22 NY3d 159, 165-166 [2013]; Matter of Adam K., 110 AD3d 168,

177 [2013]).[3] Supreme Court also properly excluded extrinsic evidence of a prior lawsuit involving plaintiff and Eljamal, as such evidence was unrelated to the present action and would have permitted the introduction of collateral matters constituting prejudicial propensity evidence (see Mazella v Beals, 27 NY3d at 709; Coopersmith v Gold, 89 NY2d 957, 959 [1997]). Supreme Court was also under no obligation to take judicial notice of prior factual findings and credibility determinations made by a different court in collateral, unrelated litigation involving plaintiff and Eljamal and did not abuse its discretion by denying defendant's application to admit same (see CPLR 4511; Shon v State of New York, 75 AD3d 1035, 1038 [2010]; Sleasman v Sherwood, 212 AD2d 868, 870 [1995]).

Finally, defendant failed to preserve his challenges to Supreme Court's award of prejudgment interest (see De Castro v Turnbull, 66 AD3d 417, 417 [2009]) and counsel fees (see generally Matter of Carol S. [Christine T.–Mary AA.], 68 AD3d 1337, 1339 [2009]). In any event, were these issues before us, we would find both arguments to be without merit (see CPLR 5001; Labor Law § 198 [1-a]; J. D'Addario & Co., Inc. v Embassy Indus., Inc., 20 NY3d 113, 117-118 [2012]; Gottlieb v Kenneth D. Laub & Co., 82 NY2d 457, 459 [1993]). To the extent not specifically addressed, the remaining contentions have been reviewed and found to be without merit.

Mulvey, Devine, Aarons and Rumsey, JJ., concur.

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[3] In fact, defendant subpoenaed Eljamal to testify during its case-in-chief, but was subsequently informed by Eljamal's counsel that he was unavailable as he was undergoing certain postoperative examinations and was "otherwise physically not able to travel and testify."

ORDERED that the order is affirmed, without costs.

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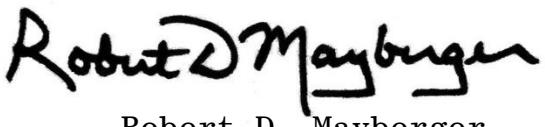

Robert D. Mayberger
Clerk of the Court