DBD-CV-19-6030780-S	SUPERIOR COURT
ALARM KING, INC.	JUDICIAL DISTRICT
V.	OF DANBURY
BELIMO AIR CONTROLS (USA), INC.	SEPTEMBER 5, 2019

MEMORANDUM OF DECISION

The issue before the court is whether counts I, II, and III of the plaintiff Alarm King, Inc.'s ("Alarm") complaint sounding in breach of contract should be stricken because they are legally insufficient, in that each count fails to allege a necessary element of a breach of contract cause of action. The defendant, Belimo Air Controls (USA), Inc. ("Belimo") contends that all three counts for breach of contract are legally insufficient in that one of the necessary elements of breach of contract is missing from each of the three counts. Defendant alleges that the non-solicitation clause does not come into effect until plaintiff has completed rendering services to the defendant, and the plaintiff has not plead that it has completed rendering services to the defendant, as required by the non-solicitation clause.

In response, the plaintiff argues that each of the three counts are legally sufficient because each count for breach of contract demonstrates that the defendant hired an employee of the plaintiff during the term of the non-solicitation clause prohibition of the contracts. The defendant's interpretation of the non-solicitation clause is illogical and provides unworkable and unreasonable results clearly not intended by the parties when the contracts were executed. It is clear the non-solicitation prohibitions run from the execution of the contracts, and for a term of two years after the conclusion of services by the plaintiff for the defendant. In the alternative the non-solicitation clause is ambiguous, and thus creates an issue of fact not suitable for a motion to strike, therefore, under each claim the counts are legally sufficient to withstand a motion to strike.

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Vanessa S. Fertaly
Assistant Clerk

FACTS

On or about April 3, 2018, Alarm and Belimo entered into three contracts (referred to herein as the "subject agreements"), each of which had the following non-solicitation provision entitled "NON- SOLICITATION":

"Subscriber agrees that it will not solicit for employment for itself, or any other entity, or employ, in any capacity, any employee of ALARM KING assigned by ALARM KING to perform any service for or on behalf of Subscriber for a period of two years after ALARM KING has completed providing service to Subscriber. In the event of Subscriber's violation of this provision, in addition to injunctive relief, ALARM KING shall recover from Subscriber an amount equal to such employee's salary based upon the average three months preceding employee's termination of employment with ALARM KING times twelve, together with ALARM KING's counsel and expert witness fee."

This case is predicated on the breach of a non-solicitation clause in each of three contracts between the parties. In 1989, Hector Mercado began employment with Alarm, over the years it invested considerable time, money and resources to train Mr. Mercado to install and service security and fire systems, and paid for Mr. Mercado's licenses and certifications. Mr. Mercado was given access to confidential and proprietary business information, business practices, methods, procedures, trade secrets and pricing information. In 1999, Alarm and Belimo developed a business relationship whereby Alarm would provide three separate type of services to Belimo; access and burglar alarm service; fire alarm system test and inspection; and camera system service. Mr. Mercado was assigned to service Belimo's account in the three areas listed above. On or about October 18, 2018, Mr. Mercado submitted his resignation with Alarm to begin his employment with Belimo. When Belimo hired Mr. Mercado, it was in breach of the non-solicitation clause of the contracts. As a result of Belimo's breach, Alarm suffered losses and damages, which the parties agreed was a consequence of a potential breach, as evidenced by the mandate within the non-solicitation clause of each contract.

LEGAL STANDARD

Practice Book § 10-39 (a) provides in relevant part: "A motion to strike shall be used whenever any party wishes to contest: (1) the legal sufficiency of the allegations of the complaint . . . ." "A motion to strike admits all *facts* well pleaded; it does not admit *legal conclusions or the truth or accuracy of opinions* stated in the pleadings." (Emphasis in original; internal quotation marks omitted.) *Faulkner* v. *United Technologies Corp.*, 240 Conn. 576, 588, 693 A.2d 293 (1997). The court must "construe the [pleading] in the manner most favorable to sustaining its legal sufficiency." (Internal quotation marks omitted.) *American Progressive Life & Health Ins. Co. of New York* v. *Better Benefits, LLC*, 292 Conn. 111, 120, 971 A.2d 17 (2009). "[A] party may challenge the legal sufficiency of an adverse party's claim by filing a motion to strike." *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 564, 898 A.2d 178 (2006). "The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). "[A] motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court . . . ." (Internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 398, 142 A.3d 227 (2016). "It is well established that a motion to strike must be considered within the confines of the pleadings and not external documents, such as the agreement between the parties." *Zirinsky* v. *Zirinsky*, 87 Conn. App. 257, 268 n. 9, 865 A.2d 488 *cert. denied*, 273 Conn. 916 (2005). "A complaint includes [however] all exhibits attached thereto." *Dlugokecki* v. *Vieira*, 98 Conn. App. 252, 258 n. 3, 907 A.2d 1269 *cert. denied*, 280 Conn. 951 (2006).

Rogal v. *UTA Peters Randall* 115 Conn. App. 89, 971 A.2d 796 (2009) gives this court additional guidance in this case. "When a party asserts a claim that challenges the trial court's construction of a contract, we must first ascertain whether the relevant language in the agreement is ambiguous. . . . A contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [W]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law. . . . The intent of the parties as expressed in a contract is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and. . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity. . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." "When interpreting a contract, we construe the contract as a whole and all relevant provisions are considered when determining the intent of the parties." *Shawmut Bank Connecticut, N.A.* v. *Connecticut Limousine Service, Inc.*, 40 Conn. App. 268, 272, 670 A.2d 880, cert. denied, 236 Conn. 915, 673 A.2d 1143 (1996). "The law prefers an interpretation which gives effect to all parts of the contract rather than one which leaves a portion of the contract ineffective or meaningless." 11 S. Williston, Contracts (4th Ed. Lord 1999) § 32:9, p. 440. Id at 95-96.

Additionally, "[a] written contract should be construed according to the obvious intention of the parties, notwithstanding clerical errors or inadvertent omissions therein, which can be

corrected by perusing the whole instrument. . . . If an improper word has been used or a word omitted, the court will strike out the improper word or supply the omitted word if from the context it can ascertain what word should have been used." 17A Am.Jur.2d 361, Contracts § 373 (2004). Id at 95-96. The court further determined that the law allows "the court to be empowered to supply an obvious missing term consistent with the clear intent expressed in the balance of the contract language. *Rogal* at 98. Finally, "The applicable rule of contract interpretation in such situations is well settled. When there is ambiguity, we must construe contractual terms against the drafter." *Rund* v. *Melillo,* 63 Conn. App. 216, 222, 772 A.2d 774 (2001).

DEFENDANT'S POSITION

"The elements of a breach of contract claim are the formation of an agreement, performance by one party, breach of the agreement by the other party, and damages." *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 311 Conn. 282, 291, 87 A.3d 534 (2014). "A contract is an agreement between parties. . . . If the agreement is shown by the direct words of the parties, spoken or written, the contract is said to be an express one." (Internal quotation marks omitted.) *Boland* v. *Catalano*, 202 Conn. 333, 336–37, 521 A.2d 142 (1987). Alarm must allege that it performed under each of the agreements. "[A] plaintiff could not recover contract damages under the agreement unless he has fully performed his own obligation under it, has tendered performance, or has some legal excuse for not performing." *David M. Somers & Associates, P.C.* v. *Busch*, 283 Conn. 396, 406, 927 A.2d 832 (2007). In paragraph 9 of the subject agreements states that the parties:."entered into an Access and Burglary Systems Service Contract pursuant to which **Alarm King would provide access system and burglar alarm service and maintenance** to Belimo as Subscriber for an agreed upon quarterly fee for a term of three (3) years." (Emphasis added.) In paragraph 10, Alarm alleges that it: "assigned Hector Mercado as the Service Technician

to perform the aforementioned services for Belimo as an employee of Alarm King." This allegation does not satisfy the performance element of a breach of contract claim. Alarm does not allege that it performed under that agreement, only that Alarm assigned Mr. Mercado to perform services. He could be assigned to Belimo and perform no work, or he could be assigned and perform under the contract. Assigning Mr. Mercado to Belimo is not the same as alleging that Alarm performed under the terms of the contract, especially given that Alarm alleges that its performance under the contracts was to provide service and maintenance.

In order to sustain these counts, the court would have to assume that by assigning Mr. Mercado to the Belimo account to perform services, Alarm performed under the agreement. This is not in accord with the language of the complaint. "[A] trial court must take the facts to be those alleged in the complaint. . . and cannot be aided by the assumption of any facts not therein alleged." *Liljedahl Bros., Inc.* v. *Grigsby*, 215 Conn. 345, 348, 576 A.2d 149 (1990). Because Alarm failed to allege it performed pursuant to the contracts, Alarm failed to plead the only conditions under the non-solicitation clause it incorporated into the contracts which would support its conclusion that Belimo breached the contracts at issue. Here, the complaint puts forth a "mere conclusion of law" that Belimo breached its agreement with Alarm. Alarm alleges that hiring Mr. Mercado under the non-solicitation clause, which Alarm incorporated into the complaint, is a breach of the agreement. Importantly, Alarm does not allege that it has completed providing service to Belimo. Alarm only alleges in paragraph 13 of every count of the complaint that Belimo hired Mr. Mercado as an employee of Belimo in breach of Section 17 of the Contract (non-solicitation clause).

This clause makes clear that the non-solicitation prohibition is only applicable after Alarm has completed providing service to Belimo. For Alarm's rights to vest, or for Belimo to have breached the contract, the non-solicitation clause requires 1) Alarm to finish providing service to

Belimo; and 2) Belimo employ in any capacity an Alarm employee assigned by Alarm to provide service to Belimo. Alarm only alleges in the complaint that Belimo employs Mr. Mercado, satisfying the first prong for a breach under that clause, not that Alarm completed providing service to Belimo, the second prong required to state a claim for a breach of contract. Whether Belimo breached the contract is a question of fact, however, whether Alarm properly pleaded its breach of contract claims based on the contractual language its references is a matter of law. If an express "condition [in the contract] is not fulfilled, the right to enforce the contract does not come into existence." *Christophersen* v. *Blount*, 216 Conn. 509, 512, 582 A.2d 640 (1990).

Under Alarm's theory of Belimo's breach premised upon the express language of the non-solicitation clause, both elements for that breach must be affirmatively pleaded. Because Alarm failed to plead that it completed providing service to Belimo, counts I, II, and III are legally insufficient and this court must strike all three counts from the complaint.

PLAINTIFF'S POSITION

Belimo argues that Alarm "must allege that it performed under each of the agreements that it claims Belimo breached." It cites to paragraphs 9 and 10 while ignoring paragraph 8. When these are read in conjunction, it is clear that Alarm did perform under the subject agreements, and that Alarm has plead same. From paragraphs 8 through 10 it is clear that Alarm is alleging that: (1) Alarm and Belimo entered into an agreement for service; (2) Mr. Mercado was assigned by Alarm to perform the services to Belimo as the contracts required; and (3) Mr. Mercado continued to perform such services. Plaintiff alleges performance, and an inference of performance, can be drawn from the allegations. Although Alarm did not set out in a separate paragraph a conclusory allegation that Alarm performed under the contract, when read as a whole, the complaint makes clear that Alarm performed under the contract. The allegation that Mr. Mercado "continued to

perform such services as an Alarm King employee," satisfies the pleading requirement that Alarm plead that it performed. Logically, if one "continues to perform" they must first have performed. Alarm's complaint **must be read as a whole** and **in a light most favorable to sustaining its legal sufficiency**. *Kumah* v. *Brown*, 127 Conn. App. 254, 259, 14 A.3d 1012 (2011) (emphasis added).

Belimo's first argument is an overly narrow reading of Alarm's complaint. Because Alarm has adequately plead that it performed under the contract, Alarm's complaint should not be stricken. The salient portion of the non-solicitation clause provides: "Subscriber agrees that it will not solicit for employment for itself, or any other entity, or employ, in any capacity, any employee of ALARM KING assigned by ALARM KING to perform any service for or on behalf of Subscriber for a period of two years after ALARM KING has completed providing service to Subscriber." Belimo is restricted from the date of the execution of the contracts from soliciting for employment any employee of Alarm who provided service to Belimo, which continues for two years after Alarm completes providing service to Belimo. Alarm's interpretation is far more reasonable, and is also is undergirded by the purpose for which the clause was drafted. This provision bars Belimo from soliciting employees but limits that restriction to two years after service is completed. The non-solicitation clause does not say that the restricted period is limited to only the period after Alarm King completed providing service. Belimo would have this court read into the non-solicitation clause the word "only" such that the non-solicitation clause kicks in only upon the conclusion of service. As for a start date, the non-solicitation clause is clear that the prohibition is in the present tense and continues until two years after service ends. Based on Alarm's reading, the restricted period began at the conception of the parties' agreement and stayed in effect until two years after service was concluded. This would support the purpose of a non-solicitation clause.

The intent behind the parties' non-solicitation clause is clear. It is meant to prevent companies to which Alarm provides service from poaching Alarm employees, thereby obfuscating the need for a contractual relationship with Alarm, but limits that prohibition. To interpret the non-solicitation clause as beginning to take effect only after the parties' relationship has concluded is illogical because Belimo could hire away an employee then stop using Alarm King for service work. Therefore, the non-solicitation prohibition begins at the inception of the business relationship to serve the purpose for which it was included in the service contract.

To the extent to which the non-solicitation clause is ambiguous, Belimo's motion to strike must fail as the parties' intent is a question of fact not suitable to determination on a motion to strike. See, *Tallmadge Bros., Inc.* v. *Iroquois Gas Transmission Sys., L.P.*, 252 Conn. 479, 495, 746 A.2d 1277 (2000) ("[O]rdinarily the quests of contract interpretation, being a question of the parties' intent, is a question of fact."); But see *Eckert* v. *Eckert*, 285 Conn. 687, 692, 941 A.2d 301 (2008) ("the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous."). Belimo and Alarm's interpretation of the non-solicitation clause and analysis of intent and purpose behind the non-solicitation clause presents questions of fact that are not properly determined on a motion to strike, particularly when viewed in the light most favorable to Alarm.

Alarm has plead that it performed under the parties' agreement. Belimo's reading of the non-solicitation clause is illogical and provides for unworkable and unreasonable results clearly unintended by the parties. Because the non-solicitation clause provides for non-solicitation of employees with a limitation of two years from the conclusion of service, the court should interpret it to be in full force and effect during the time in which Belimo poached Mr. Mercado from Alarm. In the alternative, this court must deny Belimo's motion to strike as interpretation of an ambiguous

contract presents questions of fact not suitable for determination on a motion to strike. For the foregoing reasons, Alarm respectfully requests that this court deny Belimo's motion to strike and sustain the present objection.

ANALYSIS

The court is limited in its review of this matter to the complaint, motion to strike, and plaintiff's objection to motion to strike. There are no exhibits attached to the complaint, and the contracts referred to in the complaint were not attached to the complaint for review by the court. As was stated in *Rogal* above, "When a party asserts a claim that challenges the trial court's construction of a contract, we must first ascertain whether the relevant language in the agreement is ambiguous. . . ." Here, there are no contracts for the court to review, it is limited to small snippets from the contracts, paragraph 17 in the complaint, and paragraphs 8 through 10 in plaintiff's objection to motion to strike. The *Rogal* court went further and said "A contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [W]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law." Since there is limited language presented to the court, the court is limited in its review. Here, only paragraphs, 8 through 10 and 17 the non-solicitation clause itself has been submitted for review and interpretation. In the final analysis, the *Rogal* court stated "Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity. . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." "When interpreting a contract, we construe the contract as a whole and all relevant provisions are considered when determining the intent of the parties." This court

cannot construe the "contract as a whole" because it was not presented with the contract in whole. Hamstrung by the limited material presented, this court can only look at the language as presented, to determine if it is ambiguous on its face, as the court is limited by the Appellate Court's directive in *Zirinsky* that "It is well established that a motion to strike must be considered within the confines of the pleadings. . . ." While it is conceivable that there may have been e-mails, faxes, discussions or oral communications, etc., between the parties as to what was the intent of paragraph 17 when discussed and drafted, this court cannot speculate as to what, if any, there might have been, as it is limited by the pleadings.

As a review of paragraph 17 in and of itself reveals no ambiguity, the court must obey *Rogal's* directive that "where the language . . . is clear and unambiguous . . . is to be given effect according to its terms. A court will not torture words to import ambiguity . . . any ambiguity . . . must emanate from the language used . . . rather than from one party's subjective perception of the terms." This paraphrases *Rogal*, as it dealt with a situation where the court was presented with the whole contract, where it could examine and interpret the contested section in light of the overall intent of the entire contract not just a small part of the contract. That is not possible here, as this court only has one paragraph singled out from each of the entire contracts that are the crux of the three count complaint. It must examine that limited language alone as to ambiguity, and not, whether the language drafted, mirrors the intent of the parties in the entire contract, or whether that was what the parties had intended, but due to unartful drafting, the contract that was executed may not have contained language that accomplished the intended result. The *Rogal* decision gives this court power to implement reformation of the contract. It stated "We recognize that before reformation can be granted by the court, equitable relief must specifically be requested by the plaintiff. Practice Book § 10–27. Nevertheless, "[i]n many instances, words used by the parties in

their writing are not particularly suitable to express their meaning, but they are nevertheless capable of being interpreted, even without an actual physical reformation of the contract. . . . In such a case no equity power is required." Id at 98. The unfortunate aspect of this language is that this court was (1) never requested to provide equitable relief, and (2) it requires the court to be able to review the contract itself, which this court does not have before it. Therefore, this court is again limited by one paragraph of the contract. Had this court been able to review the contract, and had it been demonstrated to the satisfaction of the court that the plaintiff's interpretation of the non-solicitation clause was in fact supported by the contract when reviewed in full, the *Rogal* decision gave further authority in that situation when it stated "Because the intent of the non-solicitation agreement is plain from an objective reading of the contract, a request for reformation is not necessary to enforce the provision. '[I]n order to carry out the contracting parties' intention, the contract's words may be interpolated, transposed or even rejected. For the same reason, words may be supplied by the court.' In this instance, the court could have supplied the missing prohibitory language to carry out the parties' clear intention without resorting to the equitable remedy of reformation." *Rogal* at 98-99. Since this court does not have the contract it is unable to make a review as stated above.

For the plaintiff to have accomplished what it has intended when it drafted the contract for the defendant to execute, simple additional language was needed to accomplish the plaintiff's intended non-solicitation prohibition. The contracts could easily have read as below:

"Subscriber agrees that it will not solicit for employment for itself, or any other entity, or employ, in any capacity, any employee of ALARM KING assigned by ALARM KING to perform any service for or on behalf of Subscriber **for the period beginning from the execution of this agreement, and then** for a period of two years after ALARM KING has completed providing service to Subscriber. In the event of Subscriber's violation of this provision, in addition to injunctive relief, ALARM KING shall recover from Subscriber an amount equal to such employee's salary based upon the average three months preceding employee's termination of

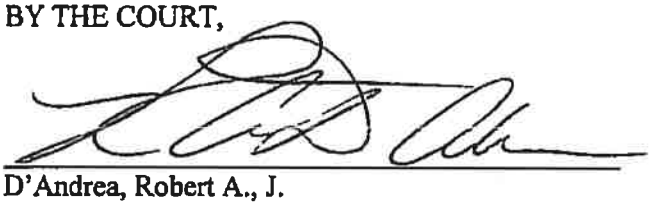
employment with ALARM KING times twelve, together with ALARM KING's counsel and expert witness fee.

Had the agreement been drafted in this fashion, the outcome would have been different. The plaintiff drafted the three contracts containing the non-solicitation clauses, it is now prevented from asking the court to interpret the non-ambiguous clauses at it would like, in order to allow it to sue the defendant. Without an ambiguity, there is nothing for this court to interpret, and even if there was ambiguity, there is no whole contract for it to review in an attempt to interpret the non-solicitation clause. Either way, the non-solicitation provision is not ambiguous, although ineffective standing by itself to protect the plaintiff.

CONCLUSION

Based on the foregoing, the motion to strike counts I, II and III of the plaintiff's complaint is GRANTED.

BY THE COURT,



D'Andrea, Robert A., J.