AMERICAN ARBITRATION ASSOCIATION
IN THE MATTER OF ARBITRATION

BAHAR GIDWANI,

Claimant,

v.

AAA# 01-18-0001-9789
Allen S. Blair, Arbitrator

AMERICAN CONTRACT BRIDGE LEAGUE,

Respondent.

ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT

This matter comes before the Arbitrator on the parties' cross motions for summary judgment. Each party has submitted a motion and memorandum with supporting exhibits. Those exhibits include deposition testimony, affidavits, documentary exhibits and case law. Each party has also submitted a response to the adversary's motion along with additional exhibits. Upon consideration of the parties' submissions, the Arbitrator finds and concludes as follows.

BACKGROUND

Claimant, Bahar Gidwani (hereinafter "Gidwani" or "Claimant"), was hired by Respondent, American Contract Bridge League (hereinafter "ACBL" or "Respondent"), to serve as its Chief Executive Officer in spring of 2017. The parties executed an Employment Agreement (hereinafter "Agreement") on May 29, 2017 following negotiations. The Agreement had a term of July 1, 2017 to June 30, 2020.

The Agreement contains a clause governing the location of work at §1.03 which provides:

> Location of Work. During the term of this Agreement, Executive shall generally work at the ACBL's principal office and Executive's residence shall be within daily commuting distance of the principal office within 10 months of employment.

Also included in the contract was an integration or merger clause which states:

> 11.01 Entire Agreement. This Agreement is a fully integrated document and contacts [sic] any and all promises, covenants,

> and agreements between the parties hereto with respect to Executive's employment. This Agreement supersedes any and all other prior or contemporaneous, discussions, negotiations, representations, warranties, covenants, conditions, and agreements, whether written or oral, between the parties to this Agreement. Except as expressed in this Agreement, the parties have not exchanged any other representations, warranties, inducements, promises, or agreements respecting Executive's employment with the ACBL

.

The Agreement treats terminations for cause differently than terminations without cause.

The termination for cause provision states:

> 3.04 Failure to Comply with Agreement. In the event the ACBL is adversely affected by any failure of Executive to comply with a material term or provision of this Agreement, the ACBL shall have the right to terminate Executive's employment and to take such other action against Executive, at law or in equity, as the ACBL may deem necessary or proper. In such event, Executive's termination shall be effective immediately upon receipt of written notice from the ACBL.

As to termination without cause, the Agreement provides:

> 3.05 Without Cause. Either party may terminate this Agreement without cause upon thirty (30) calendar day's prior written notice to the other party. In the event of termination of this Agreement by the ACBL in accordance with this Section 3.05, the ACBL at its option may advise Executive that his physical presence at the ACBL is not required during the thirty (30) calendar day period after receipt of the notice; provided, however, that Executive shall be entitled to regular salary and benefits under this Agreement during such thirty (30) calendar day period.
>
> 4.01 Compensation in the Event of Termination Without Cause. In the event this Agreement is terminated by the ACBL without cause pursuant to Section 3.05 herein, the ACBL shall pay Executive an amount equal to the total monthly salary owed to the Executive for the remaining term of this Agreement and an amount equal to the bonus amounts accrued during the year in which Executive was terminated pursuant to Section 3.05. For instance, if Executive is terminated without cause in the first thirty (30) days of his employment, ACBL shall pay Executive the remaining three years' salary under this Agreement.

After his hiring, Gidwani rented an apartment in the Memphis area, clearly within daily commuting distance of the ACBL's principal office. The apartment lease was for twelve (12) months at approximately $1,300 per month which Gidwani paid. He also purchased renter's insurance and made monthly utility payments to Memphis Light Gas and Water. Claimant occupied the apartment while he was employed by ACBL. Due to her work, his wife remained in

New York City in a residence the couple had in the city. Gidwani regularly, although not always, made weekend trips to see his wife.

In an obvious effort to be sure there was no misunderstanding about his compliance with Section 1.03, on July 30, 2017 Gidwani sent an email to the ACBL Board President, the head of the search committee who recruited Gidwani and negotiated the Agreement, the head of the ACBL Board's CEO Review Committee and the ACBL's Human Resource Manager, stating in pertinent part: "Thought I'd confirm that I've met my contract requirement regarding establishing a domicile [sic] in the Horn Lake Area." (SUMF at ¶ 24). Gidwani in that same email expressly invited a response if anyone at ACBL believed that he was not in fact in compliance with the residency requirement contained in § 1.03 of the Employment Agreement: He said "as far as I know, I am fully complying with all terms of our contract. Let me know if you have any issues or concerns, on this matter." (*Id.* at ¶ 25).

None of the recipients of the above-quoted email nor anyone else in a position of responsibility at ACBL ever responded or indicated to Gidwani that he was allegedly not in compliance with the residency requirement set forth in §1.03 until March 29, 2018, when Jay Whipple sent Claimant an email asserting that Gidwani was not in compliance with that provision of the Employment Agreement.

That email states:

> Dear Bahar,
>
> On behalf of the Board of Directors, I want to call Section 1.03 of your Employment Agreement with ACBL to your attention. That section provides: "During the term of this Agreement, Executive shall be within daily commuting distance of the principal office within 10 months of employment." Section 5.07 of the Employment Agreement provides reimbursement for your actual costs for relocation. As of March 30, 2018, more than ten months will have passed and you have not fulfilled your obligation to relocate to the greater Horn Lake/Memphis area to be in compliance with Section 1.03.
>
> You are currently not in compliance with this material term of your Employment Agreement. Please advise me in writing by no later than April 6, 2018, that you intend to fulfill this obligation under your Agreement and plan to do so by no later than June 30, 2018.

> If you do not fulfill this obligation under your Employment Agreement, I would also appreciate you advising me of that fact so that we can have a discussion about your intentions and employment status.

Gidwani, through his counsel, responded to the March 29, 2018 email by letter dated April 5, 2018. In the letter, Claimant again informed ACBL that he did in fact reside in Memphis and had continuously resided in Memphis since July 2017. The letter included the following exhibits: (1) Gidwani's July 30, 2017 email, (2) the lease agreement for Gidwani's Memphis apartment, (3) the renter's insurance agreement, (4) a then-current MLGW bill and (5) a copy of Gidwani's auto lease statement.

Claimant further explained in the letter that he "resides in Memphis" and merely "travels on weekends to New York City to visit his wife who has maintained her employment in New York." Gidwani's wife, Dr. Tao Dao, holds an MD and a PhD. Dr. Dao works as a Senior Research Scientist at the Memorial Sloan Kettering Cancer Center in New York City.

He emphasized in the letter that: (1) the weekend trips to New York to see his wife were entirely consistent with §1.03's residency requirement and were no different than the trips of other executives who routinely travel to second homes or vacation homes on the weekends, (2) he was and remained at all relevant times "resident in the Horn Lake offices of ACBL Monday through Friday . . . and is available to both board members and staff members seven days a week" unless he was traveling on ACBL business and (3) he "has at all times during the contractual period fully executed his duties as Chief Executive Officer of ACBL and regularly works in excess of 40 hours per week." ACBL never directly responded to the April 5, 2018 letter sent by Gidwani's counsel.

Instead, ACBL through Mr. Whipple, terminated Gidwani's employment by letter dated April 30, 2018 solely on the basis of his alleged violation or failure to comply with Section 1.03 of the Agreement. The letter stated in relevant part:

> As we have previously discussed, you have failed to fulfill your obligation to relocate your residence from New York to the Memphis/Horn Lake area as required by Section 1:03 [sic] of your Employment Agreement with the American Contract Bridge League dated May 29, 2017.

In connection with Mr. Gidwani's termination, ACBL issued a press release that appeared on its own website and was sent by ACBL to be posted on the Bridge Winners website on April 30, 2018. The press release states as follows:

> Bahar Gidwani, chief executive officer of the ACBL, has been relieved of his duties according to ACBL President Jay Whipple. "While Mr.Gidwani brought many new ideas to the organization, we regret there are issues that remain unresolved despite counselling [sic] by the Board of Directors," Whipple says. For legal reasons, Whipple cannot elaborate further.
>
> The Board has appointed Chief Financial Officer Joe Jones to fill the role of acting executive director until a successor is named. A search committee has been formed and work is under way [sic] to fill the position.

CONTENTIONS OF THE PARTIES

As noted above, both parties have moved for summary judgment and therefore both parties contend that there are no genuine issues of material fact. Claimant contends that Respondent breached the Agreement by terminating him because he had allegedly failed to comply with Section 1.03 That was the only reason on which the ACBL relied in firing Gidwani and thus, Gidwani asserts that the ACBL cannot argue in arbitration that it relied on any other reason.

Relying on the Governing Law Section in the Agreement which provides that the "Agreement shall be governed by, enforced under and construed in accordance with the laws of the State of New York," Claimant argues that the meaning of the term "residence" in the Agreement is governed by New York law. Under applicable New York law, Gidwani contends a person can have two places of residence. In addition, he points to the July 30, 2017 email which Claimant sent to four different ACBL officials advising that he had satisfied the provisions of Section 1.03 and invited a response, if anyone believed he was not in compliance with the residency requirement. No one responded or took issue until March 29, 2018 when Jay Whipple sent an email to Gidwani claiming he was not in compliance with Section 1.03.

Claimant asserts that when his counsel responded to the March 29, 2018 email his lawyer noted that Gidwani resides in Memphis and travels on weekends to New York City to visit his wife who has maintained her employment there. The weekend visits to see his wife were

completely consistent with the residency requirement, argues Gidwani, being like those of executives to second homes on weekends.

To the extent that the ACBL attempts to rely upon the parties' negotiating history as it applies to Section 1.03, Gidwani asserts that the merger or integration clause in the Agreement precludes any consideration of that history or makes it irrelevant under New York law. Likewise, as noted above, Gidwani argues that ACBL cannot now try to say that it terminated him for some other reason or reasons, whether the reasons be some cause other than violation of Section 1.03 or some violation of another clause in the Agreement.

Thus, it is the position of Gidwani that he was terminated without cause. In that event, he argues he is entitled to contract-based damages that include an amount equal to the total monthly salary owed for the remaining term of the Agreement, an amount equal to the bonus amounts accrued and other related monetary relief. Specifically, he seeks an amount in excess of $806,000. He contends the amount includes: two years and two months of salary at $315,000 per year, for a total of $682,000; a bonus estimated at $30,000; 401K matching funds (up to 3% of salary) of $23,405; compensation increases of 3% cost of living increase and 7% merit increase for $31,500 the first year and $34,650 the second year for a total of $66,150; and expenses associated with termination of approximately $5,000. In addition to these amounts, Mr. Gidwani seeks his attorneys' fees, costs and prejudgment interest.

Gidwani has also asserted a defamation claim contending that the April 30, 2018 press release defamed him. That claim is predicated on the theory that it contains false and defamatory statements of fact insofar as it contains incorrect characterizations of the circumstances surrounding Gidwani's termination. Specifically, Claimant objects to: (1) the reference to "issues that remain unresolved" and (2) the statement that the issues remained "unresolved despite counseling."

Gidwani contends that the law of New York or the law of Tennessee applies to the defamation claim. If the laws of one of those states applies then it is Claimant's position that the doctrine of defamation by implication will apply. In that event, it would be easier for Gidwani to prove his defamation case because the alleged defamatory statement could be based not just on

a direct statement but on false suggestions, impressions or implications arising from otherwise truthful statements. While Gidwani argues the press release was untruthful, he obviously recognizes the possibility it can be read to be truthful and would need a way around that potential problem. Finally, Gidwani requests that the Arbitrator bifurcate the liability and damage components of his defamation claim should the Arbitrator conclude that he has established liability as to that claim.

It is the position of the ACBL that it is entitled to a summary judgment on Gidwani's breach of contract claim because he, not the ACBL, breached a material term of his Employment Agreement which entitled the ACBL to terminate him for cause. As to Gidwani's alleged breach, ACBL contends that he failed to relocate from New York or maintain a fixed, permanent and principle home in the Horn Lake/Memphis area. ACBL relies on discussions it contends took place during the interview and hiring process in which ACBL claims it made clear to Gidwani it wanted him to relocate on a full time basis and not be a commuting CEO. ACBL also asserts it inquired if Gidwani's wife would be moving to which he said she was considering it. When he was asked if she was serious, Gidwani is said to have assured them, "of course."

ACBL makes note of the fact that Gidwani regularly left ACBL offices on Fridays during the work day and returned the following Monday during the work day. This, ACBL asserts, is not consistent with Claimant's obligation under Section 1.03. In that regard, ACBL contends that 1.03 must be read together with Section 5.06 of the Agreement which deals with Housing Allowance and Moving Expense. It is in the latter section that the term "relocation" appears in reference to the actual costs of relocation.

ACBL argues that the term residence in Section 1.03 does not refer to a residence, another residence or a secondary residence. Rather ACBL asserts it refers to his primary residence. In related arguments ACBL contends that "residence" or "executive's residence" as used in 1.03 mean "principle residence," "primary residence" or "permanent residence." As referenced above, ACBL also argues that the parties' negotiating history as to 1.03 supports its position on the interpretation of that section. Finally as to the interpretation of Section 1.03, ACBL agrees that New York law controls on the breach of contract claim. However, Respondent argues

that New York law defines "residence" as "that place where a person maintains a fixed, permanent and principal home to which he . . . always intends to return." ACBL's position in that regard is grounded on a New York Election Law Statute and election law cases. ACBL's lawyers strongly advocate that the cases on which Gidwani relies to show that a person can have two places of residence are inapplicable.

As to damages on the breach of contract claim, Respondent asserts that: (1) at most Gidwani is entitled to thirty (30) days compensation contending that the termination was for cause, (2) he is not entitled to what ACBL terms "speculative damages" in the form of 2 ½ % annual raises and 10% annual bonuses and (3) Gidwani is not entitled to "litigation expenses."

Turning to the defamation claim and the choice of law issue as to that claim, it is noteworthy that the parties agree on the controlling choice of law test. They are in accord that the general rule is that the governing law is the law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties. Here ACBL argues Mississippi has the most significant relationship. Regardless of whose law applies, ACBL makes the point that falsity is an essential element of any defamation claim. That being the case Respondent argues that the statements about Gidwani were true. Lastly, ACBL contends that even if the doctrine of defamation-by-implication applied under New York or Tennessee law nothing was said in the press release that was a false suggestion, impression or implication of anything nefarious.

OPINION AND RULING

Breach of Contract Claim

Claimant's employment relationship with ACBL was governed by the Agreement and when he was terminated ACBL relied solely on the alleged breach of Section 1.03 in doing so. Specifically, Gidwani was told that he failed to fulfill his obligation to relocate his residence from New York to the Memphis/Horn Lake area ("Memphis Area") as required by Section 1.03. Thus, as to the breach of contract claim, the heart of the dispute lies in the meaning of the term "residence" as used in 1.03.

Since the Agreement contains a New York choice of law clause, the meaning of the term is controlled by New York law. The parties agree as to that but disagree as to how "residence" should be construed under New York law. The question boils down to whether the contract required Gidwani to establish a residence in the Memphis Area or establish his fixed, permanent and principal residence in that area. ACBL contends that he was required to do the latter, which would make the term residence as used in the Agreement the equivalent of the term "domicile."

New York law allows a person to have two places of residence. In Re Newcomb's Estate, 84 N.E. 950, 954 (N.Y 1908). As explained by New York's highest court in that case more than a century ago, the term "'(r)esidence' simply requires bodily presence as an inhabitant in a given place." While Respondent relies on a statute and cases under New York election law, the Arbitrator finds that statute and those cases, to the extent they support ACBL's position, to be inapposite. There can be little doubt that a person can only vote in one place. Thus, the New York election law defines residence as the equivalent of domicile. However, domicile and residence normally have distinct meanings. As explained in the court's decision in the Newcomb case:

> As 'domicile' and 'residence' are usually in the same place, they are frequently used, even in our statutes, as if they had the same meaning; but they are not identical terms, for a person may have two places of 'residence,' as in the city and country, but only one 'domicile.' 'Residence' means living in a particular locality, but 'domicile' means living in that locality with intent to make it a fixed and permanent home. 'Residence' simply requires bodily presence as an inhabitant in a given place, while 'domicile' requires bodily presence in that place and also an intention to make it one's domicile. Id.

In addition, in this case it is noteworthy what the Agreement does not state in Section 1.03. First, it does not require specifically that Gidwani's residence be his fixed or his permanent or his principal residence. It also does not provide that he must establish or relocate his domicile within commuting distance of the ACBL principal office. Further, it does not preclude Claimant from maintaining a residence with his wife in New York, does not state that he can have but one residence and does not state that he or his wife, Dr. Dao, must forfeit the New York City apartment. Finally, Dr. Dao is not a party to the Agreement or mentioned therein.

Nor can it seriously be debated that Gidwani established a residence in the Memphis Area within commuting distance as required by the contract. After being hired, as mentioned above, he rented a Memphis apartment paying approximately $1,300 per month in rent. He purchased renter's insurance and paid monthly utility bills. In addition, the undisputed proof shows that not only did he establish the residence, he was on the job. Gidwani was physically present at the principal office of ACBL or at official ACBL events 200 days while he was employed by Respondent. During that period there were 195 week day work days.

In addition ACBL's argument that Section 5.06 of the Agreement somehow required Gidwani to relocate in a fashion which he did not, will not withstand close analysis. First, Section 5.06 really only deals with relocation expenses and ACBL obviously considered Gidwani's residence to satisfy 5.06 by reimbursing him for his relocation expenses. Second, it should be noted that this argument assumes there is some interrelationship between Sections 1.03 and 5.06. Third, the only obligations imposed by 5.06 are upon ACBL, not Gidwani.

And then there is Gidwani's July 30, 2017 email to four different high-ranking officials with ACBL including its President and Human Resources Manager. He was clearly and explicitly seeking to confirm that he had satisfied the residency requirement in Section 1.03. In addition, he invited the response of any of the four email recipients, if they felt he was not in compliance with the contract. In that regard he stated, "as far as I know, I am fully complying with all terms of our contract. Let me know if you know of any issues or concerns on this matter." Although not determinative in this case, one can make a very strong argument that having received this email, it was time for ACBL to speak then or forever hold their peace. No one responded or raised an issue until Mr. Whipple's March 29, 2018 letter raising the residency issue. Claimant's lawyer promptly responded on April 5, 2018 laying out Gidwani's case as to his compliance with Section 1.03. There was no direct response again until ACBL terminated Gidwani on April 30, 2018.

In terminating Claimant's employment for that reason, ACBL cannot now raise a different reason or reasons directly or indirectly. It is estopped from doing so under New York Law. Leventhal v. New Valley Corp., (1992 W.L. 15989 at *5 S.D.N.Y. Jan. 17, 1992). Likewise given

the merger or integration clause in the Agreement, ACBL cannot rely upon the negotiating history as to the Agreement.

Gidwani fulfilled his obligation under Section 1.03. Having terminated Gidwani as it did, ACBL terminated him without cause. It also has not compensated him as required by the contract or otherwise. Since Gidwani's claims for damages are multifaceted and the facts as to damages are not without dispute, the Arbitrator needs to receive proof and argument on that aspect of the case. Thus, the arbitrator is hereby bifurcating the liability and damages components of Gidwani's breach of contract claim. Proof will be taken and argument heard on the damages aspect of the claim at the hearing in this case.

Therefore, the Arbitrator finds and concludes that ACBL has breached the Agreement by firing Gidwani without cause and failing to compensate him for the breach.

Defamation Claim

Gidwani's defamation claim is a tort claim and does not involve interpretation or construction of the Agreement. Thus, it is not controlled by the New York choice of law provision in the Agreement. As noted above, the parties are in agreement as to the choice of law test under the applicable law. The governing law is the law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties. It is clear that, on balance, Mississippi has the most significant relationship to the occurrence and the parties. ACBL's principal office is in Mississippi and that was the location of Gidwani's office. The uncontested proof shows that he worked in Mississippi 160 of his 213 working days as CEO of ACBL. His claim is based on a press release published by ACBL from its corporate headquarters in Mississippi. That press release related to his employment which again was based in Mississippi. Since the press release was posted on the internet, Gidwani was theoretically harmed in all 50 states. So the location of the harm favors no state or specific jurisdiction.

Under Mississippi law, a plaintiff, or herein claimant, has the burden to prove: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability

of the statement irrespective of special harm or the existence of special harm caused by the publication. Blake v. Gannet Co., Inc., 529 So. 2d 595, 602 (Miss. 1988). "[T]he threshold question … is whether the published statements are false. Truth is a complete defense to an action for libel." Id. at 602. Importantly, the plaintiff has the burden of proving falsity. Id. (citing Reaves v. Foster, 200 So. 2d 453 Miss. 1967)). Mississippi courts strictly enforce two crucial restrictions on defamation actions: "First, the words employed must have clearly been directly toward the plaintiff. Beyond that, the defamation must be clear and unmistakable from the words themselves and not be the product of innuendo, speculation or conjecture." Id. at 603. All of the above establishes one critical point. In order to prove defamation Gidwani would have to show the ACBL press release contained false statements and the defamation must be clear and unmistakable from the words themselves. Gidwani has not met this standard.

Gidwani focuses on what he claims is an incorrect characterization of circumstances surrounding his termination. First, he objects to the release referring to "issues that remain unresolved." While Claimant was terminated solely for his alleged failure to comply with Section 1.03 and no other issue can be used to by Respondent to justify his firing, there were other issues raised with him. Specifically the proof does establish that four issues were raised with him at least at a dinner meeting with ACBL officials in early March, 2018. They were treatment of staff, progress on the CRM and accounting review project, interaction with and listening to the Board and, what some called, change of pace. Second, he claims that the release falsely states that he received "counseling [sic] by the Board of Directors." As indicated above, the proof does show that ACBL officials discussed employment related issues with him. In an employment context an employee can be counseled in the sense that he or she is advised of issues, given guidance about an issue or given input about an issue. The word counseling does not in and of itself necessarily convey a defamatory meaning. It does not necessarily mean Gidwani received a serious form of discipline or that he engaged in some serious malfeasance or misconduct. It could and often does refer to situations where an employer has concerns which do not rise to the level of malfeasance or misconduct. It also can refer to situations where an employee receives no discipline. To find the reference to "counseling" to be false would be the product of innuendo,

speculation or conjecture. Neither the comment about "issues," nor the comment about "counseling," relied upon by Gidwani were false. Because Gidwani cannot establish falsity, his claim for defamation must be dismissed. No further analysis is necessary.

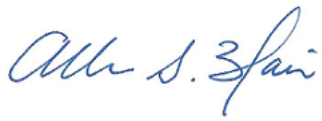
CONCLUSION

Claimant's Motion for Summary Judgment is granted in part and denied in part. The proceedings concerning Claimant's breach of contract claim are hereby bifurcated. Gidwani's Motion for Summary Judgment is granted as to liability on that claim. The damages aspect of that claim shall be heard with the parties being entitled to submit proof and argument as to damages. Claimant's motion as to the defamation claim is hereby denied.

Conversely, Respondent's Motion for Summary Judgment is likewise granted in part and denied in part. That motion is granted as to the defamation claim and denied as to the breach of contract claim as set forth herein.

The damages phase of the breach of contract claim shall proceed to hearing. Upon that hearing being closed, the Arbitrator shall issue the award herein which shall incorporate this order by reference.

IT IS SO ORDERED.



_____
ALLEN S. BLAIR, Arbitrator

Date:_____