****NOT FOR PUBLICATION****

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DR. MICHAEL B. MORGAN, Plaintiff, v. QUEST DIAGNOSTIC INCORPORATED, Defendant.	Civil Action No.: 20-430 (CCC) **OPINION**

CECCHI, District Judge.

I. INTRODUCTION

This matter comes before the Court on Defendant Quest Diagnostic Incorporated's ("Quest" or "Defendant") motion to dismiss. ECF No. 41. The Court has considered all submissions in support of and in opposition to the motion, and decides this matter without oral argument pursuant to Rule 78(b) of the Federal Rules of Civil Procedure. For the reasons set forth below, the motion to dismiss (ECF No. 41) is granted.

II. BACKGROUND

1. On January 14, 2020 Plaintiff Dr. Michael B. Morgan ("Plaintiff" or "Morgan") filed a complaint (the "Complaint") in the instant matter. ECF No. 1. By Agreement of the parties, Plaintiff filed an amended complaint (the "Amended Complaint") on July 31, 2020. ECF No. 39. Plaintiff alleges that he was improperly terminated by Quest without good cause on January 27, 2015 and that this improper termination constitutes a breach of the employment agreement (the "Employment Agreement") that existed between Morgan and Quest. Id. at 7. Plaintiff further

alleges that Quest improperly "continued to maintain his likeness and image on their marketing material and website for almost two years" after his termination. Id. at 8. The Amended Complaint contains four counts stemming from the above-mentioned allegations: (1) breach of contract, (2) unauthorized misappropriation of name and likeness under Section 540.08 of the Florida Statutes,[1] (3) violation of the common law right of publicity, and (4) unjust enrichment. Id. at 11–17.

2. Quest filed a motion to dismiss the Amended Complaint on August 14, 2020. ECF No. 41. Quest argues that the Amended Complaint should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. ECF No. 41-2 at 3. Specifically, Quest argues that Plaintiff has failed to state a claim for breach of contract because he voluntarily resigned, Quest terminated him with cause, and because Plaintiff has not alleged facts that plausibly show the alleged breach of contract caused any damages. Id. at 10, 13, 16. Quest next argues that Plaintiff fails to state a claim for misappropriation of likeness under Florida common law because his claims are time-barred and Plaintiff's likeness was not used to promote a product or service. Id. at 18, 20–21, 23.

3. Plaintiff filed a brief in opposition to Quest's motion to dismiss. ECF No. 51. Plaintiff argues that Quest has failed to demonstrate that the claims for common law right of publicity and unjust enrichment should be dismissed. In this regard, Plaintiff contends that Quest's reliance on Florida law is improper, and Plaintiff's claims survive under New Jersey law. Id. at 11. As to the breach of contract claim, which the parties agree is governed by Florida law, Plaintiff asserts that he has adequately alleged a breach of contract claim because he alleges the

[1] Plaintiff's brief in opposition to the motion to dismiss states that "Morgan consents to dismissal of his Florida statutory misappropriation claim." ECF No. 51 at 8 n.1.

existence of a valid contract, a breach (fired without cause, not given proper written notice of termination), and damages (lost salary and quarterly bonuses). Id. at 14–15, 17. Plaintiff further alleges that he did not resign from Quest until after he was terminated. Id. at 14–15, 17.

4. Quest replied in support of its motion to dismiss (ECF No. 58) and Plaintiff, with permission of the Court, submitted a sur-reply addressing choice of law issues that it contends Quest raised for the first time in its reply brief (ECF No. 64).[2]

III. ANALYSIS

5. To survive dismissal under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). A claim is facially plausible when supported by "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint that contains "a formulaic recitation of the elements of a cause of action" supported by mere conclusory statements or offers "'naked assertions' devoid of 'further factual enhancement'" will not suffice. *Id*. (citation omitted). In evaluating the sufficiency of a complaint, the court accepts all factual allegations as true, draws all reasonable inferences in favor of the non-moving party, and disregards legal conclusions. *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 231–34 (3d Cir. 2008).

Breach of Contract

6. Count One of the Amended Complaint states a claim for breach of contract. ECF No. 39 at 11. The parties agree that this claim is governed by Florida law pursuant to the

[2] As the Court has afforded the parties ample opportunity to brief the issues involved in this matter, the Court rejects the various assertions that arguments have been improperly raised or waived in this matter. *See* ECF No. 51 at 10; ECF No. 58 at 17; ECF No. 64 at 1.

Employment Agreement's choice of law provision. ECF No. 41-2 at 14; ECF No. 51 at 8. The elements of a breach of contract claim under Florida law are a valid contract, a material breach, and damages. *Beck v. Lazard Freres & Co. LLC*, 175 F.3d 913, 914 (11th Cir. 1999). Here, the Amended Complaint fails to adequately allege a material breach of the Employment Agreement and damages stemming the alleged breach. The Amended Complaint states that Quest breached the terms of the Employment Agreement by terminating Plaintiff without good cause and by terminating Plaintiff before it served him with a written notice as required by paragraph 14(a). ECF No. 39 at 7–8. The Amended Complaint alternatively alleges that Quest breached the Employment Agreement by not serving Plaintiff with a notice of termination in the manner required by paragraph 24. Id. at 8. With respect to damages, the Amended Complaint states that "[a]s a result of Quest's breach of the Employment Agreement, Morgan has suffered actual and consequential damages exceeding $5,600,000." Id. at 12.

7. The Court notes that the Employment Agreement has provisions that explicitly allowed Quest to terminate Plaintiff with cause (ECF No. 2-1 at 6) and without cause (id. at 9). Accordingly, while the Parties argue at great length over whether Plaintiff was terminated with or without cause, the Court finds that both types of termination were contemplated by the Employment Agreement and cannot qualify as a material breach of said agreement. *See Maor v. Dollar Thrifty Auto. Grp., Inc.*, No. 15-22959, 2018 WL 4698512, at *5 (S.D. Fla. Sept. 30, 2018) ("Defendants' conduct was strictly compliant with the terms of the contract, and Plaintiff was charged the precise amount he agreed to under the contract. There can be no breach.").[3]

[3] While the Court need not presently reach the issue of whether Plaintiff's voluntary resignation was effective and pre-dated Quest's termination of Plaintiff, Quest strongly argues that the allegations of the Amended Complaint, along with exhibits attached to the initial pleading in this

8. Similarly, the Amended Complaint states that "Quest purported to terminate Morgan's employment by letter dated January 27, 2015." ECF No. 39 at 8. Paragraph 24 of the Employment Agreement states that "[a]ny required notice under this Agreement and shall be delivered either personally, by reputable overnight courier services or by first class mail, return receipt requested. . . . Delivery of such notice shall be deemed to have occurred . . . in the case of mailing, three (3) days after such notice has been deposited in the United states mails . . . or . . . ***in any other case, when actually received by the other party***." ECF No. 2-1 at 17 (emphasis added. Accordingly, the Court fails to discern how Quest materially breached the Employment Agreement as the Amended Complaint admits that he was notified of his termination by written letter.

9. Turning next to damages, the Court finds that the breach of contract claim in the Amended Complaint is inadequately pled in this respect as well. Under Florida law, "damages for breach of contract must arise naturally from the breach, or have been in contemplation of both parties at the time they made the contract, as a probable result of a breach." *ACG S. Ins. Agency, LLC v. Safeco Ins. Co.*, No. 19-528, 2019 WL 8273657, at *6 (M.D. Fla. Dec. 16, 2019) (internal citations and quotation marks omitted). Here, the Amended Complaint baldly states, without any factual allegations, that "[a]s a result of Quest's breach of the Employment Agreement, Morgan has suffered actual and consequential damages exceeding $5,600,000." The Amended Complaint is silent as to how the alleged breach of contract caused such damages, how Plaintiff arrived at this figure, and what money, if any, Quest paid to Plaintiff after he was terminated. This

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matter, demonstrate that such resignation was knowing and voluntary. *See* ECF No. 2-4, ECF No. 39 at 8, 11.

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