

Blog

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
J.S.C. Justice

PART 45

DAMON G. BARBER

INDEX NO. 100653/11

MOTION DATE _____

-v-
DEUTSCHE BANK SECURITIES, INC.
et al

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *by defendant to dismiss*
the complaint is GRANTED
per the attached
Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 14, 2011

Melvin L. Schweitzer
MELVIN L. SCHWEITZER J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

also included a discretionary bonus that was to be determined at the sole discretion of Securities. In order to receive any bonus, the Offer Letter provided that an employee must be “actively employed” by Securities on the applicable Bonus Payout Date. However, if the employee was terminated “without cause” or resigned for “good reason” before the Bonus Payout Date, Securities agreed to pay the employee their guaranteed non-discretionary bonus, but not a discretionary bonus, on the Bonus Payout Date. The Offer Letter also included a no oral modification clause which read, “The Agreement can only be amended or modified in a written agreement signed by you and authorized representatives of Deutsche Bank.”

In the summer of 2008, Alex Manson, Deutsche Bank’s then Head of Coverage for Asia-Pacific, approached Barber about an assignment in Hong Kong, commencing January 1, 2009. Barber contends that because he and his partner (now wife) were well-established in New York, and he lacked business contacts in Hong Kong, he expressed to Manson that he would not be willing to relocate unless he knew in advance that he would be properly compensated. Barber states in his complaint that Manson expressly assured Barber that if he accepted the assignment, his compensation for 2009 would be “commensurate with the average of what other Managing Directors of the Natural Resources Group in New York received for 2009.” Barber also discussed the assignment and received similar assurances from Michael Hill, Deutsche Bank’s co-head of Global Natural Resources.

The Assignment Contract

Barber contends that he relied on these assurances when he decided to accept the assignment and signed the Assignment Contract (the “Assignment Contract”) on November 19, 2008. The Assignment Contract provided a two year duration for the assignment but reserved Deutsche Bank’s right to terminate his employment pursuant to the terms of the Offer Letter or

to reassign Barber after consultation with him. The compensation provisions included a \$200,000 yearly base salary and contained a discretionary bonus provision. There was no mention of a guaranteed bonus of \$1.3 million or any other amount. Additionally, the Assignment Contract stated that the terms therein worked in conjunction with Deutsche Bank's Global Policy for International Assignments (the "IAP"). The IAP did not include a guaranteed bonus provision and reiterated that all discretionary incentive compensation was paid at the *sole* discretion of Deutsche Bank unless there was a written agreement that stated otherwise. The Assignment Contract did not include a no-oral-modification clause but provided that in the event of an inconsistency between the terms of the Assignment and the terms of the Offer Letter, the Assignment Contract would prevail.

Barber commenced his employment in Hong Kong on January 1, 2009. On December 10, 2009, Barber was told that he was being terminated effective January 29, 2010 due to the global credit crisis. There was no effort to reassign him to another position. Barber's termination date was two weeks prior to the Bonus Payout Date for the 2009 calendar year, and consequently he did not receive any bonus for 2009.

Barber claims that this failure to pay a bonus for 2009 is a breach of the oral promises he received from Manson and Hill, as well as a breach of the implied covenant of good faith and fair dealing. Barber also contends that by the terms of the Assignment Contract, his assignment in Hong Kong was for a two year term and so his termination in January 2010 was premature. Barber is therefore also seeking damages for his unpaid salary for the remaining term of his employment contract.

Additionally, Barber brings claims based on New York Labor Law § 193, which prohibits a deduction from the wages of an employee. Barber seeks an amount as liquidated

damages pursuant to Labor Law § 198.1-a. Deutsche Bank disputes the applicability of this statute and argues that any bonus that Barber may have received for 2009 was purely discretionary and therefore not covered by the statute's definition of "wages".

Discussion

Barber initiated this action by filing a complaint alleging breach of contract, violation of New York Labor Law § 193, and breach of the implied covenant of good faith and fair dealing for both Deutsche Bank's failure to pay his 2009 bonus and for what Barber alleges to be a premature termination. Deutsche Bank seeks dismissal of these claims for failure to state a cause of action pursuant to CPLR 3211 (a) (7) and, more specifically, seeks to dismiss Barber's claim relating to a breach of the alleged oral promises as unenforceable under the Statute of Frauds pursuant to CPLR 3211 (a) (5). Deutsche Bank also argues that the bonus award in dispute does not constitute "wages" as defined in New York Labor Law § 193.

CPLR 3211 (a) provides, in pertinent part, "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... (7) the pleading fails to state a cause of action" New York courts construe the complaint liberally and take facts alleged in the complaint as true when considering such a motion to dismiss. *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 (2d Dept 2008). The criterion is whether the plaintiff has a cause of action, not necessarily whether the plaintiff has stated one. *Guggenheimer v Ginzburg*, 43 NY2d 268, 274-275 (1977). If allegations are discerned from the four corners of the complaint which, taken as a whole, state *any* cause of action recognized by law, a motion to dismiss under CPLR 3211 (a) (7) must fail. *Cooper v 620 Prop. Assoc.*, 242 AD2d 359, 360 (2d Dept 1997).

Statute of Frauds

Deutsche Bank argues that Barber's complaint does not state a cause of action because the oral agreement that his allegations rely on is unenforceable under New York's Statute of Frauds. The Statute of Frauds provides in pertinent part:

"Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: By its terms is not to be performed within one year from the making thereof..."

N.Y. Gen. Oblig. Law § 5-701 (a) (1). The purpose of this statute is to prevent fraud in proving the existence of certain agreements where there is no writing and the parties are unable to perform within a year. *See Sheehy v Clifford Chance Rogers & Wells LLP*, 3 NY3d 554, 560 (2004). Deutsche Bank contends that because the alleged oral promise was made in the summer of 2008 and payment of the 2009 bonus pursuant to the alleged oral promise would not have been made until the Bonus Payout Date in February 2010, the promise could not have been performed within a year. Therefore, the alleged oral promise would be barred by the Statute of Frauds.

Barber asserts that the Statute of Frauds is inapplicable because his employment could have been terminated in less than a year by invoking the "For Cause" or "Good Reason" provisions of the Offer Letter. Pursuant to the terms of the Offer Letter, Barber could be terminated at any time without cause or choose to leave for good reason and still receive his guaranteed non-discretionary bonus on the Payout Date. However, if Barber is terminated for cause or leaves without good reason, he is not entitled to any bonus. Barber argues that termination under these conditions could occur within a year of the alleged oral promise and therefore the Statute of Frauds does not apply. In short, he contends that the Offer Letter provided for at-will employment.

Barber crafts this argument to avoid conceding that his employment in Hong Kong was at-will. Barber's view is that although the Offer Letter contained language indicating that Barber's employment was at-will, the Assignment Contract did not contain any such language, and so his employment while on assignment was not at-will. Rather, Barber believes that his employment was for a two-year term as stated by the "Assignment Duration" provision in the Assignment Contract. The Assignment Contract also provides that Deutsche Bank reserves the right to terminate the assignment at any time and to reassign Barber to another position with Barber's consultation. Barber views his termination without reassignment as a violation of the duration provision in the Assignment Contract. However, the Assignment Contract specifically states that while on assignment, the employee would still be bound by the "notice, dismissal for cause, and confidentiality provisions" of his original employment agreement. Additionally, by the terms of the Assignment Contract, the assignment terms were meant to work in tandem with the terms of the Offer Letter. Therefore, the court is of the opinion that Barber's employment while on assignment continued to be at-will.

At-will employment is employment that may be terminated by either party for any reason or no reason whatsoever. *See Cron v Hargro Fabrics*, 91 NY2d 362, 367 (1998). Accordingly, New York courts have held that employment agreements of this type are without the proscription of the Statute of Frauds concerning one year performance. *Id.* Although the Bonus Payout Date is more than a year from when the alleged oral promise was made, courts have consistently ruled that a bonus term that is payable after one year does not bring at-will employment within the Statute of Frauds. *Id.* Therefore, Barber's claim of the existence of an oral contract is not barred by the Statute of Frauds.

No-Oral-Modification

Deutsche Bank also argues that the alleged oral promise is unenforceable because of the no-oral-modification clause in the Offer Letter. Deutsche Bank contends that because the Offer Letter only provided for a guaranteed non-discretionary bonus of \$1.3 million for the years 2007 and 2008, any further bonuses that Barber might receive were at the sole discretion of Deutsche Bank. Deutsche Bank argues that because of the no-oral-modification clause, the terms of the Offer Letter could not be orally modified to guarantee Barber's bonus for 2009.

New York law provides:

“A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executor agreement unless such executor agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent.”

N.Y. Gen. Oblig. Law § 15-301 (1). Pursuant to this statute, Deutsche Bank maintains that any alleged oral promise to pay Barber a 2009 bonus was ineffective in modifying the terms of the Offer Letter.

Barber, however, seeks to avoid the effect of this provision and the no-oral-modification clause by showing partial performance and equitable estoppel. *See Baraliu v Vinya Capital LP*, 2011 WL 102730, at *6 (SDNY Jan 6, 2011). In *Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 (1977), the court ruled that no-oral-modification clauses may be waived either by completed performance or partial performance. Where there is partial performance, the performance must be “unequivocally referable” to the oral modification. *Id.* Equitable estoppel applies where one party induces another's significant and substantial reliance upon an oral modification and the acting party's conduct is not otherwise referable to the written agreement. *Id.* at 344.

Barber allegedly obtained the oral promise during conversations with his superiors regarding his assignment to Hong Kong. Barber's complaint states that he informed Manson that he would not accept the assignment unless he knew he would be properly compensated. The no-oral-modification clause is overcome because Manson's alleged promise of a 2009 bonus was clearly made to induce Barber's acceptance of the assignment to Hong Kong and Barber's move to Hong Kong and his employment there for all of 2009 is clearly partial performance which is unequivocally referable to such an alleged oral promise. Furthermore, because Barber had no other contacts with Hong Kong and apparently no other reason to move there, the court concludes that Barber significantly and substantially relied on the alleged oral promise and, consequently, Deutsche Bank is equitably estopped from reliance on the no-oral-modification clause.

Subsequent Written Agreements Supersede Prior Oral Agreements

Although the court is of the opinion that Barber's claim is not defeated by application of the Statute of Frauds and the no-oral-modification clause in the Offer Letter, the written Assignment Contract, which was entered into *after* the alleged oral promise, supersedes the alleged oral promise and defeats Barber's claim. Under New York law, subsequent contracts regarding the same subject matter merge and subsume any prior agreements. *See Cobb v. Chubb Corp.*, 2007 WL 7126612, at *6 (NY Sup Ct Jan 31, 2007). Barber's agreement regarding his assignment in Hong Kong is comprised of the Assignment Contract and the IAP, which is referred to therein. These two documents contain provisions regarding Barber's compensation, which is the same subject matter as the alleged oral agreement. Therefore, the prior alleged oral promise is merged and subsumed within the subsequent written Assignment Contract and IAP. Despite Barber's argument that the Assignment Contract did not subsume the oral agreement

because it lacked an integration clause, New York courts have held that subsequent written agreements will subsume prior agreements even with the absence of an integration clause. *See Indep. Energy Corp. v Trigen Energy Corp.*, 944 FSupp 1184, 1195 (SNDY 1996); *Friedman v Ocean Dreams, LLC*, 2007 WL 1687165, at *8 (NY Sup Ct June 11, 2007). Accordingly, the terms of the Assignment Contract and IAP must control.

Neither the Assignment Contract nor the IAP makes any reference to a guaranteed non-discretionary incentive bonus of \$1.3 million or any other amount. In fact, both written documents only provide for a discretionary bonus and explicitly state that this bonus would be determined at the *sole* discretion of Deutsche Bank. According to the IAP, any change to the bonus terms must be in writing. Under New York law, an employee's entitlement to a bonus is governed entirely by the terms of the employer's bonus plan. *See Hall v United Parcel Serv. of Am.*, 76 NY2d 27, 36 (1990); *Brennan v JP Morgan Secs., Inc.*, 2004 WL 3314910, at *2 (NY Sup Ct Aug 31, 2004). An employee has no enforceable right to a bonus under a discretionary bonus plan. *Brennan*, 2004 WL 3314910, at *2. Although Barber did have a contractually enforceable guaranteed bonus for 2007 and 2008, the same was not true for the year 2009. Beyond 2008, any future bonuses were to be determined at the discretion of Barber's employer.

Barber's Employment Was At-Will

As stated previously, Barber's employment while on assignment continued to be at-will. Although the Assignment Contract specified that the assignment duration was for two years, Barber still was bound by the termination provisions of the Offer Letter and the IAP. Barber argues that the provision requiring consultation with an employee prior to reassignment indicates that Barber's assignment in Hong Kong could be terminated before two years, but not his employment with Deutsche Bank. However, as argued by Deutsche Bank, consultation with

Barber before reassigning him within Deutsche Bank does not prevent the employer from terminating the employment altogether.

In *Hughes v Standard Chartered Bank*, 2010 WL 1644949 (SDNY Apr 14, 2010), the plaintiff was a former employee of the defendant who brought a breach of contract claim arising out of his termination while on assignment in Singapore. Hughes claimed that his termination was premature because his assignment agreement provided for a duration of three years. *Id.* at *4. The court held that this duration merely indicated the expected length of assignment and did not limit the employer's right to terminate employment. *Id.* Similarly, in the present case, the duration provided in Barber's Assignment Contract only pertained to the expected assignment duration and did not limit Deutsche Bank's prerogative to terminate Barber's employment. Accordingly, Barber does not have a claim for unpaid salary for the balance of the Assignment Contract. Barber's employment, even while on assignment, continued to be at-will and Deutsche Bank had no further payment obligation to Barber after termination of his employment.

Barber also argues that even if his termination was rightfully made under the terms of the Offer Letter, specifically under the "without cause" provision, he is still entitled to his guaranteed non-discretionary bonus for 2009. The Offer Letter provides that if an employee is terminated without cause, and is therefore not actively employed on the Bonus Payout Date, Deutsche Bank still will pay the employee's guaranteed non-discretionary bonus. However, because this court holds that the alleged oral promise to pay a guaranteed non-discretionary bonus for 2009 is not enforceable as it is superseded by the Assignment Contract and the IAP, Barber did not have a guaranteed non-discretionary bonus for 2009. Deutsche Bank, therefore, had no obligation to pay Barber a bonus of any kind on the Bonus Payout Date in February 2010.

The Implied Covenant of Good Faith and Fair Dealing

Barber also brings claims alleging a breach of the implied covenant of good faith and fair dealing for Deutsche Bank's failure to pay him a bonus in 2009 and for what Barber views as early termination. Every contract contains an implied covenant of good faith and fair dealing which is breached when one party acts in a way that deprives the other party of his right to receive benefits under their contract, even if such an act is not expressly forbidden by the agreement. *Jaffe v Paramount Communications*, 644 NYS2d 43, 47 (1996). However, the implied covenant of good faith and fair dealing cannot be used to create new duties or negate existing rights under the contract. *See Richbell Info. Servs., Inc. v Jupiter Partners, LP*, 309 AD2d 288, 302 (1st Dept 2003).

As stated above, the court is of the opinion that Barber's employment remained at-will during his assignment in Hong Kong. Consequently, Deutsche Bank had the contractual right to terminate Barber's employment at any time. Additionally, New York law does not impose an implied covenant of good faith and fair dealing in cases of termination of an at-will employee. *Graves v Deutsche Bank Secs., Inc.*, 2010 WL 997178, at *5 (SDNY March 18, 2010). Deutsche Bank had an unabridged right to terminate Barber's employment at any time, even while on assignment in Hong Kong, which was not subject to a duty of good faith and fair dealing.

This court also has determined that Barber had no contractual right to a 2009 bonus because it was discretionary. The implied covenant of good faith and fair dealing does not create a right for Barber to receive a non-discretionary bonus in 2009. Barber argues that New York courts have held that even where discretion lies with a single party, the discretion still must be exercised in good faith. *Travelers Int'l, AG v Trans World Airlines, Inc.*, 41 F3d 1570, 1575 (2d Cir 1994). However, the clear terms of Barber's employment contract provided that any

bonus for 2009 would be purely discretionary. An employee has no enforceable right to a bonus under a discretionary bonus plan, and an employer's decision to not pay a bonus to an employee does not amount to a breach of the implied covenant of good faith and fair dealing. *See Nikitovich v O'Neal*, 40 AD3d 300, 300-01 (1st Dept 2007). Even if Barber still was employed by Deutsche Bank on the Bonus Payout Date for 2009, he still would have no guaranteed right to a bonus.

Barber claims that by terminating his employment only two weeks prior to the Bonus Payout Date, Deutsche Bank exercised its right in full compliance with the terms of the contract but in a way that frustrated Barber's expectations and the purpose of the contract. Barber, however, could not reasonably expect a bonus for 2009 when the terms of his employment clearly provided that discretionary bonuses were paid at the sole discretion of Deutsche Bank and the Offer Letter only provided for guaranteed bonuses in 2007 and 2008. *See Graves*, WL 997178, at *5 (holding that a memorandum regarding the discretionary nature of the employer's year-end bonus compensation process that was distributed to all employees could not give rise to a reasonable expectation that the employee was guaranteed a discretionary bonus). As a result, Deutsche Bank could not have frustrated Barber's expectation of a bonus when such an expectation was not objectively reasonable.

New York Labor Law § 193

The plaintiff also makes a claim under New York Labor Law § 193, which provides in pertinent part, that "[n]o employer shall make any deduction from the wages of an employee." Barber seeks liquidated damages and attorney's fees pursuant to Labor Law § 198.1-a which imposes a penalty where the employer's act was willful. Labor Law § 190(1) defines "wages" as

“the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis.”

New York law holds that bonuses and other forms of incentive compensation that are contingent or dependent, at least in part, on the overall success of the employer business, do not constitute wages under Labor Law § 193. *See Truelove v Northeast Capital*, 95 NY2d 220, 224 (2000); *Ferrari v Keybank Nat'l Ass'n*, 2009 WL 35330 (WDNY Jan 5, 2009). Additionally, bonuses wholly subject to the employer's discretion also are not considered wages. *See Fiorenti v Cent. Emergency Physicians*, 187 Misc 2d 805, 808 (Sup Ct Nassau Cty 2001). The Offer Letter states that in exercising its discretion in determining incentive compensation, Deutsche Bank will consider several factors including the performance of the firm, the performance of the employee's division, and the employee's individual contribution. Because Barber's discretionary bonus depended in part on the financial success of his employer, and was to be paid or not paid at the sole discretion of Deutsche Bank, the bonus is not considered “wages” under the definition of the statute.

Barber makes the argument that guaranteed and nondiscretionary bonus payments have been considered “wages” by New York courts under the definition of Labor Law § 193. However, this court has determined that any bonus Barber may have received for 2009 was not guaranteed and was discretionary. Consequently, Barber's claim under Labor Law § 193 is without merit.

Conclusion

For the above reasons, this court is of the opinion that Barber has no valid cause of action against Deutsche Bank for payment of a bonus or other compensation under the terms of the

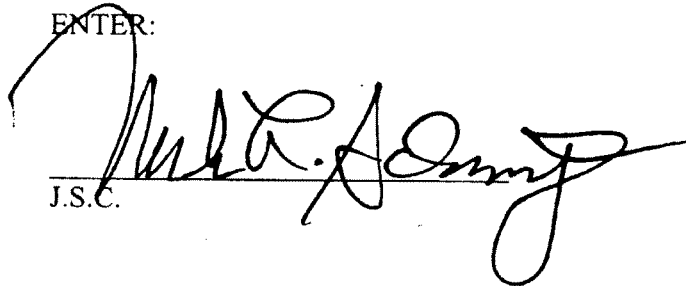
Assignment. His claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and his New York Labor Law § 193 claims are dismissed.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) is granted.

Dated: July 14, 2011

ENTER:

A handwritten signature in black ink, appearing to read "J.S.C.", is written over a horizontal line. The signature is highly stylized and cursive.

J.S.C.