

Glatt v Mariner Partners, Inc.

2004 NY Slip Op 30158(U)

December 20, 2004

Supreme Court, New York County

Docket Number: 0601590/2007

Judge: Richard B. Lowe

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Index Number : 601590/2007

PART 56

GLATT, ALAN D.

vs.

MARINER PARTNERS, INC.

SEQUENCE NUMBER : 001

DISMISS COMPLAINT

INDEX NO. _____

MOTION DATE 11/15/07

MOTION SEQ. NO. _____

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

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

FILED
JAN 07 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/20/07

RICHARD B. LOVETT III J.S.C.

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X
ALAN D. GLATT

Plaintiff

Index No: 601590/07

-against-

DECISION AND ORDER

MARINER PARTNERS, INC. and WILLIAM
MICHAELCHECK,

Defendants.

FILED
JAN 07 2008
NEW YORK
COUNTY CLERK'S OFFICE

-----X
RICHARD B. LOWE III, J.:

This dispute arises out of the employment of Plaintiff Alan D. Glatt ("Glatt") with Defendant Mariner Partners, Inc. ("Mariner Partners") and out of the alleged representations by Defendant William Michaelcheck ("Michaelcheck") leading up to Glatt's employment. Defendants move pursuant to CPLR 3211(a)(1) and 3211(a)(7) to dismiss the first, second, and third causes of action.

BACKGROUND

Plaintiff Glatt engages in business in the securities industry.

Mariner Investment Group ("Mariner") is an investment advisor that specializes in managing non-traditional investments, including hedge funds and fund of funds, and also provides funding capital to other hedge funds. Mariner Partners is an entity of Mariner and engages in the business of asset management. Defendant Michaelcheck founded Mariner in 1992. Michaelcheck is the largest shareholder and Chairman and Chief Executive Officer of both Mariner and Mariner Partners.

In 1991, Glatt joined Morgan Stanley and eventually headed an investment team in its private wealth management group.

In 2001, Glatt began work on developing a new company ("NewCo") with the company Accenture. The intended purpose of NewCo was to manage the investment assets of Accenture's partners. Glatt sought advice concerning the NewCo deal from long-time social acquaintance, Michaelcheck. Michaelcheck advised Glatt to pursue the NewCo deal and introduced Glatt to securities industry contacts who could offer assistance. Michaelcheck also advised Glatt to allow Mariner to play a role in the NewCo deal.

During discussions regarding the NewCo deal, Michaelcheck, on behalf of Mariner Partners, offered Glatt employment. Despite its institutional experience, Mariner Partners did not have a strong presence or experience with the categories of clients Glatt specialized in. In urging Glatt to accept an offer of employment, Michaelcheck told Glatt, among other things, that: (1) Glatt's total compensation at Morgan Stanley was "a rounding error" compared to what he would make at Mariner Partners; (2) Glatt would be able to transfer his Morgan Stanley clients to Mariner Partners; and (3) Glatt would be able to fully manage and serve those clients and their accounts at Mariner Partners.

In April 2002, Michaelcheck informed Glatt that Mariner was not going to participate in the NewCo deal, citing discomfort with the associated costs of infrastructure development. Despite declining to participate in the NewCo deal, Mariner Partners continued to offer Glatt employment. On two separate occasions, April 15 and April 27, Michaelcheck told Glatt that he and Mariner Partners remained committed to Glatt joining Mariner Partners. However, if Glatt joined Mariner Partners, there would be no bulk Accenture clients and Glatt would be dedicated

to management of his current clients and development of existing Mariner Partners clients and new prospects

On April 24, 2002, Glatt entered into an agreement which covered the terms of Glatt's employment (the "Employment Agreement"). Glatt resigned from his employment at Morgan Stanley and accepted an offer of employment with Mariner Partners. Glatt believed he would be able to transfer his Morgan Stanley clients to Mariner Partners, fully maintain their accounts, develop additional clients at Mariner Partners, and make more money at Mariner Partners than he made at Morgan Stanley.

In September 2002, Glatt confronted Michaelcheck and other Mariner Partners senior officers about his inability to transfer Morgan Stanley clients to Mariner Partners and to trade in non-Mariner products. Glatt was told that Mariner Partners had not and would not increase their *limited broker dealer authority* to permit Glatt to transfer his Morgan Stanley clients and to trade stocks and manage portfolios that contained non-Mariner products.

In June 2005, Glatt notified Mariner Partners of his intention to resign, effective June 30, 2005.

Glatt commenced this action asserting causes of action for (1) fraudulent inducement; (2) breach of contract with respect to Defendants' alleged obligations during Glatt's employment; (3) breach of contract with respect to Defendants' alleged obligations following Glatt's resignation; and (4) unjust enrichment. Defendants move pursuant to CPLR 3211(a)(1) and 3211(a)(7) to dismiss the first, second and fourth causes of action.

DISCUSSION

Motion to Dismiss

In making a determination on a motion pursuant to CPLR 3211, the court must accept as true all of the facts alleged in the complaint (*511 West 232nd Street Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]). The complaint must be liberally construed and the plaintiff must be given the benefit of every favorable inference (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

In deciding a CPLR 3211(a)(7) motion, courts must accept all the allegations of the complaint as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within a cognizable legal theory (*CBS Corp. v Dumsday*, 268 AD2d 350, 352 [1st Dept 2000]; see *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998] [“the test is simply whether the pleading has a cause of action, not even whether he has stated one”] [internal quotation marks omitted]).

To prevail on a motion pursuant to CPLR 3211(a)(1), the defendant must put forth documentary evidence that unequivocally contradicts plaintiff's allegations and conclusively establishes a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]; *511 West 232nd Owners Corp.*, 98 NY2d at 152; *Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.*, 275 AD2d 243, 246 [1st Dept 2000]).

Fraudulent Inducement

In his first cause of action, Glatt alleges that Defendants made fraudulent misrepresentations to induce Glatt to accept an offer of employment with Mariners. Glatt alleges that Defendants represented that: (1) Glatt's total Morgan Stanley compensation was a “rounding

error” compared to what he would make at Mariner; (2) Glatt would be able to transfer his Morgan Stanley clients to Mariner; and (3) Glatt would be able to fully manage and serve those clients and their accounts at the firm (Compl ¶ 22). Glatt also alleges that Defendants’ representations to Glatt were false and known by Defendants to be false at the time they were made because Defendants knew at the time that: (1) Mariner Partners did not have - and had no intention of increasing - the authority to permit Glatt to transfer his Morgan Stanley clients (Compl ¶ 30). Glatt alleges that upon reasonable reliance and to his detriment, he accepted an offer of employment with Mariner and resigned from his employment at Morgan Stanley; (2) Mariner Partners did not have - and had no intention of increasing - the authority to permit Glatt to trade non-Mariner products; and (3) Mariner Partners would not pay Glatt compensation that greatly exceeded what Glatt earned at Morgan Stanley (Compl ¶ 32, 33, 36).

Defendants argue that the fraudulent inducement claim fails to satisfy an essential precept of the cause of action, i.e., that the claim is not collateral to the Employment Agreement.

If a plaintiff alleges a fraud claim, (i) which is based on the same facts underlying the contract claim, (ii) where the fraud claim is not collateral to the contract, and (iii) if no damages are alleged that would not be recoverable under a contract claim, dismissal of the claim is proper on the ground that it is duplicative (*J.E. Morgan Knitting Mills v Reeves Bros., Inc.*, 243 AD2d 422, 422-23 [1st Dept 1997]; *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986] [the alleged misrepresentation must be extraneous to the contract]; *Krantz v Chateau Stores of Canada Ltd.*, 256 AD2d 186, 186 [1st Dept 1998] [plaintiff must allege the breach of a duty which is collateral or extraneous to the contract to allege a viable fraud claim arising out of a contractual relationship]). Furthermore, a fraud claim is duplicative

of a breach of contract claim where the only fraud alleged merely relates to a party's alleged intent not to perform and to breach the contract (*see Town House Stock LLC v Coby Housing Corp.*, 36 AD3d 509, 509 [1st Dept 2007]; *Big Apple Car v City of New York*, 234 AD2d 136, 138 [1st Dept 1996] [holding that a claim of fraud in the inducement based on allegations that the defendant entered into an agreement with plaintiff that defendant did not intend to fulfill is not extraneous to the agreement]).

Here, the allegations of misrepresentations put forth by Glatt are the same promises which Glatt alleges that Defendants breached under the Employment Agreement. In his first cause of action for fraudulent inducement, Glatt alleges Michaelcheck represented that: "Glatt would be able to transfer his Morgan Stanley clients to Mariner Partners," and "Glatt would be able to fully manage and serve those clients and their accounts at the firm" (Compl ¶ 22). In his second cause of action for breach of contract, Glatt alleges that Mariner Partners: "prevented Glatt from transferring certain Morgan Stanley clientele over to Mariner" (Compl ¶ 53), and "prevented Glatt from managing his existing clients" (Compl ¶ 52). Additionally, in his first cause of action, Glatt alleges that Michaelcheck represented that "Glatt's total Morgan Stanley compensation was a 'rounding error' (i.e., so small as to be inconsequential by comparison) compared to what he would make at Mariner Partners" (Compl ¶ 22). However, in his second cause of action, Glatt alleges that "[a]s a result of Mariner Partners' failure to honor its obligations under the contract, Glatt earned only [] in 2003, [] in 2004, and [] 2005 (Compl ¶ 65). Glatt further alleges that "Glatt's total compensation at Mariner Partners[] diminished as a result of the inability to maintain or develop clients, was well below (a) the lucrative, and steadily increasing, compensation he left behind at Morgan Stanley to join Mariner Partners, and (b) the

amount he would have earned had Mariner Partners honored the contract” (Compl ¶ 66). Thus, because the alleged misrepresentations were not an inducement to the making of the contract, but rather representations that Glatt alleges were part of the contract, the fraudulent inducement claim is not collateral to the breach of contract claim (*see Sager v Friedman*, 270 NY 472, 481 [1936]).

Moreover, except for the request for punitive damages in the first cause of action, Glatt has not claimed any special damages proximately caused by the misrepresentation that would not be recoverable under the contract damages sought in the second and third causes of action. That “there are no damages sought that would not be recoverable under a contract measure of damages” further supports the view that these claims are duplicative (*see Town House Stock LLC v Coby Housing Corp.*, 36 AD3d 509, 509 [2007]). Accordingly, because the claim for fraudulent inducement is not collateral to the breach of contract claim, the first cause of action must be dismissed.

Breach of Contract

In his second cause of action, Glatt alleges that Defendants breached express obligations contained in the Agreement that Glatt and Defendants entered into. Specifically, Glatt alleges that the “‘Responsibilities’ section of the [Employment Agreement] required that Mariner Partners take certain actions that are clear and defined in the securities industry in order to allow Glatt to fulfill his role in the Mariner Partners’ corporate structure” (Compl ¶ 49). Glatt alleges that Defendants breached its implied contractual obligations by not allowing, preventing, not permitting, failing to provide, not including, and refusing certain things Defendants were “required” to do under “Responsibilities” section of the Employment Agreement (Compl ¶¶ 49,

50-64). Thus, Glatt attempts to argue that the “Responsibilities” section of the Employment Agreement contains, by implication, obligations on the part of Mariner Partners and that Mariner Partners breached those implied obligations.

Defendants argue that Glatt’s second cause of action alleges the breach of contractual obligations that do not exist; that Glatt seeks to impermissibly impose nonexistent obligations by implication; and that Defendants’ only obligation under the Employment Agreement was to compensate Glatt.

Where a contract is unambiguous, its interpretation presents a question of law for the court to be determined without resort to extrinsic evidence (*West, Weir & Bartel v Mary Carter Paint Co.*, 25 NY2d 535, 540 [1969]). A term may be implied only where it may be assumed that it would have been included if attention had been drawn to it (*Long Is. R. R. Co. v Northville Inds. Corp.*, 41 NY2d 455, 461 [1977]).

As a general matter, custom and usage cannot be used to contradict, alter or vary the terms of an unambiguous contract. A party “may not introduce evidence of custom or industry practice to subvert the agreement’s plain meaning” (*see Uribe v Merchants Bank of N.Y.*, 91 NY2d 336, 342 [1998]; *Michael J. Torpey, Inc. v Consolidated Edison Co. of N.Y.*, 99 AD2d 484 [1984], appeal dismissed 66 NY2d 915 [1985]; *see also Reuters Ltd. v Dow Jones Telerate*, 231 AD2d 337, 343 [1st Dept 1997] [in order to use trade usage to define language or annex a term to a contract, the proponent must show either that the other party to the contract is actually aware of the usage, or that the existence of the usage in the business to which the transaction relates is so notorious that a person of ordinary prudence in the exercise of reasonable care would be aware of it]). Where there is ambiguity, courts may consider industry custom (*cf. Evans v Famous Music*

Corp., 1 NY3d 452, 463 [2004] [considering music industry custom to interpret the contracts]). However, unambiguous language does not become ambiguous just because the parties argue differing interpretations (*Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 352 [1996]; *Moore v Kopel*, 237 AD2d 124, 125 [1st Dept 1997]). Furthermore, the parties may contract with reference to a custom known to both, and then proof of the custom may explain and make definite a writing otherwise vague and of doubtful meaning (*Stulsaft v Mercer Tube & Mfg. Co.*, 288 NY 255, 260 [1942]).

Here, there is no allegation that the parties agreed to reference a custom with respect to the Responsibilities section of the Employment Agreement. Indeed, the plain language of the Employment Agreement is silent as to incorporating securities industry custom in order to clarify the meaning of the term “Responsibilities.” Where no ambiguity exists in the plain language of the Employment Agreement, whether custom or particularized trade usage should be used in interpreting the terms of the Employment Agreement is irrelevant (*see B & R Children's Overalls Co. v New York Job Dev. Auth.*, 257 AD2d 368, 369 [1st Dept 1999]).

“[G]iving reasonable, lawful, and effective meaning” to the terms of the contract, the Court finds that the Employment Agreement is unambiguous as a matter of law (*American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990]). Thus, the Court may not use industry custom or trade usage to imply obligations into the Employment Agreement (*ABS Partnership v AirTran Airways, Inc.*, 1 AD3d 24, 29 [1st Dept 2003] [“When the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the document, and the court must enforce it without recourse to parol evidence.”] [internal citations omitted]). Accordingly, the Employment Agreement does not contain “mutual

obligations” with respect to the “Responsibilities” section.

Glatt also alleges that “Mariner Partners further breached its contractual duties and obligations owed to Glatt under the [Employment Agreement] by refusing to grant Glatt ‘the same opportunity as all other partners in Mariner to participate on [a] merit basis in the stock option plan,’ and by never considering Glatt ‘for grant of options on up to 2% of the outstanding stock of Mariner” (Compl ¶ 64). To be clear, the “Compensation” section of the Employment Agreement reads: “Equity in Mariner: You shall be granted the same opportunity as all other partners to participate” It also reads: “On the next grant date (December 31, 2002), we shall consider you for a grant of options” Accordingly, because Glatt alleges that Defendants breached the Employment Agreement by not granting Glatt the opportunity to participate and by not considering Glatt for a grant of options, the claim states a valid cause of action sounding in breach of contract.

Moreover, the Court is not persuaded that the documentary evidence, here, the Employment Agreement, contradicts Glatt’s allegations and establishes a defense as a matter of law. Defendants argue that participation on a merit basis and consideration for a grant of options are discretionary matters and, thus, not actionable as a matter of law. However, Defendants fail to address the plain language that reads “[y]ou shall be granted the same opportunity as other partners to participate” and “we shall consider you for a grant of options.” Thus, whether Defendants actually granted Glatt an opportunity to participate or considered Glatt precedes any discussion of whether Glatt participated or was considered subject to Defendants’ discretion. Accordingly, Defendants’ motion to dismiss Glatt’s second cause of action for a defense based upon documentary evidence and for failure to state a cause of action must be denied.

Unjust Enrichment

In his fourth cause of action, Glatt alleges that he provided services to Mariner from 2002 to 2005 and Mariner refused to pay the compensation to which Glatt was entitled for the work he performed. Glatt alleges that Mariner's retention of the benefit of Glatt's services would be unjust. Defendants argue that because a valid contract governing the scope of Glatt's employment exists, Glatt's claim for unjust enrichment is precluded. Glatt responds that the basis of his unjust enrichment claims lies beyond a valid contract because the Employment Agreement does not cover Glatt's "personal compensation."

The elements of unjust enrichment are: (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and impoverishment; (4) the absence of justification; and (5) the absence of a remedy provided by law (*Jackson Nat'l Life Ins. Co. v Kennedy*, 741 A2d 377, 393 [1999]). While a plaintiff may proceed upon a theory of unjust enrichment as well as contract where there is a bona fide dispute as to the existence or scope of a contract (*Rab Contrs., Inc. v. Stillman*, 266 AD2d 70, 70 [1st Dept 1999]; *see also Farash v Sykes Datatronics*, 59 NY2d 500, 503 [1983]), "existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter" (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 23 [2005]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Here, a claim of unjust enrichment is barred because there is an express contract that Glatt was to receive an agreed upon compensation. In *Clark-Fitzpatrick*, the Court of Appeals stated that "the plaintiff's claim was that the defendant breached the contract, the plaintiff chose not to rescind the agreement, but instead to complete performance of the contract and sue to

recover damages, which of course was plaintiff's right" (70 NY2d at 389). The Court of Appeals reasoned that having chosen to pursue its claim based on contract, the "plaintiff is now limited to recovery of damages on the contract, and may not seek recovery based on an alleged quasi contract." (*Id.*) Similarly, Glatt performed under the contract and seeks entitlement to compensation based on his performance. Indeed, although Glatt discovered the alleged fraud in September 2002 (Compl ¶ 35), he remained with Mariner Partners through June 2005 (Compl ¶ 73, 79, 83). Having performed on the contract and chosen to pursue damages for breach of contract for compensation, Glatt may not preserve a claim for unjust enrichment for compensation by creating a dispute over the contract's validity or scope (*see Clark-Fitzpatrick*, 70 NY2d at 389). Glatt attempts to bring the unjust enrichment claim outside the scope of the Employment Agreement by arguing that "a close reading of the [Employment A]greement makes clear that the parties did *not* enter into a written agreement as to how *Plaintiff's* personal compensation would be determined" (Plaintiff's Mem in Opp, at 22 [emphasis in original]; *contra* Davis Aff Ex B [page two of Glatt's Employment Agreement contains the heading "Compensation"]). Thus, the Employment Agreement unequivocally contradicts the argument that compensation was not contemplated in the Employment Agreement. Accordingly, because Glatt chose to seek recovery based on a valid contract governing the subject matter of the unjust enrichment claim, Glatt is precluded from seeking recovery based on unjust enrichment (*Clark-Fitzpatrick*, 70 NY2d at 389).


CONCLUSION

ORDERED that defendant's motion to dismiss is granted to the extent the first and fourth causes of action are dismissed; and it is further

ORDERED that defendant's motion to dismiss is denied insofar as it seeks to dismiss the second cause of action for breach fo contract.

Dated: December 19, 2007

ENTER:


JUSTICE RICHARD B. LOWE, III

J.S.C.

FILED
JAN 07 2008
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