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

PRESENT: JANE S. SOLOMON Justice

PART 55

Gursey, Marden

-v-

Goldman Sachs & Co

INDEX NO. 101929/04

MOTION DATE 7/26/04

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED

2004

RK

'S OFFICE

Dated: 10/1/04

JANE S. SOLOMON J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55
----------X

MARTIN GUIRY,

Plaintiff,

-against-

GOLDMAN, SACHS & CO.,

Defendant.
----------X

DECISION and ORDER

Index No. 101929/04

SOLOMON J.:

In this action, plaintiff Martin Guiry (Guiry) seeks to recover compensation allegedly earned as a salesperson in the Private Client Services Group (PCS Group) of defendant Goldman, Sachs & Co. (Goldman Sachs). The complaint asserts four causes of action. The first cause of action alleges Labor Law violations. The second and third causes of action allege disability discrimination under the Executive Law and City Law, respectively. The fourth cause of action seeks a judgment declaring certain non-solicitation provisions of Guiry's compensation plan unenforceable under New York law, and awarding him punitive damages. Goldman Sachs moves to dismiss the first and fourth causes of action, pursuant to CPLR 3211 (a) (1), (5) and (7).

Facts

Goldman Sachs employed Guiry as a salesperson in its PCS Group from May 1993 until June 2002. From 1996 through 1999, he was compensated on a commission-only basis, earning between

$400,000 and $952,000 per year. In December 1999, Goldman Sachs adopted a new compensation plan for the PCS Group (Compensation Plan), which was described in a memorandum entitled, "Overview of Changes to the Compensation Program of PCS Professionals," a copy of which is attached as an exhibit to the complaint (Compensation Memorandum).

The Compensation Memorandum states that, effective December 18, 1999, compensation would have three components: a commission component, a subjective component, and an equity-based component. The commission component was to be earned and paid on a monthly basis. The subjective component allocated 10% of each salesperson's monthly compensation to a subjective bonus pool, for payment at year-end. Guiry does not seek recovery of the subjective component of his compensation.[1]

The equity-based component was calculated as a percentage of the employee's "Target Total Compensation," which, together with commissions and the subjective component, was a theoretical amount calculated monthly. In other words, Goldman Sachs would annualize the employee's Target Total Compensation on a monthly basis. Based upon an equity award table that was established annually, an employee's Target Total Compensation would correspond with a fixed percentage that would be attributed to

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[1] The complaint alleges that, as of December 2001, Goldman Sachs modified the Compensation Plan to eliminate the subjective component, but retained the equity-based component.

equity-based compensation. The Compensation Memorandum provides that the higher the total compensation, the larger the percentage of the individual's total compensation would come from the equity component. While the equity-based component was deducted on a monthly basis, the actual equity awards, like the subjective component, were to be awarded at the end of the fiscal year.

The equity awards were paid out in the form of Restricted Stock Units (RSUs) and stock options. Each RSU was an unfunded, unsecured promise by Goldman Sachs to deliver a share of common stock, subject to the terms of a Stock Incentive Plan and an Award Agreement (together, Award Agreements). Option awards, also governed by the Award Agreements, gave employees the right to purchase a specified number of Goldman Sachs shares during a specified period of time at a specified price. Guiry signed signature cards whereby he expressly agreed to be bound by the terms of the Award Agreements. Johnson Aff., Exs. F, G and H.

A portion of Guiry's RSUs and options vested when they were granted, meaning that Guiry did not have to provide additional services to be eligible for delivery of vested RSUs or to exercise vested options. The RSUs and options that did not vest when granted were subject to vesting and delivery conditions under the Award Agreements. The Award Agreements state that Guiry's right to receive vested and unvested RSUs and options would be terminated if he were to "directly or indirectly . . .

Solicit any Client to transact business with a Competitive Enterprise . . . [or] interfere with or damage . . . any relationship between the Firm and any such Client" (Non-Solicitation Provision). Johnson Aff., Ex. C, ¶ 4 (b), Ex. D, ¶ 4 (c), and Ex. E., ¶ 4 (c).

Guiry claims that, in 2000, he was paid commissions of approximately $1,174,000 and he was awarded 1,226 RSUs and 3,768 options. He maintains that 760 of the RSUs and 2,280 of the options constituted the equity-based component of his 2000 compensation, and that 612 of the RSUs granted in 2000 were vested when granted, but were not due for delivery until January 2004. He contends that Goldman Sachs caused him to forfeit the vested, undelivered RSUs, "because he transacted business and/or discussed the possibility of transacting business with a client or prospective client of [Goldman Sachs] before the delivery date of January 2004 . . . ." Complaint, ¶ 38.

For 2001, Guiry claims that he was paid commissions of approximately $787,000, and was awarded 2,437 options, 935 of which allegedly constituted equity awards. He maintains that 609 of the 2001 options vested when they were granted, but were not exercisable until January 2005, and that, under the Non-Solicitation Provision, he purportedly forfeited all of his 2001 options.

For 2002, he was paid commissions of approximately $325,000

for six months of employment in 2002. Approximately $35,000 was held back as equity awards to be paid at year end, and he avers that Goldman Sachs has denied him any equity-based compensation for 2002.

The first cause of action alleges that portions of Guiry's 2000, 2001 and 2002 equity-based compensation constituted "wages" within the meaning of sections 191 and 193 of New York's Labor Law. The fourth cause of action seeks a declaration that the Non-Solicitation Provision of the Award Agreements is unenforceable, and requiring Goldman Sachs to deliver the vested RSUs and 2001 options.

Discussion

First Cause of Action - Labor Law Violations

Goldman Sachs moves to dismiss the Labor Law claim, arguing that Guiry is a highly-paid executive not covered under Article 6 of the Labor Law. In opposition, Guiry argues that the "Executive Exception" does not bar his claims. Guiry Opp. Mem. of Law, at 14.

Under Article 6, section 191 of the Labor Law, commission salesmen are entitled to "wages . . . commissions and all other monies earned or payable in accordance with the agreed terms of employment . . . ." Section 190 (6) defines "[c]ommission salesman" as "any employee whose principal activity is the selling of any . . . securities . . . and whose earnings are

based in whole or in part on commissions. The term 'commission salesman' does not include an employee whose principal activity is of a supervisory, managerial, executive or administrative nature."

Section 193 (1) prohibits an employer from making "any deduction from the wages of an employee, except deductions which: . . . b. are expressly authorized in writing by the employee and are for the benefit of the employee . . . ." However, an account representative who "exercise[s] . . . independent judgment in determining for himself which customers to solicit and the extent to which he should advise them and accept their orders to 'buy' and 'sell'" is acting "in an administrative or executive capacity, so that his terms of employment cannot be considered in violation of section 193 of the Labor Law (see exception in Labor Law, § 190, subd 6)." *Conticommodity Serv., Inc. v Haltmier*, 67 AD2d 480, 482 (2d Dept 1979). Thus, the so-called executive exception applies to both sections 191 and 193 of Article 6.

The complaint alleges that Guiry was employed as a salesperson in the PCS Group, which allegedly "develop[ed] and manag[ed] relationships with wealthy individuals and family groups for the purpose of helping them build and protect their financial assets through equity, fixed income and alternative investments." Complaint, ¶ 6. The complaint avers that Guiry was the PCS Group "salesperson with lead responsibility for

advising and managing the assets of a ... key client of [Goldman Sachs]. Indeed, throughout his tenure at [Goldman Sachs], Guiry was the lead salesperson for numerous high-profile and important clients, as well as several retired [Goldman Sachs] partners." *Id.*, ¶ 10. Another allegation of the complaint makes clear that Guiry was actively bringing in, and "advising," his clients. *Id.*, ¶ 11.

The allegations of the complaint show that Guiry's principal activities were of a "managerial, executive or administrative nature," whereby he exercised independent judgment in advising his clients, and managing their accounts. Labor Law, article 6, section 190 (6); *Conticommodity Serv., Inc.*, 67 AD2d 480, *supra*. Therefore, Guiry is excepted from the definition of "[c]ommission salesman", rendering section 191 inapplicable to his claims. Nor is section 193 of Article 6 applicable to Guiry's claims. *Conticommodity Serv., Inc.* (67 AD2d 480, *supra*). As a result, Goldman Sachs' motion to dismiss the first cause of action is granted.

Because the first cause of action is dismissed under Goldman Sachs' "Executive Exception" argument, the alternative arguments that the equity awards are not "wages" under Article 6 of the Labor Law, and that Guiry has no contractual right to bring a claim under Article 6 need not be addressed.

Fourth Cause of Action - Declaratory Judgment

As to the fourth cause of action, Goldman Sachs argues that the "employee choice doctrine" bars a declaration that the Non-Solicitation Provision is unenforceable, and that the Non-Solicitation Provision is lawful.

Generally, New York courts will enforce restrictive covenants "only to the extent they are reasonable and necessary to protect valid business interests." *Lucente v International Bus. Mach. Corp.*, 310 F3d 243, 254 (2d Cir 2002). However, the "employee choice doctrine" is an exception to the general rule, whereby "courts will enforce a restrictive covenant without regard to its reasonableness if the employee has been afforded the choice between not competing (and thereby preserving his benefits) or competing (and thereby risking forfeiture)." *Id.*, *citing Post v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 NY2d 84 (1979). This doctrine "assumes that an employee who elects to leave a company makes an informed choice between forfeiting a certain benefit or retaining this benefit by avoiding competitive employment." *Lucente*, 310 F3d at 254. Thus, "an employer can rely on the doctrine only if it can demonstrate its continued willingness to employ the party who covenanted not to compete." *Id.*

The complaint alleges that Guiry's employment was terminated by Goldman Sachs. Goldman Sachs fails to demonstrate that it

remained willing to employ Guiry. Thus, the employee choice doctrine is not applicable. *Lucente*, 310 F3d 243, *supra; see also International Bus. Mach. Corp. v Martson*, 37 F Supp 2d 613, 620-21 (court denied motion to dismiss where it was possible that employee did not resign voluntarily, but rather, was constructively discharged); *York v Actmedia Inc.*, 1990 U.S. Dist. LEXIS 3483, *3 (SD NY, March 30, 1990) (employee choice doctrine not applicable where employee was terminated without cause). Guiry's fourth cause of action will be dismissed only if Goldman Sachs shows that the Non-Solicitation Provision is reasonable. *Lucente*, 310 F3d 243, *supra*.

Goldman Sachs argues that the right to challenge the reasonableness of the Non-Solicitation Provision does not include a right to challenge the forfeiture of "benefits payable at the discretion of the employer, such as stock options." *Cray v Nationwide Mutual Ins. Co.*, 136 F Supp 2d 171 (WD NY 2001), *citing International Bus. Mach. Corp.*, 37 F Supp 2d at 617. However, Goldman Sachs has not established that the equity awards were discretionary. The parties dispute whether the equity awards were earned compensation or discretionary payments. While the dispute is raised in connection with Guiry's dismissed Labor Law claim, whether the equity awards are earned compensation or discretionary payments is relevant to the enforceability of the Non-Solicitation Provision, and raises an issue of fact. *Modugu*

v Continuum Health Partners, Inc., 3 AD3d 422, 423 (1st Dept 2004); *Mirchel v RMJ Sec. Corp.*, 205 AD2d 388 (1st Dept 1994); *Weiner v Diebold Group, Inc.*, 173 AD2d 166, 167 (1st Dept 1991).

Moreover, contrary to Goldman Sachs' assertion, in cases involving the forfeiture of stock options, the employee choice doctrine is inapplicable where the employee was involuntarily terminated. *Lucente*, 310 F3d 243, *supra*; *International Bus. Mach. Corp.*, 37 F Supp 2d 613, *supra*; *York*, 1990 U.S. Dist. LEXIS 3483, *supra*. Therefore, Guiry remains entitled to challenge the reasonableness of the Non-Solicitation Provision.

An employee's agreement not to compete "is reasonable only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public [citations omitted]." *BDO Seidman v Hirshberg*, 93 NY2d 382, 388-89 (1999) (emphasis in original). With respect to the third, public policy prong of the reasonableness test, New York has a "long standing policy against the forfeiture of earned wages, which applies to earned, uncollected commissions as well [citation omitted]." *Weiner*, 173 AD2d 166, *supra*. Ordinarily, "the question of whether unpaid compensation constitutes a discretionary bonus or nonforfeitable earned wages is a question of fact . . ." *Modugu*, 3 AD3d 422, *supra*; *Mirchel*, 205 AD2d 388, *supra*; *Weiner*, 173 AD2d 166, *supra*; *see also Murphy v Gutfreund*,

583 F Supp 957, 964-65 (SD NY 1984) (denying motion to dismiss, because challenging the reasonableness of a non-competition provision raises triable issues of fact).

Goldman Sachs cites *York* (1990 U.S. Dist. LEXIS 3483, *supra*) in support of its argument that the Non-Solicitation Provision is lawful. In *York*, the non-solicitation provision subjected the plaintiff-employee's stock options to forfeiture. The Court upheld the validity of the provision, based upon evidence and testimony at trial establishing that the stock options were not part of the employee's basic compensation. 1990 U.S. Dist. LEXIS 3483, *6. The Court concluded that "it was perfectly reasonable for plaintiff and defendant to agree . . . that, in consideration of the stock options, plaintiff would refrain from certain steps injuring the business of defendant." *Id.* at *7.

Unlike *York*, on this pre-answer motion to dismiss, there has been no trial. The Compensation Plan and Award Agreements fail to "unambiguously demonstrate that the [equity award] compensation was . . . made discretionary under the parties' agreement[s]." *Modugu*, 3 AD3d at 423. Nor does the evidence unambiguously establish that the equity awards constitute earned compensation. On the record here, it remains unclear whether the equity awards were tantamount to discretionary bonuses subject to forfeiture, or earned wages or commissions payments that are not subject to forfeiture. *Weiner*, 173 AD2d at 167. Therefore, *York*

is distinguishable and does not support dismissal of the fourth cause of action.

Goldman Sachs also cites *International Bus. Mach. Corp.* (37 F Supp 2d 613, *supra*) in support of its argument that the Non-Solicitation Provision is lawful. However, in *International Bus. Mach. Corp.*, the Court never reached the issue of the reasonableness of the non-competition provision because, construing the pleadings liberally, it was possible that the employee had been constructively discharged. 37 F Supp 2d at 619-21. The Court could not determine whether the employee choice doctrine applied, so it denied the employer's motion for judgment on the pleadings, and afforded the employee an opportunity to file an amended pleading "that explicitly asserts a claim for constructive discharge so as to remove him from the ambit of the employee choice doctrine . . . ." *Id.* at 621. *Marsh v Prudential Sec. Inc.* (1 NY3d 146 [2003]) and *Wise v Transco, Inc.* (73 AD2d 1039 [4th Dept 1980]), both cited by Goldman Sachs, also are distinguishable.

In view of Goldman Sachs inability to show that the employee choice doctrine is applicable, or that the Non-Solicitation Provision was reasonable as a matter of law, its motion to dismiss the fourth cause of action is denied.

In his opposition papers, Guiry concedes that his request for punitive damages ought to have been asserted in connection

with the third cause of action, which is not the subject of this motion. As a result, the complaint is deemed so amended, and the claim for punitive damages is deleted from the fourth cause of action.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent that the first cause of action is dismissed, and the motion is otherwise denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint as deemed amended within 10 days after service of a copy of this order with notice of entry.

Dated: 10/1/04

ENTER:

FILED
OCT 06 2004
COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.

JANE S. SOLOMON