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SCANNED ON 2/1/2006

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

PRESENT: HON. MARILYN SHAFER, JSC PART 62

Justice

Index Number : 601672/2005
LOMBROSO, EYTAN
VS
JP MORGAN CHASE & CO
Sequence Number : 001
DISMISS ACTION

INDEX NO. 601672/05

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

on this motion to/for

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion decided pursuant to attached Decision

FILED
FEB - 1 2006
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 1/23/06

HON. MARILYN SHAFER, JSC

HON. MARILYN SHAFER, JSC *J.S.C.*

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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EYTAN LOMBROSO,

Plaintiff,

Index No.: 601672/05
DECISION/ORDER

-against-

J.P. MORGAN CHASE & CO.,

Defendant.

----------X

HON. MARILYN SHAFER, J.S.C.:

In this action for equitable and declaratory relief, the defendant moves to dismiss the complaint, and the plaintiff cross-moves for leave to amend the complaint (collectively, motion sequence number 001). For the following reasons, the defendant's motion is granted, and the plaintiff's cross motion is denied.

BACKGROUND

Plaintiff Eytan Lombroso (Lombroso) was employed by Chase Manhattan Bank (Chase) from 1987 through June 16, 2001, by which time Chase had merged with J.P. Morgan Bank to form a new entity: defendant J.P. Morgan Chase & Co.[1] (Morgan/Chase). See Notice of Motion, Sowell Affidavit, Exhibit A (complaint), ¶¶ 4, 27, 48. For most of his tenure, Lombroso occupied a managerial position as a senior vice president, and worked in several divisions of Chase in that capacity, including "Chase Cardmember Services" and "Chase.com." Id., ¶¶ 5-24.

One of the benefits that Chase (and Morgan/Chase) confers on its executives is periodic awards of non-qualified stock options through the company's "Long-Term Incentive Plan"

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[1] Defendant avers that its correct name is actually "J.P. Morgan Chase Bank, N.A.," and not "J.P. Morgan Chase & Co." See Notice of Motion, Sowell Affidavit, ¶ 1.

(LTIP). Id., ¶ 30. Lombroso was awarded LTIP stock options each year from 1992 through 2001. Id. Normally, employees who receive non-qualified stock options have ten years in which to exercise them. Id. However, the Terms and Conditions of the LTIP program specifically provide that, in the event that an employee is terminated as a result of job position elimination, any non-qualified stock options that the employee holds must be exercised within two years of the date on which his or her employment is terminated (unless they expire of their own terms in the interim). Id.; Plaine Affidavit, Exhibits A, B, C.

Morgan/Chase explains that the LTIP program also places another significant precondition on an employee's ability to exercise his or her non-qualified stock options. Specifically, an employee cannot sell until and unless the company's publicly traded stock attains a certain minimum price per share - denominated the "strike price." See Memorandum of Law in Support of Motion, at 7. If the company's stock never reaches the "strike price" during the period for which the employee holds the option, then the employee may never sell the stock. Id. The company refers to stock options that may not be exercised because the "strike price" has not been reached as "underwater options." Id.

In January of 2000, Lombroso began working in Chase's "Chase.com" division, whose purpose was to invest in technology and internet-related businesses. See Notice of Motion, Sowell Affidavit, Exhibit A (complaint), ¶¶ 17-24. He states that Chase.com had difficulty in generating revenue because of the downturn in internet and technology stocks that began in 2000. Id., ¶ 25. He also states that towards the end of that year Chase completed its merger with J.P. Morgan Bank, which had its own internet/technology business unit called "Lab Morgan." Id., ¶¶ 27-28. Thus, in order to avoid redundancy, the newly created Morgan/Chase opted to retain "Lab

Morgan" and close "Chase.com." Lombroso states that late in 2000 Dennis O'Leary (O'Leary), the executive in charge of "Chase.com," informed him that his position was being eliminated, but that he could either accept a similar position with "Lab Morgan," relocate to a different position in another division of Morgan/Chase, or accept a severance package and leave. Id., ¶ 29.

After speaking with O'Leary, Lombroso states that he began gathering information that would help him decide upon his best course of action. See Notice of Cross Motion, Lombroso Affidavit, ¶ 7. Lombroso alleges that he attempted to reach Michael Bagnell (Bagnell), the officer in charge of human resources for "Chase.com," to ask what impact departure would have on his LTIP stock options. Id. Lombroso alleges that he was unsuccessful in contacting Bagnell, and that on February 15, 2001 he met instead with Gary Baumer (Baumer), the officer in charge of human resources for "Chase Cardmember Services" (where Lombroso had formerly worked). Id. Lombroso also states that Baumer told him that he did not know what impact Lombroso's departure would have on his stock options, but that he would find out. Id., ¶ 8. On the next day, Lombroso and Baumer exchanged the following e-mails (the Baumer e-mails):

> [From Lombroso to Baumer, 2/16/01, 9:16 am]
> Gary thanks: we also spoke about the following two issues as open items.
> 1. What is the holding period for all options and Pars. Is there a specific trigger date (a year, two years, etc.) or is their tenure according to their original schedule???
> 2. You thought (although you were not sure) that the most recent options and Pars (rewarded during January 2001) may not vest with elimination.
> Please let me know. Cheers, Eytan
>
> [From Baumer to Lombroso, 2/16/01, 9:34 am]
> You're right...the memory failed me on that front.
> 1. Tenure according to original date.
> 2. No different treatment on the new award...memory playing tricks.
> Cheers, Gary.

See Notice of Motion, Sowell Affidavit, Exhibit A-1 (the Baumer e-mails). Lombroso states that he decided to accept termination rather than seek a new position in either Morgan/Chase or Lab Morgan largely because of this information. See Notice of Cross Motion, Lombroso Affidavit, ¶ 10.

On April 17, 2001, Bagnell sent Lombroso a letter (the Bagnell letter) that stated, in relevant part, that:

> Due to changes in our business, our staffing needs have changed. As a result, your position will be eliminated and your employment terminated on June 15, 2001. You will continue to receive salary and benefits during the 60-day notice period that precedes your termination date. Your notice period begins on April 17, 2001 and ends on June 15, 2001...
>
> While I know this is a difficult time for you, I want to assure you that we are prepared to provide you with a range of support services to help you manage your transition. The following summarizes those services...
>
> Other Benefits and Compensation...
>
> Terms and conditions of the Long-Term Incentive Plan (restricted stock/units or options) may vary according to each individual grant. If you hold awards under the Long-Term Incentive Plan or participate in other Executive Benefits Programs, you should call Nell Plaine at (212) 270-4833 with any questions...

See Notice of Motion, Bagnell Affidavit, Exhibit A (the Bagnell letter). On April 18, 2001, one day after Bagnell sent Lombroso the Bagnell letter, Lombroso had a meeting with Nellieanita Plaine (Plaine), a vice president in charge of human resources in Morgan/Chase's Compensation and Benefits Department. See Notice of Cross Motion, Lombroso Affidavit, ¶ 11. Lombroso describes the meeting as "in the nature of an exit interview" because "I had already made my determination to leave the bank." Id. Lombroso denies that they discussed the impact that his termination would have on his stock options. Id. He also denies having received an interoffice

memo which Plaine alleges that she sent to him on April 26, 2001 (the Plaine memo). Id. In relevant part, the Plaine memo states:

> The purpose of this memo is to summarize the Executive Programs you currently participate in and their treatment as a result of your departure from J.P. Morgan Chase on June 15, 2001.
>
> **Long-Term Incentive Plan Awards**
>
> **Stock Options:**
> You currently hold stock option grants totaling 96,515 options. All outstanding options become immediately exercisable as of your termination date and they will remain exercisable for two years from your termination date, but not beyond the original option expiration date (7500 options received in November 1992 will expire on the original expiration date of November 17, 2002).

See Notice of Motion, Plaine Affidavit, Exhibit D (the Plaine memo).

On June 13, 2001, just prior to his termination date, Lombroso signed a release (the release). See Notice of Cross Motion, Lombroso Affidavit, ¶ 13. The release provides, in relevant part, that:

> I hereby release J.P. Morgan Chase (the "Company") ... from any and all claims of any kind that I now have or may have against the Released Parties, whether known or unknown to me, by reason of facts which have occurred on or prior to the date that I have signed this Release (except a claim for the payments described in the plan [and other payments described herein])...
>
> Notwithstanding anything else herein to the contrary, this release shall not affect: the obligations of the Company set forth in the Plan or other obligations that, by their terms, are to be performed after the date hereof (including, without limitation, obligations to me under any stock option, stock award or obligations under any pension plan or other benefit or deferred compensation plan, all of which shall remain in effect in accordance with their terms)...

See Notice of Motion, Bagnell Affidavit, Exhibit A (the release). Lombroso thereafter voluntarily terminated his employment with Morgan/Chase on June 15, 2001. See Notice of Motion, Sowell Affidavit, Exhibit A (complaint), ¶ 48.

After his termination, Lombroso states that Morgan/Chase sent him a letter on October 16, 2002 informing him that all of his LTIP stock options would expire on June 16, 2003. Id., ¶ 49. Lombroso thereafter sold the LTIP stock options that he had been awarded between 1993 and 1998. Id., ¶ 52. However, because Morgan/Chase's stock was not then trading at the "strike price" specified on Lombroso's 1999, 2000 and 2001 LTIP stock options,[2] Lombroso was unable to exercise them. Id., ¶¶ 50-51. Morgan/Chase states that, because its stock never attained the "strike price" before Lombroso's 1999, 2000 and 2001 LTIP options expired on June 16, 2003,[3] those stock options remained "underwater." See Memorandum of Law in Support of Motion, at 7, fn4.

Lombroso commenced this action on May 8, 2005. The complaint sets forth causes of action for: 1) money damages on a theory of detrimental reliance; and 2) a declaratory judgment that Chase/Morgan must restore all of his expired stock options to him with their original (ten-year) expiration date. See Notice of Motion, Sowell Affidavit, Exhibit A (complaint), ¶¶ 53-58, 59-62. Chase/Morgan has not yet filed an answer, but has instead submitted the instant motion to dismiss (motion sequence number 001).

DISCUSSION

Chase/Morgan's Motion to Dismiss

Chase/Morgan's motion seeks dismissal pursuant to CPLR 3211 (a) (1) on the grounds

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[2] The "strike price" specified on Lombroso's 1999, 2000 and 2001 LTIP stock options was $41.00/share for 1999; $49.2133/share for 2000; and $51.22/share for 2001, respectively. See Memorandum of Law in Support of Motion, at 7, fn4.

[3] Morgan/Chase states that its stock was publicly trading at a price of $35.86/share as of July 15, 2005 - i.e., below the "strike prices" applicable to Lombroso's 1999, 2000 and 2001 options. See Notice of Motion, Sowell Affidavit, ¶ 3.

that it has a defense founded upon documentary evidence, and pursuant to 3211 (a) (7) on the grounds that both of Lombroso's claims fail to state a cause of action. The Court of Appeals has held that a "CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence, ... may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314, 326 (2002), quoting Leon v Martinez, 84 NY2d 83, 88 (1994). When evaluating a motion pursuant to CPLR 3211 (a) (7), the test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae, 243 AD2d 168, 176 (1st Dept 1998), quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any "cognizable legal theory." See e.g. Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 (2001). However, that where the documentary evidence submitted flatly contradicts the plaintiff's factual claims, the entitlement to the presumption of truth and the favorable inferences are both rebutted. Scott v Bell Atlantic Corp., 282 AD2d 180, 183 (1st Dept 2001), aff'd as mod Goshen v Mutual Life Insurance Co. of N.Y., 98 NY2d 314 (2002), citing Ullmann v Norma Kamali, Inc., 207 AD2d 691, 692 (1st Dept 1994).

Chase/Morgan's "documentary evidence" argument is that the release bars Lombroso's claims against them as a matter of law. See Memorandum of Law in Support of Motion, at 10-12. Lombroso responds that the language of the release expressly exempts claims that arise from

Chase/Morgan's obligations under its stock option plans. See Plaintiff's Memorandum of Law in Opposition to Motion, at 8-10. Chase/Morgan replies that the specific language of the release "does not allow for claims beyond the 'terms' of [the] stock options awards" that were granted to Lombroso. See Defendant's Memorandum of Law in Further Support of Motion, at 5. Although it is clear that Chase/Morgan did comply with its obligations to Lombroso under the terms of its LTIP stock option award program (as will be discussed), the court agrees with Lombroso's interpretation of the release. That document specifically provides that "this release shall not affect: the obligations of the Company ... to me under any stock option [or] stock award ... plan ...all of which shall remain in effect in accordance with their terms." This unambiguous language acknowledges that Chase/Morgan's obligations under its stock options programs are the subject of separate agreements, and plainly states that the release does not apply to disputes over those obligations. Therefore, the court rejects Chase/Morgan's "documentary evidence" argument.

Chase/Morgan next argues that Lombroso's detrimental reliance claim fails to state a cause of action. See Memorandum of Law in Support of Motion, at 13-15. In order to state a claim for "promissory estoppel," a/k/a "detrimental reliance," its proponent must allege: "(1) an oral promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance." New York City Health and Hospitals Corp. v St. Barnabas Hospital, 10 AD3d 489, 491 (1st Dept.,2004). Further, "as a general matter, an oral promise will not be enforced on this ground unless it would be unconscionable to deny it." Steele v Delverde S.R.L., 242 AD2d 414, 415 (1st Dept 1997), citing Ginsberg v Fairfield-Noble Corp., 81 AD2d 318, 320-321 (1st Dept 1981).

Here, Chase/Morgan specifically argues that the Baumer e-mails did not constitute a clear

and unambiguous promise, and that, in any event Lombroso's reliance on them was not reasonable. See Memorandum of Law in Support of Motion, at 13-15. Lombroso responds that Baumer's position of authority within Chase/Morgan rendered the promise clear and his own reliance on it reasonable. See Plaintiff's Memorandum of Law in Opposition to Motion, at 10-12. Chase/Morgan's reply papers dispute Lombroso's interpretation. See Defendant's Memorandum of Law in Further Support of Motion, at 6-8. After reviewing the evidence, the court finds that the promise embodied in the Baumer e-mails was sufficiently clear and unambiguous, but that Lombroso's reliance upon that promise was wholly unreasonable.

Lombroso cites the Appellate Division, First Department's, holding in Bailey v Gray, Siefert & Co., Inc. (300 AD2d 258 [1st Dept 2002]) to support his argument that the promise embodied in the Baumer e-mails was clear and unambiguous. In that case, like this one, the plaintiff claimed that an officer at his corporation had assured him that he would be entitled to retain his stock options after the plaintiff left his job, despite the provisions in the stock option plan that stated that those options would expire if the plaintiff left. The court in Bailey found that the complaint was deficient because it contained no allegations either that the officer had authority to make an oral modification of the terms of his stock option plan, or that the company had vested the officer with the appearance of such authority. Lombroso notes that the instant complaint does contain such allegations, and argues that it is therefore sufficient where the complaint in Bailey was not. Chase/Morgan replies that, because Baumer stated that he would have to inquire into the terms of the company's LTIP stock option plan, there is no basis for inferring that Baumer had authority (or apparent authority) to modify the terms of that plan. See Defendant's Memorandum of Law in Further Support of Motion, at 8. However, this argument

ignores the fact that Lombroso's complaint does contain the necessary allegations. See Notice of Motion, Sowell Affidavit, Exhibit A (complaint), ¶¶ 32-46. It also asks the court to impose an unjustifiably strict interpretation on those allegations, given the liberal construction that applies to review of CPLR 3211 dismissal motions. Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae, 243 AD2d at 176. Instead, the court finds that the Baumer e-mails may be reasonably read to state that Lombroso would be allowed to dispose of his LTIP stock options on their original terms, and that his job termination would have no negative repercussions. Accordingly, the court rejects Chase/Morgan's contentions and finds that the promise embodied in the Baumer e-mails was sufficiently clear and unambiguous to support a claim for promissory estoppel. This does not end the inquiry, however.

Chase/Morgan also argues that the allegations of the complaint demonstrate that Lombroso's reliance on the Baumer e-mails was not reasonable. See Memorandum of Law in Support of Motion, at 14-15. After examining the totality of the circumstances in the light most favorable to Lombroso, the court agrees. During his entire tenure at Chase-Morgan/Chase, whenever Lombroso received his annual LTIP stock option awards, he also received copies of the Terms and Conditions that governed those awards, which specifically stated that all such options would expire two years after an employee's termination date if such termination resulted from the employee's position being eliminated. Lombroso states that his concern over that provision was the factor that prompted him to meet with Baumer on February 15, 2001. However, the complaint makes it clear that Baumer was not the human resources officer in charge of the division of Morgan/Chase that Lombroso was working in at the time of his termination. It states that Bagnell was the human resources officer in charge of Lombroso's division, and that Bagnell

contacted Lombroso in April of 2001 - two months after Lombroso had spoken to Baumer. The Bagnell letter, which explained the terms of Lombroso's termination, specifically instructed Lombroso to contact Plaine regarding the effect that Lombroso's termination would have on his LTIP stock options. Although Lombroso admits having met with Plaine on April 18, 2001, he states that he did not discuss that important matter with her. He does not allege that he showed Plaine the Baumer e-mails or asked her to confirm Baumer's representations, despite the fact that those representations were then several months old and contradicted the written provisions of the LTIP stock option plan that Bagnell had instructed him to discuss with Plaine. In the court's view, Lombroso's behavior can only be interpreted as willful disregard of both the written instructions that he had received from his employer's human resources officer and of his own obligations as an employee and a sophisticated businessman to seek confirmation of his company's policy. The court is also moved by the fact that Lombroso allowed a total of four months to pass between his receipt of the Baumer e-mails and his termination from Morgan/Chase without once broaching what he claims was an issue of signal importance to anyone in his own department. Under these circumstances, the court finds that Lombroso's reliance on the Baumer e-mails was unjustified. Accordingly, the court finds that Lombroso's promissory estoppel claim must fail as a matter of law, and that the portion of Morgan/Chase's motion that seeks dismissal of that claim should be granted.

Although neither party raises any argument with respect to Lombroso's second cause of action, which seeks a declaratory judgment, it is clear that that cause of action cannot stand either, as a matter of law. Pursuant to CPLR 3001, the court "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a

justiciable controversy whether or not further relief is or could be claimed." The decision to award a declaratory judgment is a matter committed to the sound discretion of the court. See e.g. Morgenthau v Erlbaum, 59 NY2d 143 (1983). However, because the court has already dismissed Lombroso's first cause of action, no "justiciable controversy" remains, and there is no further legal justification to make the declaration that Lombroso seeks. Therefore, Lombroso's second cause of action must also be dismissed. Accordingly, the court finds that Chase/Morgan's motion should be granted in full, and that this action should be dismissed.

Lombroso's Cross Motion

The court observes that Lombroso has taken note that Chase/Morgan's correct name is actually "J.P. Morgan Chase Bank, N.A.," although he originally sued defendant as "J.P. Morgan Chase & Co." See Memorandum of Law in Opposition to Motion, at 13. As a result, Lombroso has cross-moved, pursuant to CPLR 3025 (b), to amend the caption of this action to reflect Chase/Morgan's correct name. See Notice of Cross Motion. Chase/Morgan states that it has no objection to the cross motion. See Defendant's Memorandum of Law in Further Support of Motion, at 8-9. The court is willing to grant Lombroso's cross motion on consent, and to amend the caption of this action to reflect Chase/Morgan's correct name. However, because the court has already granted Chase/Morgan's motion to dismiss the complaint, Lombroso's request is now moot and there is no need for the court to act on it. Accordingly, Lombroso's cross motion is denied.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of defendant J.P. Morgan Chase

Bank, N.A. s/h/a J.P. Morgan Chase & Co. is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion, pursuant to CPLR 3025 (b), of plaintiff Eytan Lombroso is denied as moot.

Dated: New York, New York
January 23, 2006

ENTER:

Hon. Marilyn Shafer, J.S.C.

HON. MARILYN SHAFER, JSC