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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Justice

Index Number : 113105/2006

SOKOLOFF, RICHARD

VS

AMERICAN EXPRESS

Sequence Number : 002

DISMISS

INDEX NO. 113105/06

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

s motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

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

FILED
JUL 23 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 19, 2007

MARTIN SHULMAN J.S.C. *J.S.C.*

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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 1

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RICHARD SOKOLOFF,

Plaintiff,

-against-

AMERICAN EXPRESS COMPANY AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Defendants.

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Index No. 113105/06

DECISION/ORDER

HON. MARTIN SHULMAN, J.S.C.:

Plaintiff, Richard Sokoloff ("Plaintiff" or "Sokoloff"), brings this action *pro se* against defendants AMERICAN EXPRESS COMPANY ("Amex Co.") and AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC. ("Amex TRS"), (collectively the "Defendants"). As gleaned from the amended complaint Plaintiff asserts three identical causes of action against each of the Defendants for "fraudulent inducement", unjust enrichment, and gross negligence (the "Complaint"). Defendants move for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the Complaint on the grounds that the Complaint: 1) fails to state a cognizable claim; 2) is rebutted by documentary evidence; and 3) fails to satisfy the basic pleading requirements of CPLR §§ 3013 and 3016(b).

The Complaint

The Complaint *inter alia* sets forth the following factual averments which are assumed to be true for purposes of this motion: 1) Defendants are New York corporations duly registered and authorized to conduct business in the State of New

York (Complaint ¶¶2-3); 2) Plaintiff claims to have been employed by "defendant"[1] in June 1992 as an attorney and further avers that "in his employ with Defendants[2] was awarded stock options on or about February 22, 1999 that would accrue after three years and could be used within 10 years from the date of the award" (Complaint ¶5); 3) Approximately one year later, "defendants unilaterally created a *situation* whereby plaintiff and others were forced to leave the employ of defendant and were allegedly transferred to Schwartz and Schwartz" (Complaint ¶6); 4) Plaintiff also alleges that "defendant kept insisting that I [Plaintiff] was an employee of Coldata, a collection agency, but upon information and belief this was just one of a series of lies told by defendants [sic] employees" (Complaint ¶7); 5) Defendants, by Jim Panzarino, provided Plaintiff with a "fraudulent e-mail" in order to defraud Plaintiff of stock options and induce Plaintiff to be part of the transfer (the "Email") (Complaint ¶8); 6) Plaintiff "insisted on being able to have the full use of these stock options whether employed by Amex or not, and was advised that he would" (Complaint ¶9); and 7) Plaintiff ultimately sought to use the stock options but was told that the options were no longer valid (Complaint ¶10).

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[1] Notably, the Complaint utilizes the blanket term "defendant" without further identification.

[2] The Complaint also utilizes the blanket term "Defendants" without further identification.

Analysis

On a motion to dismiss a complaint for failure to state a cause of action (CPLR 3211[a] [7]), a court must take all of the complaint's allegations as true and resolve all inferences that reasonably flow therefrom in favor of the plaintiff. *Cron v. Hargro Fabrics, Inc.*, 91 N.Y.2d 362, 670 N.Y.S.2d 973 (1998); *Marini v. D'Apolito*, 162 A.D.2d 391, 557 N.Y.S.2d 45 (1st Dept., 1990). Here, the scope of review is narrow and limited to determining whether the pleading states *any* cause of action, and not whether there is evidentiary support for the complaint. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182 (1977); *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314 (1976). The complaint must be liberally construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. *Morone v. Morone*, 50 N.Y.2d 481, 429 N.Y.S.2d 592 (1980).

With respect to a defense founded upon documentary evidence under CPLR 3211(a)(1), a defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that plaintiff's claims fail as a matter of law. *Fortis Fin. Servs., LLC v. Fimat Futures USA, Inc.*, 290 A.D.2d 383, 737 N.Y.S.2d 40 (1st Dept., 2002). The criterion is whether the proponent of a pleading has a cause of action, not whether he has stated one. *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994).

Fraudulent Inducement

"In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false

by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (citations omitted)." *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76 (1996). Further, CPLR 3016(b) provides:

> Fraud or mistake. Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

Defendants argue that Sokoloff's fraud allegations lack particularity as required by CPLR 3016(b) in that the Complaint contains "no factual assertions describing the date, nature or content of the alleged misrepresentations and 'series of lies'" and fails to "identify any misrepresentation of material fact, and, with one exception, does not even identify who at Amex Co. or Amex TRS allegedly made the misrepresentations." Park Aff. at ¶21. Defendants further argue that Plaintiff cannot establish damages, the final element required to state a claim for fraud.

Here, the Complaint's first cause of action lacks specificity. Sokoloff relies upon the Email (Motion at Exh. B), which states:

> On February 28, 2000, the Compensation and Benefits Committee of the Board of Directors approved the continuation of outstanding American Express long-term incentive awards for American Express employees transferring to Coldata Inc., under the 1989 Long-Term Incentive Plan and 1988 Incentive Compensation Plan. Subject to your continuous employment at Coldata, the requirements and provisions of your long-term incentive awards will continue unchanged, including vesting provisions and the 10-year term to exercise stock option shares.

Plaintiff summarily contends that defendant falsely "kept insisting that I was an employee of Coldata" (Complaint ¶7), yet he concedes that he was transferred not to Coldata, but to Schwartz and Schwartz. *Id.*; *see also*, Complaint at ¶14; Sokoloff Opp.

Aff. at ¶6. The Email does not state, as Sokoloff alleges, that he and others were being transferred to Coldata (Complaint ¶13; Sokoloff Opp. Aff. at ¶6).

Without more, the Email is insufficient to support a fraud claim. The Complaint's remaining allegations are conclusory and insufficiently particularized. For example, Plaintiff offers no supporting facts as to who represented to him that he would be a Coldata employee with the attendant benefit of retaining his stock options or when such representations were allegedly made. As such, Plaintiff fails to state the circumstances surrounding the alleged fraud in detail. *Bank Leumi Trust Co. of New York v. D'Evori Intern., Inc.*, 163 A.D.2d 26, 32, 558 N.Y.S.2d 909 (1st Dept., 1990). The Complaint contains no allegation that Defendants represented that employees transferred to Schwartz and Schwartz would retain their stock options. Nor does the Email make such a representation. Under these circumstances the Complaint's allegations are not only insufficient, but the Email explicitly refutes any claim of alleged justifiable reliance upon the statements made therein.

Finally, Defendants correctly argue that damages for fraud "are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained (citation omitted)." *Lama Holding Co. v. Smith Barney Inc.*, *supra*. For the foregoing reasons the first cause of action must be dismissed for failure to state a cause of action and based upon documentary evidence (ie, the Email).

Unjust Enrichment

Defendants correctly argue that the second cause of action alleging unjust enrichment should be dismissed. "To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor." *Nakamura v. Fujii*, 253 A.D.2d 387, 390, 677 N.Y.S.2d 113 (1st Dept., 1998). Defendants argue that the Complaint fails to allege that Sokoloff conferred a benefit upon Defendants. In opposition, Plaintiff contends that his "inability to use his stock options at a profit as awarded allows Defendant to obtain a benefit in that they save money on the inability of Plaintiff to exercise said options thus increasing their profits" at Plaintiff's expense. Sokoloff Opp. Aff. at ¶¶ 17 and 18; Complaint ¶¶ 29 and 30.

Taking the Complaint's allegations as true, Plaintiff has not conferred any benefit on Defendants as a matter of law. See *Kinsey v. Cendant Corp.*, 2004 WL 2591946 (S.D.N.Y., 2004)(former employee's inability to exercise stock options resulted from employer's alleged misconduct and thus was not a benefit employee bestowed upon employer). Accordingly, the second cause of action for unjust enrichment fails to state a cause of action and therefore must be dismissed.

Gross Negligence

Defendants argue that the third cause of action for gross negligence should be dismissed since it "is grounded in the same predicate acts upon which [Plaintiff] bases his fraud claim" which lack particularity under CPLR 3016(b). Further, even assuming the Complaint's allegations met CPLR 3016(b)'s pleading requirements, Defendants

contend Plaintiff fails to state a cause of action for gross negligence and/or negligent misrepresentation.[3] The court agrees.

Gross negligence is variously defined as "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Colnaghi, U.S.A., Ltd. v. Jewelers Protection Services, Ltd.*, 81 N.Y.2d 821, 823-824, 595 N.Y.S.2d 381 [1993]), or an act or omission "of an aggravated character as distinguished from the failure to exercise ordinary care" (*Dalton v. Hamilton Hotel Operating Co.*, 242 N.Y. 481, 487-488 [1926]). Here, taking the Complaint's conclusory allegations as true, under no scenario could Defendants' alleged misrepresentations be deemed aggravated or reckless. Thus, no claim is stated for gross negligence. *Accord*, *Kinsey v. Cendant Corp.*, 2004 WL 2591946, at *18 (S.D.N.Y.)(motion to dismiss gross negligence cause of action pursuant to F.R.C.P. 12[b][6] granted where plaintiff alleged that defendant transmitted misinformation regarding exercise of stock options without further factual allegations as to why such transmission alone established "want of scant care" or intentional wrongdoing).

"A claim for negligent misrepresentation can only stand where there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given (citations omitted)." *Hudson River Club v. Consolidated Edison Co. of New York, Inc.*, 275 A.D.2d 218, 220, 712 N.Y.S.2d 104

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[3] The Complaint identifies the third cause of action as gross negligence. However, since the claim is based upon alleged misrepresentations, Defendants' motion also analyzes the claim as one for negligent misrepresentation.

(1st Dept., 2000). As Defendants correctly argue, the first of the foregoing elements is not met since an employer-employee relationship is not one of trust or confidence. *Rivas v. Amerimed USA, Inc.*, 34 A.D.3d 250, 824 N.Y.S.2d 41, 43 (1st Dept., 2006). Accordingly, Plaintiff's allegations that he "had no choice but to rely on the information disseminated from his bosses" which "was a lie" and that Defendants held "a special position of confidence and trust" with employees such as plaintiff are unavailing. Sokoloff Opp. Aff. at ¶¶ 20 and 21. For the foregoing reasons, the third cause of action fails to state a claim for either gross negligence or negligent misrepresentation and must be dismissed.

Accordingly, it is

ORDERED that Defendants' motion to dismiss the complaint is granted in its entirety.

The foregoing constitutes this court's Decision and Order. Copies of this Decision and Order have been sent to counsel for plaintiff and defendants.

Dated: New York, New York
July 19, 2007

Hon. Martin Shulman, J.S.C.