

Hunter v Deutsche Bank AG., N.Y. Branch

2007 NY Slip Op 33668(U)

November 7, 2007

Supreme Court, New York County

Docket Number: 0602791/2004

Judge: Karla Moskowitz

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----X
BRIAN J. HUNTER,
Plaintiff,
-against-
DEUTSCHE BANK AG, NEW YORK BRANCH,
Defendant.

Action No. 1
INDEX NO. 602791/2004
MOTION DATE _____
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

-----X
ERIC L. RACE,
Plaintiff,
-against-
DEUTSCHE BANK AG, NEW YORK BRANCH,
Defendant.

Action No. 2
INDEX NO. 602792/2004
MOTION DATE _____
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

FILED
NOV 14 2007

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 _____

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that Action No. 1 in Hunter v Deutsche Bank, motion sequence 005, is decided in accordance with the accompanying original Decision and Order; and it is further

ORDERED that Action No. 2 in Race v Deutsche Bank, motion sequence 004, is consolidated in the Decision and Order in Action No. 1, Hunter v Deutsche Bank, file copy of original Decision and Order is annexed.

Dated: October 7, 2007

KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 3

-----X
BRIAN J. HUNTER,

Action No. 1

Plaintiff,

Index No. 602791/2004

-against-

DEUTSCHE BANK AG, NEW YORK BRANCH,

Defendant.

-----X
ERIC L. RACE,

Action No. 2

Plaintiff,

Index No. 602792/2004

-against-

DEUTSCHE BANK AG, NEW YORK BRANCH,

DECISION and ORDER

Defendant.

-----X
KARLA MOSKOWITZ, J.:

The court consolidates motion sequence numbers 602791/04-005 and 602792/04-004 in the above-captioned actions for disposition. Defendant Deutsche Bank AG, New York Branch (“Deutsche Bank”) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint in each action.

Deutsche Bank is an international financial services provider. Plaintiffs are former commodities traders for Deutsche Bank. Plaintiffs bring this action to recover year-end bonus payments and other compensation for the years 2002 and 2003. Plaintiffs allege defendant represented that plaintiffs would receive these payments based upon plaintiffs’ contribution and the profitability of their division. Plaintiffs contend that despite defendant’s representations, the division’s overall profits and plaintiffs’ contributions, defendant gave them insufficient bonuses for 2002. Plaintiffs contend that defendant then assured them that the bonuses would be greater

for 2003, but in fact they received no bonuses at all for 2003.

BACKGROUND

Plaintiffs state that Deutsche Bank distributes bonuses for the traders from a “total bonus pool” for all employees in the commodities division that is then divided into separate “desk bonus pools” for each commodities desk.

Bryon Hunter (“Hunter”)'s Complaint

Plaintiff Hunter joined Deutsche Bank as a commodities trader on the natural gas desk on May 7, 2001. Hunter alleges that, both prior to joining the firm and once there, managers at Deutsche Bank represented to him that, in addition to his base salary, Hunter would receive a year-end bonus in an amount representing between 5% to 10% of the profits that he generated through proprietary trading. Increases in his profitability would reduce on a scale the amount of his bonus. According to Hunter, this bonus compensation structure was consistent with the practice in the commodities industry.

On May 7, 2001, Hunter signed an Offer Letter dated April 11, 2001 (“Hunter’s Offer Letter”) that set forth his salary of \$100,000 per year and provided the terms under which Deutsche Bank would award his bonus. Deutsche Bank refers to the bonus as “Incentive Compensation,” and that section of Hunter’s Offer Letter provided that Hunter would be eligible for Incentive Compensation contingent upon his individual contribution and the profitability of both Deutsche Bank and his division. The Offer Letter also provided that the Compensation Committee would have sole discretion in the awarding of any Incentive Compensation.

In 2001, Deutsche Bank’s worldwide commodities business generated revenues of approximately \$86 million, with the natural gas desk contributing about \$26 million and Hunter’s individual trading profit equaling approximately \$17 million. The total bonus pool for the

worldwide commodities division that year was approximately \$15 million, but the distribution to the natural gas desk was only \$1 million.

For 2001, Deutsche Bank paid Hunter an annual base salary of \$100,000, a cash bonus of \$330,000 and a deferred equity award equal to \$370,000, for total compensation of \$800,000.

Hunter alleges that in February 2002, Kerim Derhalli ("Derhalli"), one of Deutsche Bank's senior commodities managers in charge of making bonus decisions, told Hunter that Derhalli wanted to set the bonuses for the natural gas desk at \$25 million for 2002 and that he would pay Hunter very well if the desk made \$50 million. Subsequently, on March 17, 2002 Hunter and Deutsche Bank signed an agreement that Deutsche Bank refers to as a "Retention Agreement," whereby Deutsche Bank guaranteed Hunter a 2002 bonus of \$400,000.

In 2002, Deutsche Bank's worldwide commodities business grew exponentially and generated revenues of approximately \$140 million, with the natural gas desk contributing about \$76 million. In addition, Hunter's individual trading profit during 2002 was approximately \$52 million.

The total bonus pool for the worldwide commodities division that year was approximately \$25 million, but the distribution to the natural gas desk pool was only \$2.15 million, even though the natural gas desk accounted for more than one-half of the total revenues for Deutsche Bank's worldwide commodities division.

For 2002, Deutsche Bank paid Hunter an annual base salary of \$125,000, a cash bonus of approximately \$1.07 million and a deferred equity award equal to \$430,000, for total compensation of approximately \$1.625 million.

Hunter alleges that his Incentive Compensation for 2002 was well below what Derhalli and Robert Jonke ("Jonke"), his direct supervisor and a managing director, and others had

promised. Hunter alleges that based upon those representations, he was entitled to between \$2.5 million and \$4.5 million in incentive pay for 2002.

Hunter further alleges that in February 2003, Derhalli and Jonke each acknowledged to Hunter that his bonus for 2002 was low in light of his performance, but that, although Deutsche Bank was paying Hunter less in a year in which he had an outstanding performance, Deutsche Bank would pay him more in years when his performance decreased, resulting in a more stable compensation pattern.

In February 2003, Deutsche Bank promoted Hunter to Director, Global Markets—Commodities and formally placed him in charge of the natural gas trading desk. Hunter had two natural gas traders reporting to him and states that he worked with marketers to develop new deals and substantively built up Deutsche Bank's commodities and natural gas business. Hunter alleges that during 2003, senior executives, including Amrik Sandhu ("Sandhu"), Deutsche Bank's Head of Metals, and Kevin Rodgers ("Rodgers"), one of the senior commodities managers, told him that his incentive compensation for being a Director would be between 5% and 9% of the total profits the natural gas desk booked in 2003. Hunter states that this is consistent with Deutsche Bank's practice and is the standard practice in the industry.

Between January and November 2003, Hunter alleges that the natural gas desk had an exceptionally profitable year, generating a profit of approximately \$76 million. However, on December 4, 2003, the market took an unexpected turn and, spurred by a spell of cold weather, the price for natural gas rose rapidly. Hunter alleges that, during this time, there was also a problem with Openlink, Deutsche Bank's electronic system for monitoring and reporting risk for commodities and accounting errors, because of a backlog of trade and cash reconciliations in the back office. As a result, Hunter and the other natural gas traders were unable to effectively trade

out of short positions and Deutsche Bank suffered a loss of approximately \$51 million in the first week of December 2003. Despite this loss, the natural gas trading desk still had a profit of approximately \$26 million for 2003, amounting to 27% of the total revenues for Deutsche Bank's worldwide commodities business.

Hunter alleges that despite his substantial contributions to Deutsche Bank's revenues in 2003 and his reliance on Sandhu and Rodgers' promises regarding a bonus, Deutsche Bank awarded Hunter no bonus for services he performed during 2003. Hunter states that Jim Turley, Deutsche Bank's Head of Foreign Exchange, told him that Deutsche Bank did not base the "zero bonus" decision on his trading ability or performance, but rather on his "lack of professionalism," "attitude" and "lack of maturity," none of which Deutsche Bank communicated to Hunter at any time prior to the awarding of his zero bonus.

Hunter further alleges that thereafter, in February 2004, Deutsche Bank locked him out of the trading system, and he was unable to enter any transactions and that Deutsche Bank thereby effectively terminated him from his employment. Further, Deutsche Bank physically moved Hunter's seat off the natural gas trading desk and shut Hunter out of the recruiting process. Hunter left Deutsche Bank in April 2004. He alleges that thereafter, Deutsche Bank engaged in a pattern of slanderous, libelous and tortious conduct against him.

In his complaint, Hunter brings a first cause of action for breach of express or implied contract, second cause of action for promissory estoppel, third cause of action for unjust enrichment, fourth cause of action for quantum meruit, fifth cause of action for a judicial declaration that Hunter is entitled to the vesting of his equity awards, sixth cause of action for violation of New York Labor Law § 190 and § 193 and seventh cause of action for defamation and slander.

Eric Race ("Race")'s Complaint

Plaintiff Race joined Deutsche Bank in December 1999 as a natural gas trader in Deutsche Bank's Houston office. On December 1, 1999, he signed an employment letter dated October 27, 1999 that set forth his salary of \$75,000 per year and included a signing bonus of \$15,000 ("Race's Offer Letter"). As with Hunter's Offer Letter, Race's Offer Letter included a heading entitled "Incentive Compensation" that stated that the Deutsche Bank incentive pool was contingent upon the profitability of Deutsche Bank's operations, the performance of the employee's division and his individual contribution. Race's Offer Letter also stated that the Compensation Committee would have sole discretion in the awarding of any incentive payments.

In January 2001, Deutsche Bank promoted Race to a Vice President position. Race alleges that thereafter, in April 2001, Deutsche Bank moved its natural gas trading operations from Houston, Texas to Deutsche Bank's New York City office. Deutsche Bank submitted a "Transfer Letter" dated March 6, 2001 that set forth Race's base salary of \$100,000 and provided for a guaranteed bonus of \$400,000 for the calendar year 2001. The Transfer Letter also provided for Incentive Compensation contingent upon the same criteria as in Race's Offer Letter and in the sole discretion of the Compensation Committee.

In 2001, the revenues from the natural gas desk were \$26 million and Race's individual trading profit was approximately \$6 million. For 2001, Deutsche Bank paid Race an annual base salary of \$100,000, a cash bonus of \$331,025 and a deferred equity award equal to \$68,975, for total compensation of \$500,000.

Like Hunter, Race alleges that Deutsche Bank managers, including Jonke, told Race that he could expect to receive 10% of the profits that he generated through proprietary trading. Race alleges that his individual trading profit during 2002 was approximately \$7.5 million.

Nonetheless, for his services in 2002, Deutsche Bank paid Race an annual base salary of \$100,000, a cash bonus of \$380,000 and a deferred equity award equal to \$118,750, for a total compensation of \$598,750. He alleges that based upon the representations of Jonke and other Deutsche Bank managers regarding the compensation that he should expect, Deutsche Bank should have paid at least \$700,000 in Incentive Compensation for 2002.

Race states that he raised his concerns regarding his bonus for 2002 in a meeting with Jonke and the head of the natural gas trading desk in February 2003. In response, Jonke admitted that Race's distribution was very low for the extremely successful 2002 year but assured him that Deutsche Bank would pay him well in 2003 because Race still had "stuff on the books" and that Deutsche Bank would pay Race more in years when his performance decreased, resulting in a more stable compensation pattern.

Race alleges that in 2003, Deutsche Bank's worldwide commodities business generated revenues of approximately \$96 million, with the natural gas desk contributing about \$25.8 million and Race's individual trading profit equaling approximately \$4.5 million. The total bonus pool for the worldwide commodities division was \$22 million, and the distribution to the natural gas trading desk was zero, despite the fact that the natural gas trading desk contributed approximately 27% of the total profits for the commodities division. Race, like Hunter, did not receive a bonus for 2003.

Race asserts that one cannot reconcile the arbitrary and capricious "zero bonus" decision with his individual performance, the natural gas desk's overall performance or the performance of the firm. Race asserts that he was entitled to a bonus and total compensation of at least \$450,000 for 2003. In August 2004, Race submitted his resignation from Deutsche Bank to accept an offer to work for ABN Amro as Director in the Financial Markets Division.

Race brings a first cause of action for breach of express or implied contract, second cause of action for promissory estoppel, third cause of action for unjust enrichment, fourth cause of action for quantum meruit and fifth cause of action for violation of New York Labor Law § 190 and § 193.

Deutsche Bank's Position

Deutsche Bank asserts that Hunter's and Race's Offer Letters and Deutsche Bank's Human Resources Policies, which it gives to all employees in a handbook, state that the Compensation Committee has sole discretion in awarding any Incentive Compensation. Having chosen not to award these two plaintiffs a bonus, Deutsche Bank contends that the plaintiffs have no recourse.

Deutsche Bank also states that the peak of the losses to the natural gas desk that occurred in December 2003 was on Friday, December 5, 2003. Despite the losses, Hunter left the office at 3:30 p.m. on that day to attend his grandfather's birthday party in Canada. In addition, Deutsche Bank states that despite the week's losses and the market's volatility, Hunter remained in Canada through Tuesday, December 9, 2003. In the meantime, the natural gas book suffered its greatest daily loss of \$21 million on Monday, December 8, 2003, bringing the book's cumulative loss for the week to \$51 million. After the \$51 million loss to the desk's profits and Hunter's response, Deutsche Bank decided not to pay Hunter a bonus for 2003.

DISCUSSION

Two legal principles govern the issue of an employee's right to a bonus. The first is New York's "long standing policy against the forfeiture of earned wages" (*Weiner v Diebold Group*, 173 AD2d 166, 167 [1st Dept 1991]). In accordance with that policy "[e]mployees in this state may enforce an agreement to pay an annual bonus made at the onset of the employment relationship where such bonus constitutes 'an integral part of plaintiff's compensation package.'"

(*Mirchel v RMJ Sec. Corp.*, 205 AD2d 388, 390 [1st Dept 1994], quoting *Harden v Warner Amex Cable Communications*, 642 F Supp 1080, 1096 [SD NY 1986]). The second principle is that “[a]n employee’s entitlement to a bonus is governed by the terms of the employer’s bonus plan.” (*Hall v United Parcel Serv.*, 76 NY2d 27, 36 [1990]). Where the plan is unambiguous and wholly discretionary, an employee has no enforceable right to compensation. (*Namad v Salomon Inc.*, 74 NY2d 751 [1989]).

In support of its motions for summary judgment, Deutsche Bank contends first, that Hunter’s and Racc’s Offer Letters and the Human Resources Policies governed the terms of plaintiffs’ employment and second, that because these documents together gave the Compensation Committee complete discretion to award a bonus, plaintiffs are precluded from relying on any alleged oral promises of managers or of supervisors regarding any bonus payments.

Plaintiffs respond that the Offer Letters and Deutsche Bank’s handbook set forth specific criteria upon which Deutsche Bank is to base an annual bonus payment, such as individual performance, profitability of the firm and performance of the division. Plaintiffs contend, therefore, that these criteria in these documents limit Deutsche Bank’s discretion.

Deutsche Bank’s policy on Incentive Compensation, as in its Human Resources Policies handbook, states, in part, as follows:

Decisions on Total Compensation are at the complete discretion of the Bank. There is no guarantee of cash or equity bonuses, merit increases, or any other pay items unless the employee has a written agreement with the Bank that states otherwise

Incentive Compensation

Incentive compensation comprises cash bonus and, in some cases, other elements of equity-based non-cash compensation. Incentive compensation is discretionary and designed to reward employees

for their individual performance, the performance of their division, and the overall financial success of Deutsche Bank.

All employees are eligible to receive a discretionary cash bonus. To receive a bonus, you must be employed with Deutsche Bank on the day the bonus is paid out. Employees' Total Compensation packages will be reviewed and considered along with individual, divisional, and Bank performance when determining the amount (if any) of an employee's cash bonus. Deutsche Bank's focus on Total Compensation may result in some employees receiving no bonus in cases where:

- Base salary is at an equitable level relative to the Total Compensation of others who are making comparable contributions; or
- Performance warrants

(Braut Aff., Ex. B at 00304).

Hunter's Offer Letter also contains Deutsche Bank's criteria for Incentive Compensation as follows:

You will be eligible for incentive compensation in an amount contingent upon the profitability of our operations, your division's performance and your individual contribution, as determined by the applicable DB Compensation Committee. Except as stated in this agreement, the applicable Compensation Committee has sole discretion in the awarding of any incentive compensation.

(Braut Aff. Ex. A).

Race's Offer Letter states, in relevant part, as follows:

You will be eligible to participate in the Deutsche Bank incentive pool in an amount contingent upon the profitability of Deutsche Bank's operations, the performance of your division and your individual contribution, finally to be determined by the Compensation Committee, which has sole discretion in the awarding of any incentive payments.

(Braut Aff., Ex. A).

In *Namad*, the Court of Appeals already considered and rejected plaintiffs' argument that, in setting forth criteria upon which Deutsche Bank's Compensation Committee bases Incentive

Compensation, the above documents limit Deutsche Bank's discretion in determining those amounts. The Court stated that, where a clause in an employment contract "unambiguously vests discretion regarding the amount of bonus compensation" in the employer, to read as binding a subsequent sentence that stated that the employer would award bonuses "consistent with the customary policy of the company" "would render the previous sentence vesting the employer with complete discretion a nullity. Such a construction is untenable." (74 NY2d at 753).

Further, the Appellate Division, First Department has held that where, as here, an employee handbook clearly states that bonus compensation is discretionary, an employee has no contractual right to recover bonus compensation, even where company officials allegedly orally promised him a bonus. (*Kaplan v Capital Co. of Am. LLC*, 298 AD2d 110 [1st Dept 2002]). Accordingly, plaintiffs have failed to set forth a cause of action for breach of contract.

Plaintiffs' claims for promissory estoppel also fail. Promissory estoppel requires: (i) an unambiguous promise; (ii) reasonable and foreseeable reliance on the promise and (iii) injury as a result of that reliance. (*See Urban Holding Corp. v Haberman*, 162 AD2d 230 [1st Dept 1990]). Where the parties only intend to bind each other with a written agreement, however, a plaintiff cannot rely on alleged oral promises as the basis for a cause of action for promissory estoppel. (*Jordan Panel Sys. Corp., v Turner Constr. Co.*, ___ AD3d ___, 841 NYS2d 561 [1st Dept 2007]).

Here, an unambiguous promise does not exist. As set forth above, the Human Resources Policies handbook provides that "[d]ecisions on Total Compensation are at the complete discretion of the Bank. There is no guarantee of cash or equity bonuses, merit increases, or any other pay items unless the employee has a written agreement with the Bank that states otherwise." In addition, Hunter and Race each signed Offer Letters with Deutsche Bank further

specifying the terms of their respective bonuses. Plaintiffs therefore cannot rely on any alleged oral promises, and their claims for promissory estoppel fail.

Plaintiffs' third causes of action are for unjust enrichment. "To state a cause of action for unjust enrichment a plaintiff must allege that he conferred a benefit upon the defendant and that the defendant will obtain such benefit without adequately compensating plaintiff therefor."

(*Nakamura v Fujii*, 253 AD2d 387, 390 [1st Dept 1998]). In New York, however,

the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter [citations omitted]. A "quasi contract" only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment.

(*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]). This reasoning is equally applicable here, and the court thus dismisses the plaintiffs' claims for unjust enrichment.

Plaintiffs' fourth causes of action are for recovery in quantum meruit. In order to make out a claim for quantum meruit, a plaintiff must establish: (1) the performance of the services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefor and (4) the reasonable value of the services. (*Moors v Hall*, 143 AD2d 336, 337-338 [2d Dept 1988]). However, the existence of an express employment contract that governs salary and bonuses and clearly sets forth that the employer has discretion in awarding bonus amounts precludes an employees' quantum meruit claim that the bonuses paid were inadequate. (*Smalley v Dreyfus Corp.*, 40 AD3d 99 [1st Dept 2007]). The court therefore also dismisses plaintiffs' quantum meruit claims.

Hunter has not raised an issue of fact as to his fifth cause of action for payment of his deferred equity awards. The plan that governs the equity awards contains the following

provisions:

[I]f you leave Deutsche Bank prior to the Vesting Date or if at that date you are under notice of termination for any other reason, any unvested Awards will be subject to forfeiture without any claim for compensation. Notwithstanding this, and subject to the Plan Rules regarding automatic forfeiture of Awards, the Committee may, in its sole discretion, determine whether you will be permitted to retain your rights to any unvested Awards and the terms upon which those Awards will vest.

While this will not bind the discretion of the Committee, provided that you do not breach any of the conditions in the Plan Rules which would lead to an automatic forfeiture of your Award, the Committee will normally exercise its discretion for your Award not to be forfeited if you leave DB for one of the following reasons:

- Agreed termination of employment
- Termination without Cause
- Redundancy . . .

(Gilly Aff., Ex. 34 at 35).

This provision gives the Committee the discretion to either allow or not allow a terminated employee to retain deferred equity awards. While the plan does state that the Committee will normally exercise its discretion in favor of the employee, it does not state criteria for the Committee's discretion, unlike the bonus provisions in the Human Resources Policies handbook. In addition, Hunter does not allege that Deutsche Bank orally promised that he could retain his deferred equity awards after his termination. The court dismisses Hunter's fifth cause of action as well.

Plaintiffs bring their Labor Law claims pursuant to § 193 (1) that prohibits an employer from making any deduction from the wages of an employee that the employee or the statute have not authorized. Section 190 (1) of the Labor Law defines "wages" as "the earnings of an

employee for labor or services rendered” The Court of Appeals has held that the Labor Law’s restrictive statutory definition of wages excludes Incentive Compensation that the employer bases on its profits or on other factors falling outside the scope of the employee’s actual work. (*Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220 [2000]). Moreover, the definition excludes bonus compensation plans that are entirely discretionary. (*Id.*). Similarly, deferred equity-based compensation does not fall within the definition of wages because its ultimate value depends on the employer’s stock price after the rights have vested. (*Guiry v Goldman, Sachs & Co.*, 31 AD3d 70, 73 [1st Dept 2006]).

Accordingly, the court dismisses Race’s fifth cause of action and Hunter’s sixth cause of action. The court has dismissed Hunter’s claim for deferred equity awards, but in any event, these awards are not “wages” within the Labor Law. (*Id.*; *Truelove*, 95 NY2d 220).

Hunter brings a seventh cause of action for defamation and slander. “An allegedly defamatory statement is not actionable if it is an expression of pure opinion. . . .” (*O’Loughlin v Patrolmen’s Benev. Assn. of the City of New York, Inc.*, 178 AD2d 117, 117 [1st Dept. 1991]). Hunter identified an e-mail from Rodgers to the Commodities Group dated June 3, 2004, as the source of the alleged defamation. (Fonstein Aff., Ex. H). However, there is nothing in the e-mail that identifies Hunter as either causing or contributing to any of the losses or inefficiencies that the natural gas desk experienced in 2003 or 2004. Hunter points to one sentence in which Rodgers states that “[t]he old way of doing things, where risk had to [be] managed on creaky spreadsheets, made it difficult to see the risk and almost impossible to figure out P/L.” This statement merely analyzes improvements Deutsche Bank made to the systems and procedures of the natural gas desk without ascribing responsibility for any past problems to Hunter. It is a statement of opinion and simply not defamatory. Thus, the court dismisses this cause of action.

Accordingly, based upon the foregoing, it is

ORDERED that the court grants the motion by Deutsche Bank for summary judgment dismissing the complaint in Action # 1; and it is further

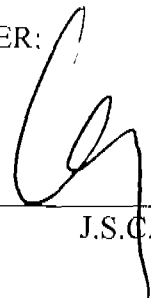
ORDERED that the court grants the motion by Deutsche Bank for summary judgment dismissing the complaint in Action # 2; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: October 2, 2007

Michael J.

ENTER:



J.S.C.