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

PRESENT: JANE S. SOLOMON Justice PART 55

Index Number : 600671/2010
METWALY, FARID
VS.
INTERNATIONAL BUSINESS MACHINES
SEQUENCE NUMBER : 001
DISMISS

INDEX NO.
MOTION DATE 1/3/11
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed Memorandum Decision and Order

NB 4-11-11 PC at 11:AM Set at end of decision

FILED

FEB 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/17/11

JANE S. SOLOMON J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

FARID METWALY,

Plaintiff,

-against-

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

----------X

Index No. 600671/2010

DECISION and ORDER

JANE S. SOLOMON, J.:

Plaintiff Farid Metwaly (Metwaly) sues International Business Machines Corporation (IBM), for interest on a sum of money owed to him from 2002 but not paid until 2009. IBM moves to dismiss for failure to state a cause of action, expiration of the statute of limitations, and lack of standing. The motion is decided as follows.

Metwaly now resides in Dubai and asserts that, as relevant, he is a Canadian citizen. In 1981, he began working for IBM's Canadian affiliate. In 2000, he was hired by IBM directly and worked for it in Dubai from 2000 to 2002. This dispute concerns the tax treatment of his compensation by IBM during those years.

In connection with his Dubai posting, Metwaly entered into several agreements with IBM, including an "International Assignment Tax Plan," which included a "Hypothetical Tax Program" (IBM International Assignment Tax Plan, attached to Metwaly

Affidavit, Ex. E). Under this program, IBM withholds from the employee the expected amount of United States Federal and State taxes that would have been collected had the employee not been stationed abroad (*id.*). At the end of each year, IBM, through its accounting firm Price Waterhouse Cooper (PWC), was to conduct a "Tax Reconciliation," and make the adjustments set forth in the governing documents which describe the program as intended to create parity between domestic and internationally assigned IBM employees.

Metwaly claims that between 2002 and 2005, he learned that his tax returns had not been properly handled by IBM, and that, although he had been subject to hypothetical tax withholding, he was not required to pay United States income taxes. (His description of these matters is, to be sure, a bit confusing.) He raised these issues with IBM several times before his retirement in 2007.

Between 2007 and 2009, Metwaly and IBM continued to discuss the tax issues (*see*, Emails, dated August 3, 2008 and January 8, 2009, attached to Metwaly Affidavit, Exs. G and H), and he carved them out of the release he signed when he retired. Not until 2009 did Ernst & Young, which replaced PWC, conduct a "final tax reconciliation" in which it concluded that IBM had withheld $116,685 in Hypothetical Tax in 2001, in addition to $85,565 in other unspecified errors, which should have been refunded to Metwaly. IBM paid Metwaly $202,250 on March 3, 2009.

Believing that he was shortchanged interest on this amount from 2002, he brought this action on September 13, 2010.

IBM makes four arguments in support of dismissal: Metwaly signed a voluntary release of claims in 2007; the action was not commenced until after the expiration of the statute of limitations; failure to allege a breach of contract because Metwaly did not identify with specificity the agreement between the parties, its terms, or which term was breached; lack of standing under the labor law.

Metwaly opposes the motion with five arguments: the 2007 release specifically exempted the tax issues; the statute of limitations continually renewed every day that IBM failed to honor its alleged contractual obligation to pay interest; the contract was an implied employment agreement that included the International Assignment Tax Plan and other documents; IBM acknowledged its obligation to repay in 2009; and, he has standing under the labor law because he was "paid by Defendant from New York by deposit into his bank account in the United States," and he received an "Assignment Memorandum" advising that "[y]ou will remain an employee of your home country and the laws of that country will be applicable if not overwritten by the laws of the work country."

ANALYSIS

The tax dispute was specifically exempted in the 2007 voluntary release (attached to Lauri Affidavit, Ex. C), which

Metwaly signed as follows: "Accepted and Agreed: (Except for tax matters handled by IBM/E&Y)." Accordingly, the release does not bar this action.

Second, the complaint sufficiently alleges breach of contract to defeat the motion. Metwaly's allegations sufficiently describe an agreement between the parties, a portion of which includes the International Assignment Tax Plan. Whether his claim may be defeated by his having signed the described documents does not defeat it on this motion, even though the text of the documents does not provide a basis for imposing interest on IBM from 2002.

Next, the statute of limitations for a breach of contract runs for six years from the date of breach (*Bulova Watch Co. V. Celotex Corp.*, 46 NY2d 606, 612 [1978]). Although 8 years passed after Metwaly raised his concerns, he persuasively argues that IBM acknowledged an obligation to him in the following 2009 email, as relevant:

> Our records show that we have never completed an ETR settlement for [2000-2002] ... I have asked E&Y to prepare these ... If there are outstanding refunds/taxes to be received, E&Y should be able to tell us. If not, hopefully the 2000-2002 ETR/Hypo tax will settle refunds due you. If your hypo tax for these years do result in a zero liability, then we can settle with you.

(Email, dated January 9, 2009, attached to Metwaly Affirmation, Ex. H).

Under General Obligations Law §17-101, "an acknowledgment . . . contained in writing signed by the party to

be charged thereby . . . take[s] an action out of the operation of the provisions of limitations of time for commencing actions under the [CPLR] . . ." "A writing, in order to constitute an acknowledgment, must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it" *Lew Morris Demolition Co. v. Board of Education.*, 40 NY2d 516, 521 [1976]).

Moreover, once the amount was determined, IBM acknowledged the claim by paying it (*Ray v. Ray*, 61 AD3d 442 [1st Dept., 2009] ["A party, by her own acts or words, may ratify what would otherwise be a questionable contract or provision of a contract"]).

Last, ratification and acknowledgment cannot save the Labor Law § 193 claim, which is time-barred because the wage deductions at issue in the complaint occurred more than six years ago (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 609 [2nd Dept., 1999]).

In accordance with the foregoing, it hereby is

ORDERED that defendant's motion to dismiss is granted to the extent that the second cause of action, under Labor Law § 193, is dismissed, and otherwise the motion is denied; and it further is

ORDERED that defendants are directed to serve an answer to the complaint within twenty days of service of a copy hereof with notice of entry; and it further is

ORDERED that the parties shall appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, New York, NY, on April 11, 2011 at 11 AM.

Dated: February 17, 2011

ENTER:

J.S.C.

JAKE S. SOLOMON

FILED

FEB 18 2011

NEW YORK
COUNTY CLERK'S OFFICE