

**Lieber v Nomura America Serv., LLC**

2013 NY Slip Op 31501(U)

July 9, 2013

Sup Ct, New York County

Docket Number: 654512/2012

Judge: Melvin L. Schweitzer

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: MELVIN L. SCHWEITZER
Justice

PART 45

DAVID LIEBER

INDEX NO. 654512/2012

NOMURA AMERICA SERVICES, LLC

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to , were read on this motion to/for
Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s).
Answering Affidavits - Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion to by defendant to dismiss
the complaint is GRANTED per the
attached Decision and Order.

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

Dated: July 9, 2013

MELVIN L. SCHWEITZER

- 1. CHECK ONE: CASE DISPOSED (checked) NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED (checked) DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 45

|                               |   |
|-------------------------------|---|
| -----X                        |   |
| DAVID LIEBER,                 | : |
| Plaintiff,                    | : |
| -against-                     | : |
| NOMURA AMERICA SERVICES, LLC, | : |
| Defendant.                    | : |
| -----X                        |   |

Index No. 654512/2012  
DECISION AND ORDER  
Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

**Background**

David Lieber (Mr. Lieber) brought suit against Nomura America Services, LLC, (NAS) on December 26, 2012 alleging six causes of action: (i) breach of contract; (ii) breach of implied contract; (iii) quantum meruit and unjust enrichment; (iv) promissory estoppel; (v) violation of § 193 of New York Labor Law; and (vi) wrongful termination. NAS moves pursuant to CPLR 3211 (a) (1) and (7) to dismiss the complaint.

In 2006 Mr. Lieber commenced his employment with Credit Suisse as a senior level professional. In April 2011, Amanda Weinberg (Ms. Weinberg) of NAS contacted Mr. Lieber and recruited him over a period of eight weeks. Mr. Lieber turned down NAS's initial proposed role, as his then current role at Credit Suisse was more senior.

Mr. Lieber asserts that in response to his rejection of the initial proposed role, Ms. Weinberg received approval to create a new role specifically for him. Mr. Lieber alleges Ms. Weinberg told him specifically that the role was extremely senior. Mr. Lieber asserts that he and Ms. Weinberg agreed that a fair compensation package for the newly proposed role would be a base salary of \$175,000 and a bonus of \$65,000. Mr. Lieber contends that Credit Suisse

offered him more responsibility to stay, but he chose to join NAS based upon Ms. Weinberg's express promises and representations.

On June 15, 2011, Mr. Lieber signed his offer letter (agreement) from NAS. On July 18, 2011, Mr. Lieber commenced his first day of employment at NAS. Mr. Lieber contends that he was given a junior role at NAS as opposed to the more senior role he was promised. Mr. Lieber says he was told the junior role was only temporary and the senior role would soon be forthcoming. On February 29, 2012, Mr. Lieber's employment with NAS was terminated without warning, reason, justification, or cause.

Mr. Lieber claims he is owed: (i) \$43,333, which is the pro-rated bonus for his eight months at NAS based on Ms. Weinberg's representations; (ii) \$15,171, representing the value of the replacement award included in the agreement; (iii) \$14,384, which equals Mr. Lieber's severance pay; and (iv) \$123,931, an appropriate severance pay for Mr. Lieber's reliance on NAS's alleged express promises and representations.

### **Discussion**

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). “To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff’s claim.” *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. In other words, “documentary evidence [must] utterly refute 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).

The first cause of action alleges breach of contract by NAS for failing to pay Mr. Lieber unpaid bonus compensation. To allege the essential elements of a breach of contract claim, plaintiff’s complaint must: (i) plead the existence of a contract between the parties; (ii) plaintiff’s performance under the contract; (iii) defendant’s breach of the contract; and (iv) plaintiff’s resulting damages. *Furia v Furia*, 116 AD2d 694, 695 (2nd Dept 1986).

Mr. Lieber argues that based upon express promises, guarantees, and representations, he is entitled to bonus compensation, in addition to his base salary. Mr. Lieber fails to point to any provision in the agreement stating he is entitled to such compensation. NAS points to Section 3 of the agreement, which makes clear that the payment of any bonus is completely within NAS’s sole discretion. NAS also argues that Section 15 provides that Mr. Lieber is not entitled to any severance, and the payment of the replacement award is contingent on Lieber signing a release acceptable to NAS. Mr. Lieber was presented with a release providing \$14,384 for severance pay, and \$15,171 for the value of the replacement award included in the agreement. Mr. Lieber refused to sign the release claiming it should include his bonus money.

As a general rule, an employee has no enforceable right to compensation under a discretionary bonus plan or contract. *Hunter v Deutsche Bank*, 56 AD3d 274, 274 (1st Dept 2008). Section 3 (b) of the agreement specifically states, “You will [] be eligible for a discretionary bonus . . . Such discretionary bonus shall be payable in the sole discretion of [NAS], and you shall have no power or right to challenge any determination as to whether you are entitled to or will receive a discretionary bonus or the amount thereof, if any.” Thus, Mr. Lieber’s first cause of action is dismissed.

The second cause of action alleges breach of implied contract. Mr. Lieber argues that an implied contractual relationship may be established by conduct of the parties, as well as by express agreement. *Land-Site Contr. Corp. v Marine Midland Bank*, 177 AD2d 413, 415 (1st Dept 1991). Mr. Lieber asserts that based upon prior conduct and course of dealing between himself and NAS, NAS breached an implied contract. Mr. Lieber does not plead sufficient facts to permit the court to hold he has properly pled a claim for an implied contract.

A contract cannot be implied in fact where there is an express contract covering the subject matter involved. *Julien J. Studley, Inc. v New York News, Inc.*, 70 NY2d 628 (1987). The court finds that the agreement explicitly addresses the compensation NAS shall provide Mr. Lieber in return for all services provided by him. Mr. Lieber’s second cause of action is dismissed.

The third cause of action alleges quantum meruit and unjust enrichment. To allege quantum meruit, a plaintiff must establish: (i) the performance of the services in good faith; (ii) the acceptance of the services by the person to whom they are rendered; (iii) an expectation of compensation therefore; and (iv) the reasonable value of the services. *Moors v Hall*, 143 AD2d 336, 337-338 (2nd Dept 1988). Mr. Lieber argues that NAS accepted and benefitted from

the services he offered, and those services were rendered with the full expectation of being paid the reasonable value of those services. NAS asserts that only where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, Mr. Lieber may proceed upon a theory of quantum meruit and not be required to elect his remedies. *Villacorta v Sacks Inc.*, 932 NYS2d 764 (N Sup 2011). Here, there is no dispute as to the existence of a contract or that the contract does not cover the dispute in issue.

To state an unjust enrichment claim, a plaintiff must allege that it conferred a benefit upon the defendant who was enriched, and that the defendant obtained the benefit without adequately compensating the plaintiff for it. *Nakamura v Fujii*, 253 AD2d 387, 390 (1st Dept 1998). Mr. Lieber alleges that NAS benefitted from his services, and obtained such benefit without adequately compensating him for it. NAS contends that, “[W]hen the complaint alleges an express, enforceable contract that controls the parties’ relationship, a claim for unjust enrichment will be dismissed.” *Zurakov v Register.Com, Inc.*, 304 AD2d 176, 182 (1st Dept 2003) (“[t]he motion court properly dismissed plaintiff’s claim for unjust enrichment since there is no dispute that a written contract exists or that it covers the subject matter of plaintiff’s claims”). The agreement between Mr. Lieber and NAS covers the subject matter of Mr. Lieber’s compensation package. Mr. Lieber’s claim for quantum meruit and unjust enrichment is unwarranted. Mr. Lieber’s third cause of action is dismissed.

The fourth cause of action alleges a claim for promissory estoppel arising out of Mr. Lieber’s reliance on purported clear and unambiguous promises. To apply the doctrine of promissory estoppel, Mr. Lieber must demonstrate: (i) a clear and unambiguous promise; (ii) reasonable and foreseeable reliance by party to whom promise is made; and (iii) injury

sustained in reliance on promise. *NGR, LLC v General Elec. Co.*, 24 AD3d 425, 425 (2nd Dept 2005).

Mr. Lieber alleges NAS made certain unequivocal and express verbal promises, representations and guarantees regarding his bonus compensation, on which he relied. Mr. Lieber argues that courts have found that if there comes a time when a party makes an unambiguous promise to another and that party reasonably and foreseeably relies upon that promise, it is unconscionable to allow that party no award. *See Cyberchron Corp. v Calldata Sys. Dev. Inc.*, 47 F3d 39 (2nd Cir 1995). Mr. Lieber's claims are merely conclusory and offer insufficient information concerning these alleged clear and unambiguous promises, representations, and guarantees made by NAS. The court cannot find a properly pled claim of promissory estoppel on these conclusory allegations.

The promises Mr. Lieber purportedly relied upon were made prior to the time he signed the agreement. Section 16 of the agreement contains a merger clause asserting, "This [agreement] shall constitute the entire agreement concerning your employment arrangement and shall supersede any and all prior letters or agreements, whether oral or written, that you may have with [NAS]." The clause bars any action by Mr. Lieber based upon express promises made prior to the agreement. Mr. Lieber's fourth cause of action is dismissed.

The fifth cause of action alleges violations of § 193 of New York Labor Law. Mr. Lieber argues that the bonus money owed to him constitute wages under New York's Labor Law. § 193 (1) of the New York Labor Law states: "[n]o employer shall make any deduction from the wages of an employee." NAS argues that it is well settled that unpaid bonuses do not constitute wages under § 193 of New York Labor Law. NAS points to a recent case, *Barber v Deutsche Bank Securities, Inc.*, 103 AD3d 512 (1st Dept 2013), in which the plaintiff contended that the

promised bonus, which was withheld by the defendants, fit within the definition of “wages” in New York Labor Law § 190 (1). It was held that even assuming an enforceable oral promise of a bonus, the cause of action would fail because the bonus would not constitute wages, as it was discretionary. Here, regardless of whether there was an enforceable oral promise between Mr. Lieber and NAS, Mr. Lieber’s bonus compensation is discretionary pursuant to the agreement. The court finds that the bonus compensation does not constitute wages under New York Labor Law. Mr. Lieber’s fifth cause of action is dismissed.

The sixth cause of action alleges wrongful termination. Mr. Lieber’s employment with NAS was categorized as at-will under Section 15 of the agreement. In order to rebut the presumption that an at-will relationship exists, a plaintiff must point to some express written limitation on the employer’s right to terminate him. *Id* at 513. Mr. Lieber has not alleged the existence of any written agreement suggesting that his employment was anything but at-will. The court finds NAS had the right to terminate Mr. Lieber’s employment without warning, reason, justification, or cause. Mr. Lieber’s sixth cause of action is dismissed.

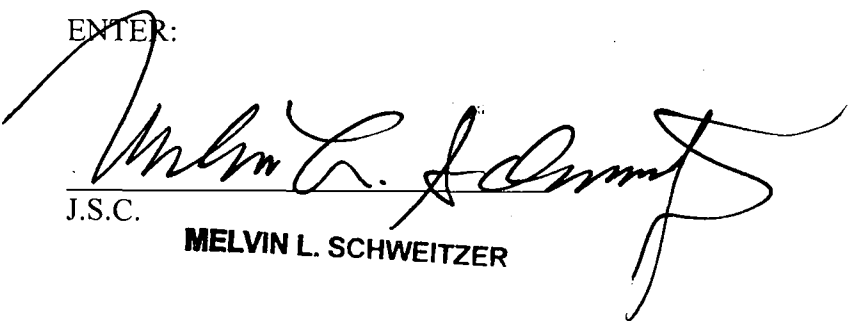
### Conclusion

ORDERED that Nomura’s motion to dismiss is granted.

Dated: July 9, 2013

ENTER:

J.S.C.

  
MELVIN L. SCHWEITZER