SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 650474/2013
GALLOTTI, NICOLA
vs.
ADVANCE WATCH COMPANY LTD.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 10/24/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 14-18
Answering Affidavits — Exhibits _____ No(s). 22-23
Replying Affidavits _____ No(s). 25

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 11/27/13

SHIRLEY WERNER KORNREICH J.S.C
_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ 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 54

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NICOLA GALLOTTI,

Index No.: 650474/2013

Plaintiff,

DECISION & ORDER

-against-

ADVANCE WATCH COMPANY LTD, d/b/a,
GENEVA WATCH GROUP,

Defendant.

----------X

SHIRLEY WERNER KORNREICH, J.:

Defendant Advance Watch Company Ltd, d/b/a, Geneva Watch Group (Geneva) moves to dismiss the Complaint pursuant to CPLR 3211. Defendant's motion is granted for the reasons that follow.

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the Complaint.

Geneva manufactures and sells high-end watches. Complaint ¶ 6. In 2004, plaintiff Nicola Gallotti began working for non-party Binda SpA (Binda) in Milan, Italy. ¶ 7. In 2008, at Gallotti's suggestion, Binda acquired Geneva, which was based in New York. ¶¶ 13-14. After the acquisition, Gallotti was transferred to Geneva's New York office. ¶ 15. On December 17, 2008, Gallotti entered into an Employment Agreement with Geneva (the Agreement), which states that Gallotti's employment is "at will." ¶ 18. The Agreement provides Gallotti with multiple forms of compensation, including a base salary of $290,000, various bonus payments exceeding $100,000, and other perquisites such as allowances for housing and a car. ¶ 19. The

only portion of Gallotti's compensation in dispute is the Medium Term Incentive Bonus (the MTI Bonus), which is described in the Agreement as follows:

> You are eligible for a Medium Term Incentive based on the increase in the shareholder value of [Geneva]. The objectives and metrics used to define and measure the achievement under this plan will be defined within one month from the approval of the strategic business plan of [Geneva].

¶ 20. Geneva never defined any "objectives and metrics", and Gallotti was never paid an MTI Bonus. ¶¶ 24-29. Gallotti's employment was terminated in August 2012. ¶ 29. During the period of Gallotti's employment, Geneva increased in value by approximately $60 million. ¶ 28.

On February 13, 2013, Gallotti commenced this action to obtain his unpaid MTI Bonus, which he believes should be in excess of $6 million. *See* ¶ 35. The Complaint lists four causes of action: (1) breach of contract; (2) unjust enrichment; (3) quantum meruit; and (4) fraud. Geneva moves to dismiss the breach of contract claim, arguing that the MTI Bonus is insufficiently defined and, thus, unenforceable. It further moves to dismiss the unjust enrichment and quantum meruit claims as improperly duplicative and the fraud claim as improperly pled. Geneva is correct on all counts.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the

complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "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 N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

It is well established that "a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable." *Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105, 109 (1981). "If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract." *Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 482 (1989). "[U]nless a court can determine what the agreement is, it cannot know whether the contract has been breached, and it cannot fashion a proper remedy." *Id.* at 483. However, "at some point virtually every agreement can be said to have a degree of indefiniteness, and if the doctrine is applied with a heavy hand it may defeat the reasonable expectations of the parties in entering into the contract." *Id.* "Before rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear." *Id.*

"[A] price term is not necessarily indefinite because the agreement fails to specify a dollar figure, or leaves fixing the amount for the future, or contains no computational formula." *Id.* Where, as here, a bonus agreement exists, but specifics of how it is to be computed is left for future negotiation, the court can compel payment, but only "if some *objective method* of determination is available, independent of either party's mere wish or desire. Such *objective criteria* may be found in the agreement itself, commercial practice or other usage and custom. If the contract can be rendered certain and complete, *by reference to something certain*, the court will fill in the gaps." *Metro-Goldwyn-Mayer, Inc. v Scheider*, 40 NY2d 1069, 1071 (1976) (emphasis added; citation omitted). In other words, the court can bind a defendant to a computational formula not expressly contained in the contract, but only if there is an *objective* method of creating such formula.

In this case, there are no "objective criteria" that can be used to compute the MTI Bonus. Though the MTI Bonus was supposed to be tied to an increase in shareholder value, which purportedly increased by $60 million during Gallotti's employment, there simply is no *objective* way to determine *how much* of such increase was meant to be remitted to Gallotti. In the complaint, Gallotti avers that he is entitled to at least $6 million. But, he provides no basis for maintaining that the MTI Bonus should be 10% of the increase in shareholder value. Indeed, any percentage proffered by Gallotti, Geneva, or even this court will merely be a made-up number with no objective nexus to the parties' intentions. Even though Geneva failed to "define and measure" the basis for calculating the MTI Bonus, the Agreement does not provide a remedy for such contingency. This renders the MTI bonus an unenforceable "agreement to agree." *See IDT Corp. v Tyco Group, S.A.R.L.*, 54 AD3d 273, 275 (1st Dept 2008) ("agreement to agree"

only actionable where contract provides for contingency in event parties do not agree on terms).[1]

Moreover, there are no applicable industry standards that the court can look to in order to figure out what the MTI Bonus should be. The Agreement was uniquely negotiated between the parties to provide adequate compensation for Gallotti to move from Milan to New York. Gallotti received substantial compensation, valued at approximately $500,000 per year ($290,000 base salary, $70,000 bonus, $48,000 housing allowance, $34,000 non-competition payment, $20,000 car allowance, $7,000 for "personal trips", plus other amounts for moving expenses, language training, and other benefits such as health insurance). If Gallotti did not receive such substantial compensation, and instead, the MTI Bonus represented "an integral part of [his] compensation package," the inquiry might be different. *See Guggenheimer v Bernstein Litowitz Berger & Grossmann LLP*, 11 Misc3d 926, 931 (Sup Ct, NY County 2006), citing *Mirchel v RMJ Secs. Corp.*, 205 AD2d 388, 389 (1st Dept 1994). However, there is no doubt that Gallotti was well compensated for moving to New York to work for Geneva. Consequently, Gallotti's breach of contract claim is dismissed.

Likewise, the court dismisses Gallotti's quasi-contract claims for unjust enrichment and quantum meruit because his entitlement to the MTI Bonus is governed by a written contract. *See Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 (2005), accord *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 (1987) ("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"). Moreover, no reasonable fact finder could conclude that Gallotti's failure to receive a further bonus payment on top of his other substantial

[1] Though *IDT* was remanded by the Court of Appeals on other grounds (*see* 13 NY3d 209 (2009)), the Appellate Division later reaffirmed its original holding. *See* 104 AD3d 170 (1st Dept 2012).

compensation would be "against equity and good conscience." *See Kickertz v N.Y. Univ.*, 971 NYS2d 271, 279 (1st Dept 2013).

Finally, Gallotti's fraud claim also fails. To properly plead a claim of fraud, the complaint must contain allegations of a material misrepresentation, scienter, reliance, and injury. *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 (1999); *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 (1st Dept 2011) (to maintain claim of fraudulent inducement, complaint must allege "a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made justifiably relied on it and was damaged."), citing *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 (1996). Additionally, pursuant to CPLR 3016(b), the circumstances constituting the fraud must be stated in detail. *Id.*

Conduct "which relates solely to the underlying breach of contract[] does not give rise to a separate cause of action for fraud." *Stuart Lipsky, P.C. v Price*, 215 AD2d 102, 103 (1st Dept 1995). Where the alleged fraud arises from a contractual duty, such claim is only viable when "the alleged misrepresentation [is a fact] extraneous to the contract and involve[s] a duty separate from or in addition to that imposed by the contract." *The Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 (1st Dept 2004), citing *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954 (1986).

Since the alleged fraud is Geneva's failure to pay the MTI Bonus, the claim is duplicative because it arises from the Agreement. In any event, as the claim is for fraudulent inducement (i.e. without the MTI Bonus, Gallotti's would not have taken the job in New York), the claim fails because Gallotti has not pled facts giving rise to a reasonable inference that he would not have taken the job without the MTI Bonus or that he was harmed in any way. To the contrary, he was well compensated. He cannot credibly contend otherwise. Accordingly, it is

ORDERED that the motion to dismiss the Complaint by defendant Advance Watch Company Ltd d/b/a Geneva Watch Group is granted, and the Clerk is directed to enter judgment dismissing the Complaint with prejudice.

Dated: November 27, 2013

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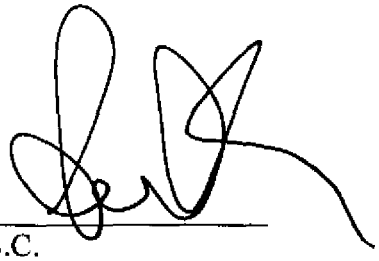

J.S.C.