SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ROBERT FREI,

Plaintiff,

-against-

STARGATE APPAREL, INC.,

Defendant.

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Index No. 155010/14

Mot. seq. nos. 001, 002

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
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For defendant:
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Plaintiff moves pursuant to CPLR 3216 for an order striking defendant's answer and counterclaim. Defendant opposes. (Mot. seq. 001).

Defendant moves pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the complaint against it, or alternatively, pursuant to CPLR 3212 for summary dismissal, and for costs and sanctions pursuant to 22 NYCRR 130-1.2. Plaintiff opposes. (Mot. seq. 002). The motions are consolidated for disposition.

I. PERTINENT FACTS

In 2004, defendant hired plaintiff to serve as its chief financial officer. (NYSCEF 15). In December 2005, plaintiff and defendant's president exchanged emails, based on an earlier conversation concerning the structure of plaintiff's annual bonus. Defendant agreed to the terms plaintiff set forth, with the caveat that, "however as we discussed for the purpose of this email this agreement is totally at my discretion," and that any bonus distribution would be "review[ed]

mid year and end of year." Plaintiff's annual bonus was to be computed based on a percentage of defendant's net income as set forth in the 2005 emails. (NYSCEF 41).

Between March and April 2012, plaintiff and defendant's president again exchanged emails whereby plaintiff proposed a modified bonus structure, which defendant's president accepted, again with the understanding that "the bonus structure remains solely at [the president's] discretion." (NYSCEF 42). In August 2012, plaintiff submitted to defendant's president a proposed bonus based on the 2012 modification, which the president approved. (NYSCEF 43). Plaintiff neither submitted, nor did defendant approve, a proposed bonus for 2013 and plaintiff received no bonus that year. (NYSCEF 54).

On or about July 2, 2013, plaintiff was fired. He thereafter commenced this action based on defendant's failure to pay him a bonus in 2013, seeking damages for breach of contract, along with liquidated damages and attorney fees pursuant to Labor Law § 198. (NYSCEF 1).

II. DEFENDANT'S MOTION TO DISMISS

A. Contentions

Defendant argues that the emails exchanged in 2005 and 2012 evidence plaintiff's agreement that his entitlement to a bonus was within defendant's discretion and not tied to his job performance, and that absent an enforceable right to a bonus under their contract, the bonus does not constitute earned wages pursuant to Labor Law § 198. It alleges that the action is nothing more than an attempt to harass and injure defendant, given plaintiff's awareness of documentary evidence that contradicts his claims and his failure to cooperate in the discovery process, and thus maintains that plaintiff's motion is frivolous, especially as it had advised him before he commenced this action of the existence of the written agreement and relevant legal

authority in its favor. (NYSCEF 15).

In opposition, plaintiff asserts that the bonuses were always part of his compensation package and were negotiated with the goal that he remain employed with defendant. He alleges that as the bonuses reflect his contribution toward increasing defendant's net profits, they were tied to his job performance, constituting earned wages within the meaning of Labor Law § 198. He minimizes the written agreement referenced by defendant, maintains that the full agreement was oral, and thus argues that defendant's motion for summary judgment is premature as further discovery will reveal the additional terms of their agreement. He also denies that there was an understanding that his bonus package could be terminated at any time, and asserts that defendant did not provide him with notice of its decision to cancel it. Moreover, he claims that he relied on the promise of a bonus when rendering services for the period in question. (NYSCEF 40).

Alternatively, plaintiff argues that defendant's president's reference to the term "bonus structure" signifies an ambiguity as to whether defendant's discretion applies to distributing bonuses generally or their calculation, and that the statement that his bonuses remain in the president's sole discretion creates an additional ambiguity concerning whose discretion is to be exercised, the president's or defendant's. (*Id.*).

In reply, defendant reiterates that the only basis for plaintiff's eligibility to receive a bonus was contained in the 2005 and 2012 emails, which establish ~~unambiguously,~~ that bonuses were discretionary, and that an alleged oral agreement is inadmissible to alter the terms of their written agreement. (NYSCEF 53).

Defendant also denies that any portion of the 2012 emails are ambiguous, observing that having expressed that any bonus "remains solely at [his] discretion" references the president's

unchanged and longstanding discretion to issue bonuses to plaintiff, and denies any ambiguity regarding its president's capacity to act on its behalf. It also denies that their agreement required that it give notice in the event it did not issue a bonus, and that plaintiff's claimed reliance on the unpaid bonus is irrelevant given its discretionary authority. (*Id.*).

B. Analysis

Pursuant to CPLR 3211(a)(1), a party may move to dismiss a cause of action based on documentary evidence provided that the evidence conclusively establishes, as a matter of law, a viable defense to the asserted claims. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). While the court must construe pleadings liberally, "it is not required to accept factual allegations that are plainly contradicted by documentary evidence." (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

To qualify as documentary evidence, the evidence must be "unambiguous, authentic, and undeniable." (*Attias v Costiera*, 120 AD3d 1281, 1292 [2d Dept 2014]). Evidence may include documents reflecting out-of-court transactions, such as contracts (*Fontanetta v John Does 1,* 73 AD3d 78, 84 [2d Dept 2010]), the provisions of which prevail over conclusory allegations in the complaint (*805 Third Ave. Co. v M.W. Reality Assoc.*, 58 NY2d 447 [1983]).

And pursuant to CPLR 3211(a)(7), a party may move for an order dismissing a cause of action against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept all of the alleged facts as true, and accord the non-movant every possible favorable inference, ascertaining only whether the allegations fall within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

1. Breach of contract claim

The elements of a claim for breach of contract are: 1) the existence of a contract between the plaintiff and the defendant, 2) the plaintiff's performance under the contract, 3) the defendant's breach of the contract, and 4) damages. (*US Bank Nat. Assn. v Lieberman,* 98 AD3d 422, 423 [1st Dept 2012]). An employee's entitlement to a bonus is a matter of contract (*Hall v United Parcel Serv. of Am.*, 76 NY2d 27, 36 [1990]), and an employee has no enforceable right to payment under a discretionary bonus plan and cannot sustain an action for breach of contract (*Doolittle v Nixon Peabody LLP*, 126 AD3d 1519, 1520 [4th Dept 2015]; *Gruber v J.W.E. Silk, Inc.*, 52 AD3d 339, 339 [1st Dept 2008]).

It is well settled that a clear and complete written agreement "must be enforced according to the plain meaning of its terms." (*Greenfield v Philles Records, Inc.,* 98 NY2d 562, 569 [2002]). However, if a contract is ambiguous, the court may then consider extrinsic evidence to aid in its interpretation. (*Joan Hansen & Co., Inc. v Nygard Intl.*, 83 AD3d 447, 448 [1st Dept 2011]). A contract is ambiguous if it is susceptible to more than one reasonable interpretation. (*Evans v Famous Music Corp.*, 1 NY3d 452, 458 [2004]; *Discovision Assoc. v Fuji Photo Film Co., Ltd.*, 71 AD3d 488, 489 [1st Dept 2010]).

When parties dispute the meaning of contract provision, the court must determine in the first instance whether the clause is ambiguous when "read in the context of the entire agreement." (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 163 [1990]; *Richard Feiner & Co. v Paramount Pictures Corp.*, 95 AD3d 232, 237-238 [1st Dept 2012], *lv denied* 19 NY3d 814). The court's construction should not "render any portion meaningless." (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]).

While ordinarily, a question of fact is raised as to whether unpaid compensation constitutes a discretionary bonus or earned wages (*Doolittle*, 126 AD3d at 1521; *Kaplan v Capital Co. of Am. LLC*, 298 AD2d 110, 111 [1st Dept 2002], *lv denied* 99 NY2d 510 [2003]), here, the emails exchanged between the parties in 2005 and in 2012 reflect that they specifically and unambiguously agreed that the award of a bonus was within the discretion of defendant's president. (*See Kaplan v Capital Co. of Am.*, 298 AD2d 110, 111 [1st Dept 2002] [employee handbook clearly stated that bonus compensation was to be discretionary]; *Smalley v Dreyfus Corp.*, 40 AD3d 99, 106 [1st Dept 2007], *revd on other grounds* 10 NY3d 55 [2008] [written incentive compensation plan specifically stated that employer had authority to modify or annul bonuses based on its sole discretion]; *cf. Simpson v Lakeside Eng'g, P.C.*, 26 AD3d 882, 883 [4th Dept 2006], *lv denied* 7 NY3d 704 [employment offer letter contained no indication that bonus would be discretionary]).

The parties dispute the meaning of the phrase "bonus structure" in the 2012 emails and whether it covers bonus calculations specifically or applies to their distribution generally. The 2005 emails express the parties' understanding that defendant's president will have discretion over the entire "agreement," while, in the 2012 emails, the president states that he has discretion over the "bonus structure." In the context of the entire agreement, and the clear reference to the president's discretion in distributing bonuses per the 2005 emails, the parties unambiguously agreed that defendant had and would continue to have complete discretion over plaintiff's entitlement to bonuses, both their method of calculation and their distribution. (*See Kasowitz, Benson, Torres & Friedman, LLP v Reade*, 98 AD3d 403, 405-406 [1st Dept 2012], *affd* 20 NY3d 1082 [2013] [read in context of email agreement covering attorney fee arrangement, terms

"recovered" and "recovery" not ambiguous]; *cf. LoFrisco v Winston & Strawn LLP*, 42 AD3d 304, 308 [1st Dept 2007] [compensation agreement as a whole did not resolve ambiguity in contract provision as to whether awarding bonus was mandatory or discretionary]). Moreover, plaintiff's interpretation of the phrase in the 2012 email renders meaningless the 2005 emails granting defendant full discretion over the entire bonus agreement. (*See Hunter v Deutsche Bank AG, New York Branch*, 56 AD3d 274, 274 [1st Dept 2008] [language in contract may not be construed to impose limitation on discretion, as it "would render the clear language of discretion meaningless"]; *see also Metro. Suburban Bus Auth. v County of Nassau*, 126 AD3d 434, 435 [1st Dept 2015] [plaintiff's interpretation of post-contract termination labor costs would render that contract provision meaningless]).

As the provision is not ambiguous, extrinsic evidence may not be considered to show that the decision to award a bonus was not discretionary. (*See Namad v Salomon Inc.*, 74 NY2d 751, 753 [1989] [as bonus clause susceptible of only one interpretation, extrinsic evidence inadmissible]; *see also Gershon v CDC IXIS Capital Mkts., Inc.*, 1 AD3d 137, 138 [1st Dept 2003] [same]).

There is also no ambiguity as to whose discretion is to be exercised in handling the bonuses, as the agreement entered into by defendant's president is presumed to be binding on defendant. (*Odell v 704 Broadway Condominium*, 284 AD2d 52, 56 [1st Dept 2001] [presumption that president of corporation has power to enter contracts on corporation's behalf]); *A & M Wallboard, Inc. v Marina Towers Assoc.*, 169 AD2d 751, 752 [2d Dept 1991], *lv denied* 79 NY2d 854 ["As President and Chairman of the Board of [defendant], [president] is presumed to have had authority to enter into contracts in the ordinary course of the corporation's business."]).

Given my determination that the parties agreed that defendant's authority to award plaintiff bonuses was discretionary, plaintiff's contention that he received no notice of defendant's decision to cancel his bonus is legally insignificant, as is his assertion of reliance, absent any cause of action requiring reliance as an element.

In light of the foregoing, I need not reach the issue of whether plaintiff states a cause of action to avoid dismissal under CPLR 3211(a)(7).

2. Labor Law § 198 claim

Plaintiff may not seek relief under Labor Law § 198 based on a common-law breach of contract claim. (*Gottlieb v Kenneth D. Laub & Co., Inc.*, 82 NY2d 457, 465 [1993] ["An expansive interpretation of Labor Law § 198(1-a) to permit recovery of attorney's fees (and liquidated damages) on a common-law contractual remuneration claim would not only violate the foregoing cannons of statutory construction, but would afford a windfall remedy to litigants . . . ."]; *Zito v Fischbein, Badillo, Wagner & Harding*, 35 AD3d 306, 306 [3d Dept 2006] [no cognizable claim under § 198 unless plaintiff alleges violation of article 6 of Labor Law]). Plaintiff thus fails to state a cognizable cause of action.

Even assuming that plaintiff had adequately pleaded a violation of article 6 of the Labor Law, because the bonus is discretionary and tied to defendant's economic performance, as a matter of law, the bonuses do not constitute earned wages within the meaning of Labor Law § 190(1). (*See Truelove v N.E. Capital & Advisory, Inc.*, 95 NY2d 220, 224 [2000] [as bonus payments entirely discretionary and "dependent solely upon his employer's overall financial success," payments did not constitute "wages"]; *see also Kaplan*, 928 AD2d at 111 [as bonus

compensation plan held discretionary, plaintiff could not sustain Labor Law claim]). Plaintiff's conclusory assertion that the bonuses were tied to his personal productivity, even if true, contradicts the written agreement, which established that his bonuses were dependent, at least in part, on the overall financial success of defendant. (*Barber v Deutsche Bank Sec., Inc.*, 103 AD3d 512, 514 [1st Dept 2013] [written agreement provided that plaintiff's bonus would be, in part, based on factors other than his personal productivity]).

3. Defendant's motion for costs and sanctions

Pursuant to 22 NYCRR 130-1.2, the court may award costs or impose sanctions for frivolous conduct in the course of litigation. Conduct is deemed frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal or existing law," or it is undertaken to delay the litigation, or harass or injure party. (22 NYCRR 130-1.1).

As plaintiff has set forth colorable, albeit unsuccessful, claims, his commencement of the instant action is not frivolous. (*See Matter of Garett YY*, 258 AD2d 702, 704 [3d Dept 1999] ["Although the [respondent] has ultimately been unsuccessful in pursuing this appeal, neither the appeal nor any argument contained in her brief is so frivolous as to justify sanctions."]).

Given my determination granting defendant's motion, plaintiff's motion to strike defendant's pleadings is moot (*see Merisel, Inc. v Weinstock*, 117 AD3d 459, 460 [1st Dept 2014] [motion for summary judgment dismissing complaint granted, rendering plaintiff's motion to strike moot]), and in any event, meritless, as counsel erroneously sought documentary evidence through interrogatories, and without seeking the production of documents pursuant to CPLR

3120 or otherwise moving to compel discovery pursuant to CPLR 3124. Moreover, the tone of counsel's papers in support of plaintiff's motions is intemperate, uncivil, and unbecoming of an attorney admitted to practice in New York. (NYSCEF 59).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion to strike defendant's answer and counterclaims is denied as moot; and it is further

ORDERED, that defendant's motion for an order dismissing the complaint is granted and the complaint is dismissed in its entirety, with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant.

ENTER:

Barbara Jaffe, JSC

DATED: June 18, 2015
New York, New York