

Bernardini v GFI Group Inc.

2020 NY Slip Op 33505(U)

October 21, 2020

Supreme Court, New York County

Docket Number: 654964/2019

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMOND PART IAS MOTION 35EFM

Justice

-----X

RYAN BERNARDINI

Plaintiff,

- v -

GFI GROUP INC.,

Defendant.

-----X

INDEX NO. 654964/2019
MOTION DATE 9/24/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for DISMISS

Upon the foregoing documents, it is

ORDERED that defendant's motion to dismiss the complaint is denied; and it is hereby

ORDERED that defendant shall answer the complaint within fourteen days of receiving this decision with notice of entry; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

Plaintiff Ryan Bernardini, a broker, brings this action against his former employer, defendant GFI Group Inc. (GFI). Plaintiff asserts causes of action for breach of contract and for the withholding of wages under Article 6 of the Labor Law. GFI moves to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action (motion seq. 001).

DISCUSSION

From February 1, 2013 until he was terminated on May 22, 2019, Bernardini worked on the emerging markets currency trading desk at GFI. At the start of his employment, plaintiff and GFI entered into an Employment Agreement (Employment Agreement), which provided that Bernardini would provide broker services to GFI for an initial five-year term beginning on February 1, 2013, in exchange for several forms of compensation, including Restricted Stock Units (RSUs) in GFI. The Employment Agreement provided that the RSUs would “vest on the fifth anniversary of [February 28, 2013]” (NYSCEF 4, complaint, ¶ 22). No copy of the Employment Agreement has been provided to the court.

On February 28, 2013, Bernardini and GFI entered into the JPI II Award Agreement (the Award Agreement), which granted Bernardini 84,507 RSUs and explicitly incorporated the terms of the GFI Group Inc. 2008 Equity Incentive Plan (the Plan). The Award Agreement and the Plan state the conditions under which Bernardini would benefit from the RSUs. Under the Award Agreement, on the fifth anniversary of February 28, 2013, if he was still employed at GFI, Bernardini “shall become eligible” to receive one share stock in GFI for each RSU (NYSCEF 5, Award Agreement, ¶¶ 3.1, 3.2). The stock distributions were to take place over four years in four allotments. The fifth anniversary is termed the “Eligibility Date,” which would have been February 28, 2018 (*id.*, ¶ 3.1).

On February 19, 2015, GFI and nonparty BGC Partners, Inc. (BCG) entered into an agreement (the Tender Offer Agreement) whereby BGC agreed to acquire GFI. The Tender Offer Agreement provided that all RSUs outstanding when the acquisition closed would convert into the right of each RSU holder to receive a cash payment equal to \$6.10 per RSU (NYSCEF 17, Tender Offer Agreement, ¶¶ 1.2 [a], 5.17). Instead of receiving GFI stock for each RSU, Bernardini would receive cash for each RSU. This change was effected as per section 9.13 of the Plan, which set forth various options for the treatment of RSUs in the event of the merger or acquisition of GFI (NYSCEF 6).

BGC's acquisition of GFI closed in January 2016. In late 2015 or early 2016, the New York Attorney General (NYAG) started to investigate whether GFI had posted false bids to purchase foreign currencies. GFI opened its own internal investigation.

In March 2017, GFI awarded Bernardini \$1 million in partnership interests in a BGC entity and extended his employment until March 16, 2022, by a written amendment to the Employment Agreement. In June 2017, GFI "further recognized Bernardini's performance and conduct by making an early partial payment of \$128,868.60 to him under the Award Agreement and the Plan" (NYSCEF 4, complaint, ¶ 55). GFI's memorandum of law states that GFI "in its discretion chose to accelerate the first vesting anniversary" for 25% of the unvested RSUs" (NYSCEF 8, GFI's memorandum of law, at 3). This partial payment is one quarter of the number of Bernardini's RSUs multiplied by \$6.10.

GFI and the NYAG came to a settlement about GFI's alleged misconduct. As part of that settlement, GFI agreed to terminate certain brokers, one of whom was plaintiff. Bernardini alleges that his termination, in May 2019, was entirely without cause and that he maintained an unblemished record throughout his tenure at GFI. Bernardini alleges that the termination served

an unjust purpose of GFI, which was to avoid placing rightful responsibility for misconduct on certain senior brokers, none of whom were terminated, and that GFI used him “as a patsy” (NYSCEF 4, ¶ 1). At the time that the instant motion was made, the parties were arbitrating the propriety of Bernardini’s termination (NYSCEF 8, at 4).

DISCUSSION

The standard on a motion to dismiss a pleading for failure to state a cause of action under CPLR 3211 (a) (7) is whether, deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 120-121 [1st Dept 2002]; *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 [1st Dept 1990]). On such a motion, the court regards the allegations in the complaint as true, allows the plaintiff the benefit of every possible favorable inference, and does not dismiss the action so long as the facts as alleged fit into any cognizable legal theory (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007]).

The parties disagree as to the meaning of the Award Agreement and the Plan. Bernardini contends that under the agreements his right to receive the cash value of his RSUs vested on February 28, 2018, the Eligibility Date. On that date, he contends that he became entitled to receive \$515,492.70 (84,507 RSUs multiplied by \$6.10), less the \$128,868.60 that he already received. GFI claims that on the Eligibility Date the RSUs became subject to separate four-year vesting periods, and that the Award Agreement contemplates that on each anniversary of the Eligibility Date one quarter of the RSUs would vest and become payable. On February 28, 2019, GFI argues, the first anniversary of the eligibility date, 25% would vest and, on each of the next three anniversaries, February 28, 2020, 2021, and 2022, another 25% would vest. GFI avers that Bernardini’s payment in June 2017 was on account of the 25% that was to vest on February 28,

2019, and that GFI had the discretion to make early payments. GFI further contends that, as 75% of the RSUs had not vested by the time that Bernardini was fired from GFI in May 2019, his right to them were forfeited under the Award Agreement.

A fundamental precept of contract interpretation is that agreements are construed in accord with the parties' intent (*Deutsche Bank Nat'l Trust Co. v Barclays Bank PLC*, 34 NY3d [2019]).] “The best evidence of what parties to a written agreement intend is what they say in their writing” (*id.*, [internal quotation marks and citation omitted]). In arriving at parties' intent, the court strives to accord the words of the contract their “fair and reasonable meaning” (*Abiele Contracting, Inc. v New York City Sch. Const. Auth.*, 91 NY2d 1, 9 [1997]). Courts must interpret a contract to avoid inconsistencies and to give meaning to all of its terms (*Gessin Elec. Contrs. Inc. v 95 Wall Assocs., LLC*, 74 AD3d 516, 518 [1st Dept 2010]). An agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66 [1st Dept 2008]), *aff'd* 13 NY3d 398 [2009]). An ambiguous contract is one reasonably susceptible of more than one meaning (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]).

Bernardini asserts that he has a vested right to the RSUs that GFI cannot take away. Vest means “1. To confer ownership (of property) on a person. 2. To invest (a person) with the full title to property. 3. To give (a person) an immediate, fixed right of present or future enjoyment” (Black's Law Dictionary [11th ed 2019 Westlaw]). Vested means “Having become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute” (*id.*).

The Award Agreement states that it is subject in all respects to the terms and definitions of the Plan and that, in the event of a conflict between the agreements, the terms of the Plan

“shall control” (NYSCEF 5, ¶ 1). The Award Agreement has no list of definitions. The Plan does, but “vest”, “entitle”, “eligible”, and “settle” -- words used in the agreements -- are not included.

The Award Agreement contains one mention of the word “vest.” Section 3.1 is entitled “Vesting and Payment of Restricted Stock Units.” It states that, on the Eligibility Date (February 28, 2018), the participant “becomes eligible to receive” payment of the RSUs, if that person is still at GFI on that date. “During the 12 month period ending on each of the first four anniversaries of the Eligibility Date [February 28, 2018], the Company shall distribute to the Participant 25% of the RSUs,” if the participant is still at GFI on the date of the distributions (NYSCEF 5, ¶ 3.1). GFI “shall determine the date of the distribution of the applicable RSUs . . . in its sole and complete discretion” (*id.*). “If the Participant becomes entitled to a distribution” of RSUs, he or she shall receive one share of GFI stock for each RSU (*id.*, ¶ 3.2).

The Award Agreement states that distributions “shall” be made, “during” the year that ends on the anniversary date. If, as GFI claims, the anniversary dates are when the RSUs vest, distributions must be made before the vesting dates. For instance, the first anniversary was on February 28, 2019. Between February 28, 2018, which is the Eligibility Date, and the first anniversary date, there was to be the first distribution of 25% of the RSUs. The second distribution was to come between the first anniversary date and the second anniversary date of February 28, 2020, and so on. Thus, according to GFI’s interpretation of the agreement, the RSUs are to be distributed before they vest.

The usual practice is for vested benefits to be distributed after they vest. Of course, GFI had the authority to distribute the RSUs at any time, including on the day before the anniversary date or on the anniversary date itself. But this possibility does not definitively establish that the

RSUs vested on the anniversary dates. The title of section 3.1, containing the words “vesting and payment,” gives the impression that first vesting occurs, followed by payment. That interpretation lends credence to Bernardini’s argument that the RSUs vested on the Eligibility Date. However, the Award Agreement states that the employee must be employed on the distribution dates in order to receive distributions, and Bernardini was present only on the first anniversary date.

Under the Plan, upon the sale of GFI, the RSUs were replaced with a “cash incentive program” that preserved the value of the RSUs, “with subsequent payment of cash incentives subject to the same vesting conditions as applicable to the [RSUs] so replaced and payment to be made within thirty (30) days of the applicable vesting date”. This provision changes the distribution dates as found in the Award Agreement, but does not clearly state the date(s) that the RSUs vested.

Under the Award Agreement, if the participant's employment terminates for any reason after the Eligibility Date and “prior to the settlement of all [RSUs] granted hereunder, the unsettled [RSUs] . . . shall immediately be cancelled and the Participant . . . shall forfeit any rights or interests in” the RSUs unless GFI “determines, in its sole and absolute discretion, that the Participant is a Good Leaver” (NYSCEF 5, ¶ 5.3). “In the absence of an affirmative decision by the Company, the Participant will not be treated as a Good Leaver upon” termination of employment (*id.*, ¶ 5.4). The complaint and Bernardini’s opposition to the motion are silent on the Good Leaver question.

The interpretation of the Award Agreement’s provision on termination depends on when the RSUs vest and whether “settle” means vest or distribute. If settle means vest, then the RSUs vest at different times. That supports GFI’s argument.

Under the Plan, “[E]xcept as provided . . . in an Award Agreement . . .,” if a participant’s employment is terminated for any reason before “such Participant’s RSUs have been settled, (a) all vesting with respect to such Participant’s RSUs shall cease, (b) each of such Participant’s outstanding unvested RSUs shall be forfeited for no consideration as of the date of such Termination, and (c) any shares remaining undelivered with respect to vested RSUs then held by such Participant shall be delivered on the delivery date or dates specified in the Award Agreement” (*id.*, ¶ 6.10). This provision indicates that all the RSUs do not vest at the same time, that RSUs can be vested and as yet undelivered, and that vest and settle have different meanings. Settle seems to mean distribute or pay. The Plan takes precedence over the Award Agreement. However, here, the Plan defers to the Award Agreement’s provision on termination, the meaning of which is not clear.

GFI has not shown that the contract claim should be dismissed. For that to happen, the contracts would have to clearly provide that only one quarter of the RSUs vested on the first anniversary date and that Bernardini forfeited the rest of the RSUs by leaving his employment before they vested. It is not yet clear when the RSUs and the corresponding cash payments vested and whether Bernardini remained entitled to them after leaving GFI. The court does not make any definitive finding on the construction of the agreements and determines only that GFI has not shown that dismissal is warranted.

Labor Law § 193

Bernardini also alleges a claim under Labor Law § 193 which prohibits unauthorized deductions from wages. The statute embodies New York's “long standing policy against the forfeiture of earned wages” (*Mirchel v RMJ Sec. Corp.*, 205 AD2d 388, 389 [1st Dept 1994][internal quotation marks and citation omitted]). The prohibition against deductions has

been interpreted as referring only to deductions from wages (*Matter of Hudacs v Frito-Lay, Inc.*, 90 NY2d 342, 348 [1997]). The definition of wages at Labor Law § 190 [1] does not encompass incentive compensation plans (*Matter of Dean Witter Reynolds v Ross*, 75 AD2d 373, 381 [1st Dept 1980]). GFI argues that the unvested RSUs and the corresponding payments constitute part of an incentive compensation plan and do not qualify as wages under the Labor Law.

Generally, bonuses and other forms of incentive compensation that are based on factors outside the scope of the employee's actual work and are dependent, at least in part, on the financial success of the employer, are excluded from the definition of wages under the Labor Law (*Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 224 [2000], *affg* 268 AD2d 648 [3d Dept]; *see also Bader v Wells Fargo Home Mtge., Inc.*, 773 F Supp 2d 397, 416 [SD NY 2011]; *Gunthel v Deutsche Bank AG*, 32 AD3d 335, 337 [1st Dept 2006]). The Labor Law, in linking earnings to labor or service, contemplates a more direct relationship between the employee's own performance and the compensation to which he or she is entitled (*Ryan v Kellogg Partners Inst. Servs.*, 19 NY3d 1, 16 [2012]).

GFI points out that the Award Agreement provides that one RSU is equal in value to one share in GFI. Thus, GFI argues, the value of the RSUs are dependent on GFI's overall success and not on Bernardini's efforts, and the RSUs constitute incentive compensation.

Bernardini argues that the dispositive factor in determining whether compensation constitutes wages is whether the compensation is vested and mandatory as opposed to discretionary and forfeitable (*Truelove*, 268 AD2d at 649; *Caruso v Allnet Communication Servs.*, 242 AD2d 484, 484-485 [1st Dept 1997]). “[T]he term wages does not include bonus, profit-sharing, and other forms of incentive compensation unless the incentive compensation is already ‘earned’ by the employee” (*Koss v Wackenhut Corp.*, 704 F Supp 2d 362, 369 [SD NY

2010], quoting *Aledia v HSH Nordbank AG*, 2009 WL 855951, at *2 [SD NY 2009]). Incentive pay is not a wage until it is earned and vested (*Reilly v Natwest Markets Grp. Inc.*, 181 F3d 253, 264 [2d Cir 1999]). Incentive compensation can become vested or earned by agreement or when an employer otherwise awards a specified amount of compensation to the employee (*Truelove*, 95 NY2d at 223–24; *Mirchel*, 205 AD2d at 389–90).

The Plan specifies a definite sum to which Bernardini is entitled, the RSUs multiplied by \$6.10. According to the Tender Offer Agreement, the dollar figure is based on the value of GFI’s stock. Nonetheless, it is a specified amount, and the complaint alleges that GFI promised Bernardini that amount.

To assert a statutory claim for wages under the Labor Law, an employee must have a contractual right to those wages (*Tierney v Capricorn Invs.*, 189 AD2d 629, 632 [1st Dept 1993]). The complaint plausibly alleges that under the agreements all the RSUs vested in Bernardini before he was terminated. GFI has not shown that the RSUs did not vest.

CONCLUSION

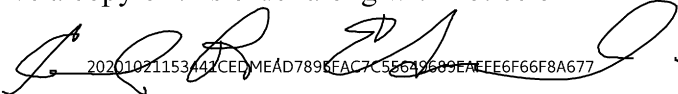
Accordingly, it is hereby

ORDERED that defendant’s motion to dismiss the complaint is denied; and it is hereby

ORDERED that defendant shall answer the complaint within fourteen days of receiving this decision with notice of entry; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.


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<u>10/21/2020</u> DATE					<u>CAROL R. EDMEAD, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE