SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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MATTHEW MIMIAGA,

Plaintiff,

- v -

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Defendant.

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INDEX NO. 160491/2018

MOTION DATE 12/21/2018

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, and 20,

were read on this motion to DISMISS AND CROSS-MOTION TO AMEND.

Upon the foregoing documents, the motion of defendant Trustees of Columbia University in the City of New York to dismiss the complaint is denied, and the cross-motion of plaintiff Matthew Mimiaga for leave to file and serve an amended complaint is granted, in accord with the following memorandum decision.

Background

This action for breach of contract arises from a purported offer of employment from defendant Trustees of Columbia University in the City of New York ("Columbia") to plaintiff Matthew J. Mimiaga. As pled in the complaint, plaintiff is a tenured member of the faculty of Brown University, holding the title of "Professor" in: (i) the Department of Behavioral and Social Sciences, Brown University School of Public Health; (ii) the Department of Epidemiology, Brown University of Public Health; and (iii) the Department of Psychiatry and Human Behavior, Brown University, Alpert Medical School (Complaint [NYSCEF Doc. No. 1]

¶ 5). On September 22, 2017, Dr. Mimiaga (as he is referred to in the complaint) was contacted by Dr. Charles C. Branas, Professor and Chairman of the Department of Epidemiology in Columbia University's Mailman School of Public Health (the "Department"), about an opportunity to join Columbia's faculty as a full-time tenured "Professor," leading Columbia's effort to establish a new center for global health equity (*id.* ¶ 7). Over the next twelve months, Dr. Mimiaga spent a considerable amount of time and effort meeting, speaking, and corresponding with Dr. Branas and other members of Columbia's faculty and administration, all with an eye toward full-time employment (*id.* ¶ 8). In March 2018, Dr. Branas extended an offer to Dr. Mimiaga to join the Department (*id.* ¶ 9). They then spent the next several months discussing and negotiating the terms of Dr. Mimiaga's compensation and other terms relevant to his relocation to New York City and the transfer of his research to Columbia (*id.* ¶ 10).

In mid-May 2018, Dr. Branas sent Dr. Mimiaga a draft term sheet with terms for his potential employment, and on June 24, 2018, Dr. Branas sent a letter to Dr. Mimiaga, which the complaint casts as "an offer letter containing the essential terms and conditions of [Dr. Mimiaga's] Columbia employment" (*id.* ¶ 11). Columbia's counsel, on the other hand, casts that letter, not an offer of employment; but rather, as a "draft offer of employment letter" (Gigante Aff. [NYSCEF Doc. No. 5] ¶ 5). That June 24, 2018, letter,[1] as submitted by Columbia (NYSCEF Doc. No. 7), bears a "Draft" watermark across each page. The letter describes the terms of an offer of employment to Dr. Mimiaga for "a faculty position as a Professor of Epidemiology in the Department of Epidemiology at the Columbia University Mailman School of Public Health" (*id.*). Among other things, the letter indicates a start date of March 1, 2019; annual compensation of $260,000; a $500,000 "discretionary fund to support pilot research

[1] Although the letter bears no date on its face, Columbia's counsel informs that it was sent to Dr. Mimiaga on June 24, 2018 (*see*, NYSCEF Doc. No. 5 ¶ 5).

projects"; up to $15,000 in moving costs; office space in the Department; and off-campus research space to be leased by Columbia for Dr. Mimiaga's use (*id.*). The letter asks that Dr. Mimiaga "make a decision about this offer and convey that decision to [Dr. Branas] within three weeks" (*id.*).

On June 25, 2018, Dr. Mimiaga sent an email to Dr. Branas that states, "[t]hank you very much for sending me the draft offer letter! I am ecstatic about this incredible opportunity to join the faculty within the Department of Epidemiology at the Mailman School under your leadership. Please find my follow-up response letter and supporting documents attached" (NYSCEF Doc. No. 16). A letter was attached to the June 25, 2018, email that reiterates the language of the email and continues, "I have read through the draft offer letter several times and really believe that we are coming very close in our negotiations for me to sign an offer letter. However, there are some individual items that I am eager to discuss with you first. I will bullet point these below and look forward to discussing these requests (as a 'package') with you soon" (*see*, NYSCEF Doc. No. 5 ¶ 6; NYSCEF Doc. No. 8). This is followed by several bullet points with questions regarding the terms of Dr. Mimiaga's potential employment including, among other things, salary, moving expenses, office and research space, and start date (NYSCEF Doc. No. 8).

On July 5, 2018, Dr. Mimiaga and Dr. Branas exchanged a series of emails regarding the terms set forth in the June 24, 2018, letter (*see*, NYSCEF Doc. No. 16). Among other responses to Dr. Mimiaga's inquiries, Dr. Branas responded that Columbia "can increase the moving expenses to $20,000 as indicated in the original draft term sheet" (*id.* at 1/11 ¶ 3). In a responsive email, Dr. Mimiaga expressed his gratitude for Dr. Branas' responses, and inquired whether Dr. Branas would be sending him a revised offer letter and whether Dr. Branas would

require a response within three weeks of the original June 24, 2018, letter or within three weeks from his receipt of a new revised offer letter (*see, id.*). On July 6, 2018, Dr. Branas responded with a brief email that reads, "Why don't you take what time you need and think through the points below and get back to me when you're ready" (*id.*). The complaint alleges that on July 13, 2018, Dr. Mimiaga signed the offer letter and communicated to Columbia that he wanted to move forward with the next steps in the process toward formally joining the Columbia faculty (*see*, Complaint [NYSCEF Doc. No. 1] ¶ 12). The complaint further alleges that Dr. Mimiaga communicated this to Dr. Branas in a July 19, 2018, telephone call and further communicated "in three separate emails to Dr. Branas, Dean Linda Fried, as well as other senior administrators, including President Bollinger, Provost Coatsworth, and Executive Vice President Goldman that he had accepted the offer of employment" (*id.*, ¶¶ 12-13).

On November 12, 2018, Dr. Mimiaga commenced this action on the theory that he accepted a binding offer of employment from Columbia, which established an enforceable employment agreement; but that Columbia breached by ultimately refusing to employ him, causing him "substantial financial injuries" (Complaint [NYSCEF Doc. No. 1] ¶¶ 14-15). Columbia now moves to dismiss the complaint on the ground that Dr. Mimiaga's June 25, 2018, letter constituted a counteroffer that extinguished Dr. Mimiaga's right to later accept any alleged prior offer of employment extended by Columbia. Columbia also posits that its June 24, 2018, letter was, actually *not* a binding offer of employment (*see*, Defendant's Mem. [NYSCEF Doc. No. 4 at 7 n 3). Dr. Mimiaga opposes the motion to dismiss, maintaining that Columbia's June 24, 2018, letter was a binding offer of employment, and that his responsive June 25, 2018, letter was not by any means a counteroffer; but simply, a request for clarification of the definite terms set forth in Columbia's June 24th offer of employment. Moreover, Dr. Mimiaga maintains that

even if his June 25th letter *was* a counteroffer, Columbia reaffirmed its original June 24th offer by virtue of Dr. Branas' July 6, 2018, email communication affording Dr. Mimiaga some luxury of time in deciding whether to accept Columbia's terms which, as alleged in the complaint, were ultimately accepted by Dr. Mimiaga.

Dr. Mimiaga's opposition is accompanied by his cross-motion to amend the complaint to include additional factual detail regarding his June 25, 2018, letter and other relevant communications between the parties, as alleged in the proposed amended complaint (NYSCEF Doc. No. 15).

Standard of Review

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*see, JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002][internal citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied sub nom Spiegel v Rowland*, 552 US 1257 [2008]) and "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions

that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

Dismissal under CPLR 3211 (a) (1) is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002]). "To be considered 'documentary' under CPLR 3211 (a) (1), evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010] [internal citation omitted]). In effect, "the paper's content must be 'essentially undeniable and . . . assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [internal citation omitted]). Affidavits and deposition testimony do not qualify as documentary evidence for the purposes of CPLR 3211 (a) (1) (*Lowenstern v Sherman Sq. Realty Corp*., 143 AD3d 562 [1st Dept 2016]; *Correa v Orient-Express Hotels, Inc*., 84 AD3d 651 [1st Dept 2011]), but judicial records, mortgages, deeds and contracts (*Fontanetta*, 73 AD3d at 84), and email and letter correspondence (*Kolchins v Evolution Markets, Inc*., 31 NY3d 100 [2018]) may be considered.

Discussion

Under New York law, to establish the existence of an enforceable contract, a plaintiff must demonstrate the existence of an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (*Kowalchuk v Stroup*, 61 AD3d 118 [1st Dept 2009]). "In considering whether a binding contract exists, the first step is to determine whether there is a sufficiently definite offer such that its unequivocal acceptance will give rise to an enforceable contract" (*Kolchins*, 31 NY3d at 107). To determine whether the course of conduct and communications

between the parties have created a legally enforceable contract, the court must "look to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds. In doing so, disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain" (*id.* [internal quotations and citations omitted]). "While the courts are charged with interpreting written instruments, where a finding of whether an intent to contract is dependent on other evidence from which differing inferences may be drawn, a question of fact arises" (*id.* [internal quotations and citations omitted]).

Defendant argues that its June 24, 2018, letter was not a binding offer of employment. Here, the alleged offer letter is marked "Draft," but it nonetheless sets forth all of the essential terms of an offer of employment and asks that plaintiff "make a decision about this offer and convey that decision to [defendant] within three weeks" (NYSCEF Doc. No. 7 at 1). Additionally, there is the subsequent July 2018 correspondence between the parties, wherein Dr. Branas thanks Dr. Mimiaga "for continuing to consider our offer" and advises him to "take what time you need and think though the points below and get back to me when you're ready" (NYSCEF Doc. No. 16 at 1/11, 2/11). Dr. Branas' statements, coupled with the definite terms of employment set forth in his July 24th letter, setting forth the discrete time frame and manner for acceptance of the offer, supports an inference that that letter *was* a binding offer. On a motion to dismiss, where the plaintiff must be afforded every reasonable inference, this is sufficient to withstand defendant's motion to dismiss premised on the stated ground that there was no offer.

Once a definite offer of contract has been made, "[t]o enter into a contract, a party must clearly and unequivocally accept the offeror's terms" (*Thor Properties, LLC v Willspring*

Holdings, LLC, 118 AD3d 505, 507 [1st Dept 2014]). "If instead the offeree responds by conditioning acceptance on new or modified terms, that response constitutes both a rejection and a counteroffer which extinguishes the initial offer" (*id.*). "The counteroffer extinguishes the original offer, and thereafter the offeree cannot . . . unilaterally revive the offer by accepting it" (*id.*). Citing to *Thor Properties*, *supra*, and similar case law, defendant moves to dismiss on the ground that plaintiff's June 25, 2018, letter constituted a counteroffer and rejection of defendant's June 24th offer of employment, insofar as its June 24th letter could be viewed as an offer. However, *Thor Properties* and the other cases cited by defendant address circumstances where an offeree responded to an offer of contract with an acceptance that was qualified or conditioned on additional or modified terms. Here, by contrast, plaintiff's June 25th letter does not condition acceptance on additional or modified terms; nor does it convey plaintiff's acceptance of the offer at all. Instead, plaintiff deferred decision regarding the offer, and sought additional information regarding the offer, stating "I . . . believe that we are coming very close in our negotiations for me to sign an offer letter. However, there are some residual items that I am eager to discuss with you first. . . . I am writing to better understand the following gaps in terms of what I had thought we agreed to" (NYSCEF Doc. No. 8 at 1). Then, in itemized form, plaintiff's June 25th letter proffers several inquiries regarding the terms of the offer in relation to the prior negotiations between the parties, stating several times "it was my understanding that you agreed to this request" (*id.*). That letter does not contain any language that conditions plaintiff's acceptance of the offer on any of the points raised; but rather, it seeks further information regarding the terms of the offer and expresses gratitude and excitement regarding defendant's offer. It is not unusual for a party to seek clarification or additional information regarding the terms of an offer, and such an inquiry should not be confused with a counteroffer if

it does not condition acceptance on new or modified terms. Accordingly, it is the finding of this court that plaintiff's June 25, 2018, letter was not a counteroffer and did not extinguish the original offer as found in defendant's June 24th letter.

Furthermore, in his July 5, 2018, email, Dr. Branas represented that Columbia "can increase the moving expenses to $20,000 as indicated in the original draft term sheet" (NYSCEF Doc. No. 16 at 1/11); offered explanations regarding the terms of employment set forth in the June 24, 2018, letter (*see, id.*); and concluded "[t]hanks for continuing to consider our offer" (*id.*, at 2/11). The complaint alleges that plaintiff then accepted the offer, not by way of his June 25, 2018, letter, but by way of separate communications made to defendant on July 13 and 19, 2018, and thereafter (*see,* Complaint [NYSCEF Doc. No. 1] ¶¶ 12-13). Acceptance in this manner comports with the method of acceptance prescribed in defendant's June 24, 2018, letter, which requested, "We ask that you make a decision about this offer and convey that decision to me within three weeks" (NYSCEF Doc. No. 7 at 1). The June 24th offer letter does not indicate that acceptance of the offer must be made in writing, and there is no evidence before the court that indicates the parties did not intend to be bound until the agreement was reduced to a final writing and signed by both parties (*see*, *Kolchins*, 31 NY3d at 107). Upon these facts, a reasonable fact-finder could conclude that, even if the June 25, 2018, letter was a counteroffer, the parties later reached an agreement to be bound by the terms set forth in the June 24, 2018, letter, with an increased moving cost of $20,000. On a pre-answer motion to dismiss, where the court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference, this is sufficient to withstand dismissal on the various grounds suggested by defendant (*see, Kolchins*, 31 NY3d at 107 [affirming denial of employer's motion

to dismiss where, "based on all the documentary evidence proffered by defendant, a reasonable factfinder could determine that a binding contract was formed"]).

Plaintiff's cross-motion to amend the complaint in order to include additional factual allegations regarding his June 25, 2018, letter and other relevant communications between the parties is granted. Leave to amend a pleading "should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Y.A. v Conair Corp.*, 154 AD3d 611, 612 [2017]). Because these communications are relevant to plaintiff's breach of contract claim, such amendment is not palpably insufficient or patently devoid of merit, and the court perceives of no undue prejudice that would befall defendant as a result of the proposed amendment.

Accordingly, it is

ORDERED that the motion of defendant Trustees of Columbia University in the City of New York to dismiss the complaint is denied; and it is further

ORDERED that the cross-motion of plaintiff Matthew Mimiaga for leave to file and serve an amended complaint is granted, and the amended complaint in the proposed form annexed to the moving papers (NYSCEF Doc. No. 15) is hereby deemed served and filed in this action; and it is further

ORDERED that defendant Trustees of Columbia University in the City of New York, through its counsel, shall serve an answer to the amended complaint, or otherwise respond thereto, if said defendant desires to do so, within twenty days from the date of electronic service and filing hereof by plaintiff Matthew Mimiaga through his counsel; and it is further

ORDERED that counsel for the parties are directed to appear for a telephonic preliminary conference on November 12, 2020, at 2:00 p.m. Plaintiff herein is directed to arrange a

conference call for the preliminary conference and circulate the dial-in information to defendant herein and to the court by contacting the Clerk of this Part (Part 38) at rwoody @ nycourts.gov no later than 48 hours before the above-scheduled date and time of the conference.

This shall constitute the decision and order of the court.

ENTER:

Louis L. Nock

10/28/2020
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE