

Ramirez v Moab Capital Partners, LLC
2022 NY Slip Op 31004(U)
March 25, 2022
Supreme Court, New York County
Docket Number: Index No. 657318/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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OMARI RAMIREZ		INDEX NO. <u>657318/2020</u>
Plaintiff,		MOTION DATE <u>02/01/2021</u>
- v -		MOTION SEQ. NO. <u>001</u>
MOAB CAPITAL PARTNERS, LLC,		
Defendant.		DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 22, 24, 25, 26, 27

were read on this motion to/for DISMISS.

Upon the foregoing documents and for the reasons set forth on the record (3.28.22), Moab Capital Partners, LLC's (**Moab**) motion to dismiss pursuant to CPLR 3211(a)(1) and (7) must be denied because whether Mr. Ramirez emails indicating merely "[g]ot it. Thank you very, very much. I really appreciate that" in response to Moab paying him \$85,000 and indicating that any losses from 2018 would not be held against him as to future compensation constituted a waiver of his alleged right to additional bonus is a factual issue which can not be decided at this stage of the proceeding on the record before the Court (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.*, 7 NY3d 96, 104 [2006]).

THE RELEVANT FACTS AND CIRCUMSTANCES

Reference is made to a letter agreement (**Employment Agreement**; NYSCEF Doc. No. 22), dated August 25, 2017, by and between Moab, an SEC registered investment advisor and Omari

Ramirez, in which Moab employed Mr. Ramirez. Pursuant to the Employment Agreement, Mr. Ramirez's employment commenced on September 15, 2017 and he was paid a base salary of \$185,000 per year. Pursuant to the Employment Agreement, Mr. Ramirez was also entitled to a bonus:

Bonus: 4.5% of gross profit and loss on your names not reduced for research expenses or cost of capital. This will increase by a minimum of 100bps after two years. Bonus is paid 90% combined over December and January, with option for firm to hold back 10% for one year. For year-end 2017, it will be the greater of the preceding calculation or \$30,000

(NYSCEF Doc. No. 22).

In 2017, Moab realized over \$10.4 million in losses from the accounts Mr. Ramirez managed allegedly due to the US Department of Justice's actions blocking AT&T's acquisition of Time Warner. Notwithstanding such losses, at the end of 2017, and in accordance with the terms of the Employment Agreement, Moab awarded Mr. Ramirez a \$30,000 bonus.

In 2018, Moab realized gains of \$9,085,875.35 from accounts that Mr. Ramirez managed. Based on his performance in 2018, Mr. Ramirez expected his bonus, pursuant to the Employment Agreement to be 4.5% of \$9,085,875.35, or \$408,864.39. When calculating Mr. Ramirez's bonus for 2018, however, Moab charged Mr. Ramirez for the losses incurred in 2017. Mr. Ramirez contests this method of calculating his bonus because the bonus provision of the Employment Agreement does not provide for the carrying forward of losses to count against future bonuses. This appears to be a correct reading of the Employment Agreement. In addition to the fact that there is no language permitting this loss carry forward assertion, it is also antithetical to the

express language of the Employment Agreement which provided that the minimum amount of bonus for 2017 was \$30,000.

On December 21, 2018, Mr. Ramirez met with Michael Rothenberg, Moab's president, and Mr. Rothenberg awarded Mr. Ramirez a bonus of only \$60,000. Mr. Ramirez was not satisfied with this. Mr. Ramirez sought help from Moab's chief financial officer, Chad Goldstein, who informed Mr. Ramirez he would be unable to help.

Subsequently, on December 24, 2018, via Bloomberg Instant Messenger (the **Bloomberg Chat**; NYSCEF Doc. No. 10), Mr. Rothenberg wrote to Mr. Ramirez that he had “[s]poke to chad – he’s going to run another 25k on top of the 60k for your bonus this year. He say expect three checks the base, the 60k and the 25k all in December.” (NYSCEF Doc. No. 10). Mr. Ramirez responded: “[g]ot it. Thank you very, very much. I really appreciate that.” (*id.*). Mr. Rothenberg responded: “[o]bviously ignoring the pnl balance of 2018 which could go either way with shire and egl both sizeable still” and “[y]ou start of[f] 2019 clean.” (*id.*). Mr. Ramirez replied: “[o]k that’s awesome. Thank you, again” (*id.*).

In 2019, Moab realized gains of \$4,865,178.80 from accounts managed by Mr. Ramirez and Mr. Ramirez asserts that under the Employment Agreement he was entitled to a bonus of \$235,150.31 for 2019. On December 31, 2019, Moab exercised its right to hold back 10%, or \$26,636.44, of Mr. Ramirez's bonus for 2019, to be paid by December 31, 2020. Moab terminated Mr. Ramirez's employment on October 31, 2020. Moab unlawfully conditioned the payment of Mr. Ramirez's receipt of the held back portion of his 2019 bonus as well as two

additional months payment as severance on signing a general release agreement. Mr. Ramirez refused to sign the release.

On December 29, 2020, Mr. Ramirez sued asserting (i) breach of contract (first cause of action) and (ii) violation of New York Labor Law § 193 (second cause of action).

On February 1, 2021, Moab filed a motion to dismiss Mr. Ramirez's complaint, pursuant to CPLR 3211(a)(1) and (7).¹

DISCUSSION

A motion to dismiss brought pursuant to CPLR 3211(a)(1) shall only be granted if the documentary evidence presented utterly refutes the plaintiff's claims (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). Contractual rights can be waived by conduct or failure to act which evinces knowing, voluntary and intentional abandonment of contractual rights (*Fundamental Portfolio Advisors, Inc.*, 7 NY3d 96, 104 [2006]). Waiver requires a clear manifestation that the individual intends to relinquish the contractual right which is typically a question of fact (*id.*). To ground a claim based on breach of contract, the plaintiff must allege that a binding contract was breached which injured plaintiff (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]).

Moab's argument that they are entitled to dismissal pursuant to CPLR 3211(a)(1) based on documentary evidence fails. On the record before the court, Moab simply fails to meet its

¹ By letter to the court, dated November 15, 2021, Moab withdrew the branch of its motion to dismiss the New York Labor Law § 193 (second) cause of action (NYSCEF Doc. No. 27).

burden in demonstrating that Mr. Ramirez’s statement of thanks in accepting the \$85,000 bonus constitutes a knowing, voluntary, and intentional abandonment of his contractual right to additional bonus compensation (*Fundamental Portfolio Advisors, Inc.*, 7 NY3d at 104). Stated differently, the record simply does not utterly refute Mr. Ramirez’s claims.

Where the pleadings fail to state a cause of action a party can move to dismiss the cause of action pursuant to CPLR 3211(a)(7). The complaint alleges that pursuant to the bonus provision of the Employment Agreement for Moab’s \$9,085,875.35 2018 gains, Mr. Ramirez is entitled to a bonus of 4.5% or \$408,864.39 for which he was not paid. Taking these allegations as true, this is sufficient to state a claim sounding in breach of contract (*Stonehill Capital Mgt. LLC*, 28 NY3d at 448). Thus, the motion must be denied.

Accordingly, it is

ORDERED that Moab Capital Partners LLC’s motion to dismiss Omari Ramirez’s complaint must be denied.

3/25/2022
DATE

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ANDREW BORROK, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE