SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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THOMAS ZAKRZEWSKI,

Plaintiff,

- against -

Index No.: 650994/2015

LUXOFT USA, INC.,

Defendant.

DECISION AND ORDER

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HON. SALIANN SCARPULLA, J.:

In this action to recover damages for, *inter alia*, breach of contract, defendant Luxoft USA, Inc. ("Luxoft") moves to dismiss plaintiff Thomas Zakrzewski's ("Zakrzewski") complaint, pursuant to CPLR 3211(a)(1) and 3211(a)(7).

Luxoft is a software development company. In late 2012, Luxoft acquired certain assets of the company Freedom OSS ("FOSS"). Zakrzewski was Vice President of Engineering at FOSS. In December of 2012, Zakrzewski was informed that the owner of FOSS Max Yankelevich ("Yankelevich") would be named as Managing Director of Luxoft for North America. Around the same time, Yankelevich and Zakrzewski commenced negotiations for Zakrzewski's terms of employment at Luxoft.

On January 4, 2013, Zakrzewski received an offer of employment from Luxoft, in the form of an email letter. The offer of employment dictated a yearly salary of $250,000, and "additional annual compensation of $50,000 that will be paid based on execution of relevant KPIs [key performance indicators] determined annually in accordance with the current Company policies." The offer letter also indicated that

Zakrzewski's "employment with the Company is for no specified period and constitutes 'at-will' employment," which "means that either you or we may terminate the employment relationship at any time with or without notice or with or without cause."

The email offer letter was sent to Yankelevich, who was instructed to forward it to Zakrzewski, and had the subject "FW: thomas's offer letter." Rather than just forwarding the email to Zakrzewski, Yankelevich added, *inter alia*, the following language: "In addition, you will have the ability to earn up to $250,000 worth of Luxoft's restricted stock, pending successful closing of Freedom's asset purchase by Luxoft and provided you will meet goals that are set by Freedom OSS BU's General Manager."

A week after Zakrzewski accepted the offer, the CEO of Luxoft, Roman Trakhtenberg ("Trakhtenberg"), emailed Zakrzewski, stating "one thing to add to agreement – 3 mo advanced notice, mutual?" According to Zakrzewski, this was an offer of a severance payment of three months' salary, which he accepted in a response email.

In July 2014, Luxoft terminated Zakrzewski's employment without notice. Zakrzewski commenced this action, alleging that Luxoft breached his employment agreement, and owes him a $50,000 bonus, three months' salary due to termination without prior notice, an upward adjustment of salary and bonus for 2014, and $1,735,000 for the value of Luxoft stock that should have been issued to him. He also asserted causes of action for negligent misrepresentation, breach of the implied covenant of good faith and fair dealing, and promissory estoppel.[1]

[1] At oral argument on October 28, 2015, I dismissed the causes of action alleging Labor Law violations, quantum meruit and unjust enrichment, conversion and fraud.

Discussion

Breach of Contract Claim

Luxoft argues that the breach of contract claim must be dismissed because Zakrzewski has not identified a single term of the offer letter that was not performed. Luxoft also argues that because the offer letter was an integrated agreement, Yankelevich's contemporaneous email offer of stock compensation is not binding, and, in any event, Yankelevich lacked the authority to offer the stock.

Zakrzewski argues that Yankelevich's email was contemporaneous with the offer letter, and thus, is part of the agreement. He also argues that Yankelevich had apparent authority to offer the stock on behalf of Luxoft. He further contends that he is entitled to three months' severance pay pursuant to an email agreement with Trakhtenberg. Additionally, Zakrzewski alleges that Luxoft owed him a bonus for 2014, and was required to increase his bonus and salary in 2014, pursuant to an agreement reached in mid-January 2013.

First, Zakrzewski's allegations that he is owed a bonus for 2014, and an increase in salary and bonus for 2014 are without merit.

> "In order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based. The pleadings must be sufficiently particular to give the court and [the] parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved"

Atkinson v. Mobil Oil Corp., 205 A.D.2d 719, 720 (2nd Dept. 1994) (internal quotation marks and citations omitted). Here, Zakrzewski points to no terms in his offer letter, or

subsequent emails, which state that he is guaranteed an upward adjustment in salary and/or bonus for the year 2014. With regard to the 2014 bonus, the offer letter stated only that Zakrzewski would be entitled to its receipt based on the "execution of relevant KPIs determined annually in accordance with current Company policies." Zakrzewski does not state what those KPIs were, and whether the KPIs were executed, and the alleged bonus promise was too indefinite to be enforced. *See generally De Madariaga v Union Bancaire Privée*, 103 A.D.3d 591 (1st Dept. 2013).

Moreover, Zakrzewski has not sufficiently pled that he is entitled to a three-month severance payment. On January 15, 2013, Trakhtenberg emailed Zakrzewski, stating "one thing to add to agreement – 3 mo advanced notice, mutual?" and Zakrzewski claims that he responded yes to that email (but does not submit that email response as an exhibit to his opposition papers). Contrary to Zakrzewski's contention, that email does not state anywhere that Zakrzewski would receive a three-month severance payment in the event that he was not given three-months' notice of termination. Further, the employee handbook and the offer letter clearly state that the employer may terminate the employee's employment without notice or reason, and that any grant of an exception to this policy was required to be in writing and signed by Luxoft's CEO.

Zakrzewski's final claim with respect to his employment contract is that he is entitled to Luxoft stock. Even assuming that the offer letter and email should be read contemporaneously as one agreement, and even assuming that Yankelevich had authority

to offer the stock to Zakrzewski,[2] the alleged promises with regard to the stock as set forth in the email were too indefinite and vague to be enforced. *See De Madariaga v Union Bancaire Privée*, 103 A.D.3d 591 (1st Dept. 2013). The email merely specified that Zakrzewski would have "the ability" to earn "up to" $250,000 worth of stock, provided he would meet "goals" set by FOSS' general manager.

Accordingly, the breach of contract claim is dismissed.

Breach of the Implied Covenant of Good Faith and Fair Dealing Claim

Zakrzewski alleges that Luxoft breached the implied covenant of good faith and fair dealing by failing to set written goals for the issuance of stock, failing to set certain performance indicators, and failing to timely issue stock to him. Luxoft argues that this claim should be dismissed as duplicative of the breach of contract claim.

Both the breach of contract claim and the breach of covenant of good faith and fair dealing claim arise from the same facts and seek identical damages. As such, I dismiss the breach of covenant of good faith and fair dealing claim as duplicative of the breach of contract claim. *See generally Netologic, Inc. v. Goldman Sachs Group, Inc.*, 110 A.D.3d 433, 433–4 (1st Dept. 2013) (internal quotation marks and citation omitted). Further, a claim for breach of the implied covenant of good faith and fair dealing may not be used as a substitute for a nonviable claim of breach of contract. *See Smile Train, Inc. v. Ferris Consulting Corp.*, 117 A.D.3d 629 (1st Dept. 2014).

[2] The issue of whether Yankelevich had actual or apparent authority to offer the stock to Zakrzewski is generally a fact determination, and not appropriate for resolution on a motion dismiss. *Arol Dev. Corp. v. Whitman & Ransom*, 215 A.D.2d 145 (1st Dept. 1995).

Promissory Estoppel and Negligent Misrepresentation Claims

"The elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance." *MatlinPatterson ATA Holdings LLC v. Federal. Express Corp*), 87 A.D.3d 836, 841–2 (1st Dept. 2011). Here, Zakrzewski cannot state a claim for promissory estoppel because any reliance on representations of future intentions, such as the ability to earn a bonus or stock, would be deemed unreasonable as a matter of law given his status as an employee-at-will. *See generally Meyercord v. Curry*, 38 A.D.3d 315 (1st Dept. 2007).

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148 (2007). In addition to satisfying the elements of a cause of action sounding in negligent misrepresentation, "[i]t is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389 (1987). In the allegations relating to this claim in his complaint, Zakrzewski merely references all prior allegations, and inserts language that Zakrzewski relied on Luxoft's statements to his detriment. Zakrzewski has not alleged a breach of any independent duty not found in his breach of contract claim, and thus, his claim for negligent misrepresentation is dismissed. *See OP Solutions, Inc. v. Crowell & Moring, LLP*, 72

A.D.3d 622 (1st Dept. 2010). Further, any reliance on representations of future intentions, such as the ability to earn a bonus or stock, would be deemed unreasonable as a matter of law given his status as an employee-at-will. *See generally Meyercord v. Curry*, 38 A.D.3d 315 (1st Dept. 2007).

In accordance with the foregoing, it is hereby

ORDERED that defendant Luxoft USA, Inc.'s motion to dismiss the complaint is granted, the complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: August 18, 2016

HON. SALIANN SCARPULLA J.S.C.