SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

GOPAL TAMPI

Plaintiff,
-against-

NOMURA AMERICA HOLDINGS, INC., and NOMURA HOLDINGS, INC.,

Defendants.

INDEX NO.	153686/2016
MOTION DATE	12/07//2016
MOTION SEQ. NO.	001
MOTION CAL. NO.	

The following papers, numbered 1 to 10 were read on this motion to dismiss, and cross-motion for leave to amend.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits	5 - 7
Replying Affidavits	8 - 10

Cross-Motion: X Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Nomura America Holdings, Inc.'s, aka Nomura Holdings America, Inc., (herein "NHA") motion to dismiss the Complaint as asserted against it is granted. Plaintiff's cross-motion for leave to amend the Complaint is granted to the extent of adding Nomura Securities International, Inc. (herein "NSI") as a Defendant.

Plaintiff was employed by NSI pursuant to a letter agreement dated June 11, 2010 (herein the "employment letter "). (Mot. Exh. E). Plaintiff commenced this action for breach of contract on May 2, 2016. The Complaint alleges that after his employment was terminated the Defendants breached (1) the Award Agreement by failing to pay him the full value of earned deferred compensation in the form of Collared Notional Stock Units (herein "CSUs") or Notional Indexed Units (herein "NSUs") (collectively herein "Stock Units"), and (2) the severance policy by failing to pay him separation pay.

Although the motion states that NHA is moving to dismiss the Complaint pursuant to CPLR 3211(a)(1), (5), and (7), the arguments appear to be for dismissal against both Defendants.

Defendants assert that NHA is the parent company of NSI, and that Defendant Nomura Holdings, Inc. (herein "NHI"), is the parent company of NHA. That Plaintiff was an employee of NSI, not NHA, that NSI awarded Plaintiff CSUs in the fiscal years ending March 31, 2013 and 2014, and that pursuant to the Stock Unit Award Agreements Plaintiff's right to any Stock Units not yet vested were conditioned on his execution of a general release and waiver of claims. (Mot. Exhs. G and H). That NSI notified Plaintiff his employment was terminated in a letter dated December 16, 2014 (Mot. Exh. K), and that this termination letter included a special lump sum payment of $95,827.00 which was conditioned on Plaintiff signing the Termination Letter releasing any and all claims. That Plaintiff refused to sign the termination letter to provide NSI with the general release, choosing to proceed with arbitration instead, thereby losing the benefit of the Stock Units vesting.

Defendants argue that the doctrine of res judicata precludes the claims in the Complaint because they arise from, and relate to, NSI's termination of Plaintiff's employment, and the monies purportedly due him whether it be in the form of a bonus, deferred stock award, or severance. That Plaintiff could have pursued his claim for the deferred compensation of the Stock Units and the separation pay in the Arbitration, but failed to do so. That Plaintiff does not distinguish between whether NHI or NSI employed him, paid him, awarded him the Stock Units or who terminated him as he only refers to them collectively as Nomura, and that NHA's and NSI's relationship, as a corporate parent and its subsidiary, establishes privity for res judicata purposes thereby invoking the preclusive effect of the Arbitration. Defendants further argue that even if Plaintiff could assert that NHA owes him the Stock Units and the separation pay, he waived his right to such compensation when he refused to provide NSI with the general release, and chose instead to proceed with Arbitration. That Plaintiff had to either sign the Termination Notice and release any claims or preserve his claims and proceed with Arbitration, not both.

Defendants also argue that Plaintiff has failed to state a cause of action against NHA because Plaintiff fails to state any basis for holding NHA liable for NSI's obligations, and that the documentary evidence demonstrates that NHA was not a party to the employment letter with Plaintiff. That Plaintiff does not assert any allegations that NHA and NSI operated as a single economic unit, or that NHA abused the corporate form to affect a fraud or an injustice on Plaintiff warranting piercing the corporate veil. Therefore, NHA argues that the Complaint must be dismissed.

Plaintiff opposes the motion arguing that the causes of action are sufficiently plead, and that NHA provides no documentary evidence to refute Plaintiff's claims. That being required to execute a release is irrelevant since doing so was not a predicate to entitlement of his severance pay or deferred compensation. That the deferred compensation agreement stated Plaintiff may be required to execute a release, but that he was not required to do so. That the termination letter does not apply because Plaintiff did not sign it, and that if it does apply the termination letter

contained a release but explicitly stated the release did not apply to the deferred compensation agreements. That there is no evidence that signing the release was required, or even if required, that the release had to be executed by a certain date in return for the separation pay.

Plaintiff also argues that res judicata is inapplicable because this action involves claims for unpaid severance and unpaid deferred compensation which are totally unrelated to the FINRA arbitration that was for an unpaid bonus claim, and that the deferred compensation claim had not even accrued at the time the FINRA action was filed. That there is no identity of the parties because the current claims are against all three joint employers- NHA, NSI, and NHI- who shared responsibility for the severance plan and deferred compensation plan, and that NHI and NHA were not subject to FINRA's jurisdiction as they are not registered brokers and cannot be a party to its arbitration proceedings. Plaintiff contends that all three Nomura entities participated in creating, promulgating and managing the deferred compensation and severance plans. That, therefore, all three entities are joint employers of Plaintiff and are liable under the severance pay's and deferred compensation's terms. That NHI is cited as the owner and promulgator, and cannot escape liability because a separate Nomura entity made the actual payments.

Under the Doctrine of Res Judicata a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action. Once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or seeking a different remedy (Parker v. Blauvelt Volunteer Fire Co., Inc., 93 N.Y.2d 343, 690 N.Y.S.2d 478, 712 N.E.2d 647 [1999] citing to Matter of Reilly v. Reid, 45 N.Y.2d 24, 407 N.Y.S. 2d 645 [1978]). For res judicata to apply the issue must have been material to the first action or proceeding and essential to the decision rendered therein (Ryan v. New York Telephone Co., 62 N.Y. 2d 494, 478 N.Y.S. 2d 823 [1984]). "Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action" (Amalgamated Bank v Helmsley-Spear, Inc., 109 A.D.3d 418, at 419, 970 N.Y.S.2d 522, at 2 [2013] citing to, Parker v. Blauvelt Volunteer Fire Co., Inc., 93 N.Y.2d 343, 690 N.Y.S.2d 478, 712 N.E.2d 647 [1999]).

Plaintiff pursued arbitration for NSI's failure to pay him his bonus after he was terminated. (Mot. Exh. D). The bonus payment was a provision contained in the employment letter, and was found to be part of the compensation package. (Mot. Exh. N). The arbitration award also noted that NHA was not a member of FINRA, that NHA did not voluntarily submit to arbitration, and that no determination with respect to any of Plaintiff's claims against NHA was being made. (Id.).

The claims in the Complaint pertain to the Stock Unit Award Agreements, and Defendants' severance policy, which were not subjects contained in the employment

letter. Further, NHA and NHI were not parties to the arbitration. Therefore, Plaintiff's claims are not barred by res judicata.

In order to dismiss an action on documentary evidence, the documentary evidence must unequivocally contradict plaintiff's factual allegations and conclusively establish a defense as a matter of law, resolve all factual issues and conclusively dispose of plaintiff's claim (Goshen v. Mutual Life Insurance Company of New York, 98 N.Y.2d 314, 774 N.E.2d 1190, 746 N.Y.S.2d 858 [2002]). "In order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable (Granada Condominium III Assn. v. Palomino, 78 A.D.3d 996, 997, 913 N.Y.S.2d 668 [2nd Dept., 2010] citing to, Fontanetta v. John Doe 1, 73 AD3d 78, 84 [2010]). To qualify as documentary evidence, printed materials "must be unambiguous and of undisputed authenticity" (Fontanetta v. John Doe 1, 73 AD3d 78, 86, 98 N.Y.S.2d 569, 575 [2nd Dept., 2010], see Flushing Sav. Bank, FSB v. Siunykalimi, 94 AD3d 807, 808, 941 N.Y.S.2d 719, 721 [2d Dept., 2012]).

"When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one," and if it is "...shown that a material fact as claimed by the pleader to be one is not a fact at all"... and no significant dispute exists regarding it, dismissal is warranted. (Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 372 N.E.2d 17 [1977]).

The employment letter does not provide any information regarding severance pay, and Defendants do not provide in their motion papers any evidence of its severance policies requiring an employee to provide a release before he or she can receive (1) any separation pay or, (2) any deferred compensation. (Mot. Exh. E). The termination letter does not specifically state that any lump sum payment was for separation pay, only that Plaintiff would be provided a special lump sum payment upon his execution of the termination letter. (Mot. Exh. K). Furthermore, the termination letter explicitly states that it does not apply to any rights for deferred compensation under the Stock Unit Award Agreements. In addition, Plaintiff did not sign the termination letter, and therefore did not agree with its terms with respect to receiving any lump sum payment. (Id.).

Defendants argue for the first time in reply that Plaintiff acknowledged receipt of Nomura's employee handbook, and that section 7.4.3 of the handbook provides that upon signing a general release, Plaintiff may be provided with transitional compensation, and that this severance is at Nomura's discretion. (Reply Exhs. A & B). New arguments raised for the first time in reply papers, deprive the opposing party of an opportunity to respond, and are not properly made before the Court (Ambac Assur. Corp. v. DLJ Mtge. Capital Inc., 92 A.D. 3d 451, 939 N.y.S. 2d 333 [1st Dept.,2012] and Chavez v. Bancker Const. Corp., Inc., 272 A.D. 2d 429, 708 N.Y.S. 2d 325 [2nd Dept., 2000]). .

The Stock Unit Award Agreements do, however, explicitly state that "...the continued vesting of the Participant's interest in his or her NSUs in any of the

circumstances permitted under this Section 5(b) shall be expressly conditioned on the Participant's execution of any general waiver and release of claims in such form as may be required by the Employer, the Company and/or any Related Entity." (Mot. Exhs. G, H, I, and J Section 5(b)(v)). However, other than the termination letter- which Plaintiff did not sign- Defendant does not provide any evidence that it required Plaintiff to sign a release with regard to the Stock Unit Award Agreements, and the termination letter specifically states that it did not encompass the deferred compensation pursuant to the Stock Unit Award Agreements. (Mot. Exh. K). Therefore, Defendants have not stated a basis to dismiss Plaintiff's claims of entitlement to severance pay, or payments under the Stock Unit Award Agreements.

However, Defendants' do state a basis to dismiss NHA from the action. The Stock Unit Award Agreements name NHI (Mot. Exhs. G, H, I, & J), and the letter of employment names NSI (Mot. Exh. E). Nowhere in these documents is NHA listed as a party to those agreements. Furthermore, NHA provides a copy of its Certificate of Incorporation showing that it is its own distinct legal entity. (Mot. Exh. A). Plaintiff does not provide any arguments to require piercing of the corporate veil, only a conclusory argument that NSI, NHA, and NHI were joint employers of Plaintiff. Therefore, the Complaint must be dismissed as against NHA.

Plaintiff cross-moves for leave to amend the Complaint. Plaintiff seeks to add NSI as a defendant, to correct the spelling of NHA's name from Nomura America Holdings, Inc. to Nomura Holdings America, Inc., and to add limited allegations regarding the joint employer status of the three entities.

Leave to amend pleadings pursuant to CPLR § 3025(b) should be freely given "absent prejudice or surprise resulting directly from the delay" (Anoun v. City of New York, 85 A.D.3d 694, 926 N.Y.S.2d 98, 99 [1st Dept., 2011]), "or if the proposed amendment is palpably improper or insufficient as a matter of law" (McGhee v. Odell, 96 A.D.3d 449, 450, 946 N.Y.S.2d 134, 135, [1st. Dept., 2012]).

Plaintiff provides a copy of the Amended Complaint. (Cross-Mot. Exh. B). The Amended Complaint is not palpably improper, and is not insufficient as a matter of law. Therefore, Plaintiff's cross-motion for leave to amend the Complaint is granted to the extent of adding NSI as a Defendant.

ACCORDINGLY, it is ORDERED, that Defendant Nomura America Holdings, Inc.'s, aka Nomura Holdings America, Inc.'s, motion to dismiss the Complaint as asserted against it, is granted, and it is further,

ORDERED, that the Complaint is dismissed as against Defendant Nomura America Holdings, Inc., aka Nomura Holdings America, Inc., only, and it is further,

ORDERED, that Plaintiff's motion for leave to amend the Complaint is granted to the extent of adding Nomura Securities, Inc. as a Defendant, and it is further,

ORDERED, that the pleadings are amended as reflected in the proposed Amended Complaint annexed to Plaintiff's cross-motion as Exhibit B, and it is further,

ORDERED, that the caption is amended and the action shall bear the following caption:

GOPAL TAMPI,
Plaintiff,
-against-

NOMURA HOLDINGS, INC., and
NOMURA SECURITIES, INC.,
Defendants.

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and it is further,

ORDERED, that within 20 days from the date of entry of this Order a copy of this Order with Notice of Entry shall be served on all parties, and it is further,

ORDERED, that the pleadings as amended in the proposed Amended Complaint annexed to Plaintiff's cross-motion as Exhibit B shall be deemed served upon Defendant Nomura Holdings, Inc., upon service on its attorneys of a copy of the pleadings together with a copy of this Order with Notice of Entry and it is further,

ORDERED, that Defendant Nomura Holdings, Inc. shall serve an Answer to the Amended Complaint within 30 days of service, and it is further,

ORDERED, that Plaintiff shall serve Defendant Nomura Securities, Inc. with a copy of the Amended Complaint in accordance with the CPLR within 30 days of Entry of this Order, and it is further,

ORDERED, that within 20 days from the date of entry of this Order a copy of this Order with Notice of Entry shall be served on the New York County Clerk's Office pursuant to e-filing protocol, and a separate copy of this Order with Notice of Entry shall be served pursuant to e-filing protocol on the Trial Support Clerk in the General Clerk's Office at genclerk-ords-non-mot@nycourts.gov, who shall amend their records and enter judgment accordingly.

ENTER: MANUEL J. MENDEZ J.S.C.

Dated: January 30, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**