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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

MEYER KATTAN, M.D.

- v -

THE MOUNT SINAI HOSPITAL, et al.

INDEX NO. 105225/11

MOTION DATE 9.15.11

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (a)(7) is denied; and it is further

ORDERED that defendants serve and file their Answer within 20 days; and it is further

ORDERED that the parties appear before Justice Carol R. Edmead, Part 35, 60 Centre Street, Room 438, for a preliminary conference on January 17, 2012, 2:15 p.m.; and it is further

ORDERED that defendants e-file and serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 10.5.11

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

MEYER KATTAN, M.D.,

Index No. 105225/2011

Plaintiff,

v.

THE MOUNT SINAI HOSITAL, THE MOUNT SINAI SCHOOL OF MEDICINE and JOHN DOES 1-99,

Defendants.

----------X

HON. CAROL. R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for, *inter alia*, breach of contract, defendants The Mount Sinai Hospital (the "Hospital'), The Mount Sinai School of Medicine (the "School of Medicine') and John Does 1-99 (the "Doe Defendants") (collectively, "defendants") move to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (a)(7) based on documentary evidence and failure to state a cause of action.

Factual Background

Plaintiff, a doctor, alleges that he was employed as a Pediatric Pulmonologist for the Hospital and the School of Medicine for almost 30 years from July of 1978 until his resignation in June of 2007. He never entered into a written employment contract with either defendant. Instead, the Hospital and the School of Medicine "orally offered" him compensation in the form of a base salary and supplemental salary. Plaintiff's base salary was determined by the Hospital and School of Medicine Pulmonary department funds and grant funding. The annual National Institute of Health ("NIH") salary cap functioned to determine how much of the plaintiff's Base Salary would be attributable to NIH grant funding, whereas plaintiff's supplement was

determined by patient receipts.

Even though the NIH salary cap and plaintiff's individual grants increased between 2005 and 2007, plaintiff's Base Salary remained the same during that period. And, even though the total patient receipts increased on an average of 5.50% per year between 2004 and 2007, plaintiff's supplemental salary decreased during that period. When plaintiff inquired of the Chairman of his department, Dr. Fredrick Suchy ("Suchy"), as to the alleged discrepancies, Suchy claimed that the Hospital and the School of Medicine would create a new compensation plan to increase, reimburse and adequately compensate plaintiff for his work in the Hospital and the School of Medicine (the "Total Compensation Shortfall"). Suchy explained that plaintiff's department had lost a physician in 2006 and that the absent physician's salary would allow the Hospital and the School of Medicine to reimburse and increase plaintiff's compensation to plaintiff for the Total Compensation Shortfall, in the amount of $61,349.00. Plaintiff was never paid the Total Compensation Shortfall.

In addition to plaintiff's Total Compensation, the Hospital and the School of Medicine also agreed to pay plaintiff for additional work that he performed during a two-week period in the Pediatric ICU during calendar year 2006. However, plaintiff was never compensated for this additional work (the "Unpaid ICU Compensation"), which amounts to $13,650.00.

From 2005 to 2007, plaintiff sought to recoup the Total Compensation Shortfall and Unpaid ICU Compensation to no avail.

Thus, in plaintiff's first cause of action, plaintiff alleges a claim for breach of the 1978 oral contract, in that (1) the parties agreed that plaintiff's (i) Base Salary would increase if department funds and the NIH Salary Cap allowed for such increases and (ii) Supplemental

Salary would increase if patient receipts increased, (2) plaintiff performed his duties, and (3) defendants breached the contract by decreasing his salary without explanation even though there was an increase in the NIH Salary Cap and patient receipts. Plaintiff also claims that defendants breached the "written" agreement, by failing to pay him for additional work he performed in the Pediatric ICU during a two-week period in 2006.

In his second cause of action for promissory estoppel, plaintiff alleges that (1) defendants made a clear and unambiguous promise to pay plaintiff if he performed additional work in the Pediatric ICU over a two-week period in 2006, and (2) plaintiff reasonably relied upon defendants' promise to his detriment because he worked for such two-week period and was not paid accordingly. Plaintiff seeks $74,999.00 in damages, plus attorneys' fees and costs.

In support of dismissal, defendants argue that the breach of contract claim should be dismissed because plaintiff failed to allege facts that would establish any contractual obligation to pay him any particular compensation during his employment. While plaintiff alleges that he entered into an oral employment contract in 1978 that was "renegotiated by the parties annually," he alleges no offer and acceptance, does not specify terms of the alleged oral contract, and in no other respect alleges the elements of a contract. A communication is not construed as an offer unless it is clear that a commitment has been made. Also, allegations are too vague and indefinite as to the terms to establish the existence of a contractual obligation by defendants to pay plaintiff any particular salary. Plaintiff does not claim that a specific amount of compensation was agreed to.

As to the alleged written agreement to pay plaintiff for his work in the Pediatric ICU, plaintiff fails to specify terms of the alleged written contract and in no other respect alleges the

elements of a contract. Further, documentary evidence such as emails from Suchy to plaintiff indicating that Suchy would "look" into plaintiff's request for the additional compensation, and that plaintiff's "actual incremental coverage" in the Pediatric ICU "amounted to a matter of days," which was "far less than others did who were not compensated" demonstrates that there was no meeting of the minds regarding the terms of any compensation for work plaintiff performed.

Defendants also argue that plaintiff's claims are barred by the doctrine of laches. Plaintiff delayed at least six years before taking action despite the fact that he had raised the issues internally before he resigned. His unexcused delay has caused prejudice to defendants in that with the passage of time it is likely that documents such as emails, would have been lost, and that memories of what occurred will have faded. Further, key witnesses who previously worked for the Hospital are no longer employed there and therefore are not available to assist in the defense. For example, Suchy has moved out of the state and therefore could not be compelled to testify at a trial.

In opposition, plaintiff argues that the Complaint alleges an agreement between plaintiff and defendants with respect to the Total Compensation Shortfall because, as alleged, each year between 1978 and 2007, defendants offered plaintiff a Total Compensation in the form of Base Salary and Supplemental Salary, which plaintiff accepted as evidenced by the continued performance of his duties as a Pediatric Pulmonologist. Further, emails between the parties demonstrate that a conditional agreement had been made between plaintiff and defendants regarding plaintiff's Total Compensation between 2005 and 2007, in that plaintiff accepted the Total Compensation offered during a June 2005 meeting and a June 2006 meeting based on the

condition that his Total Compensation would be increased given the errors in the grant funding and patient receipt calculations.

Further, as to the Unpaid ICU Compensation, plaintiff alleges that defendants agreed, in writing, to pay plaintiff for additional work that he performed for two weeks in the Pediatric ICU in 2006. And, Suchy's August 23, 2006 email states that he is "willing to pay for the incremental time spent in the PICU," showing that defendants agreed to pay plaintiff the Unpaid ICU Compensation.

Plaintiff alleged sufficient facts indicating that he performed his duties pursuant to the parties' agreements, that defendants failed to pay plaintiff the amounts due, and the specific sum of damages suffered.

Plaintiff also alleged facts, including an August 23, 2006 email from Suchy indicating a clear and unambiguous promise to pay him additional work in the Pediatric ICU, and that plaintiff reasonably relied on this promise by working for a two-week period to his detriment, to support a claim for promissory estoppel. Plaintiff's affidavit states that due to his length of employment with defendants, he believed that he could trust that they would compensate him for the additional Pediatric ICU time. Given that plaintiff has alleged facts to support that he was a contract employee, the issue of employment at will has no bearing. The caselaw cited by defendants only relates to claims of promissory estoppel where an employee claims that he or she has suffered injury after relying on an employer's offer to employ him or her and after the employer has reneged on such an offer for future employment. Here, plaintiff has not made a promissory estoppel claim with respect to future employment, as plaintiff was already employed by the defendants. Plaintiff's promissory estoppel claim only relates to non-payment of

additional compensation that defendants promised to pay plaintiff for the work that he previously performed. Plaintiff's claims are not barred by the doctrine of laches. Plaintiff's claim for promissory estoppel is an action in equity, but plaintiff's claim for breach of contract is an action at law, to which defendants' equitable defense is inapplicable. Moreover, the statute of limitations period for the breach of contract claim is six years, and defendants admit that plaintiff's breach of contract claim had not elapsed prior to the commencement of this action. Further, defendants should have patient records in their possession, which would reflect plaintiff's work during his employment. Moreover, defendants make a general claim that documents would have been lost, but fail to claim that they no longer have such patient records. In addition, defendants have offered three separate emails from July 2006 through November 2006, confirming that emails have not been lost with the passage of time. And, if necessary, any of the witnesses who no longer reside in the state can be deposed out of state.

In reply, defendants argue that plaintiff's allegations show no more than an "understanding" and not a commitment by defendants to make an additional payment beyond what he received. Paragraphs 4 through 8 of the Complaint merely allege the compensation plaintiff received and how it was allegedly determined. Such paragraphs contain no factual allegation that the Hospital agreed to pay him more than the amounts stated therein for either his base salary or his supplement during the two years in question. Also, meeting with administration and reviewing spreadsheets, as asserted by plaintiff, are insufficient, especially since he admits there was a disagreement as to the amount he was told he would received for the coming year. And, Suchy's statements in the emails are insufficient, as there is no agreement to pay plaintiff an additional money once the alleged "discretionary income" issue was resolved.

Any agreement to address plaintiff's base salary inquiries is not a commitment to pay him more. Plaintiff's own history of dissatisfaction with his compensation confirms that the parties never reached an agreement for additional compensation. If there were "still issues" about his compensation, there was no agreement and if there was no agreement, there is no right to payment.

Further, plaintiff's subjective belief based on emails and conversations that he could trust defendants is insufficient to establish a contract, as there is no reference to any document or conversation in which a promise was made.

As to the alleged Unpaid ICU compensation, Suchy's email comment to pay for "incremental" time is ambiguous and does not specify a key material term to establish a contractual agreement, *i.e*, the amount. Without providing for specification of an amount or the rate of payment per hour or per day, there cannot have been a meeting of the minds with respect to any promise to pay plaintiff any specific amount. Any issue as the amount of time plaintiff spent in the Pediatric ICU is irrelevant, due to the absence of an allegation of a clear statement of commitment by defendants to make a payment in a particular amount.

And, the existence of a contract is not inconsistent with employment at will. There is no question that plaintiff was an at-will employee, and that therefore, the doctrine of promissory estoppel cannot be invoked. Since plaintiff had already performed work in the Pediatric ICU when the alleged promise by Suchy was made, plaintiff cannot allege, much less establish, any reliance. The doctrine of laches also bars plaintiff's promissory estoppel claim, which he concedes is an action in equity.

Discussion

"When reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the factual allegations of the complaint must be deemed to be true, and the court must afford the plaintiff the benefit of all favorable inferences that can be drawn from the complaint" (*Harris v IG Greenpoint Corp.*, 72 AD3d 608, 900 NYS2d 44 [1st Dept 2010] *citing Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 318, 631 NYS2d 565 [1995]; *Leon v Martinez*, 84 NY2d 83, 87–88, 614 NYS2d 972 [1994](the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory."); *Johnson v Kings County Dist. Attorney's Off.*, 308 AD2d 278, 284, 763 NYS2d 635 [2003]). "The motion must be denied where the complaint adequately alleges, for pleading survival purposes, viable causes of action. The sole criterion on a motion to dismiss is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cognizable action at law, a motion for dismissal will fail" (*Harris v IG Greenpoint Corp.*, 72 AD3d 608, *citing Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1997]).

When the motion is based upon documentary evidence, "[d]ismissal under CPLR 3211(a)(1) is warranted 'only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (*Richbell Information Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 765 NYS2d 575 [1st Dept 2003] *citing Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 and Siegel, N.Y. Practice § 269, at 428 [3d ed.]; *see also Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326, 746 NYS2d 858)).

To state a cause of action for breach of contract, the proponent of the pleading must

specify the making of an agreement, the performance by that party, breach by the other party, and resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court, New York County 2006], *citing Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). The complaint must set forth the terms of the agreement upon which liability is predicated by making specific reference to the relevant portions of the contract or by attaching a copy of the contract to the complaint (*Atlantic Veal & Lamb, Inc. v Silliker, Inc.*, 11 Misc 3d 1072, 816 NYS2d 693 (Supreme Court, New York County 2006] *citing Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [1987] and *accord Valley Cadillac Corp. v Dick*, 238 AD2d 894, 894 [1987]). To "withstand a motion to dismiss, a breach of contract cause of action must 'allege, in nonconclusory language . . . the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated" (*Deutsche Bank Securities Inc. v Kong*, 2008 WL 828067 (Trial Order) [Supreme Court, New York County 2008 citing *Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; *see also*, *Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071 *citing Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; and *Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]). Affidavits or other evidence "may be used freely to preserve inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino, Realty Co.*, 40 NY2d 633, 635 [1976] ("Under CPLR 3211 a trial court may use affidavits in its consideration of a pleading motion to dismiss")).

At the outset, the Court notes that defendants' motion is *not* one for summary judgment.

Assuming, as this Court must, that the allegations in the Complaint are true, and based on a reading of plaintiff's affidavit in support thereof, it cannot be said the Complaint fails to state a

cause of action for breach of oral employment agreement.

Plaintiff alleges that he "was orally offered" on an annual basis compensation in the form of a base salary and supplement, and that defendants' oral offers were made to him in June of each calendar year. Plaintiff's base salary was determined by department funds and grant funding, and the supplemental portion was based on patients receipts. Plaintiff's Complaint provides an example for how his base salary was measured in relation to the annual National Institute of Health salary cap: "For example, if a particular grant totaled one hundred and eighty-thousand dollars ($1 80,000.00) and the grantee's time spent working on the research funded by such grant or percentage effort was twenty percent (20.00%), thirty-six thousand dollars ($36,000.00) of such grant would be attributed to the grantee's Base Salary ($180,000.00 x 20.00% = $36,000.00)." Plaintiff claims that Suchy essentially offered to "create a new compensation plan" to reimburse and compensate plaintiff for his work he previously performed for the period of 2005 to 2007. This "Total Compensation Shortfall" amounts to the precisely $61,349.00.

The cases cited by defendants are factually distinguishable (*cf. Cooper Square Realty, Inc. v. A.R.S. Management, Ltd.*, 181 AD2d 551, 581 NYS2d 50 [1st Dept 1992] ("as no objective method or formula was provided for determining a commission, the exclusive sales contract was merely an agreement to agree and was unenforceable"); *Deutsche Bank Securities Inc. v. Kong*, 2008 WL 828067 [Supreme Court, New York County 2008] (dismissing breach of contract claim where the pleading acknowledges that Kennedy "was supposed to follow up with a formal offer in writing, lacked any details as to the amount of money actually offered or the other terms of the agreement, are insufficient to plead a claim for breach of a contract for future compensation);

Chin v American Tel. & Tel. Co., 96 Misc 2d 1070, 410 NYS2d 737 [Supreme Court, New York County 1978] (plaintiff failed to describe the duties and responsibilities of the particular position, the length of employment or the terms of compensation)).

Plaintiff worked as a Pediatric Pulmonologist, and his exact duties and responsibilities can be explored during discovery. Plaintiff provided an example by which his compensation can be calculated, and discovery may yield the exact amount of grant funding defendants' received, the amount of time plaintiff worked in relation to such grant funding, and patients receipts, from which plaintiff's alleged compensation may be calculated.

The same holds true as to plaintiff's breach of contract claim concerning his work in the Pediatric ICU. Giving a liberal interpretation to the allegations in the Complaint and assuming such allegations as true, plaintiff states a breach of contract claim for $13,650.00 for his work in Pediatric ICU. Plaintiff alleges that defendants agreed in writing to pay him $13,650.00 for additional work that he previously performed during a two-week period in the Pediatric ICU in 2006, but failed to do so.

As to plaintiff's second cause of action alleging promissory estoppel, 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.*, --- NYS2d ----, 2011 WL 3847422 [1st Dept 2011]). Plaintiff's Complaint alleges that defendants made a clear and unambiguous promise to pay plaintiff "if he performed additional work in the Pediatric ICU over a two (2) week period in 2006" and that plaintiff reasonably relied upon defendants' promise "by working in the Pediatric ICU for an additional two (2) week period in 2006." Further, plaintiff

alleges he worked for an additional two (2) week period in 2006, but the defendants failed to pay him for such additional work. Assuming the truth of such allegations, plaintiff states a claim for promissory estoppel.

Thus, dismissal of plaintiff's claims for failure to state a cause of action is unwarranted at this juncture.

Contrary to defendants' contention, the documentary evidence they submit fails to establish a defense to plaintiff's claims as a matter of law (*Novus Partners, Inc. v Vainchenker*, 32 Misc 3d 1241(A), 2011 WL 4031521 [Supreme Court, New York County 2011] (emails and charts submitted by defendants as documentary evidence, as they cannot be appropriately considered on a CPLR § 3211(a)(1) motion); *Northern Valley Partners, LLC v Jenkins*, 27 Misc 3d 1207(A), 910 NYS2d 406 [Supreme Court, New York County 2010] (subject email may be used to defend but does not conclusively refute plaintiffs' fraud claims, *even assuming the court were to consider dismissing the complaint based on documentary evidence* pursuant to CPLR 3211(a)(1) (emphasis added)).

In any event, the emails do not establish a defense as a matter of law. The emails do not refute plaintiff's allegations concerning the oral offer to pay plaintiff a base salary and supplement based on department funds, grant funding, patients receipts, or the amount of $61,349.00 allegedly owed. Additionally, such emails contain statements from Suchy, such as "I am willing to pay for the incremental time spent in the PICU" or "for the additional time spent in the PICU over the past 4 months" that are subject to varying interpretations.

As to defendants' defense of laches, such a defense is unavailable to defeat plaintiff's timely action at law for breach of contract, and thus, dismissal of such claim on this ground is

unwarranted (*In re Liquidation of American Druggists' Ins. Co.*, 15 AD3d 268, 789 NYS2d 483 [1st Dept 2005] (the defense of laches is unavailable in an action at law for breach of bond agreement commenced within the period of limitation); *Cadlerock, L.L.C. v Renner*, 72 AD3d 454, 898 NYS2d 127 [1st Dept 2010]).

In any event, defendants failed to establish the requisite showing of prejudice to support their laches defense. Laches bars recovery where a plaintiff's inaction has prejudiced the defendant and rendered it inequitable to permit recovery (*Airco Alloys Division, Airco Inc. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 430 NYS2d 179 [4th Dept 1980]). Prejudice may be demonstrated "by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay" (*In re Linker*, 23 AD3d 186, 803 NYS2d 534 [1st Dept 2005]; *Airco Alloys Division, Airco Inc. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 430 NYS2d 179 (defendants "must show reliance and change of position resulting from the delay"). The record fails to show that defendants changed their position in reliance upon any acts or omissions of the plaintiff, or that defendants will be unable to recover documents or testimony to aid in their defense, especially in light of the existence of emails submitted by defendants.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (a)(7) is denied; and it is further

ORDERED that defendants serve and file their Answer within 20 days; and it is further

ORDERED that the parties appear before Justice Carol R. Edmead, Part 35, 60 Centre Street, Room 438, for a preliminary conference on January 17, 2012, 2:15 p.m.; and it is further

ORDERED that defendants e-file and serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 5, 2011

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD