SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN J.S.C. PART 3
Justice

Index Number : 653536/2012
KOLCHINS, ANDREW
vs.
EVOLUTION MARKETS INC.
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. 653536/12
MOTION DATE 4/2/13
MOTION SEQ. NO. 003

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits — No(s). 1
Answering Affidavits — Exhibits — No(s). 2
Replying Affidavits — No(s). 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 8-19-13

Eileen Branston J.S.C.
EILEEN BRANSTEN
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

----------X

ANDREW KOLCHINS,

Plaintiff,

-against-

EVOLUTION MARKETS INC.,

Defendants.

----------X

Index No. 653536/2012
Motion Date: 4/2/2013
Motion Seq. No.: 003

BRANSTEN, J.

Defendant Evolution Markets Inc. ("EvoMarkets") brings the instant motion seeking dismissal of the first two counts of Plaintiff Kolchins' three-count Complaint. EvoMarkets brings its motion under CPLR 3211(a)(1) and (a)(7). Plaintiff opposes. For the reasons that follow, EvoMarkets' motion is granted in part and denied in part.

I. Background[1]

Kolchins filed the instant action after his termination by Defendant EvoMarkets on September 1, 2012. EvoMarkets provides brokerage and advisory services in the global environmental and energy commodity marketplace. (Compl. ¶ 9.) Kolchins started at EvoMarkets in 2005, and during his tenure with the company, managed the three brokerage desks that comprised EvoMarkets' renewable energy markets group. *Id.* ¶ 10.

[1] The facts described in this section are drawn from the Complaint.

While at EvoMarkets, Kolchins entered into successive employment agreements with the company in 2005, 2006, and 2009. *Id.* ¶ 13. The 2009 Employment Agreement was dated August 31, 2009 and covered the period from September 1, 2009 through August 31, 2012. This 2009 agreement detailed the compensation package due to Kolchins, including a base salary, "Sign On Bonus," and a "Production Bonus." *Id.* ¶ 14. In addition, while Kolchins was an "at will" employee, the 2009 agreement nonetheless provided that Kolchins would be entitled to certain benefits if he were terminated without cause, such as his "Sign On Bonus," any vested and accrued "Production Bonus," 100% of his base salary for the remainder of the contract term, and a "Special Non-Compete Payment." *Id.* ¶ 15.

As the expiration of the 2009 Employment Agreement approached, Kolchins alleges that he began discussing the terms of an Extension Agreement with EvoMarkets' President and CEO. *Id.* ¶ 16. While Kolchins sought to negotiate for more favorable terms, EvoMarkets' offered Kolchins the same terms and conditions contained in the 2009 Employment Agreement for the next three-year period, from 2012 through 2015. *Id.* ¶¶ 16-17. On June 22, 2012, Kolchins notified EvoMarkets that he did not intend to renew the 2009 Employment Agreement on the terms offered. *Id.* ¶ 26. However, on July 16, 2012, Kolchins alleges that he accepted EvoMarkets' offer by sending an email, to which EvoMarkets' President and CEO replied. *Id.* ¶ 18. In his reply, the President

and CEO acknowledged Kolchins' acceptance and congratulated the parties on reaching an agreement. *Id.* The parties then attempted to memorialize the terms of the Extension Agreement but did not complete this process by the end date for the 2009 Employment Agreement – August 31, 2012. *Id.* ¶¶ 27-30.

Kolchins was terminated by EvoMarkets on September 1, 2012. *Id.* ¶ 31. EvoMarkets asserted that Kolchins' employment with EvoMarkets "had ceased as a result of the expiration of the 2009 Employment Agreement on August 31, 2012 and the purported failure of the parties to enter into a new agreement." *Id.* ¶ 32. Kolchins contends that he entered into a binding Extension Agreement with EvoMarkets on July 16, 2012. *Id.*

Following his termination, Kolchins filed the instant three-count complaint. Only two of Plaintiff's claims are challenged by Defendant's motion to dismiss: (1) Plaintiff's breach of contract claim, stemming from Defendant's failure to honor the Extension Agreement; and, (2) Plaintiff's unjust enrichment count, based on Defendant's failure to pay a "Production Bonus" and "Special Non-Compete Payment" to Kolchins. The Court will turn to these claims below.

II. Analysis

Defendant brings the instant motion to dismiss, seeking dismissal of Plaintiff's breach of contract claim under CPLR 3211(a)(1) and its unjust enrichment claim under CPLR 3211(a)(7).

On a motion to dismiss for failure to state a cause of action, the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977); *see* CPLR 3211(a)(7). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). A motion to dismiss 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 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

Moreover, where the motion to dismiss is based on documentary evidence (CPLR 3211(a)(1)), the claim will be dismissed "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d at 88; *see also 150 Broadway N.Y. Assoc., L.P. v. Bodner*, 14 A.D.3d 1, 5 (1st Dep't 2004). Where, as here, the defendants have presented documentary evidence, the court is required to determine "whether the proponent of the

pleading has a cause of action, not whether he has stated one." *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150 (1st Dep't 2001) (internal quotation mark and citation omitted).

A. *Defendant's CPLR 3211(a)(1) Motion*

Defendant EvoMarkets seeks dismissal of Plaintiff's breach of contract claim pursuant to CPLR 3211(a)(1), offering emails exchanged between the parties as the "documentary evidence" underlying its motion. However, the emails submitted are not "documentary evidence" under the rule. Documentary evidence includes "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable ... [T]o be considered documentary, evidence must be unambiguous and of undisputed authenticity." *Fontanetta v. Doe*, 73 A.D.3d 78, 84–86 (2d Dep't 2010) (citations omitted). Emails do not fall within this category. *See Cives Corp. v. Fuller*, 97 A.D.3d 713, 714 (2d Dep't 2012) ("Here, the letters and emails ... did not constitute 'documentary evidence' under CPLR 3211(a)(1) and, thus, should not have been considered by the Supreme Court."); *Novus Partners, Inc. v. Vainchenker*, 32 Misc.3d 1241(a), at *5 n.1 (Sup. Ct. N.Y. Cnty. Sept. 7, 2011) ("I disregard the emails and charts submitted by

defendants as documentary evidence, as they cannot be appropriately considered on a CPLR § 3211(a)(1) motion.").

Further, "[o]n a motion to dismiss pursuant to CPLR 3211(a)(1), the defendant has the burden of showing that the relied-upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" *Fortis Fin. Serv. v. Fimat Futures USA*, 290 A.D.2d 383, 383 (1st Dep't 2002). Even if deemed "documentary evidence," the documents cited to by Defendant, however, do not "resolve" all factual issues "as a matter of law." Instead, while the emails may be used by EvoMarkets in its defense, they do not conclusively refute Plaintiff's contention that the parties had entered into a binding agreement as of July 16, 2012. Defendant asks this court to accept its argument that the emails demonstrate that the parties had not come to a "meeting of the minds"; however, acceptance of such an argument would "require[] the impermissible drawing of inferences in favor of the non-moving party from messages that are not necessarily self-explanatory." *Marin v. AI Holdings (USA) Corp.*, 35 Misc.3d 1227(A), at *7 (Sup. Ct. N.Y. Cnty. 2012). Accordingly, Defendant's motion to dismiss Count One pursuant to CPLR 3211(a)(1) is denied.

B. *Defendant's CPLR 3211(a)(7) Motion*

Defendant next seeks dismissal of Plaintiff's breach of contract claim under CPLR 3211(a)(7), to the extent that Plaintiff's claim seeks recovery of unpaid "Production Bonus" and "Special Non-Compete Payment" monies.[2] In addition, EvoMarkets argues that Plaintiff's unjust enrichment claim fails to state a claim. Each argument will be considered in turn.

1. Count One – Breach of Contract

Under the terms of the 2009 Employment Agreement, Plaintiff was to be paid a "Production Bonus" each trimester as compensation for the net earnings of three brokerage desks that he oversaw. Plaintiff states that he is entitled to a "Production Bonus" for the second trimester of 2012 (May through August), which he earned prior to his termination. Likewise, Plaintiff claims entitlement to a "Special Non-Compete Payment" under the 2009 Agreement, which was "bonus compensation" for transactions "brokered during the period of [Plaintiff's] employment," "for which any contingency

[2] While Defendant did not seek dismissal on this basis in its notice of motion, it asserts on reply that Plaintiff's breach claim stemming from non-payment of the "Production Bonus" and "Special Non-Compete Payment" was "not clear from the face of the Complaint" and only became apparent when Plaintiff described the claim in its opposition papers. (Def.'s Reply Br. at 9.) As the parties know, new claims for relief cannot be raised in reply papers. However, in this instance, since both sides had the opportunity to brief this issue – Plaintiff in its opposition papers and Defendant in its reply – the Court will consider the issue.

associated with EvoMarket's right to receive payment is satisfied during the Non-Compete Period." (Affirmation of Todd Gutfleisch Ex. D at 11.)

Plaintiff maintains that Defendant breached the 2009 Employment Agreement by failing to pay him the Special Non-Compete Payment and Production Bonus monies to which he was entitled. Defendant offers only one argument in opposition: that Plaintiff forfeited his right to the monies by leaving the company, albeit involuntarily, before the monies were due to be paid.

However, Defendant's timing argument fails to provide a basis for dismissal of Plaintiff's claim for these payments. Where an employee has satisfied the criteria for a bonus before termination, that compensation cannot "be withheld because, as here, the employee did not work until the date the bonus was to have been paid." *Mirchel v. RMJ Sec. Corp.*, 205 A.D.2d 388, 390 (1st Dep't 1994); *see also Guggenheimer v. Bernstein Litowitz Berger & Grossmann LLP*, 11 Misc.3d 926, 932 (Sup. Ct. N.Y. Cnty. 2006); *Wiener v. Diebold Group*, 173 A.D.3d 166, 167 (1st Dep't 2006) (noting New York's "long standing policy against the forfeiture of earned wages"). Here, the 2009 Employment Agreement entered into by the parties describes how the bonus payments are earned, and Plaintiff pleads in the Complaint that he is entitled to such payments under the Agreement. *See* Compl. ¶ 33. Defendant's argument that Kolchins' termination

vitiates his entitlement to such payments fails to provide a basis for dismissal of the claim.

2. Count Two – Unjust Enrichment

Defendant EvoMarkets next seeks dismissal of Plaintiff's unjust enrichment claim, arguing that this quasi contract claim is precluded by the existence of a written contract – here, the 2009 Employment Agreement. Here, Plaintiff grounds his claim in his performance under the Production Bonus and Special Non-Compete Payment provisions of the 2009 Employment Agreement. Thus, Plaintiff seeks recovery of this compensation pursuant to the terms of an express, written agreement. Accordingly, Plaintiff's unjust enrichment claim fails. *See Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987) ("The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.")

III. Conclusion and Order

Accordingly, it is

ORDERED that Defendant Evolution Markets Inc.'s motion to dismiss is granted as to Count Two of the Complaint and is otherwise denied; and it is further

ORDERED that Defendant Evolution Markets Inc. is directed to serve an Answer to the Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on October 1, 2013, at 10 AM.

This constitutes the decision and order of the court.

Dated: New York, New York
August 19, 2013

ENTER

Hon. Eileen Bransten, J.S.C.