

Treadway v Workmarket, Inc.
2019 NY Slip Op 31224(U)
April 25, 2019
Supreme Court, New York County
Docket Number: 653695/2018
Judge: Gerald Lebovits
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. GERALD LBOVITS PART IAS MOTION 7EFM

Justice

-----X
 DAVID TREADWAY and ADAM FAMULARO
 Plaintiffs,
 - v -
 WORKMARKET, INC.,
 Defendant.

INDEX NO. 653695/2018
 MOTION DATE 02/13/2019
 MOTION SEQ. NO. 001

DECISION AND ORDER

-----X
 The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to

DISMISS

Scoolidge Peters Russotti & Fox LLP, New York (Peter Scoolidge of counsel), for plaintiffs.
Duke, Holzman, Photiadis & Gresens LLP, New York (Steven W. Kultkowski of counsel), for defendant.

Gerald Lebovits, J.:

Plaintiffs, David Treadway and Adam Famularo, were employed by defendant, Work Market, Inc. (Work Market), a web-based freelance-management system. Plaintiffs sought to exercise stock options previously granted to them by Work Market. Work Market rejected plaintiffs' attempts to exercise those options, on the ground that the options had expired. Plaintiffs brought a breach of contract action, and Work Market now moves to dismiss under CPLR 3211 (a) (1).

BACKGROUND

Work Market was formed in 2010. Work Market's Board of Directors adopted a stock incentive plan (the 2010 plan). This plan authorized the Board to grant options to buy common stock to Work Market employees, officers, directors, consultants, and advisors. The Board determined the duration, terms, and conditions of these stock options.

A. Plaintiff Treadway

Treadway began assisting Work Market and attending its board meetings in 2010. In December 2010, Treadway and the Board entered into a stock option agreement that incorporated the 2010 plan. Under the agreement, Treadway had an option to buy 100,000 shares

of common stock at the price of \$0.09 per share, which would last until three months after Treadway's employment relationship with Work Market had ended.¹

Treadway resigned from the Board by letter dated August 17, 2014. His letter stated that he would continue to serve as an advisor to Work Market under an advisory-services agreement between himself and Work Market.

In February 2018, Treadway notified Work Market that he wished to exercise his option to purchase the remaining 58,344 shares available under the option agreement, and provided Work Market with a check to cover the purchase price. Work Market declined, however, to permit Treadway to purchase the shares. Work Market stated that it had not entered into an advisory agreement with Treadway after his resignation in August 2014 (or otherwise modified the terms of his option agreement), and that Treadway's stock options had therefore expired on November 17, 2014.

B. Plaintiff Famularo

Famularo and Work Market entered into an advisory-services agreement in November 2011, under which Famularo was retroactively deemed an advisor to Work Market effective June 2010. The advisory agreement stated that Famularo's retention as an advisor would terminate four years from the effective date (here, June 2010), unless the parties renewed the agreement. The agreement was ultimately not renewed, and therefore expired on June 4, 2014.

Pursuant to this agreement, the Board granted Famularo a stock option in December 2011, under which Famularo could purchase 50,000 shares at a price of \$0.18 per share. Famularo and Work Market agreed that the stock option would terminate three months after the end of Famularo's advisory relationship with Work Market.

In January 2018, Famularo notified Work Market that he wished to exercise his option to purchase the 50,000 shares available under the option agreement, and provided Work Market with a check to cover the purchase price. Work Market rejected Famularo's attempt to exercise his stock option. As with Treadway, Work Market stated that it had not modified the terms of Famularo's stock option, that it had not entered into any new advisory agreement after Famularo's original agreement expired in June 2014, and that Famularo's option had therefore expired three months later, on September 4, 2014.

DISCUSSION

Treadway and Famularo then brought this action against Work Market. Plaintiffs allege that Work Market breached their contracts by refusing to let them exercise their stock options; and in the alternative, that Work Market unjustly enriched itself by refusing to let plaintiffs exercise their options.

¹ Treadway was appointed to the Work Market Board in February 2011. He partially exercised his option in August 2012 by buying 41,666 shares of Work Market stock.

Work Market now moves to dismiss the complaint under CPLR 3211 (a) (1) on the basis of documentary evidence. Work Market's motion is denied as to plaintiff Treadway, but granted as to plaintiff Famularo.

Under CPLR 3211 (a) (1), to warrant dismissing a complaint, the documentary evidence submitted must conclusively establish a defense to the asserted claims as a matter of law. (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 144-145 [1st Dept 2014].) Assertions made in an affidavit are not documentary evidence on a CPLR 3211 (a) (1) motion to dismiss. (*Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 651 [1st Dept 2011].)

Work Market argues that it has submitted evidence establishing that at the time plaintiffs sought to exercise their stock options any employment or advisory agreement between Work Market and plaintiffs had long since expired, leaving plaintiffs ineligible to exercise those options. Defendants rely on documents submitted as exhibits to an attorney affirmation and an affidavit of Work Market's current president, Jeff Wald.²

A. Plaintiff Treadway

Defendant asserts that Treadway's resignation letter is documentary evidence that the relationship between Treadway and Work Market had ended in August 2014, and thus that Treadway's stock option expired approximately three months later. But Treadway's resignation letter expressly stated that he would continue to serve as an advisor to Work Market under an agreement between he and the company. Work Market itself has submitted a letter from its previous CEO stating that Treadway had continued to act as an advisor after Treadway's resignation, and that, to the CEO's knowledge, Treadway had never been terminated from that role. And this court may not consider on the present motion the Wald Affidavit's assertion that Work Market did not enter into an advisory agreement with Treadway following his resignation.

Under the 2010 plan and Treadway's stock option agreement, Treadway remained eligible to exercise his stock option while serving as an advisor to Work Market. Defendant has not conclusively shown that Treadway had stopped working as an advisor (causing his stock option to expire) at the time he allegedly exercised the option. Accordingly, defendant's motion to dismiss is denied as to Treadway.

B. Plaintiff Famularo

Defendant's assertion that Famularo's stock option had expired relies on the November 2011 advisory agreement between Work Market and Famularo. This agreement indicates that the advisory relationship between Famularo and Work Market terminated on June 4, 2014. It is thus documentary evidence that Famularo's stock option expired three months later, on September 4, 2014.

² Work Market also relies on the Wald Affidavit itself; but, as noted above, such an affidavit cannot constitute documentary evidence supporting a CPLR 3211 (a) (1) motion.

To be sure, as Famularo points out, defendant has also introduced email and text message exchanges between Famularo and Jeff Wald that suggest Famularo’s advisory relationship with Work Market may have continued until October 13, 2017. But even if this court were to take October 13, 2017, as the relevant date, that would mean that Famularo’s stock option expired three months later on January 13, 2018 — and Famularo did not seek to exercise his stock option until January 28, 2018.

Defendant, therefore, has conclusively established a defense to Famularo’s claims as a matter of law by providing documentary evidence that Famularo’s stock option had already expired when he sought to exercise it.

Accordingly, it is hereby

ORDERED that defendant’s motion to dismiss is granted as to plaintiff Adam Famularo, and denied as to plaintiff David Treadway; and it is further


ORDERED that plaintiff Famularo’s claims against defendant are dismissed, with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in defendant’s favor with respect to plaintiff Famularo; and it is further

ORDERED that the action shall continue against defendant with respect to the claims of plaintiff Treadway; and it is further

ORDERED that movant party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B), who is directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set for the in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* [accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh].

4/25/2019
DATE


GERALD LEBOVITS, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE