Bazylevsky v VR Advisory Servs. (USA) LLC
2020 NY Slip Op 31688(U)
May 27, 2020
Supreme Court, New York County
Docket Number: 655752/2019
Judge: Joel M. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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BO BAZYLEVSKY

Plaintiff,

- v -

VR ADVISORY SERVICES (USA) LLC, A WHOLLY OWNED SUBSIDIARY OF VR CAPITAL GROUP LTD.,

Defendant.

INDEX NO. 655752/2019

MOTION DATE 12/31/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29

were read on this motion to DISMISS.

This case is about allegedly unpaid bonuses. Plaintiff Bo Bazylevsky used to work as a Senior Portfolio Manager at Defendant VR Advisory Services (USA) LLC ("VR"), where he initially earned a lucrative year-end bonus tied to VR's overall performance. But then, Bazylevsky alleges, VR coerced him into agreeing to a modified, less-lucrative bonus structure. Bazylevsky did agree to the modification – the stated alternative was being fired – and continued to work at VR for another two years under those modified terms, receiving a relatively less-lucrative bonus at the end of each year. Now, having left VR's employ, Bazylevsky argues that the modification was a sham, and that he is entitled to the bonus he would have received under the original structure. VR moves to dismiss all six of Bazylevsky's claims that stem from those basic facts.

For the reasons set forth below, the motion is granted and the First Amended Complaint is dismissed in its entirety.

BACKGROUND

The following statement of facts is based on the allegations in the First Amended Complaint ("FAC"), which are taken to be true solely for purposes of this motion to dismiss (*Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [2017]), as supplemented by the Employment Agreement and Addendum that are attached to the FAC (NYSCEF 9-10).

VR is an asset manager. The majority of its assets under management (estimated at $5 billion as of June 30, 2019) are the personal wealth of its President, Richard Deitz (NYSCEF 8 ¶ 23 [FAC]). Bazylevsky joined VR as a Senior Portfolio Manager in May 2016, reporting directly to Deitz (*id.* ¶ 19).

Bazylevsky signed an Employment Agreement when he began his tenure with VR. Under its terms, Bazylevsky was an at-will employee whose employment could "be terminated by [Bazylevsky] or by [VR] at any time . . . with one month's notice with or without cause" (NYSCEF 9 § 7.1 [Employment Agreement]). Bazylevsky was to receive, in addition to a base salary of $400,000, a bonus equal to "5.5% of VR's total performance allocation" for 2016, with a minimum of $1,000,000, prorated for the portion of 2016 during which he was employed (*id.* § 3.3). This "formulaic bonus" structure was contingent on Bazylevsky's "satisfactory performance" (*id.*). In 2016, consistent with that formula, Bazylevsky received a bonus of $3,459,849 (NYSCEF 8 ¶ 34).

On March 31, 2017, VR presented to Bazylevsky an "Addendum" to the Employment Agreement, which would scrap the formulaic bonus in favor of a wholly discretionary one (*id.* ¶ 36; NYSCEF 10 [Addendum]). Bazylevsky sensed he had little leverage in the situation. Deitz, the VR principal, had allegedly told him: "Bo, you have to sign this Addendum now. If I don't

get it back by the end of the day, you will be fired. It's not up for further discussion" (NYSCEF 8 ¶ 38). Bazylevsky was extremely dismayed and went home to speak with his wife about his options (*id.* ¶ 37). Fearing for his professional reputation if he were fired just ten months into his new job, Bazylevsky signed the Addendum that same day (*id.* ¶¶ 41-52).

Bazylevsky received a $150,000 annual bonus in 2017 under the terms set out in the Addendum; Bazylevsky would have earned significantly more under the formulaic bonus structure in the original agreement (*id.* ¶¶ 58-63). Then, almost two years later, in May 2019, Bazylevsky gave notice that he was resigning from his position at VR (*id.* ¶ 65).

In October of that year, Bazylevsky brought the instant action by filing a Summons and Complaint (*id.* ¶¶ 1-2). Shortly thereafter, he filed a First Amended Complaint, which asserts six causes of action against VR: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) quantum meruit / unjust enrichment, (4) violation of New York Labor Law § 191, (5) violation of New York Labor Law § 193, and (6) tortious interference with prospective business advantage and contract.

DISCUSSION

On a motion to dismiss pursuant to CPLR §§ 3211 (a)(1) and (7), the Court must "accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within a cognizable legal theory" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 367, 270-71 [1st Dept 2014] [internal quotation marks and citation omitted]; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not

"accorded their most favorable intendment" (*Summit Solomon & Feldman v. Lacher*, 212 AD2d 487, 487 [1st Dept 1995]).

Dismissal under CPLR § 3211 (a)(1) is warranted where documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon*, 84 NY2d at 88).

A. Breach of Contract (First Cause of Action)

Bazylevsky's breach of contract claim is premised on certain "accrued obligations" under the formulaic bonus structure in the Employment Agreement, even though that bonus structure was expressly supplanted by the terms of the Addendum (NYSCEF 10 ["[T]his Addendum . . . amends and modifies the [Employment] Agreement . . . ."]). Bazylevsky does not allege any breach of the Addendum (*see* NYSCEF 8 ¶¶ 86-89). He argues, instead, that the Addendum is unenforceable for three reasons: (1) it was not supported by adequate consideration, (2) Bazylevsky was under duress when he signed the document, and (3) Bazylevsky did not "ratify" its terms. Each of these arguments fails.

First, the Addendum is not void for lack of consideration. As an initial matter, "[a]bsent a claim of fraud or unconscionability, the *adequacy* of consideration is not a proper subject for judicial scrutiny" (*Goldston v Bandwidth Tech. Corp.*, 52 AD3d 360 [1st Dept 2008] [emphasis added], citing *Spaulding v Benenati*, 57 N.Y.2d 418, 423 [1982]). By its terms, the Addendum was signed "[f]or good consideration" (NYSCEF 10), and as a matter of law, an employer's forbearance of the right to fire an at-will employee, such as Bazylevsky, constitutes adequate consideration in exchange for a modification to the terms of employment (*see Zellner v Stephen D. Conrad, M.D., P.C.*, 183 AD2d 250, 256 [2d Dept 1992] ["Because in at-will employment the employer has the right to discharge the employee . . . without cause, and without being subject to

inquiry as to his or her motives, forbearance of that right is a legal detriment which can stand as consideration for a restrictive covenant."]). Here, the consideration was that VR did not exercise its right to fire Bazylevsky (*see* NYSCEF 8 ¶ 56 ["VR confirmed that, 'absent Mr. Bazylevsky's agreement . . . he would promptly have been terminated.'"]). While obviously not a welcome choice, it was – according to Bazylevsky's own allegations – much better than the alternative (*i.e.*, no choice) and it was something VR was not obligated to provide. It was, therefore, sufficient consideration to create a binding contract.

Second, the Addendum is not void on the grounds of coercion or economic duress. "A contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will" (*Austin Instrument, Inc. v Loral Corp.*, 29 NY2d 124, 130 [1971]). Dispositive here is the requirement of a "wrongful threat." Given VR's undisputed right to fire Bazylevsky *at any time*, the threat to do so unless Bazylevsky agreed to the Addendum "cannot be viewed as 'wrongful' . . . on the ground of economic duress" (*Berzin v W.P. Carey & Co., Inc.*, 293 AD2d 320, 321 [1st Dept 2002] [citing *Austin Instrument*, 29 N.Y.2d at 130]; *see also 805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 453 [1983] ["[P]laintiff has failed to state a cause of action for economic duress for a party cannot be guilty of economic duress for refusing to do that which it is not legally required to do."]). Notably, Bazylevsky does not allege that he misunderstood, or could not understand, the terms of the Addendum. While VR may have placed Bazylevsky in a "terrible bind" (*id.* ¶ 41), the threat of firing Bazylevsky, an at-will employee, does not invalidate the Addendum.

Third, and finally, Bazylevsky ratified the terms of the Addendum by remaining at VR for another two years after signing it, continuing to receive discretionary bonuses under its terms.

"A party who would repudiate a contract procured by duress, must act promptly, or he will be deemed to have elected to affirm it" (*Bank Leumi Tr. Co. of New York v D'Evori Intern., Inc.*, 163 AD2d 26, 30 [1st Dept 1990]; *Manufacturers Hanover Tr. Co. v Jayhawk Assoc.*, 766 F Supp 124, 128 [SDNY 1991] [noting "[u]nder New York law, [defendants] will be deemed to have affirmed the agreements even if economic duress were evident"]; *see also Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 649 [2d Dept 2010] ["By remaining in the defendant's employ under the new compensation terms, the plaintiff is deemed to have accepted them."]). For his part, Bazylevsky does not dispute the law on this point, but contends that the rest of his tenure at VR came "under continued duress" because "[h]is financial situation was uncertain without a job" (NYSCEF 27 at 10 [Pl.'s Opp. Br.]). This argument appears to equate Bazylevsky's status as an at-will employee with a state of continual duress, and fails for the reasons stated above (*Berzin*, 293 AD2d at 321).

Because Bazylevsky's arguments for not enforcing the plain terms of the Addendum are unavailing, the branch of VR's motion seeking to dismiss the breach of contract claim is granted.

B. <u>Breach of the Covenant of Good Faith and Fair Dealing (Second Cause of Action)</u>

Bazylevsky's second cause of action, for breach of the implied covenant of good faith and fair dealing, is dismissed as duplicative of the breach of contract claim because both arise from the same set of facts surrounding the Employment Agreement and Addendum (*see* NYSCEF 8 ¶¶ 93-94; *Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009] [claim for breach of the implied covenant of good faith and fair dealing "was properly dismissed as duplicative of the breach of contract claim because both claims arise from the same facts"]). "A claim for breach of the implied covenant of good faith and fair dealing cannot substitute for an unsustainable breach of contract claim" (*Skillgames, LLC v Brody*, 1

AD3d 247, 252 [1st Dept 2003]; *see Berzin v W.P. Carey & Co., Inc.*, 293 AD2d 320, 321 [1st Dept 2002] ["The covenant of good faith and fair dealing cannot negate [an] express right to terminate [an employment agreement] without cause at any time"]).

Therefore, the branch of VR's motion seeking to dismiss this claim is granted.

C. Quantum Meruit / Unjust Enrichment (Third Cause of Action)

Bazylevsky's third cause of action, for quantum meruit and unjust enrichment, is also dismissed. "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). "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" (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987]). Bazylevsky's right to compensation is governed by the Employment Agreement, as amended, and there is no dispute about the *existence* of those governing agreements, only their enforceability under principles of contract law (*see* Part A, *supra*).

Therefore, the branch of VR's motion seeking to dismiss this claim is granted.

D. NY Labor Law § 191 and Tortious Interference with Prospective Business Advantage and Contract (Fourth and Six Causes of Action, Respectively)

Bazylevsky does not oppose VR's motion to dismiss these claims (*see* NYSCEF 27 at 2 n.1 [Pl.'s Opp. Br.]), and therefore those branches of VR's motion are granted.

E. NY Labor Law § 193 (Fifth Cause of Action)

Finally, Bazylevsky's claim under NYLL § 193 is also dismissed. That statute provides that "[n]o employer shall make any deduction from the wages of an employee," except under certain conditions (*see* Labor Law § 193 [1]). Like the quasi-contract claims discussed *supra*,

this cause of action recasts the same allegations underlying the breach of contract claim. At bottom, Bazylevsky is still disputing the validity of the "bad faith, consideration-less Addendum" and seeks, this time couched in the language of the Labor Law, the bonus payments he allegedly would have received under the original formula (*see* NYSCEF 27 at 13 [Pl.'s Opp. Br.]). As stated above, however, the terms of the Addendum are enforceable, so the premise of Bazylevsky's Labor Law claim is incorrect.

In any event, the claim fails because Labor Law § 193 prohibits improper wage deductions and the formulaic bonus Bazylevsky seeks to recoup is neither a wage nor a deduction. The formulaic bonus amounts are not considered "wages" under the Labor Law because they are "based at least in part on factors other than plaintiff's own performance" (*Barber v Deutsche Bank Sec., Inc.*, 103 AD3d 512, 514 [1st Dept 2013] [dismissing Labor Law § 193 claim]; *see* NYSCEF 9 § 3.3 [tying bonus to "5.5% of VR's total performance allocation"]). And because Bazylevsky alleges that VR failed to pay him the formulaic bonus, it is not a deduction within the meaning of the statute (*Kolchins v Evolution Markets, Inc.*, 182 AD3d 408 [1st Dept Apr. 2, 2020] [holding that "failure to pay" bonus constitutes "a wholesale withholding of payment, which is not a deduction within the meaning [of] Labor Law § 193"]).

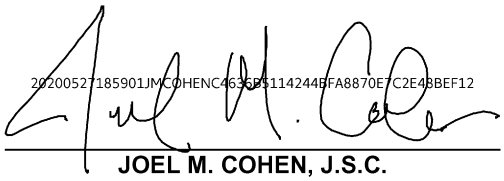
Therefore, the branch of VR's motion seeking to dismiss the Labor Law § 193 claim is granted.

* * * *

Accordingly, it is

ORDERED that Defendant VR's motion to dismiss is Granted and the Amended Complaint is dismissed.

This constitutes the Decision and Order of the Court.



5/27/2020
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE