

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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JAMES Y. XU,

Plaintiff,

-against-

J.P. MORGAN CHASE & CO.,

Defendant.  
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01 Civ. 8686 (WHP)

ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiff James Y. Xu sues his former employer, J.P. Morgan Chase & Co. ("JP Morgan Chase"), alleging breach of an express oral contract and/or an implied-in-fact contract with him because of the failure to pay him a bonus for calendar year 2000. Xu also asserts claims under the doctrine of quantum meruit and the New York Labor Law. Currently before this Court is JP Morgan Chase's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons set forth below, the motion is denied.

BACKGROUND

In October 1994, Xu was hired by a predecessor of JP Morgan Chase as a senior research analyst in the capital markets derivatives group, a part of the Global Markets Group. (Def. 56.1 Stmt. ¶ 1.) As a result of his employment in the Global

Markets Group, Xu was eligible to participate in JP Morgan Chase's incentive plan for officers of its Global Markets division (the "Incentive Plan"). (Def. 56.1 Stmt. ¶¶ 35, 40-43.) The Incentive Plan, which did not contain a set formula for determining the amount of any individual employee's bonus, prohibited its beneficiaries from participating "in any other annual bonus plans," and required as a condition of payment that the employee be "actively employed" on the date the bonus was paid. (Affidavit of Glory B. Simone, dated June 14, 2002 ("Simone Aff.") Ex. C: The Incentive Plan, at ¶¶ 3.1, 4.4.) In addition, the Incentive Plan vested absolute discretion in JP Morgan Chase to determine, inter alia, whether to pay a bonus at all. (Simone Aff. Ex. C ¶ 7.1 ("The Compensation Committee's interpretation of the [Incentive Plan] or determination of any award granted thereunder shall be final and binding on all Participants, including a determination . . . to adjust, defer or completely eliminate the payment of any award hereunder . . . ."); see also ¶ 7.2 ("The Compensation Committee . . . may amend or terminate the [Incentive Plan] as deemed necessary."))

In July 1997, Xu began working as an exotic options trader on JP Morgan Chase's derivatives trading desk, which was also in the Global Markets Group. (Affidavit of James Y. Xu, dated July 12, 2002 ("Xu Aff.") ¶ 10; Def. 56.1 Stmt. ¶ 2.) In April 1998, JP Morgan Chase replaced its derivatives trading desk

with three independent trading desks -- the exotic options trading desk, the generic options trading desk, and the structured swaps trading desk. (Xu Aff. ¶ 11.) JP Morgan Chase put Xu in charge of the exotic options trading desk, where he reported to Simon Lack, head of JP Morgan Chase's North American interest rate derivatives trading group. (Xu Aff. ¶¶ 11-12; Def. 56.1 Stmt. ¶ 3.) In August 1999, JP Morgan Chase appointed Even Berntsen to succeed Lack as head of the North American interest rate derivatives trading group. (Def. 56.1 Stmt. ¶ 10.) In 1998 and 1999, JP Morgan Chase paid Xu a base salary of \$135,000, and bonuses of \$340,000 in 1998 and \$665,000 in 1999.<sup>1</sup>

Xu claims that in early 2000, Bulent Osman, the manager of the generic options trading desk, told him that Berntsen and Steven Cohen, the manager of the structured products trading group to which Xu and Osman belonged, had agreed to calculate Osman's bonus for fiscal year 2000 pursuant to a specific formula. (Xu Aff. ¶ 18.) More particularly, Xu claims Osman told him that Berntsen and Cohen had agreed to pay Osman either 8% or 10% of the sum of his trading revenue plus 20% of client revenue -- 8% if the sum totaled less than \$10 million, and 10% if the sum was greater than \$10 million. (Xu Aff. ¶ 18.) Xu

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<sup>1</sup> Xu's authority to manage the exotic options trading desk was revoked by JP Morgan Chase in November 1998, but Xu was returned to a managerial role on that desk in August 1999. (Def. 56.1 Stmt. ¶ 6; Pl. 56.1 Stmt. ¶ 6.)

contends that he approached Cohen on the trading floor two days after his conversation with Osman and requested that his bonus be calculated in the same manner. (Xu Aff. ¶ 19.) According to Xu, Cohen agreed to pay Xu a fiscal year 2000 bonus pursuant to the same formula described by Osman, namely 8-10% of the sum of his trading revenue plus 20% of client revenue. (Xu Aff. ¶ 20.) Xu maintains that he confirmed this formula with Berntsen a few days later, because Cohen said that Berntsen made the final decisions concerning bonuses for senior traders in the structured products trading group. (Xu Aff. ¶¶ 20-22.) JP Morgan Chase disputes Xu's version of these events, arguing that no such oral agreement exists.

In August 2000, JP Morgan Chase informed Xu that it was removing him from the exotic options trading desk, and returning him to a research role. (Xu Aff. ¶ 26; Def. 56.1 Stmt. ¶¶ 11, 18.) Management advised Xu that his removal from the exotic options trading desk was due to complaints from internal salespeople and marketers, as well as difficulties interacting with others, a lack of confidence in his business judgment and for violation of personal stock trading policies. (Def. 56.1 Stmt. ¶¶ 11-13; Pl. 56.1 Stmt. ¶¶ 11-13.)

On November 28, 2000, JP Morgan Chase advised Xu that his employment was being terminated and that he would receive a standard severance package plus a payment of \$365,000. Xu

characterizes that payment as an offer of a "bonus for fiscal year 2000" (Xu Aff. ¶ 39), while JP Morgan Chase describes it as a "special payment . . . in exchange for a release of claims" (Def. 56.1 Stmt. ¶ 85). Whatever the proper characterization, it is undisputed that Xu refused the offer, and never received the \$365,000. (Xu Aff. ¶ 47.) Xu was put on a "60-day non-working notice" on November 29, 2000, and was formally terminated from JP Morgan Chase's payroll system on January 25, 2001. (Xu Aff. ¶¶ 40-42 & Ex. B: Termination Letter ("your position will be eliminated and your employment will be terminated on January 25, 2001").) Xu argues that, pursuant to the formula agreed to by Cohen and Berntsen, JP Morgan Chase owes him a bonus of \$1,846,260 for the fiscal year 2000.

#### DISCUSSION

Summary judgment must "be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the burden of establishing the absence of any "genuine issue as to any material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Any ambiguities must be resolved in

favor of the non-movant, see Celotex Corp. v. Catrett, 477 U.S. 317, 330 n.2 (1986), and "all justifiable inferences are to be drawn in his favor." Liberty Lobby, 477 U.S. at 255. If the moving party meets its initial burden, the non-movant must do "more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1996). The non-movant must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

JP Morgan Chase asserts that summary judgment is appropriate with respect to Xu's claim for breach of an express contract because the terms of the Incentive Plan govern the subject matter of employee bonuses, and Xu was not due a bonus under the Incentive Plan because: (1) he was not "actively employed" on the date that bonuses were paid; and (2) the Incentive Plan provides that bonuses are completely discretionary. Further, JP Morgan Chase argues that Xu's claims based on a breach of an implied-in-fact contract and quantum meruit are barred because an express agreement, namely the Incentive Plan, governs the same subject matter, thereby preempting any claim in quasi-contract or quantum meruit under New York law. Finally, JP Morgan Chase argues that summary judgment is appropriate for Xu's New York Labor Law claim because bonuses are not wages under New York Labor Law § 190.

With respect to Xu's claim for breach of an express contract, JP Morgan Chase misperceives Xu's argument. Xu does not claim that JP Morgan Chase breached the terms of the Incentive Plan, although he does contest JP Morgan Chase's assertion that he was not "actively employed" on the date bonuses were paid, as well as its contention that the Incentive Plan granted it "absolute discretion" to determine bonuses. (Pl. Opp. at 12-15.) Rather, Xu alleges a breach of "an explicit agreement by Xu's managers to pay Xu a certain percentage of the revenue he generated as bonus compensation." (Pl. Opp. at 12). Therefore, Xu argues that the terms of the Incentive Plan, and whether Xu was due a bonus under it, are immaterial.

Xu correctly asserts that the central factual issue in this case -- whether Cohen and Berntsen orally agreed to pay Xu a bonus pursuant to a certain formula -- is disputed. (Pl. Opp. at 2.) This alone precludes this Court from granting defendant's motion. JP Morgan Chase attempts to avoid this result by arguing that the existence of an express contract, namely the Incentive Plan, preempts any oral agreement concerning bonuses that Xu, Berntsen and Cohen may have entered into, and therefore the factual dispute is not "material." According to JP Morgan Chase, the terms of the Incentive Plan hold that "participation in the [Incentive Plan] precludes participation in any other annual bonus plans" (Desimone Aff. Ex. C ¶ 3.1), and provides that any

bonus award is within its absolute discretion. This Court agrees with JP Morgan Chase that it retained absolute discretion to determine whether to pay Xu a bonus under the Incentive Plan. It is this very discretion, however, that is fatal to JP Morgan Chase's preclusion argument.

"It is axiomatic that a promise to pay incentive compensation is unenforceable if the written terms of the compensation plan make clear that the employer has absolute discretion in deciding whether to pay the incentive." O'Shea v. Bidcom, Inc., No. 01 Civ. 3855 (WHP), 2002 WL 1610942, at \*3 (S.D.N.Y. July 22, 2002); accord Lam v. American Exp. Co., 265 F. Supp. 2d 225, 237 (S.D.N.Y. May 23, 2003); Tsegaye v. Impol Aluminum Corp., No. 01 Civ. 5943 (LMM), 2003 WL 221743, at \*8 (S.D.N.Y. Jan. 30, 2003); Culver v. Merrill Lynch & Co., Inc., No. 94 Civ. 8124 (LBS), 1995 WL 422203, at \*3 (S.D.N.Y. July 17, 1995); Namad v. Salomon Inc., 74 N.Y.2d 751, 753 (1989). The Incentive Plan unambiguously provides JP Morgan Chase with absolute discretion to determine whether to pay any individual bonuses. (Simone Aff. Ex. C ¶¶ 7.1 ("The Compensation Committee's . . . determination of any award . . . shall be final and binding on all Participants, including a determination . . . to adjust, defer or completely eliminate the payment of any award hereunder".)) Accordingly, the Incentive Plan is not enforceable as a contract, and therefore does not preclude the existence of a

separate oral contract such as the one alleged to have been made in this case. Therefore, JP Morgan Chase's motion to dismiss Xu's claim for breach of the alleged oral contract is denied on the grounds that material questions of fact exist as to whether the alleged oral contract existed, and if so, what its terms were.

The balance of JP Morgan Chase's arguments fail for the same reason. JP Morgan Chase argues that: (1) "[i]t is a fundamental and well-settled principle of New York contract law that an implied-in-fact contract cannot arise where there is an express agreement that deals with the same subject matter" (Def. Sum. Judg. Mem. at 18); and (2) "New York law does not permit recovery in quantum meruit where an express agreement covers the same subject mater [sic] involved." (Def. Sum. Judg. Mem. at 19 (quoting Kreiss v. McCown De Leeuw & Co. 131 F. Supp. 2d 428, 437 (S.D.N.Y. 2001)). However, since the Incentive Plan is not an enforceable contract, material questions of fact exist concerning Xu's implied-in-fact contract and quantum meruit claims, e.g., the parties' course of dealing, the reasonableness of Xu's expectations and the reasonable value of his services. Therefore, summary judgment on Xu's claims for breach of an implied-in-fact contract and recovery under quantum meruit would be inappropriate. See Mirchel v. RMJ Sec., Inc., 613 N.Y.S.2d 876, 879 (1st Dep. 1994) (denying motion for summary judgment on

breach of an implied-in-fact contract claim in the absence of an operative bonus agreement on grounds that "[t]he course of dealing between the parties evinces an implied promise that . . . bonus payments constitute a part of plaintiff's compensation."); GSGSB, Inc. v. New York Yankees, 862 F. Supp. 1160, 1170 (S.D.N.Y. 1994) (noting that "[t]he elements of a claim for quantum meruit are (1) plaintiff rendered services to defendant; (2) defendant accepted those services; (3) plaintiff expected compensation; and (4) the reasonable value of the services," and holding that "[t]he question of whether a party had a reasonable expectation of receiving compensation is an issue of fact for the jury").

Finally, JP Morgan Chase's argument that summary judgment is appropriate on Xu's New York Labor Law claim because bonuses do not constitute wages under § 190(1) is unavailing. JP Morgan Chase is correct that "[u]nder New York law, incentive compensation based on factors falling outside the scope of the employee's actual work is precluded from statutory coverage." Tischmann v. ITT/Sheraton Corp., 882 F. Supp. 1358, 1370 (S.D.N.Y. 1995); accord Quirk v. Am. Mgmt. Sys., Inc., No. 01 Civ. 6813 (RO), 2002 WL 31654966, at \*2 (S.D.N.Y. Nov. 22, 2002) (granting summary judgment to defendants on plaintiff's New York Labor Law claim because plaintiff's "incentive compensation was based only partially on his own performance"); International

Paper Co. v. Suwyn, 978 F. Supp. 506, 514 (S.D.N.Y. 1997)

(holding that where incentive compensation is based on factors outside an individual employee's performance, and bonus was not guaranteed as a term of employment, incentive compensation did not constitute wages under New York Labor Law). However, if the alleged oral agreement between Xu and his supervisors controls, and the terms are as Xu described, Xu's bonus formula was based entirely on his own performance, and did not depend on any factors outside the scope of his actual work. (Xu Aff. ¶ 20.)

If so, such a "bonus" payment would be more akin to a "commission," and therefore covered under the New York Labor Law. See Reilly v. Natwest Mkt. Grp. Inc., 181 F.3d 253, 265 (2d Cir. 1999) (holding that plaintiff's "pay was guaranteed under the Percentage Bonus formula to be a percentage of the revenues he generated, and was not left to [the defendant's] discretion.

. . . [Therefore the] Percentage Bonus falls comfortably within the definition of a 'commission' that is expressly included within the Labor Law's definition of 'wages'"). As noted above, the central material facts in this case -- the existence and terms of the alleged oral agreement -- are in dispute.

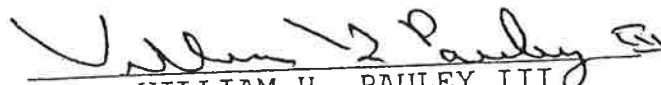
Therefore, JP Morgan Chase's motion for summary judgment on Xu's New York Labor Law claim is denied.

CONCLUSION

For the foregoing reasons, defendant JP Morgan Chase's motion for summary judgment against plaintiff James Y. Xu is denied. The parties are directed to appear for a pre-trial conference on October 17, 2003 at 10:00 a.m.

Dated: September 23, 2003  
New York, New York

SO ORDERED:

  
WILLIAM H. PAULEY III  
U.S.D.J.

*Copies mailed to:*

Christine A. Palmieri, Esq.  
Liddle & Robinson, L.L.P.  
685 Third Avenue  
New York, New York 10017  
*Attorneys for Plaintiff*

Melissa R. Gold, Esq.  
J.P. Morgan Chase & Co.  
1 Chase Manhattan Plaza  
26th Floor  
New York, New York 10081  
*Attorneys for Defendant*