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

KILGOUR WILLIAMS GROUP INCORPORATED, DANIEL WILLIAMS, and COLIN KILGOUR,

Plaintiffs,

-against-

ERIC BEN-ARTZI and MODEL RISK LLC,

Defendants.

: Index No. 654091/2018

: Motion Seq. No.: 009

: IAS Part 61
Hon. Barry R. Ostrager, J.S.C.

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' CROSS MOTION

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PRELIMINARY STATEMENT

Defendants' opposition to plaintiffs' motion for summary judgment concedes that there are virtually no disputed material facts. As to the few facts that defendants attempt to dispute, the documentary evidence shows that there is no material issue of fact. In addition, defendants fail to contest plaintiffs' arguments for dismissal of defendants' affirmative defenses, thereby conceding that those defenses are not a basis for denying summary judgment.

Instead of responding to plaintiffs' arguments for dismissal, defendants raise a new defense of unconscionability that they failed to raise in their answer, their amended answer and their second amended answer. Defendants offer no justification for raising a new defense, just days before the deadline for filing the certificate of readiness and note of issue, with trial only weeks away. That alone is grounds for rejecting the unconscionability defense.

The unconscionability defense fails on its merits too. Defendant Eric Ben-Artzi is a highly sophisticated financial executive, with a Ph.D. in mathematics. When he entered into the Letter Agreement with plaintiffs assigning them rights to a large portion of his whistleblower award, he had years of experience as a strategist and risk manager for Goldman Sachs and Deutsche Bank, two of the world's most powerful financial institutions. There is no evidence in the record of unequal bargaining power, high pressure tactics, duress or deception. He made the Letter Agreement for two primary reasons: (1) he believed that plaintiffs had earned the right to $2.747,500 through their substantial contributions to the investigation leading to the whistleblower award, as he acknowledged in a letter to the Securities and Exchange Commission ("SEC"); and (2) he did not want to accept the award because the executives at Deutsche Bank who he believed committed the wrongdoing escaped liability. His conclusion that plaintiffs had made a substantial contribution to justify assigning them a share of the award was a rational

decision, supported by both the statements of his lawyer and the SEC attorney who led the investigation of Deutsche Bank. He received consideration for the Letter Agreement in the form of releases and a reduction in the fees due to plaintiff Kilgour Williams Group Incorporated ("KWG"). The defense of unconscionability cannot succeed on these undisputed facts.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR CLAIM FOR BREACH OF THE LETTER AGREEMENT.

A. The Undisputed Facts Prove the Elements of a Breach of Contract

Plaintiffs' moving brief and supporting affirmations established all the elements of a breach of contract: (1) the existence of a contract; (2) plaintiff's performance; (3) defendants' breach and (4) resulting damages. (Moving Br. 13-18.) Defendants' concede that the facts establishing the elements of a breach of contract are undisputed and make no effort to show that plaintiffs have failed to prove the elements of a breach of contract. *See* Defendants' Response to Plaintiffs' Statement of Material Facts Not in Dispute, ¶¶ 1-12, 28-31, 37 & 47-51.

B. The Affirmative Defenses in the Second Amended Answer Are Invalid.

Plaintiffs' moving brief also established that the affirmative defenses that defendants asserted in their second amended answer are invalid. (Moving Br. 18-22.) Defendants did not respond to those arguments, thereby conceding that summary judgment should be granted dismissing those defenses.

C. The Defense of Unconscionability Fails.

The only ground on which defendants oppose the motion for summary judgment is their assertion that the Letter Agreement is unconscionable. They asserted this defense for the first time in their opposition to the motion. That defense fails both procedurally and substantively.

1. Defendants' offer no justification for their delay in claiming unconscionability.

Here, defendants seek to add a new defense, unconscionability, without even making a motion to amend and without offering any excuse for their delay in asserting the defense. Nor could defendants offer a satisfactory excuse. The facts on which they base the assertion of unconscionability were all known to them at the time Dr. Ben-Artzi entered into the contract, years before first asserting the defense in their opposition to the summary judgment motion. Moreover, the delay in asserting the defense is prejudicial, coming as it does just days before the August 31 deadline for filing the certificate of readiness and note of issue, little more than a month prior to the October 5 trial date, two years after plaintiffs commenced the case and four years after entering into the Letter Agreement. During the two years that the case has been pending, defendants have delayed the progress of the case by repeatedly changing counsel, by seeking delays to obtain new counsel, by repeatedly amending their pleadings, by making a motion to dismiss that was denied in its entirety, by making a motion for leave to file a second motion to dismiss and for sanctions, and by refusing to accept service of process.

In similar circumstances, the Appellate Courts have held that it was an abuse of discretion for the trial court to permit an amendment. For example, in *Romeo v. Arrigo*, 254 A.D.2d 270, 270-71 (2d Dep't 1998) the court reversed an order permitting a late motion to amend, holding:

> In exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether the amendment is meritorious, and whether a reasonable excuse for the delay was offered (*see Caruso v. Anpro, Ltd.*, 215 A.D.2d 713 (2d Dep't 1995); *Moeller v. Astor Chocolate Corp.*, 214 A.D.2d 548 (2d Dep't 1995); *Pellegrino v. N.Y. City Transit Auth.*, 177 A.D.2d 554, 557 (2d Dep't 1991)).
>
> In the instant case, it was an improvident exercise of discretion to grant the third-party defendants' motion for leave to amend their answer. The third-party defendants failed to proffer any reasonable excuse for their two-year delay in seeking leave to amend their answer despite the fact that they had been aware of

> all the essential facts during that period. More importantly, the third-party defendants failed to produce even a scintilla of evidence that there was any merit to their proposed amendments.

In *Williams v. N.Y. Univ. Hosp.*, 88 A.D.2d 540 (1st Dep't 1982), the Appellate Division reversed an order allowing a late amendment, stating:

> More than two and one-half years after the commencement of the action and five years after the injury, and after the Statute of Limitations had run, when discovery had been completed and the case was set for trial, plaintiff moved for leave to serve an amended complaint, adding a cause of action for loss of services on behalf of her husband. The couple had been married from the inception of the action, but that fact was not noted in the original pleadings. While leave to amend pleadings should be freely given, the inordinate delay in moving to add this new cause of action and party warrants reversal.

Moreover, when, as here, the amendment is offered on the eve of trial, "there is a heavy burden on [the amending party] to show extraordinary circumstances to justify amendment by submitting affidavits which set forth the recent change of circumstances justifying the amendment and otherwise giving an adequate explanation for the delay. . . ." *Jablonski v. County of Erie*, 286 A.D.2d 927, 928 (4th Dep't 2001) (internal citations and quotation marks omitted); *see also Meisel v. Grunberg*, 743 N.Y.S.2d 271, 271 (1st Dep't 2002) ("Plaintiff's motion to amend the complaint was properly denied because of his inordinate delay in seeking such relief . . . .") (Citations omitted).

It has been two years since plaintiffs commenced the case. Defendants have been aware of the facts on which defendants base their defense of unconscionability since before the inception of the case. Defendants offer no excuse for their two-year delay in adding the unconscionability defense. Moreover, as shown below, the defense has no merit. Accordingly, the defense presents no obstacle to an order granting summary judgment to the plaintiffs.

2. The defense of unconscionability fails on its merits.

On its merits, the defense of unconscionability fails. An unconscionable contract is "one which is so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party . . . ." *Somerset Fine Home Bldg., Inc. v. Simplex Indus., Inc.*, No. 2019-01242, 2020 N.Y. App. Div. LEXIS 3886, at *3 (2d Dep't July 8, 2020) (citations and internal quotation marks omitted). Moreover, "unconscionability rarely applies in a commercial setting, where the parties are presumed to have equal bargaining power . . . ." *Id.* (citing *Jet Acceptance Corp. v. Quest Mexicana S.A. de C.V.*, 87 A.D.3d 850, 856 (1st Dep't 2011);*Gillman v. Chase Manhattan Bank, N.A.*, 135 A.D.2d 488, 491 (2d Dep't 1987), *aff'd*, 73 N.Y.2d 1 (1988).

Unconscionability has two major elements: procedural unconscionability and substantive unconscionability. *Lister Elec., Inc. v. Cedarhurst*, 108 A.D.2d 731, 734 (2d Dep't 1985): The Court of Appeals explained these two elements in *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10-12 (1988) (citations omitted). It held that procedural unconscionability:

> requires an examination of the contract formation process and the alleged lack of meaningful choice. The focus is on such matters as the size and commercial setting of the transaction . . ., whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power . . . .

Id. at 10-11. It held that substantive unconscionability "entails an analysis of the substance of the bargain to determine whether the terms were unreasonably favorable to the party against whom unconscionability is urged . . . . *Id.* at 12. In this case, the undisputed facts show there is neither procedural nor substantive unconscionability.

a. The undisputed facts show there was no procedural unconscionability.

Turning first to procedural unconscionability, Dr. Ben-Artzi is a highly sophisticated and experienced financial executive. He has a Ph.D. in mathematics and worked for two of the world's most powerful financial institutions in positions of significant responsibility, as a strategist at Goldman Sachs and as a quantitative risk officer at Deutsche Bank. (Harwood Aff. Ex. 34 pp. 13-14).

The evidence shows that the Letter Agreement was negotiated by the parties through emails in which there was give and take and which are devoid of any indication that high pressure tactics or deception was involved. (Ben-Artzi Aff. Ex. A). In fact, in describing those emails Dr. Ben-Artzi stated in his affidavit, that he made the initial offer: "I initially offered to request that the SEC tender to both Kilgour and Williams, individually, the sum of Four Hundred Fifty Thousand Dollars ($450,000.00) – 'an admittedly random number.' Those sums would have been in addition to any amounts due and owing to KWG under the Expert Agreement and the Tri-Party Agreement." (Ben-Artzi Aff. ¶ 18.)

Additionally, the contract involved a commercial transaction between financial executives, not a consumer transaction. Because of the commercial setting, there is a presumption of equal bargaining power. *See Somerset Fine Home Bldg., Inc.*, 2020 N.Y. App. Div. LEXIS 3886, at *3. Dr. Ben-Artzi cannot overcome this presumption because the undisputed facts show he had substantial bargaining power due to the SEC having awarded him $8.25 million and having awarded the plaintiffs nothing.

In *Jet Acceptance Corp.*, 87 A.D.3d at 856, the First Department affirmed a grant of summary judgment dismissing a defense of unconscionability in similar circumstances. There the Court held there was no procedural unconscionability where the agreements were "negotiated by the parties," where the agreement was "not presented . . .as a take-it-or-leave-it proposition,"

and where the defendant was "sophisticated and sufficiently able to protect its own interests." *Id.*

Dr. Ben-Artzi attempts to prove procedural unconscionability based on the demonstrably false assertion that he was under duress, citing his deposition testimony. (Defendants' Brief at 14.) This is inadequate on both the facts and the law.

Dr. Ben-Artzi claims duress based on the actions third parties had taken. Specifically, he claims he was under duress because: (1) he had "taken on Deutsche Bank" and "the SEC," (2) "His ex-wife was trying to destroy him," (3) he was "having a great deal of trouble with the divorce court in Washington State," (4) "He was attacked in media outlets, including the Wall Street Journal and the New York Times;" (5) his "counsel at Labaton also became adversarial;" and (6) "His immediate family also turned on him and curtailed their support." (Defendants' Brief at 14.) However, it is well established that duress resulting from the actions of third parties are insufficient. *See Edison Stone Corp. v. 42nd St. Dev. Corp.*, 145 A.D.2d 249, 256 (1st Dep't 1989); *Mandavia v. Columbia Univ.*, 912 F. Supp. 2d 119, 127 (S.D.N.Y. 2012).

Turning to the acts of duress that he allegedly suffered at the hands of Mr. Kilgour and Mr. Williams, he asserts in his brief that Mr. Kilgour and Mr. Williams became "aggressive and threatening, exerting tremendous pressure upon him to give to them whatever portion of the award he would otherwise have realized (but for his repudiation)." (Defendant's Brief at 14.) This assertion is contrary to both the law and his deposition testimony.

First, while a "wrongful threat" that has "precluded the exercise of free will" may constitute duress, *805 Third Ave. Co. v. M.W. Realty Assocs.*, 58 N.Y.2d 447, 450-51 (1983), Dr. Ben-Artzi's deposition testimony shows there was no wrongful threat. He initially testified that "the implicit threat was that they would destroy me, you know, whether it's through the press,

through litigation, through other means . . . ." (Harwood Aff. Ex. 34, p.161.) However, he later admitted that Mr. Kilgour and Mr. Williams never made such a threat:

> Q Did they ever say that to you, that they would destroy you?
>
> A That was implicit. I wouldn't say—okay, not quite in those terms, but their unhappiness – I knew what unhappiness can translate into from other parties.

(Harwood Aff. Ex. 34, p. 162, lines 1-6.) Dr. Ben-Artzi's unfounded belief, based on the actions of other parties, that unhappiness translates into an implicit threat does not establish duress.

Second, Dr. Ben-Artzi's allegation that Mr. Kilgour and Mr. Williams were aggressive and applied tremendous pressure, even if true, is nothing more than hard bargaining. Hard bargaining does not constitute duress. *Mandavia*, 912 F. Supp. 2d at 127 ("hard bargaining positions, if lawful, and the press of financial circumstances, not caused by the defendant, will not be deemed duress."); *see also Edison Stone Corp.*, 145 A.D.2d at 256 ("[T]he existence of financial pressure and an unequal bargaining position are insufficient to constitute economic duress."); *Interpharm, Inc. v. Wells Fargo Bank, N.A.*, 655 F.3d 136, 142 (2d Cir. 2011) (same).

Because of the frequency with which one party to a commercial agreement will have "decided economic advantage" over the other, economic duress "is reserved for extreme and extraordinary cases." *Id.* (internal quotation marks omitted). The "implicit" threat, that Dr. Ben-Artzi claims to have perceived from the unhappiness that Mr. Kilgour and Mr. Williams allegedly expressed, is not such an extreme and extraordinary case.

Moreover, "One who would repudiate a contract procured by duress must act promptly, or he will be deemed to have elected to affirm it . . . ." *Edison Stone Corp.*, 145 A.D.2d at 253 (citation omitted). Dr. Ben-Artzi failed to take prompt action to repudiate the Letter Agreement. As shown in plaintiffs' moving papers, Dr. Ben-Artzi first repudiated the Letter Agreement on December 26, 2017, when he submitted an affidavit in his divorce proceeding which sought an

allocation of the full award between himself and his wife, without any provision for plaintiffs. (Williams Aff. ¶40 & Ex. 22.) That is more than a year after entering into the letter agreement.

b. The undisputed facts show there was no substantive unconscionability.

Defendants argue that there is substantive unconscionability because "Neither Kilgour nor Williams did anything whatsoever to earn" the $2,500,000 "earmarked for payment" to them. (Defendants' Brief at 12.) This ignores the undisputed facts, established in plaintiffs' opening papers, that the SEC said Mr. Kilgour and Mr. Williams made "critical" contributions to the investigation that led to the whistleblower award, that Dr. Ben-Artzi told the SEC that the contributions of Mr. Kilgour and Mr. Williams to the case were "crucial," and that Dr. Ben-Artzi's lawyer in the whistleblower proceeding told the SEC that Mr. Kilgour and Mr. Williams had provided extensive expert and factual analysis on behalf of Dr. Ben-Artzi. (Plaintiffs' Opening Brief at 3-5.)

Defendants also incorrectly assert that when the parties entered into the Letter Agreement, plaintiffs had no claims against Dr. Ben-Artzi and Model Risk apart from those arising out of the Expert Agreement and the Tri-Party Agreement. Defendants point to plaintiffs' responses to interrogatory number 9 to support that erroneous assertion. However, interrogatory number 9 asks what claims plaintiffs had as of August 1. That was 23 days before the parties entered into the Letter Agreement on August 24, 2016 (Williams Aff. Ex. 2) and was 15 days prior to when Dr. Ben-Artzi renounced his whistleblower award in an editorial in the Financial Times (Williams Aff. Ex. 14). As the response to interrogatory 10 shows, Mr. Kilgour and Mr. Williams believed they had claims against Dr. Ben-Artzi when they entered into the Letter Agreement because his announcement that he was rejecting his award impaired their chances of success on their appeal from the SEC's denial of their application for a whistleblower award. (Melnick Aff. Ex. A., Response to Interrogatory 10.)

Defendants assert that the releases Mr. Kilgour and Mr. Williams gave Dr. Ben-Artzi in exchange for the Letter Agreement do not constitute valid consideration because there is not "any reasonable basis upon which to conclude that Ben-Artzi's public repudiation of the whistleblower award allocated to him could possibly have 'impaired the likelihood of a successful appeal of the SEC's denial'" of their whistleblower award. However, as plaintiffs' opening brief established: "[R]elinquishment of a disputed claims is valid consideration even though the claim is in fact invalid . . . ." *Apfel v. Prudential-Bache Sec., Inc.*, 81 N.Y.2d 470, 476 (1993).

II. PLAINTIFFS' RIGHT TO DAMAGES AND ATTORNEYS' FEES IS UNDISPUTED.

Plaintiffs' opening brief demonstrated that they are entitled to damages of $2,747,500, and attorneys' fees under the provisions of the contract. (Plaintiffs' Moving Brief at 16-17.) Defendants have offered no opposition on that point, basing their entire opposition on their defense of unconscionability. As shown above, the unconscionability defense fails. Accordingly, plaintiffs respectfully request that the Court award damages in the amount of $2,747,500, plus attorneys' fees, in an amount to be determined in a separate motion, prejudgment interest at the statutory rate, costs and expenses.

CONCLUSION

For all of the foregoing reasons, and for the reasons asserted in plaintiffs moving submissions, plaintiffs respectfully request that the Court grant their motion for summary judgment: (1) holding Dr. Ben-Artzi in breach of the letter agreement; (2) awarding damages of $2,747,500, plus prejudgment interest, attorneys' fees, costs and expenses; (3) releasing the escrowed funds to plaintiffs and their counsel in partial satisfaction of the judgment; (4) severing the claims against defendant Model Risk, LLC so that plaintiffs can obtain judgment on the breach of the letter agreement, and (5) directing the Clerk to enter judgment against Dr. Ben-

Artzi for $2,747,500 with prejudgment interest at the statutory rate, costs, disbursements and attorneys' fees in an amount to be determined by the Court.

Dated: New York, New York
August 27, 2020

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CERTIFICATION OF WORD COUNT PURSUANT TO COMMERCIAL DIVISION RULE 17

Counsel for plaintiffs certifies that the number of words contained in this Memorandum of Law is 3237.

Dated: New York, New York
August 27, 2020

_____
Anthony J. Harwood