UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| INTERNATIONAL BUSINESS MACHINES CORPORATION, Plaintiff, | : | **MEMORANDUM DECISION** |
| v. | : | 14 CV 4694 (VB) |
| MITHKAL SMADI, Defendant. | : | |

Briccetti, J.:

Plaintiff International Business Machines Corporation ("IBM") brings this diversity action alleging it is due $243,710.91 for the value of rescinded stock options and equity awards previously granted to its former employee, defendant Mithkal Smadi.

Now pending is defendant's motion to dismiss the second amended complaint ("SAC"), for failure to state a claim. (Doc. #17). For the following reasons, the motion is DENIED.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

## BACKGROUND

IBM alleges that during the course of defendant's employment as a "Distinguished Engineer" with the company, defendant received stock options and equity awards (collectively, "Awards") under the IBM 2001 Long-Term Performance Plan (the "Plan") and various Equity Award Agreements ("EAAs"). (SAC ¶¶ 3-4, 6). The "Terms and Conditions of 'Your Equity Award: Effective June 8, 2011'" ("Terms and Conditions," collectively with the Plan and EAAs, the "Award Agreements") provided defendant with the terms and conditions of his Awards. (SAC ¶ 4, Cooper Decl. Ex. B). IBM alleges these Awards were "designed to attract, motivate and retain selected employees" by "making long-term incentive and other awards." (SAC ¶ 8).

Section 13(a) of the Plan provides, in pertinent part:

> [IBM] may cancel, rescind, suspend, withhold or otherwise limit or restrict any unexpired, unpaid, or deferred Awards at any time if the Participant . . . engages in any 'Detrimental Activity.' For the purposes of this Section 13, 'Detrimental Activity' shall include: (i) the rendering of services for any organization or engaging directly or indirectly in any business which is or becomes competitive with the Company, or which organization or business, or the rendering of services to such organization or business, is or becomes otherwise prejudicial to or in conflict with the interests of the Company.

(SAC ¶ 14). Section 13(b) provides, in pertinent part:

> In the event a Participant fails to comply with the provisions of [Section 13(a)] prior to, or during the Rescission Period, then any exercise, payment or delivery may be rescinded within two years after such exercise, payment or delivery.

(SAC ¶ 15). The Rescission Period is defined as the twelve month period after "any exercise, payment or delivery pursuant to an Award." (SAC ¶ 49).

Moreover, various EAAs executed by defendant during the course of his employment allowed IBM to "cancel, modify, rescind, suspend, withhold or otherwise limit or restrict" the EAA if he were to "render services for a competitor prior to, or during the Rescission Period." (SAC ¶ 16).

According to IBM, defendant exercised Awards on May 8, June 6, and June 8, 2012, realizing gains totaling $243,710.91. (SAC ¶¶ 24-33, 35).

IBM alleges plaintiff "voluntarily terminated" his employment on March 13, 2013, and soon thereafter commenced employment with Microsoft Corporation. (SAC ¶¶ 9, 10, 18, 46). IBM deemed this to be Detrimental Activity within the Rescission Period. As a result, on May 28, 2013, IBM notified defendant it had rescinded his recently exercised Awards, and demanded repayment of defendant's gain of $243,710.91. (SAC ¶¶ 40-43). IBM alleges defendant "has failed and refused to make the requested payment." (SAC ¶ 44).

IBM seeks $243,710.91 from defendant for the monetary value of his rescinded Awards, plus all costs and expenses incurred in connection with the instant action. Defendant moves to

dismiss, arguing rescission is an extraordinary remedy not permitted here, the Plan is unenforceable, and the Award Agreements limit IBM's recovery to unvested Awards.

**DISCUSSION**

I. Legal Standard

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court evaluates the sufficiency of the complaint under the "two-pronged approach" announced by the Supreme Court in Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). First, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to the assumption of truth and are thus not sufficient to withstand a motion to dismiss. Id. at 678; Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010). Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." Ashcroft v. Iqbal, 556 U.S. at 679.

To survive a Rule 12(b)(6) motion to dismiss, the allegations in the complaint must meet a standard of "plausibility." Id. at 678; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

II. Breach of the Award Agreements

Both parties fail to brief the real issue in this case – namely, whether defendant breached the Award Agreements when he failed to return the gain realized from his exercise of Awards on May 8, June 6, and June 8, 2012. Instead, the parties briefed defendant's motion as if the SAC alleged a claim for rescission.

IBM is not seeking rescission.

IBM does not wish to return to the status quo, i.e., for defendant to return to work at IBM. Rather, IBM seeks repayment of defendant's gain from the rescinded Awards, and, although inartfully pleaded,[1] the SAC purports to allege a claim for breach of contract. Put another way, IBM is claiming that when defendant failed to repay or return the monetary value of his rescinded Awards, he breached an agreement he made with IBM; and that IBM's damages are equal to the gain defendant realized from his exercise of the Awards.

To state a claim for breach of contract under New York law, "a complaint need only allege (1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages." Harsco Corp. v. Segui, 91 F.3d 337, 348 (2d Cir. 1996).

The SAC adequately alleges the four elements of a claim for breach of contract. IBM has alleged (i) the existence of the Award Agreements; (ii) IBM's performance under said agreements; (iii) defendant's failure to return the monetary value of Awards he received during the Rescission Period;[2] and (iv) $243,710.91 in damages.

Defendant argues the Plan is unenforceable because it is not reasonably tailored to protect IBM's legitimate business interests and it retroactively assigns meaning to the term Detrimental Activity based upon future performance.

The Court disagrees.

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[1] IBM labels its claim as a "First Cause of Action" and simply states "there is due and owing from Defendant to IBM the amount of $243,710.91." (SAC at 7, ¶ 58).

[2] IBM argues "[d]efendant's post-separation employment with Microsoft, a direct competitor of IBM, constitutes a fundamental breach of [the Plan]." (Pl.'s Opp'n at 7). That is simply not true. The breach occurred when defendant allegedly failed to return the monetary value of Awards. To accept IBM's argument would bind all incentivized employees to IBM forever.

A. Employee Choice Doctrine

The employee choice doctrine renders the Plan enforceable.

While New York courts "disfavor restrictive covenants in the employment context and will generally enforce them only to the extent they are reasonable and necessary to protect valid business interests," there is "one salient exception." Lucente v. International Bus. Machs. Corp., 310 F.3d 243, 254 (2d Cir. 2002). "New York courts will enforce a restrictive covenant without regard to its reasonableness if the employee has been afforded the choice between not competing (and thereby preserving his benefits) or competing (and thereby risking forfeiture)." Id.; see also Morris v. Schroder Capital Mgmt. Int'l, 7 N.Y.3d 616, 620-21 (2006). This is called the employee choice doctrine.

The employee choice doctrine is applicable if the employee left his employment voluntarily, see Morris v. Schroder Capital Mgmt. Int'l, 481 F.3d 86, 88 (2d Cir. 2007), and the employer can demonstrate its continued willingness to employ the party who covenanted not to compete. See Lucente v. International Bus. Machs. Corp., 310 F.3d at 254.

The employee choice doctrine is applicable here. Defendant was afforded the choice of continuing to receive Awards by refraining from competing with IBM, or forfeiting the monetary value of Awards by competing with IBM. IBM alleges defendant left his position voluntarily, and IBM demonstrated its continued willingness to employ defendant by paying out the Awards he exercised in May and June of 2012. It matters not that defendant was deprived of a past benefit, as the doctrine may "be applied where the benefit has already been paid." Tasciyan v. Marsh USA, Inc., 2007 WL 950091, at *3 (S.D.N.Y. Mar. 28, 2007); see also International Bus. Machs. Corp. v. Martson, 37 F. Supp. 2d 613, 619 (S.D.N.Y. 1999) (doctrine applicable where employee received award subject to forfeiture, then violated the non-compete provision of the

award).

The employee choice doctrine permits the Plan to condition acceptance of Awards on defendant's choice, and therefore, is enforceable under New York law.

B. Meaning of Detrimental Activity

It appears defendant argues the Plan is "unenforceable" because it assigns meaning to the term Detrimental Activity based upon future performance.[3] (Def.'s R. at 1).

It is unclear how the Plan does such a thing. Detrimental Activity is defined as engagement in any business which is competitive with IBM. IBM now alleges defendant accepted employment at IBM's competitor, Microsoft, and thus committed a Detrimental Activity.

Defendant explains the Plan ascribes meaning to Detrimental Activity based upon future performance because "IBM's former employees [are] subject to IBM's whim years after shares are exercised." (Pl.'s R. at 2). That explanation is nonsensical. Simply because the Plan calls for rescission of Awards within two years after their exercise, and is thus unfavorable to defendant at this juncture, does not mean IBM retroactively defined Detrimental Activity.[4]

As such, defendant's arguments are unavailing. Detrimental Activity is not defined by

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[3] Defendant also appears to argue the term Detrimental Activity is unreasonably broad. However, as discussed above, the reasonableness of the term is moot because the employee choice doctrine applies.

[4] Moreover, the cases defendant cites in support of his argument are inapplicable. In Saunders v. City of N.Y., 2009 WL 90621, at *2 (S.D.N.Y. Jan. 13, 2009), the court held a term in a Collective Bargaining Agreement could not be defined by the employee's subsequent acquiescent conduct. Here, there is no comparable allegation of subsequent acquiescent conduct. In Slatt v. Slatt, 64 N.Y.2d 966, 967 (1985), the court held an alimony agreement contained unambiguous language evincing the intent of the parties to subject all of the defendant-husband's payments to a cost of living increase. It is unclear how that case, or the law therein, is applicable to defendant's argument. Fiore v. Fiore, 46 N.Y.2d 971 (1979), Rodolitz v. Neptune Paper Prods., 22 N.Y.2d 383 (1968), and Sperling v. Great Am. Indemn. Co., 7 N.Y.2d 442 (1960), are similarly inapplicable.

future performance.

III. Recovery of Vested Awards

Finally, defendant argues the plain language of the Award Agreements limits IBM's recovery to those Awards that had neither fully vested nor expired, or, in the alternative, that the Award Agreements are internally inconsistent and therefore ambiguous.

Both arguments are unavailing.

As to the first argument, the plain language of the Award Agreements may permit recovery of unvested and unexpired Awards, but the Award Agreements also permit recovery of any Award. Pursuant to Section 13(b) of the Plan, in the event a participant fails to comply with Section 13(a), "then any exercise, payment or delivery may be rescinded within two years after such exercise, payment or delivery." (SAC ¶ 15 (emphasis added)). Also, EAAs executed by defendant allowed IBM to "cancel, modify, rescind, suspend, withhold or otherwise limit or restrict [the EAA] . . . including without limitation, canceling or rescinding." (SAC ¶ 16).

As to defendant's alternative argument, any alleged ambiguity in the Award Agreements must be construed in IBM's favor at this early stage of the case. "'When the language of a contract is ambiguous, its construction presents a question of fact,'" precluding dismissal of a breach of contract claim on a Rule 12(b)(6) motion. Crowley v. VisionMaker, LLC, 512 F. Supp. 2d 144, 152 (S.D.N.Y. 2007) (quoting Jackson Heights Medical Grp., P.C. v. Complex Corp., 222 A.D.2d 409, 411 (2d Dep't 1995)). Therefore, "while a court is not 'obliged to accept the allegations of the complaint as to how to construe' a contract, it 'should resolve any contractual ambiguities in favor of the plaintiff' on a motion to dismiss." Maniolos v. U.S., 741 F. Supp. 2d 555, 567 (S.D.N.Y. 2010) (quoting Subaru Distribs. Corp. v. Subaru of Am., Inc., 425 F.3d 119, 122 (2d Cir. 2005)). If, as defendant argues, there is ambiguity in the Award

Agreements, on a motion to dismiss, that ambiguity must be construed in IBM's favor. Accordingly, IBM's recovery cannot be limited by defendant's interpretation at this early stage of the proceedings.

**CONCLUSION**

Defendant's motion to dismiss the second amended complaint is DENIED.

The Clerk is instructed to terminate the motion. (Doc. #17).

Dated: March 2, 2015
White Plains, NY

SO ORDERED:

Vincent L. Briccetti
United States District Judge