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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

In re:	)
LEHMAN BROTHERS INC.,	) Case No. 08-01420 (SCC) SIPA
Debtor.	)

CLAIMANT WAYNE JUDKINS PRE-HEARINGN BRIEF

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I. STATEMENT OF FACTS

A. Lehman Brothers

Wayne Judkins commenced employment with Lehman Brothers, Inc. on or about January 28, 2008 as a Senior Trader in the Fixed Income Division. His title was Senior Vice President and he initially reported to Jerry Rizzieri. Pursuant to an employment contract dated January 8, 2008 (Revised January 14, 2008). Lehman Brothers agreed to pay Mr. Judkins, inter alia, an annual salary of $200,000.00 and a ***minimum*** bonus in the amount of $800,000.00 payable on or about January 31, 2009. (Please see Affirmation of Gregory Reid, Dated April 9, 2015 ("Reid Affir"), Exhibit A). Additionally, Lehman Brothers agreed in his employment contract to provide Mr. Judkins with relocation assistance with respect to the sale of his home in Easton, Md., then valued at approximately $2.8 million, which such sale was necessitated by his move to New York City to commence employment with Lehman Brothers. Reid Affir, Ex. A. Prior to Mr. Judkins' accepting the Lehman Brothers offer, his future Lehman management (Jerry Rizzieri, his superior Jeff Michaels, Global Head of Rates, and Scott Gewirtz, head of the US Treasury Government desk at Lehman) emphasized to Mr. Judkins that the sum of $800,000.00 would be the ***minimum*** bonus that he would receive for the 2008 performance year and that he would be compensated more depending on how he and Scott Gewirtz, with whom he traded, performed. Reid Affir, Ex. M. Based on these representations of the earnings potential in performance year 2008, Mr. Judkins agreed to the Lehman offer and joined the firm. Lehman Brothers "The Guide to Working

Brothers" specifically authorized managers to make representations concerning bonuses. Reid, Affir, Ex C.

Mr. Judkins and Mr. Gewirtz had a very successful 2008 performance year at Lehman Brothers. In 2008 their book was up $50 to $55 million for the year before Lehman Brothers filed for bankruptcy. Reid Affir, Ex M. The typical payout for a team like that of Messrs. Judkins and Gewirtz would have been approximately 10% to 12% of the PNL, so 5 to 6 million dollars would have been the bonus pool. As Mr. Gewirtz had a longer tenure with Lehman than Mr. Judkins, the bonus pool would have been divided 60/40 in Mr. Gewirtz's favor. Therefore, Mr. Judkins earned Lehman Brothers bonus for 2008 performance payable on or about January 31, 2009 was between $2,000,000.00 and $2,400,000.00. The Trustee's 30(b)(6) witness testified that Lehman Brothers Compensation Committee never established a grant date for RSU units under Lehman Brothers 2008 Equity Awards Program. March 19,2015 Deposition Transcript of Christopher Kiplok, ("Kiplok, Tr).) p 92: 24-25; 94:6

. The Trustee's 30(b)(6) witness also testified that the last price of Lehman Brothers shares as of December 8, 2008 was .040. Kiplok Tr. 103:24. Thus, it would have been impossible for Lehman Brothers to exercise its discretion and pay a portion of Mr. Judkins' bonus for performance year 2008, even if a grant date were established.

Additionally, under its Executive Relocation and Home Sale Policy, Lehman is required to reimburse Mr. Judkins for all reasonable and customary closing costs incurred in the sale of his Easton, Maryland residence, including brokerage fees,

mortgage prepayment penalty and forwarding fees, legal fees, transfer taxes, and title and recording fees. (Reid Aff, Ex. B) Lehman promised to "gross up" the above amounts so that Mr. Judkins would not incur adverse tax consequences from the sale. (At the time of the filing of the Proof of Claim we estimated that those amounts of relocation home sales expenses would total between $300,000.00 and $400,000.00 on a grossed up basis. Additionally, in connection with his relocation from Maryland to New York to work for Lehman Brothers in 2008, Mr. Judkins was required to pay Prudential Relocation , Inc. the sum of $845,000.00 in satisfaction of an home equity loan that Mr. Judkins incurred pursuant to the Prudential Services Relocation Services Agreement between Lehman Brothers, Inc. and Prudential Relocation , Inc., dated March 14, 2006. (Reid Affirm, Exh J). This $$845,000.00 was supposed to be the obligation of Lehman Brothers and repaid from the equity upon the sale of the home.

Mr. Judkins Guaranteed Barclays Bonus

On or about October 6, 2008, Barclays Bank PLC (hereinafter referred to as "Barclays ") extended to Mr. Judkins a written offer of employment commencing on October 31, 2008. (Reid Affir, Exh E). Pursuant to the contract with Barclays Mr. Judkins was guaranteed a cash bonus of $660,000 to be paid in February 2009. Additionally, under his employment contract Barclay promised Mr. Judkins a grant of Barclay shares with an aggregate market value of $140,000 (2008 Share Award), which would be paid in cash at the same time of his $660,000 cash bonus if the 2008 Share Award had not been granted at the date of his termination. On or about January 14, 2009, Barclays gave Mr. Judkins ninety days' written notice of his termination and told him that January 14, 2009 was the last day he was expected to report to work. (Reid

Affir, Exh F). In February 2009, Barclays paid Mr. Judkins by direct deposit the amount of $800,000.00, which included his $660,000 Barclays cash bonus and his $140,000 Barclay's Share Award payment. Barclays has never informed Mr. Judkins that his $660,000 Barclays guaranteed bonus or $140,000 Share Award cash payment was being made in satisfaction of the Lehman bonus for performance year 2008. Additionally, the Barclay's bonus payment was far less than the guaranteed bonus Lehman owed Mr. Judkins for performance year 2008. The Lehman bonus was not a discretionary bonus as the trustee argues but a guaranteed minimum bonus, although the precise bonus amount above $800,000 that would be paid was not stated in Mr. Judkins Lehman contract letter. Furthermore, as to the trustee's argument of an alleged double payment, there is no evidence that Mr. Judkins ever agreed or was even informed by Lehman or Barclays that the Barclays February 2009 $800,000 payment of the Barclays $666,000 bonus and $140,000 Barclays Share Award cash payment was intended to satisfy or offset the Lehman bonus obligation to Mr. Judkins for performance year 2008, regardless of what agreement if any was reached between Lehman and Barclays on this bonus payment issue. Moreover, in Barclays October 10, 2009 Separation Agreement with Mr. Judkins, Barclays specifically states that it paid Mr. Judkins the "Barclays" bonus and that Mr. Judkins was not releasing Lehman from any of his claims against Lehman by executing the Barclays' Separation Agreement. Under basic contract law and the parol evidence rule, the trustee is barred from modifying the clear meaning of the Barclays' October 6, 2008 employment letter with Mr. Judkins by the introduction of extrinsic and oral evidence. Finally, the Court's adoption of the Trustee's meritless argument of a double payment would mean that Mr. Judkins would

not be entitled for a bonus for performing for Barclays for performance year 2008, when the payment of performance bonuses for successful individuals in Mr. Judkins' position was clearly the industry norm.

II. Argument

A. Mr. Judkins Guaranteed Lehman Bonus for Performance Year 2008

In New York, the rule with respect to the payment of bonuses is well settled. "An employee's entitlement to a bonus is governed by the terms of the employer's bonus plan". Hall v. UPS of America, 76 N.Y.2d 27, 36, 555 N.E.2d 273, 556 N.Y.S.2d 21(1990) (citing, Bayer v. Oxford Univ. Press, 270 App. Div. 586, 61 N.Y.S.2d 209 (1st Dept. 1946), aff'd, 296 N.Y. 780, 71 N.E.2d 215 (1947).

Article 6 of New York's Labor Law "sets forth a comprehensive set of statutory provisions enacted to strengthen and clarify the rights of employees to the payment of wages." Truelove v. Northeast Capital & Advisory, Inc., 95 N.Y.2d 220, 223, 738 N.E.2d 770, 715 N.Y.S.2d 366, 367 (2000). It defines wages as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." N.Y. Labor Law § 190(1). "[C]ertain forms of 'incentive compensation' that are more in the nature of a profit-sharing arrangement and are both contingent and dependent, at least in part, on the financial success of the [business enterprise" do not qualify as wages. Truelove, 95 N.Y.2d at 223-24. In Truelove, the New York Court of Appeals concluded that the payments at issue were not wages:

> The terms of defendant's bonus compensation plan did not predicate bonus payments upon plaintiff's own personal productivity nor give plaintiff a contractual right to bonus payments based upon his productivity. To the contrary, the declaration of a bonus pool

> was dependent solely upon his employer's overall financial success. In addition, plaintiff's share in the bonus pool was entirely discretionary and subject to the non-reviewable determination of his employer.

Id. at 224.

Where, however, bonus compensation is linked to the employee's personally rendered labor or services and is earned before his/her employment is terminated, even if voluntarily, the payments are wages under the Labor Law. See Ryan v. Kellogg Partners Institutional Servs., 19 N.Y.3d 1, 16, 968 N.E.2d 947, 945 N.Y.S.2d 593, 602 (2012). See also Andrews v. Sotheby International Realty, Inc., 2014 U.S. Dist. LEXIS 20954, 2014 WL 626969 *7, n. 4 (S.D.N.Y. 2014); Econn v. Barclays Bank PLC, 2010 WL 9008868, *4 (S.D.N.Y. June 10, 2010); Fiorenti v. Cent. Emergency Physicians, P.L.L.C., 187 Misc. 2d 805, 808-09, 723 N.Y.S.2d 851, 855 (Sup. Ct. Nassau Co. 2001).

Based on the foregoing, the entire amount of Mr. Judkin's bonus for 2008 performance (I.e., $2,000,000.00 and $2,400,000.00) are wages, i.e., linked to his personally rendered services or productivity. Thus they fall within the ambit of the protection of wages provided under the Labor Law. See Arbeeny v. Kennedy Exec. Search, Inc., 893 N.Y.S.2d 39, 71 A.D.3d 177 (1st Dept. 2010); Perelli v. Liberty Mut. Ins. Co., 2013 N.Y. Misc. LEXIS 901, 6-7 (Sup. Ct. N.Y. County 2013).

B. Lehman Relocation Benefits

Barclays did not commit to reimburse Mr. Judkins for his relocation expenses actually incurred and that reasonably will be incurred in connection with his move to New York for employment at Lehman. Nothing in the Barclays-Lehman Purchase Agreement or Barclays' offer of employment obligated Barclays to pay relocation costs to Mr. Judkins. While the Lehman

Brothers Executive Relocation and Home Sale Policy provides: "[u]pon termination of your employment for any reason, any ***remaining*** relocation benefits will cease immediately", it could not reasonably be interpreted to mean that relocation benefits incurred by the relocating employee would not be paid in the event the individual's employment terminated before the expenses connected to the granted benefit were processed through the human resource system, as in the claimant's case. The relocation benefits were not a "remaining relocation benefit", but benefits that had already accrued to the claimant prior to his termination.

Lehman Brothers filed for bankruptcy before Mr. Judkins could sell his home and incur the relocation benefits due him under the relocation policy. Acts made futile by the breaching party are not a prerequisite to recovery by the party claimed to have been wronged. Kotcher v. Edelblute, 250 N.Y. 178, 164 N.E. 897 (1928). One who frustrates the other party's fulfilment of a condition precedent cannot avail himself or herself of that condition precedent as a defense. Roberts v. Gin Realty Corp., 185 A.D. 209, 586 N.Y.S. 2d 264 (1st Dept 1992). One who prevents or makes impossible the performance or happening of a condition precedent upon which that party's liability is made to depend cannot take advantage of non performance. Superb General Conracting Co. v City of New York, 39 A.D. 3d 204, 833 N.Y.S. 2d 64 (1st Dept 2007); HGCD Retail Services, LLC v. 44-45 Broadway Realty Co., 37 A.D. 3d 43, 826 N.Y.S. 2d 190 (1st Dep't 2006). Therefore, the fact that Mr. Judkins did not sell his home which would create the receipts and documentation requested by the Trustee to

reimburse his relocation expenses does not excuse Lehman from its liability, since Mr. Judkins relocation expenses were not incurred due to the fault of Lehman Brothers, i.e filing bankruptcy and therefore frustration Prudential Relocation , Inc.'s contractual obligation to provide relocation benefits under Prudential Services Relocation Services Agreement between Lehman Brothers, Inc. and Prudential Relocation , Inc., dated March 14, 2006. (Reid Affirm, Exh N). The trustee's 30 b(6) witness Christopher Kiplok did not testify that that it had knowledge that the trustee assumed the Prudential Services Relocation Services Agreement (Transcript of Christopher Kiplok).

On or about March 2009, Prudential Relocation, Inc. ("Prudential") commenced a lawsuit in the Supreme Court of the State of New York, County of Westchester against Mr. Judkins and wife after alleging their failure to repay a $840,000 home equity loan extended in connection with Mr. Judkins relocation from Maryland to New York to work for Lehman Brothers in 2008. (Reid Affirm, Ex. H and J). Lehman Brothers filing of its bankruptcy petition in September of 2008 had legally ended Lehman 's obligation to pay Prudential Relocation Inc. for its relocation services to Mr. Judkins and his Maryland home was never sold.

Finally, the trustee's objection to the payment of the Claimant's relocation claim is barred by the doctrine of laches, as Mr. Judkins' claim was filed nearly five years ago. Laches is an equitable defense a defendant may assert when there has been a prejudicial delay in the assertion of rights by plaintiff. *See Matter of Schulz v. State of New York,* 81 N.Y.2d 336, 348 (1993); *see also Weiss v. Mayflower Doughnut Corp.,* N.Y.2d 310, 318 (1956). The defense is established by a showing of:

1. conduct by a defendant giving rise to the situation complained of,
2. delay by the plaintiff in asserting its claim for relief despite the opportunity to do so,
3. lack of knowledge or notice on the part of the defendant that the plaintiff would assert its claim for relief, and
4. injury or prejudice to the defendant in the event that plaintiff's relief is granted.

See Cohen v. Krantz, 227 A.D.2d 581, 582 (1996). The proponent of the !aches defense must show "that the plaintiff inexcusably failed to act." *Id. (quoting Kraker v. Roll,* 100 A.D.2d 424, 432-433. The present situation is exactly the type where the doctrine of !aches should apply to bar all the Trustees Amended Objection to the Relocation Claim, The Trustee has unjustifiably delayed in raising the objection that Mr. Judkins has failed to provide sufficient documentation for his Home Relocation Expenses and the Claimant Wayne Judkins has suffered prejudice by such unjustifiable delay.

CONCLUSION

For the reasons stated above, the claimant Wayne Judkins opposes the disallowance and expungement of his claim listed above.

Respectfully submitted,

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