SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD **PART** IAS MOTION 49EFM

Justice

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SNYDER, BARRY

Plaintiff,

- v -

JP MORGAN SECURITIES, LLC

Defendant.

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INDEX NO. 651524/2018

MOTION DATE 06/01/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for DISMISSAL.

Upon the foregoing papers, it is ordered that this motion to dismiss is decided in accordance with the accompanying decision and order.

6/4/2019
DATE

O. PETER SHERWOOD, J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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BARRY SNYDER,

Plaintiff,

-against-

JP MORGAN SECURITIES LLC,

Defendant.

----------X

DECISION AND ORDER
Index No.: 651524/2018
Mot. Seq. No.: 003

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss, the facts are taken from the complaint and assumed true. Plaintiff Barry Snyder (Snyder) worked as a securities broker for defendant JP Morgan Securities LLC (JPMS). When JMPS found out Snyder was cooperating with a federal investigation into a "prized depositor" of JMPS and its affiliates (together, JP Morgan), JPMS fired Snyder and ruined his prospects in the industry (Complaint, ¶ 1, NYSCEF Doc. No. 20).

Snyder joined JPMS in 2013, based, in part, on his portable book of business. In the fall of 2015, Snyder was approached by the FBI and other federal authorities (together, the FBI) (*id.* ¶ 14). He was ordered to meet with them and was informed of their investigation into a client of JP Morgan (the Client) and professionals associated with the Client, including JPMS, other JP Morgan divisions, and certain employees who worked with the Client. The FBI scared Snyder and he agreed to cooperate. They forbid him to tell anyone about the investigation. Several months later, Snyder stopped communicating with the FBI (*id.* ¶ 20). In retaliation, the FBI served a subpoena on JPMS, which resulted in JMPS calling upon Snyder to report to the general counsel about the investigation. When Snyder refused to discuss certain information (understanding that he could be subject to obstruction of justice charges if he shared information), JPMS terminated his employment in April 2015, stating their intention of punishing him in the process (*id.* ¶¶ 29-30)

JPMS offered Snyder two options. Either Snyder sign a termination agreement, which included a release forgiving JPMS's obligation to pay Snyder significant amounts of money, or JPMS would file a negative Form U5 report with FINRA, which would lead clients and employers

to believe Snyder had done something wrong and thereby damage his future career prospects. JPMS then filed a false and defamatory report with FINRA. JPMS also defamed Snyder to his clients (*id.* ¶ 32). Eventually, Snyder signed the termination agreement ("Agreement"), which included mutual releases of claims arising from conduct occurring prior to July 23, 2015, the effective date of the Agreement (*id.* ¶ 33).

JPMS then seized an account in which Snyder had invested money loaned to him by JPMS to induce him to work there. Liquidating that account resulted in the sale of assets at a loss, which injured Snyder, who also lost bonuses and had to pay about $163,000 back to JPMS. JPMS then waited two years to correct the defamatory statements on the Form U5, and, even then, did not completely correct them. Snyder lost his clients and became unemployable.

Snyder asserts claims for declaratory relief (First Cause of Action), tortious interference with economic advantage (Second Cause of Action), unjust enrichment (Third Cause of Action), fraud (Fourth Cause of Action), breach of contract (Fifth Cause of Action), and defamation (Sixth Cause of Action).

In its answer, JPMS denied all material allegations, asserting that pursuant to the Agreement, Snyder released all claims for conduct occurring on or before July 23, 2015, the effective date of the Agreement, and that representations made in the Form U5 statement filed after the effective date of Agreement are not actionable.

II. DISCUSSION

A. Standard

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause

of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.,* 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.,* 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85). Here, the documentary evidence is the Agreement.

B. Claim 1- Declaratory Relief

In the First Cause of Action, plaintiff seeks to have the Agreement, or at least the release sections, declared unenforceable, as he was forced to sign it "under extreme duress" (Compl. ¶ 50). "In order to justify the intervention of equity to rescind a contract, a party must allege fraud in the inducement of the contract; failure of consideration; an inability to perform the contract after it is made; or a breach in the contract which substantially defeats the purpose thereof" (*Babylon Assoc. v Suffolk County*, 101 AD2d 207, 215 [2d Dept 1984]).

The complaint does not allege economic duress, as it does not allege that plaintiff was compelled to sign the Agreement "by means of a wrongful threat which precluded the exercise of [his] free will" *Steward M. Miller Constr Co., Inc. v New York Tel. Co.*, 40 NY 2d 955, 956 (1976); *see also Interpharm, Inc. v Wells Fargo Bank, N.A.*, 655 F 3d 136, 142 (2d Cir 2011) (financial pressure or unequal bargaining power does not constitute economic duress).

As far as plaintiff alleges this claim based on a theory of economic duress, the claim fails because the mere threat not to correct the allegedly false FINRA filing and the threat to continue to disparage Snyder to his clients are insufficient to support the claim. "Economic duress, like duress, generally, provides an injured party with grounds to void a contract. Proof of the existence of economic duress requires a showing that one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to some further demand. A party cannot be guilty of economic duress, however, for refusing to do that which it is not legally required to do or for threatening to do that which it is legally authorized to do. Thus, a plaintiff is not entitled to rescind a contract on the ground of economic duress where the menace alleged by the plaintiffs is the exercise of a legal right.

Economic duress is also not present where one party offers the other a business arrangement that the offeree is free to accept or reject" (16 N.Y. Jur. 2d Cancellation of Instruments § 22). Plaintiff was represented by counsel in the negotiations culminating in signing of the Agreement and was free to accept or reject the Agreement, and does not claim otherwise.

In this case, plaintiff signed the release and accepted the benefits of the Agreement almost three years prior to commencing this action. Having accepted the benefits of the bargain and waited for years before taking action to repudiate it, Snyder has ratified the contract and is barred from asserting duress now (*see Napolitano v City of New York*, 12 AD 3d 194, 195 [1st Dept 2004]).

The cause of action for a declaratory judgment must be denied.

C. Claim 2- Tortious Interference with Economic Advantage

In the Second Cause of Action, plaintiff alleges JPMS interfered with his relationships with his clients by making the clients believe, erroneously, that he was under investigation and by filing a false Form U5 statement (Opp. at 13).

"The required elements of a cause of action for tortious interference with prospective business relations are as follows: (a) business relations with a third party; (b) the defendant's interference with those business relations; (c) the defendant act[ed] with the sole purpose of harming the plaintiff or us[ed] wrongful means; and (d) injury to the business relationship" (*Advanced Global Tech. LLC v Sirius Satellite Radio, Inc.*, 15 Misc 3d 776, 779 [Sup Ct, NY County 2007] *affd as mod*, 44 AD3d 317 [1st Dept 2007]). "[The] plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299-300 [1st Dept 1999]). "'Wrongful means' includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure, but more than simple persuasion is required" (*id.* at 300).

The complaint does not allege that JPMS acted soley out of malice or used dishonest or improper means. Because defendant's alleged conduct does not "amount to a crime or an independent tort . . . [and is] lawful . . . it is insufficiently 'culpable' to create liability for interference with prospective contracts or other nonbinding relations" *Carvel Corp. v Noonan*, 3 NY 3d 182, 190 (2004).

The Second Cause of Action must be dismissed.

D. Claim 3- Unjust Enrichment

Regarding the Third Cause of Action for unjust enrichment, "[u]njust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). A claim for unjust enrichment cannot stand where it simply duplicates, or replicates, a conventional tort claim or seeks the same damages as a claim for breach of contract (*see Corsello v Version New York, Inc.*, 18 NY 3d 777, 791 [2012] [An "unjust enrichment claim cannot remedy the defects" of an otherwise duplicative tort or contract claim]). In order to plead a claim for unjust enrichment, the plaintiff must allege "that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co.*, 86 AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

Insofar as this claim alleges conduct that occurred prior to the effective date of the Agreement, the claim was released (*see* Agreement, ¶ 3, NYSCEF Doc. No. 19). Also, because plaintiff's Third Cause of Action for unjust enrichment is duplicative of his contract or fraud claims, it must be dismissed.

E. Claim 4- Fraudulent Inducement

The Fourth Cause of Action alleges fraudulent inducement and seeks rescission of the Agreement. Plaintiff alleges that in order to induce him to sign the Agreement, identified JPMS personnel misled him to believe that if he signed the Agreement and release, JPMS would cease disparaging him and correct the previously filed Form U5 (Compl. ¶ 62). After Snyder signed (under duress) he was again mislead into believing that if he was quiet and patient, JPMS would cease harming him and correct his Form U5 (*see id.*).

As JPMS argues, plaintiff has waived any claim for rescission of the Agreement based on fraud as he alleges that the knew JPMS had not fulfilled its alleged promise as early as July 2015, shortly after the Agreement was signed (see Compl. ¶ 36, alleging that after signing the Agreement JPMS failed to correct the Form U5 filing and did not cease disparaging him which then led to him requesting that JPMS make the correction and change its conduct)[1]. Despite knowledge of these alleged failures and the unfulfilled second promise, plaintiff waited for over two years to assert his fraud claims and therefor has waived them (*see Ballow Brasted O'Brien and Rusin P.C. v Logan*, 435 F 3d 235, 239 [2d Cir. 2006] [claims for rescission "manifestly untimely" where the plaintiff "was likely aware of the material representations in the months following" execution of the contract but waited four years to seek rescission]).

The first alleged misrepresentation must be dismissed for the additional reason that it is duplicative of the breach of contract claim (*see Wyle Inc. v ITT Corp.*, 130 AD 3d 438, 439 [1st Dept 2015]). "In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . . and not merely a misrepresented intent to perform"

[1] As JPMS also notes, where as here, plaintiff was represented by counsel during negotiation of the Agreement "subsequent allegations of fraud are generally unpersuasive," (*Shultz v Reichel Shultes*, 1 AD 3d 876, 877 [3d Dept 2003]). Plaintiff protests JPMS' "unclear and improper insertion of factual allegations" that Snyder was represented by counsel during the negotiations (*see* Opp Br. at 20). Because the Agreement contains representation that the parties "had counsel of their own choosing [to] represent them in the negotiation of this Agreement" (Agreement ¶ 8, NYSCEF Doc. No. 19), plaintiff's charge is meritless.

(*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004] [internal citations omitted]; *see also J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2007] ["[a] present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud"]).

The second alleged misrepresentation must also be dismissed for an additional reason as it does not (and cannot) allege reasonable reliance on the purported renewed promises given the alleged breaches of the first set of promises (*see* Compl. ¶¶ 31-34) (*see Stuart Silver Assocs., Inc. v Baco Dev. Corp.*, 245 AD 2d 96, 98-99 [1st Dept 1997] ["Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to use those means he cannot claim justifiable reliance on defendant's misrepresentations."])

F. Claim 5- Breach of Contract

As to the Fifth Cause of Action for breach of contract, the complaint alleges two claims: breach of the provision of the Agreement to stop Sal Tiano, a bank employee, from defaming Snyder and breach of an oral promise made after the Agreement was signed to correct the existing Form U5 filing and to not disparage Snyder if he was quite and patient (see Compl. ¶¶ 69-20, NYSCEF Doc. No. 20). In his opposition brief, Snyder adds a claim for breach of a promise made after the Agreement was signed to correct the Form U5 filing and not disparage Snyder so long as he behaved as the bank demanded (*see* Op. Br. at 23, NYSCEF Doc. No. 33). Plaintiff does not offer any further description of the three claims (*see* Opp. Br. at 23-24).

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a

contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

The Agreement provides for JPMS to advise Tiano against disparagement of plaintiff. The complaint does not allege either that the bank failed to counsel Tiano pursuant to the terms of the Agreement or that Tiano disparaged plaintiff despite being advised against engaging in any such conduct. The first branch of the Fifth Cause of Action shall be dismissed.

As to the allegations of an oral agreement for Snyder to remain "quiet and patient," JPMS claims this alleged promise is too vague to be enforced (*see Joseph Martin, Jr. Delicatessen, Inc., v Schumacher*, 52 NY 2d 105, 109 [1981] ["[B]efore the power of law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained.") Giving plaintiff the benefit of every possible favorable inference (*see EBC I*, 5 NY 3d at 19), the court cannot conclude that plaintiff does not have a cause of action based on an oral promise not to disparage him and to correct the Form U5 if plaintiff would only be quiet and patient. Here the issues to be decided are whether the parties had an oral agreement as alleged, the terms of that agreement and whether defendant breached it. These questions cannot be decided at this stage of the case where no discovery has been taken. This branch of the Fifth Cause of Action shall survive.

Regarding the claim that JPMS breached an oral promise to correct the U5 and not disparage Snyder, the claim shall be dismissed as it is not alleged in the complaint. However, plaintiff may seek to amend the complaint to add allegations sufficient to state such a claim.

G. Claim 6- Defamation

In the Sixth Cause of Action, plaintiff alleges JPMS defamed him in 2017 when it issued an amended Form U5 which failed to completely correct erroneous and damaging statements made in a previous Form U5 filing.

"Defamation is the making of a false statement which tends to expose the plaintiff to public contempt, or ridicule or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (NY Pattern Jury Instr.--Civil Division 3 D I Intro. 1, quoting *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369 [1977]; *Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636 [2d Dept 2007]). "The essence of the tort of libel is the publication of a statement about an individual that is both false and

defamatory" (NY Pattern Jury Instr.--Civil Division 3 D I Intro. 1). A "general defamation claim . . . requires allegations of special damages, i.e., "the loss of something having economic or pecuniary value, which must flow directly from the injury to reputation caused by the defamation and not from the effects of the defamation" (*Nolan v State*, 158 AD3d 186, 191 [1st Dept 2018], quoting *Franklin v Daily Holdings, Inc.,* 135 AD3d 87, 93 [1st Dept 2015], quoting *Agnant v Shakur,* 30 FSupp2d 420, 426 [SDNY 1998]). "A defamation plaintiff must plead special damages unless the defamation falls into any one of four per se categories: (1) statements charging the plaintiff with a serious crime; (2) statements that tend to injure the plaintiff in her trade, business or profession; (3) statements that impute to the plaintiff a "loathsome disease"; and (4) statements that impute unchastity to a woman" (*Nolan v State*, 158 AD3d 186, 195 [1st Dept 2018] citing *Liberman v Gelstein,* 80 NY2d 429, 435 [1992]).

The court need not decide whether plaintiff has pleaded sufficiently to make out a cause of action for defamation because this claim must be dismissed. Statements made by an employer on a Form U5 are entitled to an absolute privilege (*see Rosenberg v Metlife*, 8 NY 3d 359, 368 [2008]; and *Krolick v Natixes Secs North Am. Inc.* 36 Misc 3d 1227 [A] at *2 [Sup Ct, NY Cnty 2011]).

Accordingly, it is hereby

ORDERED that the motion to dismiss (motion sequence number 003) of defendant JP Morgan Securities, LLC is GRANTED to the extent that the First (declaratory judgment), Second (tortious interference with economic advantage), Third (unjust enrichment), Fourth (fraud) and Sixth (defamation) causes of action are hereby DISMISSED; and it is further

ORDERED that branch of the motion seeking dismissal of the Fifth Cause of Action (breach of contract) is GRANTED in part and the Fifth Cause of Action is DISMISSED to the limited extent that the claim of breach of the non-disparagement provision of the written Termination Agreement is DISMISSED and the claim of breach of an oral contract agreed to after

the written termination was signed not to disparage plaintiff and to correct the then existing Form U5 filing is DISMISSED with leave to re-plead and is otherwise DENIED.

This constitutes the decision and order of the court.

DATED: June 4, 2019

E N T E R,

O. PETER SHERWOOD J.S.C.