2020 WL 4060753
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United States District Court, D. Montana,
Butte Division.

John MILANOVICH, Plaintiff,
v.
QUANTPOST, INC., a Foreign Profit Corporation, and Lester W. Dye, individually, Defendants.

CV 19-55-BU-DWM
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Signed 06/10/2020

Attorneys and Law Firms

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Timothy B. Strauch, Strauch Law Firm PLLC, Missoula, MT, for Defendants.

OPINION and ORDER

Donald W. Molloy, District Judge

***1** This action arises out of a dispute between Plaintiff John Milanovich and Defendant Quantpost, Inc. and its CEO, Lester Dye, (collectively "Quantpost") over the termination of Milanovich's employment. Quantpost seeks to dismiss Milanovich's amended complaint, (Doc. 39), on the grounds that it fails to state a claim. (Docs. 43, 45.) While Quantpost is ultimately correct that Delaware law applies to most of Milanovich's claims, it is incorrect in asserting that they are unsalvageable.

LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its fact.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). If a court finds that the plaintiff did not allege sufficient facts "to raise a right to relief above the speculative level" and support a cognizable legal theory, it may dismiss the complaint as a matter of law. *Twombly*, 550 U.S. at 555. At this stage, the well-pleaded allegations of material fact are taken as true and must be construed in the light most favorable to the non-moving party. *Malibu Textiles, Inc. v. Label Lane Int'l, Inc.*, 922 F.3d 946, 951 (9th Cir. 2019).

The determination of a Rule 12(b)(6) motion is limited to the pleadings with the exception of documents attached to the complaint, documents incorporated by reference in the complaint, or matters subject to judicial notice. *Lee v. City of L.A.*, 250 F.3d 668, 688–89 (9th Cir. 2001); Fed. R. Civ. P. 12(d). Accordingly, the Court considered the facts as alleged in Milanovich's Amended Complaint, (Doc. 39), and those included in the attached employment agreements, (Docs. 39-1, 39-2, 39-3). I will not consider Milanovich's declaration, (Doc. 50), because doing so would require the motion be converted into one for summary judgment. *See* Fed. R. Civ. P. 12(d).

BACKGROUND

Milanovich and Dye met in early 2018 and Dye offered Milanovich an opportunity to help build his software business, Quantpost. (Doc. 39 at ¶ 12.) In March 2018, Milanovich and Dye executed a Term Sheet Agreement formalizing their relationship. (*Id.* at ¶ 16.) It provided, *inter alia*: "(i) the title of Director of Business Development of Quantpost; (ii) a start date of April 1, 2018; (iii) an initial monthly payment of $5,000 per month; and (iv) various forms of incentive compensation such as 'commissions', a 'sales incentives option bonus' and an 'investment incentive option bonus'." (*Id.*; *see* Doc. 39-1.) The Agreement was for a term of six months, terminating September 30, 2018. (Doc. 39 at ¶ 16.)

As part of his incentive compensation, Quantpost and Milanovich also entered into two Stock Option Agreements.

(*Id.* at ¶¶ 19, 23; *see* Docs. 39-2, 39-3.) Both Stock Option Agreements were subject to the Quantpost 2014 Incentive and Non-Statutory Stock Option Plan (the "Plan"). (Doc. 39 at ¶ 20; Doc. 39-2 at 8–15; Doc. 39-3 at 8–15.) The Plan provides that the options terminate three months after the optionee's employment ends unless the option specifies otherwise. (Doc. 39 at ¶ 24; *see* Doc. 39-2 at 10.) The stated expiration dates for the Stock Option Agreements are September 1, 2021, (Doc. 39-2 at 1), and August 1, 2021, (Doc. 39-3 at 1). The Plan also contains a Delaware choice-of-law provision. (Doc. 39-2 at 15; Doc. 39-3 at 15.)

***2** Milanovich worked for Quantpost from March 1, 2018 until May 23, 2019. (Doc. 39 at ¶¶ 30, 36.) Between December 31, 2018 and May 23, 2019, Milanovich did not receive any wages, but he continued to work based on promises of equity in a proposed spin-off, Quantpost Chicago. (*Id.* at ¶¶ 31–32.) Dye told Milanovich that the Quantpost Chicago Business Division would be Milanovich's to run and that he would receive additional ownership interest. (*Id.* at ¶ 33.) But on May 23, 2019, Milanovich received an electronic communication terminating his position. (*Id.* at ¶ 36.) The next day, Quantpost proposed to either pay him $25,000 (which represented unpaid wages for the prior five months) and forgo his stock options, or allow Milanovich to exercise his stock options, using the $25,000 as a credit against the amount to be paid for the stock. (*Id.* at ¶ 37.) On August 5, 2019, Milanovich requested the Fair Market Value of the options. (*Id.* at ¶ 39.) On August 15, Quantpost responded by letter, refusing to provide the requested value and setting an expiration date of August 20, 2019 for the exercise of both stock options. [1] (*Id.* at ¶ 40.)

On August 30, Milanovich sued Quantpost and Dye in the Montana Second Judicial District Court, Silver Bow County. (Doc. 1-1.) He requested, *inter alia*, declaratory judgment on the parties' rights and obligations under their various agreements. (*See id.*) Quantpost removed the action to this Court on October 28, 2019. (Doc. 1.) Milanovich filed an Amended Complaint on February 20, 2020, alleging a wage claim (Count I), a request for declaratory relief (Count II), breach of contract (Count III), wrongful termination (Count IV), and promissory estoppel (Count V). (*Id.*) Quantpost filed its current motion to dismiss on March 4, 2020, (Doc. 43), and Dye joined, (Doc. 45).

ANALYSIS

I. Choice of Law

The parties disagree about what law governs Milanovich's claims. Quantpost asserts that the choice-of-law provision contained in the Plan subjects all of Milanovich's claims to Delaware law. A federal court sitting in diversity must apply the choice-of-law rules of the forum state. *Estate of Darulis v. Garate*, 401 F.3d 1060, 1062 (9th Cir. 2005). When a choice-of-law provision is present, a court's inquiry has two components: effectiveness and scope. *See Masters Grp. Int'l, Inc. v. Comerica Bank*, 352 P.3d 1101, 1113–15 (Mont. 2015).

A. Effectiveness

In Montana, the parties' chosen law applies unless three factors are met:

> (1) but for the choice of law provision, Montana law would apply under § 188 of the *Restatement*; (2) Montana has a materially greater interest in the particular issue than the parties[']chosen state; and (3) application of the chosen state's law would contravene a Montana fundamental policy.

Polzin v. Appleway Equipment Leasing, Inc., 191 P.3d 476, 480 (Mont. 2008) (citing *Modroo v. Nationwide Mut. Fire Ins. Co.*, 191 P.3d 389 (Mont. 2008)). Because the factors are conjunctive, "[i]f a clear choice-of-law provision does not violate Montana public policy, there is no reason to analyze factors (1) and (2)." *Masters Grp. Int'l, Inc.*, 352 P.3d at 1113.

Montana courts recognize and enforce a clear and unambiguous choice of law provision unless it "violates public policy or is against good morals." *Youngblood v. Am. States Ins. Co.*, 866 P.2d 203, 205 (Mont. 1993). The choice-of-law provision contained in the Plan states: "This Plan and each option granted hereunder shall be construed and administered in accordance with the laws of the State of Delaware without giving effect to principles relating to

conflict of laws." (Doc. 39-2 at 15; Doc. 39-3 at 15.) As an aside, parties cannot simply by their agreement avoid a mandatory conflict of laws analysis. *See generally* Michael Gruson, *Governing Law Clauses Excluding Principles of Conflict of Laws*, 37 The Int'l Lawyer 1023 (2003). But because the provision's selection of Delaware law is clear and unambiguous, it is effective unless Milanovich can establish that the application of Delaware law contravenes Montana's fundamental policy. Such a determination is claim-specific.

1. Wage (Count I) and Employment (Count IV)

***3** Milanovich alleges a statutory wage claim pursuant to Montana Code Annotated §§ 39–3–201 to 216. Delaware wage claims are governed by a statutory regime similar to Montana's. *See* 19 Del. Code §§ 1101–15. Thus, there is no fundamental policy concern related to this claim.

Milanovich also alleges a claim for wrongful termination pursuant to Montana's Wrongful Discharge from Employment Act, Mont. Code Ann. §§ 39–2–901 to 915. Under this Act, Montana generally requires "good cause" to terminate a non-probationary employee. *See* § 39–2–904(1)(b). Delaware does not have a statutory wrongful discharge provision, but recognizes a common law claim in certain circumstances. Generally, the "employment-at-will doctrine" in Delaware "permits the dismissal of employees without cause and regardless of motive." *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 437 (Del. 1996). There are exceptions to this rule, however, when an employer violates the implied covenant of good faith and fair dealing by (1) terminating the employee in violation of public policy, (2) "misrepresenting some important fact" that the employee relies on to his detriment, or (3) using "its superior bargaining power to deprive the employee of compensation that is clearly identifiable and is related to the employee's past service." *Id.* at 437, 441–42 (cleaned up). Here, Milanovich's wrongful discharge claim is based primarily on Quantpost's attempt to avoid paying his wages and stock options. (*See* Doc. 39 at ¶ 63.) Thus, there is no violation of Montana policy despite the differences between the two regimes.

2. Declaratory Judgment (Count II) and Contract (Counts III)

Milanovich alleges that Quantpost breached the Stock Option Agreements by failing to provide a fair market valuation and imposing an arbitrary expiration date for exercising his options (Count III) and seeks a declaration of the rights and obligations of the parties under the Agreements (Count II). He argues that the application of Delaware law would contravene the public policy of Montana because it would strip him of the protections provided by Montana's implied covenant of good faith and fair dealing.

Under Montana law, every contract contains an implied covenant that requires "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Mont. Code Ann. § 28–1–211. Similarly, Delaware "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the contract." *Continental Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1234 (Del. Ch. 2000) (internal quotation marks omitted). Delaware's implied covenant is narrower, however, and requires a claimant show bad faith, such as "fraud, deceit, or misrepresentation." *Id.* Nevertheless, in most contract situations in Montana, "a breach of the implied covenant is only a breach of the contract and only contract damages are due." *Puryer v. HSBC Bank USA*, 419 P.3d 105, 112 (Mont. 2018) (quoting *Story v. Bozeman*, 791 P.2d 767, 775 (Mont. 1990)). Thus, Milanovich fails to show Montana's fundamental policy requires application of its law here. *See* *Nedlloyd Lines B.V. v. Sup. Ct.*, 834 P.2d 1148, 1153 (Cal. 1992).

3. Promissory Estoppel (Count V)

***4** Finally, Milanovich alleges a claim for promissory estoppel based on Quantpost's representations regarding equity he would receive in the spin-off company, Quantpost Chicago. As both parties recognize, the elements of a promissory estoppel claim are similar under both Delaware and Montana law. *Compare Turner v. Wells Fargo Bank, N.A.*,

291 P.3d 1082, 1088 (Mont. 2012) *with* *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000). Discord arises, however, in the application of the states' respective statute of frauds. In Delaware, "[a]s a rule, oral contracts for the issuance of shares by a Delaware corporation are not enforceable by either party to the contract." *Jacobson v. Dryson Acceptance Corp.*, 2002 WL 31521109, at *13 (Del. Ch. Nov. 1, 2002) (citing *Grimes v. Alteon, Inc.*, 804 A.2d 256, 260 (Del. 2002)). Montana's statute of frauds does not explicitly reference stock options, *see* Mont. Code Ann. § 28–2–903(1), and partial performance in Montana can remove a contract from the statute of frauds, *see Wood v. Anderson*, 399 P.3d 304, 309 (Mont. 2017). Regardless, courts have determined that, consistent with the *Restatement (Second) Conflict of Laws* § 187 cmt. g (1971), "formal requirements such as the Statue of Frauds do not constitute a 'fundamental policy' for the purpose of choice of law analysis." *See Finnish Fur Sales Co., Ltd. v. Juliette Shulof Furs, Inc.*, 770 F. Supp. 139, 146 (S.D.N.Y. 1991) (excepting contracts related to wills); *Davis Moreno Constr., Inc. v. Frontier Steel Bldgs. Corp.*, 2009 WL 3763706, at *3 (E.D. Cal. Nov. 9, 2009); *Zimmer, Inc. v. Sharpe*, 651 F. Supp. 2d 840, 848 (N.D. Ind. 2009).

Based on the foregoing, the choice-of-law provision is effective.

B. Scope

The next inquiry is the provision's scope, i.e., whether it encompasses all of Milanovich's claims. *Masters Grp. Int'l, Inc.*, 352 P.3d at 1114–15. Complicating matters, there is a threshold question of whether the Court applies the forum jurisdiction's scope analysis (Montana) or the chosen jurisdiction's scope analysis (Delaware). Courts are divided on this issue, with some concluding that the scope of a choice-of-law provision is a matter of contract interpretation subject to the chosen law and others, making up a slight majority, concluding that the scope is a threshold issue of enforceability to be decided under the forum law. *See Pyott-Boone Elecs., Inc. v. IRR Tr. for Donald Fetterolf Dated Dec. 9, 1997*, 918 F. Supp. 2d 532, 542–43 (W.D. Va. 2013) (collecting cases). Though Delaware falls squarely in the former category, *Weil v. Morgan Stanley DW Inc.*, 877 A.2d 1024, 1032 (Del. Ch. 2005) (referring to it as a "matter of hornbook law"), it appears Montana falls into the latter category, *Masters Grp. Int'l, Inc.*, 352 P.3d at 1115, 1115 n.10 (acknowledging the split authority identified in *Pyott-Boone* and embracing the approach "best expressed in the law"). The provision's scope is therefore assessed under Montana law.

Recognizing the limited guidance in this area, Montana has not adopted a bright-line rule for determining the scope of choice-of-law provisions. *Id.* Nevertheless, the Court has determined that some claims between contracting parties may be inextricably intertwined such that the noncontract claims cannot be treated as "purely coincidental to or independent of" the contract claims. *Id.* For example, in *Masters*, the Court concluded that because there would have been no tort claims without the contracts that connected the parties, the contractual choice-of-law provision necessarily applied to all claims. *See id.* The Court further explained that when the parties to a contract are sophisticated it is reasonable to assume they intended their choice-of-law provision to apply to all disputes arising from their contract. *Id.* at 1115–16.

Milanovich's breach of contract (Count III) and declaratory judgment claims (Count II) are both directly related to the interpretation and enforcement of the Stock Option Agreements and are therefore subject to the choice-of-law provision. Milanovich insists his remaining claims are completely independent statutory claims, emphasizing that the Stock Option Agreements "were not the contracts that tied the parties together." (Doc. 49 at 17.) However, Milanovich's wage claim (Count I), states that the stock options "are wages under Montana law" and form part of the unpaid wages he is due. (Doc. 39 at ¶¶ 43–48.) Thus, as pled, this claim is inextricably intertwined with the contracts containing the choice-of-law provision. Similarly, Milanovich's wrongful termination claim (Count IV) is based, at least in part, on Quantpost's alleged violation of the terms of the Stock Option Agreements. (*Id.* at ¶ 63.) The Term Sheet governing Milanovich's employment references other investment incentive options, (Doc. 39 at ¶ 16), that later manifested as the Stock Option Agreements, (*id.* at ¶¶ 19, 23). Thus, the contracts governing his employment, including the Stock Option Agreements, are inextricably intertwined. Accordingly, Counts I through IV are subject to the Delaware choice-of-law provision.

***5** Nevertheless, Milanovich's remaining claim, promissory estoppel (Count V), is not subject to the choice-of-law provision. Starting in March 2019, Milanovich alleges that he was induced to continue working for Quantpost by

promises of equity and a greater leadership role in the Quantpost's spin-off, Quantpost Chicago. (Doc. 39 at ¶¶ 66–71.) Because this claim is based purely on conduct that post-dates the termination of the Term Sheet and regards benefits completely distinct from the Stock Option Agreements, it is an independent claim. *See* *JMP Secs. LLP v. Altair Nanotechs., Inc.*, 880 F. Supp. 2d 1029, 1036 (N.D. Cal. 2012) (explaining that because promissory estoppel only applies in the absence of an enforceable contract it generally falls outside the scope of a contract's choice-of-law provision). In the absence of an effective choice-of-law provision, Montana law applies to this claim. *See* *Modroo*, 191 P.3d at 400 (outlining the "most significant relationship" test); Mont. Code Ann. § 28–3–102 (providing that a "contract is to be interpreted according to the law and usage of the place where it is to be performed"); (*see generally* Doc. 39 at ¶¶ 1, 33). [2]

II. Dismissal

Milanovich's wage claim (Count I), wrongful termination claim (Count IV), and implied covenant claim (part of Count III) are pled with specific reference to Montana law. Because Delaware law applies to these claims, they fail to state a claim for relief that is plausible under the applicable law. However, as discussed above, Milanovich may be able to successfully plead them under Delaware law. He is therefore granted leave to amend. *See* *Mueller v. Auker*, 700 F.3d 1180, 1191 (9th Cir. 2012) ("Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.") (internal quotation marks omitted).

To the extent Milanovich alleges a standard breach of contract claim related to the Stock Option Agreements (Counts II and III), Quantpost argues that he failed to exercise either option in the manner specified in the Plan. Quantpost's argument is premature. The Plan states the options terminate "three (3) months after termination of the optionee's employment" unless "the option by its terms specifies either (i) that it shall terminate sooner than three (3) months after termination of the optionee's employment ... or... (ii) that it may be exercised more than three (3) months after termination of such relationship." (*See* Doc. 39-2 at 10.) Here, the Stock Option Agreements each contain their own expiration date. (*See* Doc. 39-2 at 1 (Sept. 1, 2021); Doc. 39-3 at 1 (August 1, 2021).) Yet Quantpost merely states in passing that these expiration dates do not trigger that exceptional language. (*See* Doc. 44 at 19.) Construing the allegations of the Amended Complaint as true, Milanovich has alleged a plausible claim.

Finally, to establish a prima facie claim for promissory estoppel (Count V), Milanovich must show four elements: "(1) a promise clear and unambiguous in its terms; (2) reliance on the promise by the party to whom the promise is made; (3) reasonableness and foreseeability of the reliance; [and] (4) the party asserting the reliance must be injured by the reliance." *Turner*, 291 P.3d at 1088 (internal quotation marks and alteration omitted). "The terms of the promise must be certain, as there can be no promissory estoppel without a real promise." *Keil v. Glacier Park, Inc.*, 614 P.2d 502, 506 (Mont. 1980). Quantpost contends the "alleged promise for 'a substantial equity position in [Quantpost Chicago]' lacks the required definiteness" as it does not identify details such as how much of an interest and under what terms. (Doc. 51 at 19.) However, Milanovich's Amended Complaint specifically states that he would be given direct control, supervision, and an additional ownership interest. (Doc. 39 at ¶ 33.) Quantpost's dispute over the specific terms of that promise and whether it meets the requirements of promissory estoppel under Montana law are more properly arguments for summary judgment or trial. *See* *Keil*, 614 P.2d at 504 (court's decision followed bench trial). The same is true for Quantpost's argument about the fate of Quantpost Chicago.

***6** Quantpost further seeks dismissal of Milanovich's claim for emotional distress damages on his promissory estoppel claim. Milanovich did not address this argument in his response. Emotional distress damages are generally not recoverable for breach of contract under Montana law. *See* *Moloney v. Home & Inv. Ctr., Inc.*, 994 P.2d 1124, 1136 (Mont. 2000). The only exception is where a breach results in physical injury. *See id.* Because a promissory estoppel claim sounds in contract and no physical injury is alleged, Milanovich's claim for emotional distress damages is dismissed.

CONCLUSION

Based on the foregoing, IT IS ORDERED that Quantpost's motions to dismiss (Docs. 43, 45) are GRANTED-IN-PART. Milanovich's wage claim (Count I), wrongful termination claim (Count IV), and claim for breach of the implied covenant (part of Count III) are DISMISSED WITH LEAVE TO AMEND. His request for emotional distress damages as part of his promissory estoppel claim (part of Count V) is DISMISSED WITH PREJUDICE. Milanovich's amended pleading, if any, must be filed by the date stated below.

IT IS FURTHER ORDERED that the December 17, 2019 Scheduling Order (Doc. 26) is AMENDED as follows:

Amended Pleadings	June 24, 2020
Final Pretrial Conference:	April 15, 2021, at 2:30 p.m. Missoula, Montana
Trial (7-member jury):	April 26, 2021, at 9:00 a.m.[1] Mike Mansfield Federal Courthouse Butte, Montana

Additionally, all proposed orders and trial documents shall be submitted to dwm_propord@mtd.uscourts.gov. The December 17, 2019 Order remains in full force and effect in all other respects.

All Citations

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Footnotes

1 Though not relevant here, Quantpost disputes this date. (*See* Doc. 44 at 20 n.3.)

2 Even considering Chicago as the place of performance, the elements of an Illinois promissory estoppel claim are consistent with Montana law. *See* *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 906 N.E.2d 520, 523–24, 528 (Ill. 2009).

1 Pursuant to 18 U.S.C. § 3161(h) and Federal Rule of Criminal Procedure 50, criminal matters take priority over civil matters in the event of a conflict. Accordingly, all civil trial settings are subject to the Court's criminal calendar.