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CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

PAUL B. VALENTI,)
)
Plaintiff,)
vs.)
)
IDAHO GENERAL MINES, INC., an Idaho)
Corporation,)
)
Defendant.)
)

Case No. **CV 2007 5773**

**MEMORANDUM DECISION AND
ORDER DENYING DEFENDANT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

I. PROCEDURAL HISTORY AND BACKGROUND.

In April, 2006, defendant Idaho General Mines, Inc. (IGM) entered into an employment contract with plaintiff Paul Valenti (Valenti), to have Valenti serve as general manager of IGM's operations in the State of Nevada beginning May 1, 2006. The term of the agreement was for three years and Valenti moved to Eureka, Nevada in reliance on the agreement. Per the agreement Valenti was to receive an annual salary of \$150,000.00 and would be eligible to receive stock options. On November 1, 2006, IGM terminated Valenti. IGM claims they terminated Valenti for cause, alleging Vallenti was unwilling or unable to perform material duties of his job in a competent manner. Valenti claims his termination was without cause.

The agreement stated that, when terminating an employee for cause, IGM must give an employee (1) written notice, given to the employee personally or sent by registered mail, setting for the reasons for termination and (2) reasonable opportunity to

cure the act or omission that is the basis for termination. Valenti alleges that he never received such notice but instead was presented with a “General Release and Settlement Agreement” on November 1, 2006.

Valenti filed this lawsuit against IGM on August 10, 2007. On September 8, 2008, IGM filed “Defendant’s Motion for Partial Summary Judgment” as to Valenti’s claims for stock options, claiming: 1) the employment agreement contains a liquidated damage provision; 2) the stock options are treated the same whether Valenti was terminated for cause or not; and 3) the vested stock options are controlled by the plan in effect at the time of the grant. Memorandum of Law in Support of Defendant’s Motion for Partial Summary Judgment, pp. 3-14. On January 30, 2009, Valenti filed his Memorandum of Law in Opposition to Defendant’s Motion for Partial Summary Judgment. On February 5, 2009, IGM filed its Reply Memorandum in Support of Defendant Idaho General Mines, Inc.’s Motion for Partial Summary Judgment. Oral argument was held February 12, 2009. This matter is set for a four-day jury trial commencing January 12, 2009.

IGM’s Motion for Partial Summary Judgment only concerns Valenti’s alleged breach of contract claim regarding the stock options (Complaint, pp. 7, 8, Count II, III, ¶¶ 26 – 30), and Valenti’s claim for breach of employment agreement for his annual base salary (Complaint, pp. 6, 7, Count I, ¶¶ 23 – 28). IGM’s Motion for Partial Summary Judgment does not concern Valenti’s claims of unjust enrichment (Complaint, p. 8, Count IV, ¶¶ 31-33), or breach of covenant of good faith and fair dealing (Complaint, pp. 8,9, Count V, ¶¶ 34 – 36).

This Court notes Valenti has alleged punitive damages in his Complaint (Complaint, p. 9), in violation of I.C. § 6-1604(2). Accordingly, such allegation is

stricken until such time as Valenti has complied with I.C. § 6-1604(2) by filing a motion, prevailing at a hearing on that issue and being allowed to amend his complaint to add such a claim.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

III. ANALYSIS.

A. Valenti's Claim of Salary Due and the Employment Agreement's Liquidated Damages Provision.

IGM argues its Employment Agreement contains a liquidated damages provision which limits damages recoverable. Memorandum in Support of Partial Summary Judgment, pp. 3-4. IGM's position is even if Valenti was discharged without cause, IGM is limited to paying Valenti six-months salary instead of the three years salary Valenti claims. *Id.* IGM argues Paragraph 6(e) of the Employment Agreement provides that "in

the event of an Effective Change of Control (defined in the Employment Agreement as a change in half or more of the ownership of IGF), the employee's employment shall be deemed to have been terminated without cause", and entitles the employee to one year's salary unless the employee opts to remain and his decision to remain is accepted by the Company or its successors or assigns. Paragraph 6(f) of the agreement provides:

The Employee's employment may be terminated without cause by the President. In the event that the Employee's employment is so terminated, or is deemed to have been terminated pursuant to subparagraph 6(e) herein, without cause, any stock options granted but not vested shall be deemed to have immediately vested and the Company shall pay the Employee six (6) months salary, in compensation for the Employee's loss of employment. Substantially similar health related benefits as provided by the company will also continue for a period of six (6) months and access to related benefits will be provided thereafter according to applicable federal and state law.

Affidavit of Michael Branstetter in Support of Motion for Partial Summary Judgment, p. 2, ¶ 7, Exhibit A. IGM argues that where parties to a contract have agreed to a measure of damages for a breach, they are bound by those provisions and liability is restricted to the terms of the contract. Memorandum in Support of Partial Summary Judgment, p. 4.

Valenti replies that even if this liquidated damages provision is applicable, IGM is in breach for never having provided Valenti with the six month's salary or benefits (and IGM is exposed to payment of Valenti's attorney fees and costs incurred in enforcing the provisions pursuant to ¶ 17 of the agreement which states, "...In the event of such dispute, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs."). Memorandum of Law in Opposition to Defendant's Motion for Partial Summary Judgment, p. 6. In its Reply Memorandum, IGM does not address its alleged breach of the express contract provisions for termination of Valenti without cause.

Because questions of fact remain as to whether Valenti was terminated with or without cause, any determination by this Court on the applicability of paragraphs 6(e) and (f) and the issue of liquidated damages regarding salary due upon termination, is premature. Summary judgment is inappropriate on this issue.

B. Valenti's Claim of Breach of Contract Regarding the Grant of Stock Options and Additional Stock Options.

The interesting question posed is: "What happens when a company fails to convey the contract terms to its employee in an employment contract?" More specifically, at summary judgment, the question would be: "Is IGM entitled to summary judgment on a contractual dispute when IGM never conveyed the contract terms to its employee, Valenti?"

Valenti claims that as part of the employment agreement with IGM, he was promised stock options on 50,000 shares to vest immediately upon signing of the agreement and 200,000 stock options to vest on the earlier of: a) the two-year anniversary of the agreement, or b) the date the President of Idaho General Mines, Inc. deems as the effective date of the issuing of certain, specified mining permits. Valenti states that no such options were ever provided to him. Complaint (verified), p. 7; Affidavit of Paul B. Valenti, p. 2, ¶ 8. IGM argues Valenti's cause of action for the stock options cannot stand because any such options expired by reason of Valenti's failure to timely exercise them. Memorandum in Support of Motion for Partial Summary Judgment, p. 5. In response, Valenti argues he was never provided with any stock option agreement or notification and never received any indication of expiration dates, terms, or procedures for exercising the stock options. Memorandum of Law in Opposition to Defendant's Motion for Partial Summary Judgment, p. 7. IGM does not dispute that it never provided Valenti with the stock option agreement. IGM replies that

Valenti's being unaware of the terms of the stock options does not create an issue of material fact. Reply Memorandum in Support of Defendant's Motion for Partial Summary Judgment, p. 3. IGM points out that pursuant to the employment agreement, the stock options were subject to terms and conditions at the President's discretion and Valenti made no effort to determine what the terms and conditions were. *Id.* at 4.

In Idaho, employment contracts are terminable at the will of either party unless there is an express or implied contract that limits the right of termination. *Jones v. Micron Technology, Inc.*, 129 Idaho 241, 244, 923 P.2d 486, 489 (Ct.App. 1996). Express terms of a written contract may be later modified by terms implied in fact through the conduct of the parties. *See Harrington v. McCarthy*, 91 Idaho 307, 310, 420 P.2d 790, 793 (1966). However, promises should not be found by implication where such promises would be inconsistent with express provisions that there is no reason to set aside or find inoperative and even an otherwise reasonable implication should not be made when the contrary is indicated in clear and express words. *Jones*, 129 Idaho 241, 245, 923 P.2d 486, 490 (citing 3 Arthur Corbin, CORBIN ON CONTRACTS § 564, at 297-98 (1960)).

The covenant of good faith and fair dealing is implied into all employment contracts. *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 627, 778 P.2d 744, 749 (1989). The implied covenant of good faith is only violated where a party "violates, nullifies, or significantly impairs any benefit of the ... contract." *Idaho First National Bank v. Bliss Valley Foods*, 121 Idaho 266, 289, 824 P.2d 841, 864 (1991). And the duty to perform the obligations imposed by the agreement arises only in connection with terms agreed to by the parties; the covenant does not create a duty on the employer that is not inherent in the employment agreement. *Metcalf*, 116 Idaho at 627, 778 P.2d

749; *Bliss Valley Foods*, 121 Idaho at 289, 824 P.2d at 864.

The employment agreement states in regard to stock options:

The Employee shall be eligible to receive stock options granted pursuant to the Stock Option Plan (ISOs) or outside any formal plan (NQSOs), and, as may be effected for bonuses, on such terms and conditions as the President in his sole discretion may determine. NQSO options in the amount of 50,000 will vest immediately upon signing of this Agreement and 200,000 will vest on the anniversary of this Employment Agreement in 2008 or at such date as the President deems as the effective date of the issuance of the Mt Hope mining permits, whichever date is sooner. Upon a Change of Control, any and all Common Shares, options, or other forms of securities issued by the Company and beneficially owned by the Employee (whether granted before or after the date of this Agreement) that are unvested, restricted, or subject to any similar restriction that would otherwise require continued ownership by the Employee beyond the Change of Control Date in order to be vested in the hands of the Employee shall vest automatically without further action by the Board.

Affidavit of Michael Branstetter, Exhibit A, Compensation and Benefits, (b) Grant of Stock Options, Shares, and Bonuses. Here, Valenti received stock options “outside any formal plan; *to wit*: NQSOs. IGM claims if Valenti was terminated without cause, the Agreement provides for certain payment as liquidated damages and any stock options granted are immediately vested at the time of termination. Memorandum in Support of Motion for Partial Summary Judgment, p. 6. If Valenti was terminated for cause, the Agreement states that he has no claim to unvested options. *Id.* Because the 50,000 shares vested immediately, Valenti was entitled to them regardless of whether he was terminated for or without cause. *Id.* As to the 200,000 shares, they would have vested upon termination if Valenti was terminated without cause and would not have vested at any time if he was terminated for cause. *Id.* at 7.

It is undisputed that material questions of fact remain as to whether Valenti was terminated for cause or not. Discussed below is IGM's argument, that Valenti's cause of action for the stock options cannot stand regardless of whether his termination was

for cause or not, because any such options expired due to Valenti's failure to exercise them in a timely manner.

IGM argues its Stock Plan, adopted through shareholder approval at the annual shareholder meeting on October 28, 2004, controls how options must be exercised. *Id.*, p. 8. This Stock Plan, in turn, is referred to in the agreement, *see above*, in that Valenti "shall be eligible to receive stock option granted pursuant to the Stock Option Plan (ISOs) or outside any formal plan (NQSOs)..." The Stock Plan provides that an option is deemed exercised when the company receives written or electronic notice of exercise and full payment for the Shares with respect to which the option is exercised. Affidavit if Michael Branstetter, Exhibit B, Exercise of Option (a) Procedure for Exercise: Rights as a Shareholder. Upon termination, the Stock Plan provides that the time period for exercising an option is specified in the Option Agreement or, in the absence of a specified time, the option shall remain exercisable for three months following termination. Affidavit if Michael Branstetter, Exhibit B, Exercise of Option (b) Termination of Relationship as a Service Provider. However, because Valenti received stock options outside any formal plan, whether the Stock Plan applies remains disputed. Here, Valenti alleges that he received no notice of approval of the stock options or any stock option agreement. Valenti also alleges he never received notice of the grant of stock options, term or expiration of stock options, procedure for exercising the options, or any other information concerning the options. Affidavit of Paul B. Valenti, pp. 2-3, ¶¶ 8-9.

Simply stated, IGM claims that whether Valenti was terminated for cause or without cause does not matter, because Valenti "...never exercised any options at all nor did he communicate any intentions of doing so", and "Any options granted to

[Valenti] by the terms of the Agreement expired because [Valenti] failed to exercise them.” Memorandum of Law in Support of Defendant’s Motion for Partial Summary Judgment, p. 7. Valenti claims he had these stock option rights, but the information on how to execute those rights was never given to him.

Valenti cites a New Jersey case for the proposition that where an issue of fact exists as to whether an employee ever received an option agreement, courts will consider whether the employee had notice of his options expiring pursuant to that option agreement. See Memorandum of Law in Opposition to Defendant’s Motion for Partial Summary Judgment, pages 6-7, for discussion of *Bernard v. IMI Systems, Inc.* 618 A.2d 338 (N.J. 1993). This Court’s reading of *Bernard* is that if there is a dispute as to whether the employee received notice of his option agreement, the trier of fact should determine what the terms and conditions of the option agreement the employer intended to give the employee. 618 A.2d 338, 348. IGM argues *Bernard* is distinguishable and is not binding upon this Court. Reply Memorandum in Support of Defendant’s Motion for Partial Summary Judgment, p. 2.

In *Bernard v. IMI Systems, Inc.*, Bernard accepted an offer to work for IMI Systems, Inc., as a “Special Accounts Branch Manager”. 618 A.2d 338, 339. In that offer, Bernard was told he would receive stock options at the time he started full time work with IMI. *Id.* Several months after starting full time work, IMI’s vice president told Bernard his stock option had been recorded and that his written option agreement was being prepared. 618 A.2d 338, 340. The option agreement was dated the day after he became a full time employee, but was not delivered to Bernard until the day after Bernard was terminated. *Id.* Under the terms of the agreement, the stock option could not be exercised after the employee’s termination. *Id.* IMI claimed Bernard knew the

stock option expired on termination of employment, and Bernard filed an affidavit that he had an unconditional stock-option right which he had inquired about but had received no agreement until after he was terminated. 618 A.2d 338, 341. The Supreme Court of New Jersey noted it is not uncommon for an employee's right to exercise a stock option to terminate upon termination from employment (618 A.2d 338, 346), and "...the terms and conditions surrounding the grant and exercise of stock options are traditionally set forth in an option agreement." 618 A.2d 338, 347. The Supreme Court of New Jersey held "...there are genuine issues of fact to whether IMI breached its agreement to provide him with an exercisable stock option." *Id.*

The stock option was a term of Bernard's employment contract. Therefore, the finder of fact must construe this term like any other contractual term. Under New Jersey law, courts look to the objective of the parties as manifested by the language in the contract and the circumstances of the surrounding transaction. *Jacobs v. Great Pac. Century Corp.*, 104 N.J. 580, 518 A.2d 223 (1986); *Communication Workers of Am., Local 1087 v. Monmouth County Bd. Of Social Servs.*, 96 N.J. 442, 476 A.2d 777 (1984). Bernard, therefore, should be entitled to exercise his option subject to the terms and conditions of the option agreement that the trier of fact determines IMI intended to give to him as a condition of his employment.

618 A.2d 338, 348. Just as in *Bernard*, in the present case, Valenti's stock options were specifically granted to him by IGM in his Employment Agreement. Affidavit of Michael Branstetter in Support of Motion for Summary Judgment, p. 2, ¶ 6, Exhibit A, ¶ 3(b).

The pertinent paragraph of Valenti's Employment Agreement reads:

3. Compensation and Benefits

(b) *Grant of Stock Options, Shares, and Bonuses*

The Employee shall be eligible to receive stock options granted pursuant to the Stock Option Plan (ISOs) or outside any formal plan (NQSOS), and, as may be effected for bonuses, on such terms and conditions as the President in his sole discretion may determine.

Id. If, as in *Bernard*, a stock option that was eventually given to the terminated

employee too late to be utilized, creates an issue of fact, then in the instant case a stock option that was *never* given to Valenti should certainly create an issue of fact. There is simply no way this Court can determine as a matter of law, that the Stock Option Plan, referenced in Valenti's employment agreement, gave Valenti notice of the how to exercise his options as a matter of law, when Valenti was never given a copy of the Stock Option Plan.

In *Loomis v. Cudahy*, 104 Idaho 106, 118-19, 656 P.2d 1359, 1371-72 (1982), the Idaho Supreme Court determined the California Court of Appeals' decision in clarifying the prerequisites for incorporation by reference of an extraneous document was sound and quoted:

For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties.

Loomis, 104 Idaho 106, 119, 656 P.2d 1359, 1372, quoting *Scots Valley Fruit Exchange v. Growers Refrigeration Co.*, 81 Cal.App.2d 437, 184 P.2d 183, 189 (1947) (overruled on other grounds by *Hischenmoeller v. National Ice & Cold Storage Co.*, 46 Cal.2d 318, 294 P.2d 433, 439 (1956)). Here, IGM argues the Stock Plan is "a publically filed document.... available for public viewing as an exhibit to the company's schedule 14-A proxy solicitation filing." Memorandum in Support of Partial Motion for Summary Judgment, p. 8. There is certainly an issue of fact as to whether this availability arises to the level being known or easily available to Valenti. IGM's reference to the Stock Option Agreements entered into by Todd Vick and Kenneth Rux, as evidence of company's intent concerning the exercise of options following termination, is inapplicable to the instant case. See Memorandum in Support of Partial Motion for

Partial Summary Judgment, pp. 12-13. The options granted Valenti were explicitly outside any formal plan and, further, the Vick and Rux agreements were likely not called to the attention of Valenti and he certainly did not consent thereto.

IGM argues if the stock options at issue fall outside the Stock Plan, this Court must consider if the option agreement is enforceable and, if so, what its terms are. Memorandum in Support of Partial Motion for Summary Judgment, p. 13. IGM urges the Court to consider the Stock Option Agreements of Vick and Rux as evidence of the parties' intent. *Id.* However, despite IGM's argument that the authority to determine the terms of any stock option agreement was reserved exclusively to IGM, in the light most favorable to the non-moving party, Valenti, the Employment Agreement does not mention what occurs upon the termination of Valenti and it remains a question of fact what "terms and conditions... the President in his sole discretion may determine." See Affidavit of Michael Branstetter, Exhibit A, Compensation and Benefits, (b) Grant of Stock Options, Shares, and Bonuses.

At oral argument, counsel for IGM claimed that "Valenti's knowledge (or lack thereof) of how his options were applied doesn't change the fact of how they were applied (that they have expired)." At oral argument, counsel for IGM tried to distinguish *Bernard* as follows. Counsel for IGM claimed Bernard wasn't informed of his stock option agreement until after he was terminated, and the issue of fact was between what he was promised and what he got, where in the present case, Valenti is claiming he didn't know what his options were, which affects how his options should be applied, yet Valenti has never exercised his options. The New Jersey Supreme Court specifically found that "During his employment Bernard did not request or attempt to exercise his stock options", and this Court can find no mention in that court's opinion that Bernard

attempted to exercise his stock options *after* his termination, other than by his filing the lawsuit. On that point, *Bernard* and the instant case appear to be the same, and IGM's attempt to distinguish the two on that basis, fails.

Finally, one other important factor distinguishes this case from *Bernard*, but that distinction inures in favor of Valenti. IGM argues: "Those plans provide how vested options are exercised and their expiration in the absence of any action." Memorandum of Law in Support of Defendant's Motion for Partial Summary Judgment, p. 7. Without citation, IGM argues "...the options have expired by Plaintiff's failure to exercise them within ninety days of his termination on November 1, 2006." *Id.*, p. 15. In *Bernard*, the stock option agreement stated the stock option could not be exercised after the employee's termination. 618 A.2d 338, 340. In the present case, the Option in the agreements that were given to Vick, Rux and Miller, which was never given to Valenti, states: "This Option shall be exercisable for (a) ninety (90) days after Optionee ceases to be a Service Provider if, on the date that Optionee ceases to be a Service Provider, he or she has been a Service Provider for less than one year..." Affidavit of Michael Branstetter in Support of Motion for Summary Judgment, p. 2, ¶ 9, Exhibit D [Vick], p. 2; Exhibit E [Rux], p. 2; and Exhibit F [Miller], p. 2. Thus, if the trier of fact were allowed to determine what should have happened in *Bernard* when Bernard's rights expired the moment he was terminated, the trier of fact should determine the appropriate outcome in the instant case when those rights expired ninety days after termination.

III. CONCLUSION AND ORDER.

Based on the pleadings and affidavits of IGM and Valenti, material questions of fact remain as to: whether the Stock Plan (which allegedly controls how options are exercised or, at a minimum, demonstrates IGM's intent regarding the exercise of the

options at issue) was referred to clearly and unequivocally; whether Valenti's attention was called to the reference; whether Valenti consented to the terms of the Stock Plan; and whether the terms of the Stock Plan were known or easily available to Valenti. Therefore, as pertains to the stock options at issue here, IGM is not entitled to judgment as a matter of law.

IT IS HEREBY ORDERED defendant's Motion for Partial Summary Judgment is DENIED.

IT IS FURTHER ORDERED the paragraph in Valenti's Complaint which alleges punitive damages (Complaint, p. 9) is STRICKEN for failure to comply with I.C. § 6-1604.

Entered this 9th day of March, 2009.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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