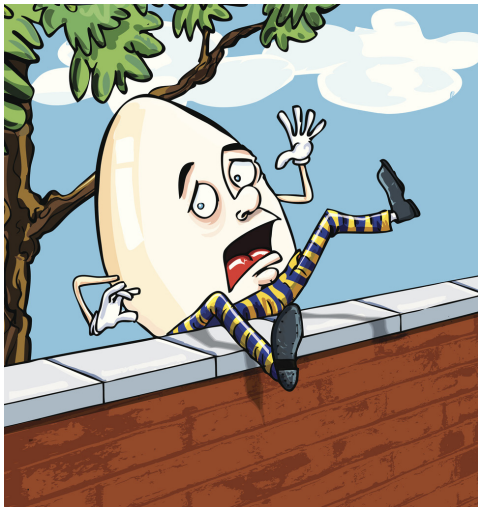
SEYFARTH SHAW

Financial Services Employment Blog

The New York Court of Appeals Takes *Truelove* Through the Looking Glass



By Jacob Oslick

When I use a word . . . it means just what I choose it to mean — neither more nor less," said Humpty Dumpty to Alice, in Lewis Carrol's classic Through the Looking-Glass. Such an attitude makes for great absurdist fiction. But as the New York Court of Appeals recent decision in *Kolchins v. Evolution Markets, Inc.* (attached here) shows, it's not going to resolve factual questions on a motion to dismiss, regarding the formation and meaning of a contract.

In *Kolchins*, the Court of Appeals principally addressed whether the plaintiff and defendant had reached an agreement to renew the plaintiff's employment contract. The documentary evidence established that, via email, the defendant offered to renew the plaintiff's employment contract on the "same [] terms" as his existing contract, with one minor "clarification." The defendant suggested that, if the plaintiff had any questions about its offer, he should consult his "existing contract." The plaintiff responded "I accept, pls send contract," to which the defendant responded "Mazel. Looking forward to another great run."

Despite this exchange, the defendant argued, ***on a motion to dismiss***, that the parties never reached an agreement. The defendant contended that subsequent correspondence between the parties showed no "mutual assent to material terms." It further argued that "Mazel" meant simply "luck" (its literal Hebrew/Yiddish meaning), instead of "congratulations" (its usual colloquial meaning, as in "Mazel Tov").

The Court of Appeals shattered these arguments, beyond the point of being put back together again. The Court noted that, to form a contract, the parties do not need to fix the terms with "absolute certainty." And here, a reasonable fact-finder could agree that the parties reached an agreement on the contract's material terms, because the defendant "accept[ed]" plaintiff's offer for a contract on the "same [] terms" as their prior written agreement. Similarly, the Court of Appeals concluded that a reasonable jury could interpret "Mazel" as a "congratulatory interjection" on the parties having reached an agreement, instead of as simply "luck."

The Court of Appeals took a similar approach to the defendant's second argument, concerning whether the plaintiff had contractually "earned" a bonus set forth in the plaintiff's prior agreement. The agreement stated that plaintiff was "eligible" for a "Production Bonus" that was "based on [his] performance." The agreement further set forth that the bonus must be

"paid within two months of the close of a given trimester." The agreement added that, "to be eligible" for the Production Bonus, the plaintiff needed to be employed "at the time of our firm-wide bonus payment dates." Based on this last provision, the defendant argued that the plaintiff did not "earn" his bonus (within the meaning of the New York Labor Law) because he was no longer employed by the firm's bonus payment date.

By focusing on the payment date, the Court of Appeals found that the defendant's argument put the cart before all the king's horses. What mattered is what the plaintiff needed to do to "earn" his bonus, not when it would be paid. Because the bonus was based on the plaintiff's personal performance, the Court of Appeals concluded that a reasonable factfinder could conclude that the plaintiff must have "earned" his bonus by the end of his employment agreement. As such, any agreement "to deny plaintiff those wages after they were 'earned' based on the timing of payment [of the company's bonuses] would be void as against public policy."

The Court of Appeals further noted that, while an earlier agreement between the parties set forth that the plaintiff's bonus was "entirely discretionary," this language "was not carried over" into the operative agreement. In so doing, the Court of Appeals distinguished *Kolchins* from its decision in *Truelove v. Northeast Capital & Advisory,* 95 N.Y.2d 220 (2000). In Truelove, the contractual language made clear that the plaintiff's bonus was "entirely discretionary."

Kolichins contains two pieces of advice for employers:

First, clarity matters. Negotiating an employment agreement over email can sound convenient. But sending short, terse emails back-and-forth can create significant ambiguities that wouldn't exist if an employer sends over a complete contract to accept-or-reject. Similarly, if an employer wants to retain discretion over whether to pay a bonus, it is imperative that the agreement specify a wholly "discretionary" bonus. Otherwise, a court or jury may interpret unclear terms in an employee's favor.

Second, a defendant employer should think carefully about whether to move to dismiss based on documentary evidence under CPLR 3211(a). It's one thing to rely on documents to establish indisputable facts, such as a plaintiff's signature on a general release. It's quite another to ask the Court to decide contractual ambiguities in your favor. Before going down that rabbit-hole, a defendant should ask itself not just how it interprets the documents, but whether any reasonable person might disagree. If, as Alice responded to Humpty Dumpty, reasonable people "can make words mean so many different things," perhaps it's best to take discovery and await summary judgment.

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