UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 05-CV-11928-RGS

MARIO MARIASCH,

v.

THE GILLETTE COMPANY,

MEMORANDUM AND ORDER ON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

February 15, 2007

STEARNS, D.J.

Mario Mariasch, a Gillette Company executive, retired from Gillette on April 22, 2002. Upon his retirement, Mariasch held a number of Gillette nonqualified stock options (NQSOs) and Incentive Stock Options (ISOs). Mariasch was granted the NQSOs in 1995 and 1996. Under the terms of Gillette's 1971 Stock Option Plan (Plan), the NQSOs expired on April 22, 2005. Mariasch did not attempt to exercise the NQSOs until April 29, 2005, seven days after they expired. Gillette refused to honor the attempt. On September 22, 2005, Mariasch filed this lawsuit seeking a declaration that he is excused from the untimely exercise of the NQSOs. Gillette now moves for summary judgment on Mariasch's claims. On February 1, 2007, the court heard oral argument. For reasons that will be stated, Gillette's motion will be allowed.

BACKGROUND

The facts taken in the light most favorable to Mariasch as the nonmoving party are as follows. Mariasch, who now resides in California, worked for Gillette for almost thirty-

three years. Mariasch's most recent position was eliminated on December 31, 2000, as part of a corporate reorganization. Pursuant to the terms of a "Termination Settlement Agreement," Mariasch formally retired on April 22, 2002.

As part of his executive compensation package, Mariasch received ISOs and/or NQSOs yearly from 1984 to 1999. From 1986 through 2005, Mariasch exercised a number of these options, eventually acquiring more than 210,000 shares of Gillette stock.[1] In 1998, Mariasch received and read the Plan Brochure and attended a PowerPoint presentation explaining the Plan. The Brochure warned that if a Plan member failed to exercise his or her options in a timely fashion, then the "options [would] expire and [be] no longer valid." The maximum life of any Gillette option was ten years, but only active employees were entitled to the full ten years.

Beginning in the late 1990's, Gillette began to send "friendly reminders" to active employees as the tenth anniversary of their unredeemed stock options approached. Mariasch received at least one such reminder while working at Gillette. Upon retirement, employees were notified that their ISOs would expire in three months, while NQSOs granted after April 20, 1994, would expire after three years. On February 13, 2002, Mariasch received a letter from Linda Kostigan, a Gillette Executive Compensation Specialist, enclosing a list of his unredeemed ISOs and NQSOs and a copy of a page from the Plan Brochure specifying that the 1995 and 1996 NQSOs had a three year shelf life.

[1]Mariasch is a sophisticated investor with significant holdings in investment funds and commercial real estate.

Mariasch conceded at his deposition that he was aware that the NQSOs expired three years after the date that he retired.[2] On March 21, 2002, Mariasch received a letter from Kim O'Neil, the Retirement Plan Leader for Gillette, confirming that for benefits purposes, his retirement date was April 22, 2002.[3] On April 15, 2002, Mariasch signed and returned a benefits form to Gillette stating: "I elect to receive my pension benefit from The

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[2]The following exchange took place at Mariasch's deposition:

> Q. And it [the second attachment to the letter from Linda Kostigan dated February 13, 2002] told you that on retirement for non-qualified options that you had three years for options granted after December 31, 1993 and prior to April 17, 1997; is that correct?
> A. Yea. Yes.

Mariasch Dep., at 39-40.

> Q. But when you retired, you understood that you had to exercise them within three years of your retirement date, right?
> A. Yes.

Id. at 109-110. . . .

> Q. You knew the rule, right?
> A. Sure.

Id. at 136-137.

[3]At his deposition, Mariasch conceded that the letter from Kim O'Neill, dated March 21, 2002, effectively informed him that his official retirement date was April 22, 2002:

> Q. But this letter [the letter from Kim O'Neill, dated March 21, 2002] also told you on March 21, in the first sentence, "I have enclosed your retirement package as of April 22, 2002," right?
> A. Yes.
> Q. So that clearly explained to you that your retirement date was April 22, 2002, right?
> A. Yes, sir.

Mariasch Dep. at 100-101.

Gillette Company Retirement plan Effective 4/22/02." The first retirement check Mariasch received from Gillette, dated May 1, 2002, included a payment retroactive to April 22, 2002. Mariasch exercised his ISOs on July 18, 2002, several days before they expired. Mariasch had registered in 2004 on a Merrill Lynch website that permitted him to look up his Gillette "stock option grant detail," including the expiration dates of all of his outstanding options.[4] Mariasch exercised some of his options on June 16, 2004, after receiving a letter dated March 4, 2004, from Gillette advising him that "a remaining June 16, 1994 stock option . . . will expire on June 16, 2004."[5] Mariasch did not receive a similar "friendly reminder" in early 2005 that the 1995 and 1996 NQSOs were about to expire. He did not attempt to exercise his remaining NQSOs until April 29, 2005. Merrill Lynch, the Plan agent, advised him that the options had expired on April 22, 2005.[6]

On May 2, 2005, Mariasch sent an e-mail to Gillette in which he stated: "I made an honest mistake on the due date to exercise two stock options that were due three years after retirement." Mariasch appealed to Gillette to reconsider and to allow him to exercise the options notwithstanding the "honest mistake." Gillette refused.[7]

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[4]Effective August 1, 1998, the exercise of Gillette stock options was processed by Merrill Lynch. All Gillette employees and retirees were required to open a Merrill Lynch account prior to exercising their options.

[5]Gillette maintains that the letter was sent to Mariasch by mistake, as the Plan practice was not to send reminder notices to retirees.

[6]Mariasch maintains that he believed that the effective date of his retirement began on May 1, 2002, because a payment stub he received in 2002 showed a payment period from May 1, 2002, to May 31, 2002.

[7]The unexercised option grants gave Mariasch the right to purchase approximately 100,000 shares of Gillette stock. Mariasch estimates his loss at some $720,000.

Mariasch filed this action against Gillette on September 22, 2005. In Count I, Mariasch seeks a declaratory judgment that under the terms of the Plan, his 1995 and 1996 options did not expire until ten years after the dates of the grants. In the alternative, if the court deems the NQSOs to have expired three years after the date of his retirement, Mariasch seeks a declaration that he should be permitted to exercise the options notwithstanding their expiration because: (1) none of the Plan documents specified that "time was of the essence;" (2) his date of retirement was "ambiguous;" (3) he did not receive a timely warning from Gillette that his options were about to expire; and (4) he deserves the benefit of the maxim that equity abhors a forfeiture. Mariasch also pleads three counts at law: breach of contract (Count II); a violation of the covenant of good faith and fair dealing (Count III); and promissory estoppel (Count IV).

DISCUSSION

Summary judgment is appropriate when, based upon the pleadings, affidavits, and depositions, "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Gaskell v. Harvard Co-op Soc., 3 F.3d 495, 497 (1st Cir. 1993).

The recent decision of the Court of Appeals in First Marblehead Corp. v. House, 473 F.3d 1 (1st Cir. 2006), is dispositive of Mariasch's case. House, a former First Marblehead employee, sued when First Marblehead refused to honor the untimely exercise of his ISOs. Under First Marblehead's stock option plan, ISOs expired three months after an employee left the company. Although House contended that he was never given a copy of the Plan, and that he had been repeatedly assured by employees of First

Marblehead that his ISOs were valid for ten years, the district court dismissed the action. Judge Saris held that under Delaware law, First Marblehead was bound by the time limits imposed on stock options by its Board of Directors. See First Marblehead Corp. v. House, 401 F. Supp. 2d 152, 157 (D. Mass. 2005). Judge Saris noted that "Delaware law mandates 'strict conformity with the statutory requirements for the issuance and sale of stock' even in situations which 'might generate an inequitable result.'" Id. citing Liebermann v. Frangiosa, 844 A.2d 992, 1004 (Del. Ch. 2002). The Court of Appeals agreed.[8] See First Marblehead Corp. v. House, 473 F.3d at 7.

While conceding that Gillette (like First Marblehead) is a Delaware corporation and therefore beholden to the Delaware courts, Mariasch argues that Gillette's principal place of business is in Massachusetts, and therefore Massachusetts and not Delaware law should apply to his claims. The argument is mistaken. While in most instances, Massachusetts applies a functional approach to choice of law questions, in matters involving the internal affairs of a corporation, such as the issuance of shares of stock, "the State of incorporation dictates the choice of law . . . ." Harrison v. NetCentric Corp., 433 Mass. 465, 471 (2001).[9]

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[8]While the First Circuit upheld Judge Saris' grant of summary judgment on House's breach of contract and promissory estoppel claims, it remanded a negligent misrepresentation claim that it found to be governed by Massachusetts law, noting the "strong preference [of Massachusetts courts] that reliance in the context of negligent misrepresentation claims, be determined by a jury." First Marblehead, 473 F.3d at 10. Mariasch makes no misrepresentation claim.

[9]Even if Mariasch's choice of law argument had substance, the result would be no different. Massachusetts courts view the exercise of options with the same strict scrutiny that is applied by the courts of Delaware. "A party who stumbles in exercising an option is generally not entitled to equitable relief." Loitherstein v. International Business Machines Corp., 11 Mass. App. Ct. 91, 96 (1980) (rejecting an a prayer by IBM to be excused from an untimely exercise of an option). See also McDonald's Corp. v. Lebow Realty Trust, 888

ORDER

For the foregoing reasons, the Gillette Company's Motion for Summary Judgment is ALLOWED. The Clerk will enter final judgment for Gillette on all claims of the Complaint.

SO ORDERED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE

F.2d 912, 914 (1st Cir. 1989) ("Under Massachusetts Law: 'An option . . . must be exercised, if it is exercised at all by turning corners squarely.'"), quoting The Tristam's Group, Inc. v. Morrow, 22 Mass. App. Ct. 980 (1986).