

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
THOMAS R. WILLIAMSON, III,

Plaintiff,

- against -

MOLTECH CORP.,

Defendant.
-----X

Index No. 96-5253
Assigned to IAS Part 34
(Justice Hall)

**NOTICE OF MOTION FOR
SUMMARY JUDGMENT**

C O U N S E L :

PLEASE TAKE NOTICE that, upon the annexed affidavit of Herbert Rosenberg, sworn to September 22, 1997, and upon all of the pleadings and proceedings heretofore had herein, defendant will move this Court, at an IAS Part 34 thereof, located at the Supreme Court Building, 235 Griffing Avenue, Riverhead, New York 11901, on the 17th day of October, 1997, at 9:30 a.m., or as soon thereafter as counsel may be heard, pursuant to CPLR 3212, for summary judgment dismissing each of the causes of action in the amended complaint, and granting defendant such other and further relief as to this Court may seem just and proper.

The above action arises from an allegedly wrongful termination of plaintiff's employment.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214(b), answering papers, if any, are required to be served upon the undersigned no less than seven (7)

days prior to the hearing of this motion.

Dated: September 22, 1997

Yours, etc.

SPECTOR & FELDMAN
Attorneys for Defendant
655 Third Avenue
New York, New York 10017
(212) 818-1400

TO: TWOMEY, LATHAM, SHEA & KELLEY
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**AFFIDAVIT IN SUPPORT
OF MOTION FOR
SUMMARY JUDGMENT**

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HERBERT ROSENBERG, being duly sworn, deposes and says:

1. I am Corporate Secretary and general counsel of Moltech Corporation ("Moltech"), defendant in the above-entitled action, and I am fully familiar with the facts set forth herein. I make this affidavit in support of Moltech's motion for summary judgment dismissing each of the seven causes of action in plaintiff's amended complaint. As set forth below and in the accompanying memorandum of law, admissions made by plaintiff during his recent deposition, as well as the clear and unambiguous language of two written agreements between plaintiff and Moltech, leave no issues of fact regarding any of those causes of action.

2. Annexed hereto are copies of the following documents, which are discussed in greater detail below and in the accompanying memorandum of law:

- EXHIBIT A — Plaintiff's Amended Complaint.
EXHIBIT B — Moltech's Answer to the Amended Complaint.
EXHIBIT C — Employment Agreement between plaintiff and Moltech, dated January 13, 1994.
EXHIBIT D — Incentive Stock Option Agreement, dated "as of" January 13, 1994.
EXHIBIT E — Relevant pages from the transcript of plaintiff's deposition, including:
 Pages 44-48 (on the subject of plaintiff's employment following his termination from Moltech);
 Pages 64-65 (on the subject of a restrictive covenant contained in the Employment Agreement);
 Pages 114-115 (on the subject of plaintiff's receiving incentive stock options as part of his employment by Moltech);
 Pages 127-32 (on the subject of plaintiff's refusal to execute the Employment Agreement until he received a copy of the Incentive Stock Option Agreement);
 Page 183 (on the subject of the Incentive Stock Option Agreement being a vehicle for implementation of the provision in the Employment Agreement regarding stock option rights); and
 Pages 394-401 (on the subject of the manner in which plaintiff attempted to exercise a stock option in January, and again in February, 1995).

Relevant Background Facts

3. Moltech is a privately-held company, formed in 1988, that is developing plans for the production and commercialization of a new type of rechargeable battery with a lithium-polymer base. At all times referred to in the amended complaint, Moltech's offices were located in the Town of Stony Brook, in Suffolk County, New York, adjacent to the campus of the State University of New York in Stony Brook.

4. After extensive negotiations over drafting, in large part between plaintiff (who is, himself, an attorney) and me, Moltech and plaintiff entered into two written contracts:

(a) an employment agreement, dated and executed on January 13, 1994 (the "Employment Agreement" — Exhibit C hereto), pursuant to which Moltech hired plaintiff as its president and chief operating officer; and (b) an incentive stock option agreement, dated "as of" January 13, 1994, but executed approximately one week later (the "Incentive Stock Option Agreement" — Exhibit D hereto), pursuant to which the parties set forth the terms of a provision contained in the Employment Agreement granting plaintiff certain stock option rights. These stock option rights were exercisable by plaintiff only in stages; in each such stage, plaintiff was permitted to purchase shares of stock, but he was required to deliver directly to me (as "Secretary of the Corporation") an executed Stock Purchase Agreement and personal check. (See Incentive Stock Option Agreement, ¶ 4) Under Paragraph 1 of the Incentive Stock Option Agreement, the first stage of the option was exercisable (and, in fact, was exercised by plaintiff) on or after the date of the agreement (January 13, 1994); the second stage was exercisable (and, again, was exercised by plaintiff) on or after the six-month anniversary of the agreement (July 13, 1994); the third stage was exercisable on or after the one-year anniversary of the agreement (January 13, 1995); and the remaining stages were exercisable on later dates not relevant to this motion.

5. The Employment Agreement was for a term of three years. Although that contract contained no specific provision for the grounds upon which plaintiff's employment could be terminated, the Incentive Stock Option Agreement expressly provided that the stock option rights being granted to plaintiff would terminate, and that any unexercised options would become null and void, in the event that plaintiff's employment were terminated "for any reason except retirement, death or disability." (See Incentive Stock Option Agreement, ¶ 3)

6. Regrettably, plaintiff's job performance for Moltech was far below expectations, as a result of which he was terminated by Moltech's Board of Directors on January 20, 1995. As we have already explained in detail in our answers to an extensive set of interrogatories served by plaintiff's first set of attorneys, plaintiff had, prior to January 1995, demonstrated an inability, or unwillingness, to perform his job responsibilities in a responsible or competent manner and, in fact, had acted destructively and deceitfully toward Moltech as well as toward the company's Board of Directors and Chief Executive Officer. (The details of plaintiff's inadequate and improper performance are not relevant to this motion and need not, therefore, be described in this affidavit, although they are, at this point, well known to plaintiff and his attorneys.)

Relevant Procedural History

7. This action was commenced in January 1995 in the Supreme Court, Erie County. After Moltech served on plaintiff's first set of attorneys (a law firm located in Buffalo) a notice to take plaintiff's deposition, plaintiff's attorneys served notices to take the depositions of three representatives of Moltech: Dr. Terje Skotheim, the company's Chief Executive Office and Chairman of the Board of Directors; Ms. Evelyn Berezin, a member of the company's Board of Directors; and me.

8. On June 23, 1995, Moltech moved for a change of the venue of this action from Erie County to Suffolk County, and, by Memorandum Decision, dated January 25, 1995,

and Order, dated February 9, 1996, that motion was granted. Following a preliminary conference held on September 17, 1996, both sides' counsel agreed upon a schedule for plaintiff's deposition and the depositions of the three representatives of Moltech referred to above. However, on the date scheduled for plaintiff's deposition (even though Moltech's attorney and I, on behalf of Moltech, had appeared in the office of plaintiff's attorneys ready to proceed with plaintiff's deposition), plaintiff's attorneys abruptly canceled the deposition on the purported ground that I might be a "material" witness at the trial of this action. As a result, plaintiff unilaterally refused to go forward with the deposition unless the firm of Spector & Feldman (to which I am "of counsel") withdrew.

9. However, plaintiff's purported ground for that contention was based on an outdated version of the so-called attorney-witness rule, which had been amended in 1990. Despite efforts made by Moltech's attorney to convince plaintiff not to continue asserting a legal position that was insupportable, he refused to change his position, as a result of which Moltech had to move to compel the deposition. Plaintiff then cross-moved for disqualification of Moltech's attorneys, and this Court, by Decision and Order dated and entered May 21, 1997, granted Moltech's motion and denied plaintiff's cross-motion. Thereafter, by agreement between counsel, plaintiff's deposition was re-scheduled and held on August 5 and 6, 1997.

All Seven Causes of Action in the Amended Complaint Should be Dismissed

10. The amended complaint is somewhat confusing in manner in which it sets

forth the bases for its various claims for relief and in which it characterizes, in the *ad damnum* clause, the relief requested. Nevertheless, it is clear enough that, in each of the seven causes of action in the amended complaint, plaintiff demands equitable relief in the form of either a declaratory judgment or specific performance of one or more provisions of the Employment Agreement or the Incentive Stock Option Agreement. Only the fifth cause of action contains an additional request for money damages, allegedly on the basis of Moltech's refusal to issue plaintiff shares of stock in connection with option rights under the Employment Agreement.

11. As set forth in greater detail in the accompanying memorandum of law, there is no real or justiciable controversy necessitating a declaratory judgment in this action. Each of the two contracts — the Employment Agreement and the Incentive Stock Option Agreement — that form the basis of all of plaintiff's claims is plain and unambiguous on its face. Therefore, there is no need for this Court to issue a declaratory judgment, and the claims for such relief asserted in plaintiff's first, third, fourth, fifth, sixth and seventh causes of action should be dismissed.¹

12. In plaintiff's second, fourth, fifth, sixth and seventh causes of action, a request is made for "specific performance" of certain contractual obligations. However, plaintiff

¹ An additional ground exists for dismissal of the third cause of action, in which plaintiff seeks a declaration that a restrictive covenant contained in Section 6.1 of the Employment Agreement is null and void. That covenant relates only to the eighteen-month period following plaintiff's termination (i.e., from January 20, 1995 through July 20, 1996). Obviously, the covenant currently has no force or effect, inasmuch as it has already expired of its own terms. Moreover, Moltech does not contend, nor has it ever contended, that any of the professional work performed by plaintiff during the period of the restriction constituted a violation of the covenant.

is not entitled to such an equitable remedy with respect to either one of the two contracts that form the basis of his claims:

a. With respect to the Employment Agreement, plaintiff arguably may be *entitled* to assert a claim for money damages, if any, caused by a breach of this contract (even though any such claim would be without merit), but he does not do so in the amended complaint; all that he seeks (except with respect to the fifth cause of action, which is discussed below) is equitable relief. However, as set forth in the accompanying memorandum of law, the equitable remedy of specific performance is inappropriate, particularly with respect to employment agreements, where there would exist a remedy at law. Accordingly, the demands for such relief contained in the second and fifth causes of action should be dismissed.

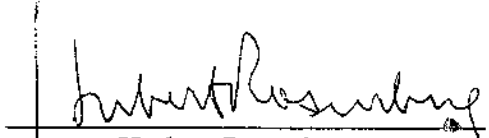
b. With respect to the Incentive Stock Option Agreement, the Court need not reach the question of whether there exists an adequate remedy at law precluding plaintiff's requests for specific performance in the fourth, sixth and seventh causes of action. As set forth in the accompanying memorandum of law, those causes of action are subject to dismissal because (a) the Incentive Stock Option Agreement expired of its own terms, on January 20, 1995, as a function of the termination of plaintiff's employment (inasmuch as Section 3 of that agreement provides for the termination of plaintiff's stock option rights upon termination of his employment, without regard to whether the employment was terminated with cause or without cause); (b) plaintiff's attempt to exercise a stock option by delivering the operative document, a Stock Purchase Agreement, on January 12, 1995 was invalid because it was untimely (inasmuch

as it was made *before* the first anniversary of the agreement, rather than on or after the date of the agreement) and because plaintiff did not deliver the Stock Purchase Agreement to me, as required by the agreement, but, instead, delivered it to the desk of Moltech's Chairman, Dr. Skotheim;² and (c) plaintiff's attempt to correct the mistake he had made on January 12, 1995 by delivering the Stock Purchase Agreement to me on February 13, 1995 was invalid because it was attempted *after* that date of plaintiff's termination and, therefore (as set forth above), after the termination of plaintiff's stock option rights.

c. Finally, with respect to the single claim for money damages contained in the amended complaint — which is part of the fifth cause of action — plaintiff is not entitled to the relief requested inasmuch as the allegations supporting the claim (that Moltech's refusal to recognize any stock option rights on plaintiff's part following the termination of his employment constituted a breach of the Employment Agreement) merely constitute an attempt to make an end-run around Paragraph 3 of the Incentive Stock Option Agreement, which (as set forth above) unequivocally sets forth the parties' agreement to deem *all* stock option rights terminated as of the date of plaintiff's termination, with regard to whether that termination was made with or without cause.

² Parenthetically, an attempt was made both in the amended complaint and in plaintiff's deposition testimony to suggest that plaintiff's delivery of the Stock Purchase Agreement to Dr. Skotheim, rather than to me, was done at my direction. Although such a contention is not relevant to this motion, inasmuch as it constitutes inadmissible parol evidence contradicting an unambiguous contractual provision, I can state categorically that it is a bald-faced lie. I never gave plaintiff any such direction, and I certainly never agreed to a modification of plaintiff's responsibilities under the Incentive Stock Option Agreement.

WHEREFORE it is respectfully requested that Moltech's motion be granted in all respects.


Herbert Rosenberg

Sworn to before me this
22nd day of September, 1997


Notary Public

JEFFREY C. DANNENBERG
NOTARY PUBLIC, State of New York
No. 31-4805721
Qualified in New York County
Commission Expires June 30, 1998