To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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WILLIAM F. COSTELLO,

Plaintiff,

-against-

CURAN & AHLERS LLP, and KEITH J. AHLERS,

Defendants.

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DECISION AND ORDER
Index No.: 58874/2021
Motion Date: 12/14/2021
Seq. No. 1

DAMARIS E. TORRENT, A.J.S.C.

The following papers numbered 1 to 7 were read on the pre-answer motion by defendants for an order dismissing any claims for breach of contract and violation of the Labor Law arising prior to June 30, 2015 as time barred pursuant to CPLR 3211(a)(5); dismissing plaintiff's Labor Law 193 claim pursuant to 3211(a)(7) because plaintiff fails to state a cause of action for deduction from wages; dismissing plaintiff's breach of contract claim against defendant Keith Ahlers pursuant to CPLR 3211 because defendant Ahlers was not a party to the alleged contract; and dismissing plaintiff's Labor Law claim against defendant Ahlers pursuant to CPLR 3211 because defendant Ahlers was not plaintiff's employer under the Labor Law; and for such other and further relief as this Court deems just and proper.

PAPERS	NUMBERED
Notice of Motion / Affirmation in Support / Exhibits	1-4
Stipulation	5
Memorandum of Law in Opposition	6
Affirmation in Reply	7

Plaintiff commenced this action on June 30, 2021, seeking to recover for breach of contract and violation of Labor Law 193 and 198 in connection with defendants' failure to pay plaintiff's bonuses and bi-weekly salary in accordance with the parties' agreement. Plaintiff alleges he was employed by Curan & Ahlers LLP from 2002 until he resigned on August 25, 2020. It is alleged that in or around September 2004, plaintiff and defendants entered into an agreement pursuant to which defendants were to pay plaintiff a salary of $70,000 per year plus bonuses equal to 5% of the attorneys' fees recovered by Curan & Ahlers LLP on matters litigated by plaintiff (Defendants' Exhibit A, p. 3). Plaintiff alleges that in or around 2008, Mr. Ahlers began paying bi-weekly paychecks on a delayed basis, and issuing bonus checks for reduced amounts, advising plaintiff that there was not sufficient funds to cover the checks. It is alleged that Mr. Ahlers continued to acknowledge that plaintiff was owed and would eventually be paid the fully 5% bonus on each case that he litigated and he continued making payments toward the full amount owed over time (Defendants' Exhibit A, p. 4). Plaintiff alleges that he is owed $118,835 in bonuses, representing 5% of attorneys' fees recovered by Curan & Ahlers LLP in cases litigated by plaintiff. Plaintiff alleges that he is owed $4,183.12 in paychecks which were to be paid on July 24, 2020 and August 7, 2020. It is alleged that Mr. Ahlers is the managing partner of Curan & Ahlers LLP and Mr. Ahlers was plaintiff's employer within the meaning of Labor Law 190(2) (Defendants' Exhibit A).

Motion to Dismiss pursuant to CPLR 3211(a)(5)

Pursuant to CPLR 3211(a)(5), a party may move for judgment dismissing a cause of action asserted against him on the ground that the cause of action may not be maintained because the applicable statute of limitations has expired. Defendants move for an order dismissing any claims for breach of contract and for non-payment of wages under the Labor Law arising prior to June 30, 2015 as time barred. Defendants argue that plaintiff's claims accrue as far back as 2008,

and the claims are subject to a six year statute of limitations (CPLR §213[2]; Labor Law §198[3]). Defendants contend that as plaintiff commenced this action on June 30, 2021, all claims for breach of contract and for non-payment of wages under the Labor Law that accrued prior to June 30, 2015 should be dismissed as time barred.

On a motion to dismiss on the grounds of expiration of the statute of limitations pursuant to CPLR 3211(a)(5), the moving defendant has the initial burden of establishing that the time in which to commence the action has expired. Upon defendant's prima facie showing, the burden shifts to plaintiff to raise a question of fact as to whether an exception to the statute of limitations applies, whether the statute of limitations was tolled, or whether the action was actually commenced within the applicable statute of limitations (*Witty v 1725 Fifth Ave. Corp.*, 170 AD3d 781 [2d Dept 2019]; *Celestin v Simpson*, 153 AD3d 656 [2d Dept 2017]). In considering the motion, the court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff (*Silver v Silver*, 162 AD3d 937 [2d Dept 2018]; *Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815 [2d Dept 2008]).

Here, defendants establish, prima facie, that the six year period of limitations applicable to plaintiff's breach of contract and Labor Law claims bars claims that accrued prior to June 30, 2015. In opposition, plaintiff argues the statute of limitations started running anew on July 17, 2015, when defendants made a partial payment on the outstanding bonus payments due under the parties' agreement (Memorandum of Law in Opposition, p. 12). In order for partial payment to have the effect of tolling a period of limitations, plaintiff must establish that there was "payment of a portion of an admitted debt… accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder" (*Stern v Stern Metals, Inc.*, 22 AD3d 567 [2d Dept 2005]).

Plaintiff alleges that starting in 2008, Mr. Ahlers began issuing plaintiff bonus checks for whatever amount was available at the time as partial payment toward the amount owed. Plaintiff alleges that from 2008 through August 2020, he maintained a spreadsheet recording the amount of the bonuses owed and payments received. Plaintiff allegedly printed out the spreadsheet every few months and showed it to Mr. Ahlers, who continued to acknowledge that Curan & Ahlers LLP owed plaintiff for the bonuses and promised that it would continue to make payments toward the full amount owed as it was able to do so (Defendants' Exhibit A, p. 5). Defendants submit plaintiff's alleged bonus spreadsheet, which shows a payment in the amount of $19,450 was made on July 17, 2015 and it is noted as a bonus check (Defendants' Exhibit B). Plaintiff's allegations together with the alleged bonus spreadsheet are sufficient to raise a question of fact as to whether the statute of limitations started running anew when defendants allegedly made a partial payment of the bonuses owed on July 17, 2015 (*see Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815 [2d Dept 2008]). Plaintiff's claims related to salary that was not paid on July 24, 2020 and August 7, 2020 are clearly within the applicable six year statute of limitations. As such, no portion of plaintiff's claims for unpaid bonuses and salary are barred by the statute of limitations.

Motion to Dismiss pursuant to CPLR 3211(a)(7)

Defendants move for an order pursuant to CPLR 3211(a)(7), dismissing plaintiff's Labor Law 193 claim on the grounds that plaintiff's complaint fails to state a cause of action. In considering a motion to dismiss for failure to state a cause of action, the pleading must be liberally construed. The Court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. The issue is whether the plaintiff has a cause of action, not whether he will be successful on the merits (*Ackerman v New York Hosp. Med. Ctr.*

Of Queens, 127 AD3d 784 [2d Dept 2015]; *Jacobs v Macy's East, Inc.*, 262 AD2d 607 [2d Dept 1999]).

Pursuant to Labor Law 193, no employer shall make any deduction from the wages of an employee, except deductions made in accordance with the provisions of any law, or authorized in writing by the employee for certain payments made for the employee's benefit (Labor Law §193[1][a], [b]). Labor Law 193(5) provides "[t]here is no exception to liability under this section for the unauthorized failure to pay wages, benefits or wage supplements." Defendants correctly noted that Labor Law 193 was amended in August 2021 to add Labor Law 193(5) and the amendment is inapplicable here because the allegations in this matter concern the period 2008 through 2020. However, the Court notes that the bill to add Labor Law 193(5) states Article 6 of the Labor Law, particularly sections 193 and 198(3), reflects New York's longstanding policy against the forfeiture of earned but undistributed wages. The purpose of the amendment is to clarify that the unauthorized failure to pay wages, benefits and wage supplements has always been encompassed by the prohibitions of section 193 (2021 NY Senate Bill 858 §1 [August 19, 2021]).

Labor Law 190(1) defines wages as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis" (Labor Law §190[1]). When an employer fails to pay wages, including non-discretionary bonus payments already due and vested, this constitutes a violation of Labor Law 193 (*Ryan v Kellogg Partners Institutional Servs.*, 19 NY3d 1 [2012]). Here, plaintiff's complaint adequately sets forth causes of action to recover for unpaid wages and bonuses withheld from the plaintiff (*see Ackerman v New York Hosp. Med. Ctr. Of Queens*, 127 AD3d 784 [2d Dept 2015]).

Motion to Dismiss as to Defendant Keith Ahlers

It is undisputed that Keith Ahlers is a partner at Curan & Ahlers LLP, a registered limited liability partnership in White Plains, New York. Defendants move for an order pursuant to CPLR 3211(a)(7), dismissing plaintiff's breach of contract and Labor Law claims against Keith Ahlers, arguing Mr. Ahlers was not a party to any alleged contract with plaintiff, and he was not plaintiff's employer within the meaning of the Labor Law. Defendants argue that as a partner at the firm, Mr. Ahlers is not personally liable for any of the partnership's alleged debts.

In opposition, plaintiff argues that Mr. Ahlers personally guaranteed bonus payments to plaintiff. Plaintiff contends that Mr. Ahlers personally made separate and independent promises to pay plaintiff his salary and bonuses. Plaintiff argues this allegation is sufficient to establish a separate obligation to perform under the contract within the meaning of New York Partnership Law 26(b).

New York Partnership Law 26 provides that all partners are jointly liable for all other debts and obligations of the partnership, but any partner may enter into a separate obligation to perform a partnership contract (NYPL §26[a][2]). However, no partner of a registered limited liability partnership is liable or accountable, directly or indirectly, including by way of indemnification or contribution, for any debts, obligations or liabilities of the partnership, whether arising in tort contract or otherwise, solely by reason of being a partner or acting in such capacity (NYPL §26[b]). New York Partnership Law 26(d) provides "[n]othing in this section impairs the ability of a partner to act as a guarantor or surety for the debts, obligations or liabilities of a registered limited liability partnership."

As an initial matter, plaintiff fails to set forth a cognizable cause of action against Mr. Ahlers based on a theory of personal guarantee. The facts as alleged in the complaint state that Mr. Ahlers proposed the terms of the alleged oral agreement regarding compensation on behalf

of Curan & Ahlers LLP, he acknowledged that Curan & Ahlers LLP owed plaintiff for the bonuses, and he promised that Curan & Ahlers LLP would continue to make payment toward the full amount owed. This acknowledgement and promise on behalf of Curan & Ahlers LLP does not constitute a personal guarantee or assumption of liability by Mr. Ahlers under New York Partnership Law 26.

In any event, pursuant to New York Partnership Law 26(a)(2), a partner's liability for the contractual liabilities of the partnership is joint rather than several. "[E]ach partner is liable for the whole amount of every debt of the partnership, not merely for a proportionate part" (*Midwood Dev. Corp. v K 12th Assocs*, 146 AD2d 754 [2d Dept 1989]; *see also City of New York v Evanston Ins. Co*, 165 AD3d 1032 [2d Dept 2018]). Here, plaintiff alleges the dispute arose when Mr. Ahlers told him in August 2020 that the firm could not afford to pay him anymore (Defendants' Exhibit A, p. 5). Where there are allegations of insolvency of the partnership, the individual partners are proper parties to the litigation (*St. James Plaza v Notey*, 166 AD2d 438 [2d Dept 1990]). However, a judgment creditor generally must look to the partnership property first to satisfy the judgment (*Midwood Dev. Corp. v K 12th Assocs*, 146 AD2d 754 [2d Dept 1989]). Accepting the facts as alleged in the complaint as true, and according plaintiff the benefit of every favorable inference, plaintiff sets forth cognizable causes of action against Mr. Ahlers in an individual capacity, as limited by his obligations under the partnership. The parties' remaining contentions and have been considered and are without merit.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is denied in its entirety; and it is further

ORDERED that pursuant to CPLR 3211(f), defendants' time to serve an answer is extended until ten days after service of this order with notice of entry; and it is further

ORDERED that the parties are directed to complete and file to NYSCEF on or before April 14, 2022 a preliminary conference stipulation to be so ordered https://www.nycourts.gov/legacypdfs/courts/9jd/civilCaseMgmt/west-general-civil-preliminary-conf-stip-form.pdf; and it is further

ORDERED that should counsel fail to file the preliminary conference stipulation by April 14, 2022 as directed, all counsel shall appear for a virtual preliminary conference on April 22, 2022 at 11:30 a.m., subject to confirmation by Teams link to be sent by the Part; and it is further

ORDERED that within ten days of the date hereof, plaintiff shall serve a copy of this Decision and Order with notice of entry upon all parties and file proof of service on NYSCEF.

The foregoing constitutes the Decision and Order of the Court.

Dated: February 28, 2022
White Plains, New York

E N T E R:

HON. DAMARIS E. TORRENT, A.J.S.C.

TO: All parties via NYSCEF

FILED VIA NYSCEF