

**FF Venture Capital LLC v Adam J. Plotkin, RDWC,
LLC**

2024 NY Slip Op 31599(U)

May 5, 2024

Supreme Court, New York County

Docket Number: Index No. 651314/2023

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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FF VENTURE CAPITAL LLC,	INDEX NO.	<u>651314/2023</u>
Plaintiff,	MOTION DATE	<u>01/04/2024</u>
- v -	MOTION SEQ. NO.	<u>002</u>
ADAM J. PLOTKIN, RDWC, LLC		
Defendant.	DECISION + ORDER ON MOTION	

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 27, 29, 30, 31
 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the Plaintiff/Counterclaim-Defendant (**ffVC**)’s are not entitled to dismissal of the Defendants/Counterclaim-Plaintiff (**Defendants**)’s Labor Law (second) counterclaim. The motion is however granted solely to the extent that the promissory estoppel (sixth) counterclaim is dismissed without prejudice.

New York Labor Law § 193 prohibits any unauthorized “deductions” from an employee’s wages. “Wages” means “the earnings of an employee for labor or services rendered,” including severance pay (NYLL § 190[1]; *Gertler v Davidoff Hutcher & Citron LLP*, 186 AD3d 801 [2d Dept 2020]). In *Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449 (1st Dept 2017), the Appellate Division recognized the then long-standing authority that the wholesale withholding of compensation did not give rise to a Labor Law claim. The law has however changed since the 2017 *Perella Weinberg* decision.

On August 21, 2021, Governor Cuomo signed the “No Wage Theft Loophole Act” (the **Act**) codified at Labor Law § 193(5) which was effective immediately upon signing and provides “[t]here is no exception to liability under this section for the unauthorized failure to pay wages, benefits or wage supplements.” In the Act’s Sponsoring Memorandum, the legislature specifically noted that:

[t]he purpose of this remedial amendment is to clarify that: (a) the unauthorized failure to pay wages, benefits and wage supplements has always been encompassed by the prohibitions of section 193, *see, e.g., Ryan v. Kellogg Partners Inst. Servs.*, 19 N.Y. 3d 1, 16 (2012) (correctly holding that employer's neglect to pay sum that constitutes a “wage” violated section 193); and (b) consistent with established principles of statutory construction, section 193 should be harmonized with section 198(3)’s guarantee that “All employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages....”

(2021 Sess. Law News of N.Y. Ch. 397 [S. 858]).

Since then, the Appellate Division has had occasion to revisit the application of Labor Law § 193 claims to the wholesale withholding of compensation in two recent decisions, *Raparathi v Clark*, 214 AD3d 613, 614 (1st Dept 2023) and *Perella Weinberg Partners LLC v Kramer*, 2024 NY Slip Op 02026 (1st Dept Apr. 16, 2024). Taken together, these cases mean that Labor Law § 193 claims which arise from post-Act application are not subject to the prior line of cases which held that the wholesale withholding of compensation did not give rise to a claim under Labor Law § 193 and that those case only apply to and bar claims arising from pre-Act conduct. Inasmuch as it is undisputed that the claims in this case arise from post-Act application, ffVC’s argument that the wholesale withholding of allegedly vested severance pay does not give rise to a Labor Law § 193 claims fails. Nor is ffVC entitled to dismissal based on their allegation that Adam Plotkin resigned. Mr. Plotkin disputes this fact and alleges termination without cause pursuant to

which his severance vested. As such, this involves a factual issue not resolvable at this stage of the litigation.

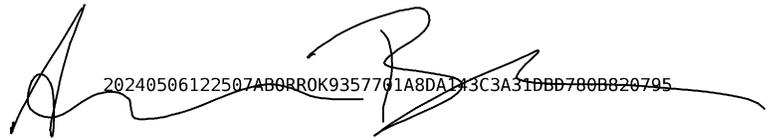
A claim for promissory estoppel requires allegations of (i) a sufficiently clear and unambiguous promise, (ii) reasonable reliance on the promise, and (iii) injury caused by the reliance (*Castellotti v Free*, 138 AD3d 198, 204 [1st Dept 2016]). As currently alleged the claim fails because the promissory counterclaim does not properly allege reasonable reliance or unconscionable injury (*Tierney v Capricorn Inv'rs, L.P.*, 189 AD2d 629, 631 [1st Dept 1993]; *Darby Trading Inc. v Shell Intern. Trading and Shipping Co. Ltd.*, 568 F Supp 2d 329, 341 [SDNY 2008]). The parties agreements (NYSCEF Doc. Nos. 2 and 3) demonstrate that Mr. Plotkin was to receive the floor of a 7.5% carried interest in then and future funds. The documentary evidence suggests that to the extent that the parties deviated from this arrangement, they entered into written agreements clarifying that departure as late as April, 2020. Given the foregoing written agreements and course of conduct, the promissory estoppel counter-claim as alleged fails to identify the date any such promise with respect to Burgundy took place or how any such promise was reasonably relied upon for Mr. Plotkin to perform services not otherwise contemplated by his agreements; 2020 K-1s and 2021 K-1s not in the record would not have been received during the calendar year 2020 and 2021 respectively but would have been received in the calendar year 2021 and 2022 respectively. Given the 7.5% carry contemplated by the agreements, Mr. Plotkin also fails to allege unconscionable injury based on “raising capital from investors” (NYSCEF Doc. No. 18, at ¶ 18) albeit “tirelessly” or “with alacrity” (NYSCEF Doc. No. 27, at 1, 10). Thus, the counter-claim must be dismissed without prejudice.

The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that ffVC's motion to dismiss is granted solely to the extent that the Defendants' sixth counterclaim for promissory estoppel is dismissed; and it is further

ORDERED that the Defendants shall move to replead their sixth counterclaim for promissory estoppel within 45 days or the claim shall be dismissed with prejudice.



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5/5/2024
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
CHECK IF APPROPRIATE:					<input type="checkbox"/>
					REFERENCE