

Cohen v National Grid USA

2009 NY Slip Op 30461(U)

February 20, 2009

Supreme Court, Nassau County

Docket Number: 018536/2008

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 9

JASON COHEN, RICHARD CHOINSKI, JOHN
ADAMS, PATRICK BENSON, EILEEN BONASIA,
PATRICK BOYLE, GERALD CHIARELLA, JAMES
COMMISSO, CRISTIAN CRUZ, JENNIFER FORST,
MARK GOERCKE, GERARD MANGELLI, PETER
PETRONZI, ELENA THOMPSON, and KRISTIN
ZAKY,

INDEX NO.: 018536/2008
MOTION DATE: 12/23/2008
MOTION SEQUENCE: 001 and 002

Plaintiffs,

- against -

NATIONAL GRID USA, KEYSpan CORP.,
KEYSPAN SERVICES INCL, KEYSpan ENERGY
CORP. and NATIONAL GRID CORPORATE
SERVICES LLC,

Defendants.

The following papers read on this motion:

Notice of Motion, Affidavit & Exhibits Annexed	1
Affirmation of Patrick M. Collins & Exhibit Annexed	2
Memorandum of Law in Support of Defendants' Motion to Dismiss the Action	3
Affidavit in Opposition of Jason Cohen & Exhibit Annexed	4
Notice of Cross-Motion & Affirmation	5
Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss Complaint	6
Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss the Action and in Opposition to the Cross Motion for Sanctions	7

PRELIMINARY STATEMENT

The Defendants move for an Order pursuant to Civil Practice Law and Rules § 3211 (a) (1) and (a) (7) dismissing the complaint for failure to state a claim upon which relief can be granted and because a defense is based on documentary evidence. The Plaintiffs oppose the motion and have submitted a cross-motion for the imposition of sanctions. The basis for the request is set forth in the affirmation in support of the motion and the affidavit of the Plaintiff Jason Cohen.

The essence of the cross-motion is that counsel were in the process of addressing the issue as to whether or not Mr. Cohen had actually exercised all of the stock options available, and if there were documentary evidence to that effect, the claims on his behalf would be withdrawn. The motion alleges that no such documentary evidence was supplied and, instead, the Defendants moved for dismissal on the basis of failure to plead detrimental reliance.

Because their motion to dismiss the Seventeenth Cause of Action on behalf of Mr. Cohen does not address the options to which he is entitled under the 2007 Management Change of Control Severance Plan, but addresses only the stock options under the Incentive Compensation Plan, the Plaintiffs claim that the motion to dismiss the Seventeenth Cause of Action constitutes frivolous conduct. It is further claimed that the authorities relied upon by the Defendants have no application to situations in which severance benefits are contained in a written, as opposed to oral, employment agreement.

BACKGROUND

Fifteen former managerial employees of KeySpan Communications Corp. (KCC) seek severance pay and benefits as a consequence of their termination without cause in conjunction with the sale of KCC. KCC was owned by KeySpan Services Inc. (KSI), which in turn was owned by KeySpan Energy Corp. KeySpan Energy's parent, KeySpan Corporation, merged with National Grid, USA in August 2007. In November 2007 National Grid gave Light Tower Fiber (LT) an option to purchase KCC, the plaintiffs' former employer. On or about July 24, 2008 the assets and liabilities of KCC were acquired by LightTower Fiber Long Island, LLC, which was formed for the purpose of the transaction. Contemporaneously KSI transferred membership interest in Light Tower to LT. Assets of KCC not sold to LightTower were transferred to

KeySpan Corporate Services LLC, which became the Defendant National Grid Corporate Services.

In anticipation of the potential disruption which the loss of managerial employees would cause in the midst of the potential sale or merger of the company, KeySpan Corporation had in place a program entitled "Senior Executive Change of Control Severance Plan".¹ The Introduction to the document reiterates the existence of the possibility of a Change of Control which, by virtue of the uncertainty it creates, "may result in the loss or distraction of senior executives of the company, to the detriment of the Company and its shareholders".²

The complaint,³ alleges that the Plaintiffs were entitled to receive payments in accordance with the Severance Plan when there was a "change of control". This occurred when their employer's were transferred to National Grid Corporate Services. They contend that they were terminated without cause within 18 months of the date of change of control. In fact, they were offered, and accepted, employment with National Grid contemporaneously with the change of control.

The Defendants contend that the Plaintiffs hardly qualify as having been terminated without cause, since they were immediately provided with a position equal to or greater than their former positions with KCC. They also contend that the First through Sixteenth Causes of Action (all except the Seventeenth and last) must be dismissed because the Plaintiffs fail to allege detrimental reliance on a prior policy of severance payments, and that such allegation and proof is an essential component of the action. They also contend that the Seventeenth Cause of Action should be dismissed based on undisputed documentary evidence, which reflects the exercise of a KeySpan stock option by Jason Cohen, the Plaintiff on the Declaratory Judgment.⁴ According to the document, the option was issued on February 13, 2001, and exercised on March 2, 2006.

¹ Exh. "2" to Exh. "1", Affidavit of Patrick M. Collins.

² *Id.* at p. 2.

³ Exh. "1" to Exh. "1" Affidavit of Patrick M. Collins.

⁴ Exh. "B" to Notice of Motion.

The Plaintiffs also annex contracts of employment for seven of the named Defendants.⁵ Each of those documents provides that "(i)f your employment is terminated by the company for any reason other than cause, you will receive severance and health coverage benefits equal to that of a comparable KeySpan Electric Service employee". Breach of Contract actions on behalf of these individuals are incorporated in the Third through Ninth Causes of Action. The First Cause of Action alleges breach of contract on behalf of all Plaintiffs. The Second Cause of Action seeks Declaratory relief. The Tenth is for Tortious Interference; the Eleventh alleges Breach of Good Faith and Fair Dealing; the Twelfth through Fourteenth seek relief under the Debtor and Creditor Law; the Fifteenth seeks Imposition of a Constructive Trust; the Sixteenth alleges Unjust Enrichment; and the Seventeenth seeks a Declaratory Judgment on behalf of Jason Cohen.

DISCUSSION

The Defendants position is that the First through Sixteenth Causes of Action are dependent upon the existence of a contract, which does not exist. As an alternative position, they claim that even if there were an agreement, a breach by the Defendants has not been adequately pled since there is no allegation that the Plaintiffs relied to their detriment upon a uniform policy of the Defendant to provide severance payments. The Plaintiffs respond that the authorities relied upon by the Defendants do not apply where the commitment to provide severance benefits is pursuant to a written agreement; but if they are required to plead "detrimental reliance", that they be permitted to amend the verified complaint to make this allegation.

Validity of Severance Claims - Analysis of Cited Cases

The cases cited by the moving Defendant and the Plaintiff which deal with the ability to enforce employee severance benefits seem to state fundamental principles, but are actually less than clear. Based upon an analysis of those submitted by the parties, the following statements appear to be correct;

1. A policy manual, subject to change by an employer, does not constitute a contract between the parties;⁶

⁵ Exhs. "5" — "11" to Exh. "1" to Affirmation of Patrick M. Collins.

⁶ *Gallagher v. Ashland Oil, Inc.*, 183 A.D.2d 1033, 1034 (3d Dept. 1992).

2. Where an employee relies upon an oral severance policy, the plaintiff must produce evidence in admissible form demonstrating that the employer had a regular practice of making severance payments, and that the plaintiff relied upon this practice in continuing employment;⁷

3. Where the terms of the Plaintiff's employment contract were not written, sued for the breach of a written severance pay policy for salaried employees, but the employee was not aware of the existence of the policy until after termination of his employment, they were unable to show both the existence of the policy and reliance on the practice in accepting or continuing employment;⁸

4. When the Plaintiff is determined to be an employee at will under a written agreement which is silent as to duration, but provided for severance pay, the Plaintiff raised a question of fact as to whether he was fired without cause and entitled to severance pay. In addition, where the fraud claim is indistinguishable from the breach of contract allegation, no fraud cause of action arises;⁹

The only clear message which these cases deliver is that there is very little clarity in whether or not an employee is entitled to the benefit of a company's severance package. The best that can be said is that each matter appears to be fact sensitive.

Motion to Dismiss First — Fourteenth Causes of Action for Failure to State Material Elements

In this case seven of the employee-plaintiffs have employment agreements.¹⁰ None of them state a term of years, but provide for an annual salary. They also provide that "(i)f your employment is terminated by the company for any reason other than cause, you will receive severance and health coverage benefits equal to that of a comparable KeySpan Electric Services employee". At best these are one-year contracts, after which they were employees-at-will. With respect to the severance benefits under this document, the Court concludes that the employees

⁷ *Bailey v. New York Westchester Square Medical Centre*, 38 A.D.3d 119 (1st Dept. 2007)

⁸ *Smith v. New York State Elec. and Gas Corp.*, 155 A.D.2d 850 (3d Dept. 1989).

⁹ *Todd v. Grandoe Corp.*, 302 A.D.2d 789 (3d Dept. 2003).

¹⁰ Exhs. "5" — "11" to Exh. "1" to Affirmation of Patrick M. Collins.

would have to show that there was a policy in place for payment of severance benefits to Electric Services employees, and that they relied upon this policy in continuing their employment.

It is apparent that the reality of the situation presented was that by 2007, KeySpan Corporation was actively involved in the process of the earlier-described transfers, ultimately to National Grid. In order to preserve the economic viability of KeySpan Communications, the existing KeySpan Corporation Senior Executive Change of Control Severance Plan¹¹, effective as of October 29, 2003, was specifically addressed by the 2007 Management Change of Control Severance Plan.¹² It included, in addition to the Separation Allowance, Supplemental Benefits based upon the level of employment from Band 1 through Band 4.

The Defendants seek dismissal of the complaint in its entirety because of a failure to state a cause of action upon which relief can be granted and because a defense is based upon documentary evidence. The failure to state a claim is based upon the Defendants' position that the Plaintiffs must specify reliance upon an existing severance policy to their detriment. In light of the 2007 Management Control Severance Plan, with the alleged Change of Control triggering event occurring in the same year, it would be impossible for the Plaintiffs to document a reliance on the practice of the employer in providing severance benefits under a policy virtually contemporaneous with the change of control.

Nevertheless, with respect to the pleading technicality, the Complaint alleges the existence of an agreement for severance payments, and that the Plaintiffs have complied with the agreement. That is essentially identical to saying we were aware of the offered severance package and remained in the employ of KeySpan Communications until its sale to what ultimately became National Grid.

The Defendants make a point of the fact that the Plaintiffs were immediately employed by National Grid with equal or better salary than they enjoyed with KeySpan. This is certainly the result the Plaintiffs hoped for, but it was anything but guaranteed. National Grid was under no obligation to hire former KeySpan employees, and, having foregone the opportunity to seek other

¹¹ Exh. "1" to Affirmation of Patrick M. Collins.

¹² Exh. "2" to Affirmation of Patrick M. Collins.

employment prospects after the implementation of the 2007 Agreement, the Plaintiffs state a cause of action for entitlement to the benefits promised them for remaining employed during the negotiation of the transaction.

Motion to Dismiss Third — Ninth Causes of Action Based on Memorandum Agreements

As previously noted, seven of the named Plaintiffs had memorandum agreements of employment which are annexed as exhibits to the Complaint. They are each dated long before the 2007 Management Change of Control Severance Plan, but specifically provide that if the employee is terminated other than for cause, they are entitled to severance benefits equal to those of comparable employees of KeySpan Electric Services, a different subsidiary.

These memoranda, which do not state a term of years, can, as previously noted, at best be construed as an agreement for one year. Agreements which do not state a term of years have long been regarded as connoting at-will employees, terminable at will.¹³ Very little has changed in this regard during the intervening years. In determining where these seven Plaintiffs fall within the analyses of the available case law, it appears that, with respect to their claims under the memoranda, they are at-will employees, with an oral agreement to provide severance benefits commensurate with those available to discharged employees of KeySpan Electric. Under these circumstances, it appears that, in order to make a claim under the memoranda, the Plaintiffs must allege reliance on the terms of the memo and the policy of the KeySpan Electric to grant severance payments to their employees who were discharged other than for cause.¹⁴

While the Plaintiffs are in a better position than the Plaintiff in *Bailey*, they are nevertheless making a claim under what is now an oral agreement to make severance payments consistent with those paid to another subsidiary. Plaintiff is obligated to claim and prove reliance on those representations and the carrying out of a severance payment policy by the employer. In this case they have not made this allegation, and, in the face of subsequent commitments by KeySpan, would be hard pressed to establish that their continued employment was in reliance on

¹³ *Martin v. New York Life Ins. Co.*, 148 N.Y. 117 (1895).

¹⁴ *Bailey v. New York Westchester Square Medical Centre*, 38 A.D.3d 119 (1st Dept. 2007).

a seven or eight year old document in the face of more recent pronouncements.

The motion to dismiss the Third through Ninth Causes of Action to the extent that they claim reliance on the memoranda of employment documents is granted.

Declaratory Judgment Claim

In the Second Cause of Action the Plaintiffs seek a declaration that the transaction between KeySpan Communications and Light Tower, was a Change of Control within the meaning of the 2007 Severance Plan and the individual employment agreements of the seven identified employees. The Defendants seek dismissal of this Cause of Action for the same reasons that they argue for dismissal of the First — Fourteenth Causes of Action, the failure to state a claim upon which relief can be granted, in that the Plaintiffs have not pled justifiable reliance to their detriment. For the previously stated reasons, the motion to dismiss the claim for Declaratory Relief is denied with respect to the Senior Executive Change of Control Severance Plan and the 2007 Severance Plan, but is granted as to the individual claims under the memoranda of employment.

Tortious Interference with Contract - Tenth Cause of Action

The motion to Dismiss the Tenth Cause of Action as it relates to the 2007 Severance Plan is denied. It is granted with respect to the individual memoranda of employment for the reasons above stated. Counsel contend that this Cause of Action should be dismissed because there is no third party with whom it is alleged that the Plaintiffs had a contract subject to tortious interference. The contention is that the agreement is between KeySpan Corp. and the Plaintiffs, and that KeySpan could not tortiously interfere with its own contract.

The reality, however, is somewhat different, the document is no doubt the product of the parent company, but it is intended to be binding on its subsidiaries, who are independent entities. Under this reading, the parent could theoretically direct the subsidiary not to make severance payments in accordance with the agreement. Such conduct may well constitute tortious interference, and, at the pleading stage, the claim should be permitted to stand. The motion to dismiss the tortious interference claim in the Tenth Cause of Action is denied.

Breach of Covenant of Good Faith and Fair Dealing

The Defendants move to dismiss the Eleventh Cause of Action which alleges a breach of

covenant of good faith and fair dealing. The Court of Appeals has relatively recently provided an informative history of this claim in the employment setting.¹⁵ The Court recounts the long-standing reluctance of the Court to find such a right in the face of the limited rights afforded at-will employees under traditional New York law. There was a significant, if aberrational, departure from this position in a case involving the discharge of an attorney who had requested his firm to file a grievance with the Disciplinary Committee when an associate assigned to represent him in a real estate transaction both neglected the matter, and lied to cover his transgressions.¹⁶ Because of the legislatively imposed duty to regulate the conduct of attorneys, the Court held that the Plaintiff had a legitimate claim to anticipate that his employer would adhere to the Code of Professional Responsibility in reporting the transgression, and not take action against him because of his request that they do so.

This would seem to be as narrow an exception to the non-recognition of such a claim as can be imagined. The Plaintiff in *Horn*, a physician, was discharged, among other reasons, because she allegedly did not act in the best interests of her employer when determining whether injured employees were eligible for Workers' Compensation benefits. Her claim that doing so would violate the code of medical ethics was insufficient for the Court to find that she fell within the "Wieder Exception". It certainly seems unlikely that there will be many such claims sustained in the future.

The motion to dismiss the Eleventh Cause of Action is granted.

Claims under Debtor Creditor Law §§ 274 — 276.

The Plaintiffs also request relief under the following provisions of the Debtor and Creditor Law:

§ 274. Conveyances by persons in business

Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the

¹⁵ *Horn v. New York Times*, 100 N.Y.2d 85 (2003).

¹⁶ *Wieder v. Shala*, 80 N.Y.2d 628 (1992).

continuance of such business or transaction without regard to his actual intent.

§ 275. Conveyances by a person about to incur debts

Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

§ 276. Conveyance made with intent to defraud

Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

The Defendants move to dismiss the claims under the statute. Their stated position is that complaint alleges that the structure of the transaction left KeySpan Communications with inadequate capital to pay the obligations under the 2007 Severance Agreement. Since KCC Communications is not a party, the complaint fails to allege a violation of the language of the statute.

The Twelfth Cause of Action alleges that KCC and the KeySpan Defendants were aware of the obligation to pay Severance Pay to the Plaintiffs, making the Plaintiffs creditors. The complaint further alleges that the conveyance of the assets of KCC by the KeySpan Defendants, rendered KCC unable to meet its obligation to make the severance payments.

The party to the Senior Executive Change of Control Severance Plan and the 2007 Management Change of Control Severance Plan was not KCC, but rather KeySpan Corporation. Whether or not the subsidiary was left with inadequate capital to make severance payments is not an issue. The question is whether the debtor, KeySpan Corporation, was left with unreasonably small capital so as to constitute a fraud on the Plaintiffs. Not only does the complaint not allege that the KeySpan Defendants were left with inadequate capital, it affirmatively alleges that the transaction was structured to provide for the Defendants to receive the funds which are claimed to be due the Plaintiffs under the severance agreements.

The complaint fails to allege that the Defendants, the debtors, have been rendered incapable of meeting their obligations under the severance agreements, and the Twelfth Cause of Action is therefore dismissed.

The Thirteenth and Fourteenth Causes of Action suffer from the same malady. They are premised on the principle that KCC is the debtor who is required to make severance payments to the Plaintiffs. They are not. The obligor under the severance agreements is KeySpan Corporation, a named Defendant in the action.

Imposition of a Constructive Trust

The Fifteenth Cause of Action seeks to impose a constructive trust on the proceeds of the transaction in an amount equal to the sums due under the severance agreements.

A constructive trust may be imposed “(w)hen property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest.”¹⁷ It is an equitable remedy, necessarily flexible so as to accomplish its purpose.¹⁸

The Court of Appeals has set forth four elements to establish a constructive trust: “(1) a confidential or fiduciary relation, (2), a promise, (3) a transfer in reliance thereon and(4) unjust enrichment.”¹⁹ There are no rigid requirements for the establishment of a constructive trust, and these are more aptly considered as guidelines. Because the fundamental purpose is to prevent unjust enrichment, a constructive trust is appropriate whenever necessary to satisfy the demands of justice.²⁰

The Plaintiff has not adequately pleaded the essential elements of a claim for constructive trust. There may well be circumstances where the employer-employee relationship may involve issues of trust.²¹ *Bayside* involved a fourteen year relationship under which the Plaintiff invested

¹⁷ *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386 (1919).

¹⁸ *Counihan v. Allstate Insurance Co.*, 194 F3d 357, 361 (2d Cir. 1999), citing *Simonds v. Simonds*, 45 N.Y.2d 233, 241 (1978).

¹⁹ *Sharp v. Komalski*, 40 N.Y.2d 119, 123 (1976).

²⁰ *Matter of Estate of Knappen*, 237 A.D.2d 677 (3d Dept. 1997).

²¹ *In re Bayside Controls, Inc.*, 295 A.D.3d 343 (2d Dept. 2002).

time, money and effort in the operation of the business, upon the oral representation of his employer that he was the owner of 50% of the shares of the corporation, and that those shares were being held in trust for him. When the employer sought to remove the employee, and disclaimed his entitlement to the 50% share of ownership, the Court held that the Plaintiff adequately pleaded a cause of action for the imposition of a constructive trust.

Aside from the fact that the Plaintiffs in this case have not alleged a confidential or fiducial relationship between the parties, the situation is far different from that in *Bayside*. The Plaintiffs may well be owed money from the Defendants, but this does not entitle them to the status of fiduciaries, an essential component of the claim for imposition of a constructive trust.²²

The motion to dismiss the Fifteenth Cause of Action is granted.

Claim for Unjust Enrichment

Unjust enrichment is one of the essential elements for the imposition of a constructive trust. As such, it is an integral part of the claim for a constructive trust, which requires the allegation and existence of a confidential relationship. For the reasons dealt with by counsel, the case law relied upon by the Plaintiffs in their Memorandum of Law in support of the imposition of a constructive trust and unjust enrichment is not persuasive. For the same reason that the complaint fails to adequately allege a confidential relationship, it also fails in its claim of unjust enrichment. These allegations are subsumed in the breach of contract claims which have been sustained as viable.

Declaratory Judgment with Respect to Stock Options Awarded to Jason Cohen

The Defendants' position that the award of stock options pursuant to a 2001 — 2003 Long Term Cash Incentive Plan is documentary evidence so as to determine the claim of Jason Cohen for incentive payments under the 2007 Agreement is misplaced. The stock award does not seem in any way to be related to termination of employment, but rather, is based upon exemplary performance and constitutes a bonus.²³

²² *Waldman v. Englishtown Sportswear, Ltd.*, 92 A.D.2d 833, 835 — 836 (1st Dept. 1983).

²³ See Exh. "13" to Exh. "1", the Affirmation of Patrick M. Collins.

According to the February 28, 2001 correspondence to Cohen,²⁴ KeySpan granted an option to purchase 2,000 shares as of February 21, 2001. The options became fully vested as of February 13, 2004. The option expires on February 12, 2011. It further provides that in the event of Change in Control of the Company, the option "shall become immediately 100% vested as of the effective date of the Change of Control, and shall remain exercisable until the close of business on the Expiration Date."

The Plaintiff Jason M. Cohen is entitled to Declaratory Relief that he is fully vested in an option to purchase 2,000 shares of KeySpan Corp. at the Option Exercise Price of \$39.50.

Cross-Motion by Plaintiffs

The Plaintiffs seek sanctions as provided for in 22 NYCRR 130-1.1 (a). The essential claim is that there were discussions between counsel with respect to the Seventeenth Cause of Action, the claim for Declaratory Relief on behalf of Jason M. Cohen. Rather than forward requested documentation which allegedly established that Mr. Cohen had received all the severance benefits to which he was entitled, counsel for the Defendants served the instant Motion to Dismiss all Causes of Action. The Plaintiff claims that the Motion to Dismiss the Seventeenth Cause of Action is frivolous in that it addresses stock options, but not related to severance. This application is denied. The requisites for a determination of frivolous conduct are set forth at 22 NYCRR 130-1.1 (c) as follows:

(c) For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal

²⁴ Exh. "12" to Exh. "1" to the Affirmation of Patrick M. Collins.

or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

The Defendants' conduct in moving for relief, including the claim that Cohen's entitlement to severance benefits is determinable based upon documentary evidence, does not approach the level of conduct which could reasonably be classified as frivolous.

The Plaintiff also seeks leave to re-plead in the event the Complaint is dismissed for failure to allege detrimental reliance. The claims based upon the 2007 Management Change of Control Severance Plan are not barred by failure to allege detrimental reliance. The causes of action alleging entitlement to severance benefits based upon the seven memoranda of employment are dismissed. To the extent the Plaintiff believes that the claims under these memoranda remain viable, they are authorized to serve an amended complaint alleging the requisite elements of reliance and the employer's adherence to the policy regarding payment of severance benefits to employees of KeySpan Electric Services. The Plaintiffs are directed to serve and file such amended complaint within thirty (30) days of receipt of a copy of this Order with Notice of Entry.

A Preliminary Conference (see NYCRR 202.12) shall be held on March 30, 2009, at 9:30 A.M., before the undersigned in the Supreme Court of Nassau County.

Counsel for all parties are reminded that this matter has been assigned to the Commercial Division of the Supreme Court of Nassau County and the parties are directed to follow the Rules of this Division.

This constitutes the Decision, Order, and Judgment of the Court.

ENTERED

FEB 25 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: February 20, 2009

J. S. C.
J.S.C.