SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN Justice

PART 12

Index Number : 651262/2011 E
DE MADARIAGA, ELENA G
vs
UNION BANCAIRE PRIVEE
Sequence Number : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.

PC 8/15/12 2:15

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/25/12

PHF
_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

----------X

ELANA G. de MADARIAGA,
Plaintiff,

against

UNION BANCIARE PRIVÉE and UNION BANCAIRE PRIVÉE ASSET MANAGEMENT,
Defendants.

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Index Number 651262/2011E
Mot. Seq. No. 002

DECISION AND ORDER

For the Plaintiff:
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For the Defendants:
Seward & Kissel LLP
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E-filed papers considered in review of this motion to dismiss:

Papers	**E-filing Document Number:**
Notice of Motion, Memo of Law, Affidavits, exhibits	12 - 15-6
Memo of Law in Opposition	18
Reply Memorandum	21

PAUL G. FEINMAN, J.:

Defendants move to dismiss the amended complaint pursuant to CPLR 3211 (a) (1) and (a) (7). For the reasons set forth below, the motion is granted in part, and otherwise denied.

BACKGROUND

Plaintiff was the former General Counsel and Senior Managing Director of defendant Union Bancaire Privée Asset Management (UBPAM), a New York-based subsidiary of the Swiss-owned Union Bancaire Privée (Doc. 9, Am. Compl. ¶¶ 6-8). She was allegedly terminated without cause in early 2011 (Doc. 9, Am. Compl. ¶ 1). Specifically, she seeks monetary damages based on her claim that her former employer breached its oral agreement to pay the full compensation promised to her for her work in 2010, a promise which induced her to stay with the company that year, and then breached its agreement to pay her severance when

they terminated her (Doc. 9, Am. Compl. ¶¶ 1,2).

Plaintiff commenced her employment with UBPAM in 2008 (Doc. 9, Am. Compl. ¶ 2). Her first year's base salary and guaranteed minimum bonus were spelled out in a written offer dated December 12, 2007 (Doc. 9, Am. Compl. ¶ 11; Doc. 15-1, Rudel Affid. in Opp., ex. A, Offer letter). The letter also stated that in the year 2009 and beyond, she would be eligible for an annual bonus "based upon your performance and UBPAM's profitability," with the amount of "any such annual bonus" to "be in the sole and absolute discretion of UBPAM" (Doc. 15-1, Rudel Affid. in Opp., ex. A, Offer letter). Toward the end of her first year of employment, the Bernard Madoff scandal unfolded, as well as another Ponzi scheme, and UBP and UBPAM faced potential risk (Doc. 9, Am. Compl. ¶¶ 2, 13). During the next year, plaintiff worked "tirelessly" on behalf of the companies (Doc. 9, Am. Compl. ¶ 14). However, she believed that her compensation for the 2009 annual year did not mirror the quality of her work for that year, and she expressed her disappointment (Doc. 9, Am. Compl. ¶¶ 15, 19). According to the amended complaint, UBPAM and UBP sought to induce plaintiff to remain in 2010 by promoting her to Senior Managing Director, giving her a raise in her base salary, and offering "a compensation package for the 2010 calendar year that was commensurate with her peers in the marketplace" (Doc. 9, Am. Compl. ¶¶ 3, 16). She was told that a new "objective, transparent and non-discretionary compensation process based exclusively on market data" had been designed by a UBP executive and approved for 2010 going forward (Doc. 9, Am. Compl. ¶¶ 19, 20). According to the amended complaint, UBP hired nonparty McLagan, an independent firm, to conduct the survey that would establish a target bonus range based on the market for similarly situated professionals; McLagan was also to implement the new compensation plan (Doc. 9, Am.

Compl. ¶¶ 20,21).[1] The UBP executive and his team made "presentations" to defendants' employees explaining the new plan (Doc. 9, Am. Compl. ¶ 21).[2] Plaintiff relied on defendants' promise and agreed to continue her employment with UBPAM (Doc. 9, Am. Compl. ¶¶ 13, 20, 23).

Defendants allegedly did not keep their express promises (Doc. 9, Am. Compl. ¶ 4). In November 2010, she was informed that her target bonus figure for that year was $250,000, an amount nearly 50 percent less than what she received in 2009; not only was this figure materially lower than she had been led to believe she would receive, but it "did not come close to reflecting a market rate for her job, as had been promised" (Doc. 9, Am. Compl. ¶ 26; Doc. 15-4, Rudel Affid. in Opp. ex. D). Following discussions over the next couple of days in which she was assured that based on her work performance she would be well compensated, she was given a document confirming that her target bonus was $250,000, a "blatant[]" contradiction of the verbal assurances she had been given (Doc. 9, Am. Compl. ¶ 31; Doc. 15-4, Rudel Affid. in Opp., Affid. ex. D). She complained and was told that the UBP executive had in fact confirmed that she was entitled to a much larger bonus based on being a "top performer" (Doc. 9, Am. Compl. ¶ 32).

On January 19, 2011, after making another complaint that defendants were failing to compensate her based on the new non-discretionary bonus plan, she was told that UBP had decided to terminate her employment effective March 31, 2011 (Doc. 9, Am. Compl. ¶ 34). To

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[1]According to the amended complaint, UBPAM's Chief Financial Officer Kristy Rudel stated on "numerous occasions" that the employee offer letters and employee handbook would "likely" have to be amended to reflect the new bonus plan and other employment-related changes (Doc. 9, Am. Compl. ¶ 20).

[2]Plaintiff's memorandum of law in opposition to the motion describes these as "materials prepared by Defendants' senior executives, which were explained and discussed at length at [a] 'town hall' meeting" (Doc. 18, Pl. Memo of Law in Opp., p. 5).

induce her to remain through March 31, 2011, defendants promised "unconditionally" to pay a standard severance package "in accordance and consistent with prior severance packages provided to other senior executives at UBPAM" (Doc. 9, Am. Compl. ¶¶ 4, 19. 35). However, the proposed Separation Agreement presented on January 27, 2011 "was not in line" with the severance package she had been promised and instead offered an amount that approximated the bonus she should have received for 2010 pursuant to the non-discretionary bonus plan (Doc. 9, Am. Compl. ¶ 37). After speaking with an attorney she made "a good faith counteroffer" but was told on March 2, 2011, that her termination was to be immediate and she would receive no bonus for 2010 or severance benefits (Doc. 9, Am. Compl. ¶¶ 37, 38). Weeks later she was sent a check for $250,000 (Doc. 9, Am. Compl. ¶ 39).

The amended complaint alleges seven causes of action: (1) breach of oral contract regarding the 2010 bonus; (2) breach of oral agreement of contract regarding severance; (3) breach of implied contract to pay severance; (4) quantum meruit and unjust enrichment; (5) promissory estoppel; (6) violation of New York Labor Law § 193; and (7) fraud.

Defendants move to dismiss the amended complaint based on documentary evidence and failure to state a cause of action (CPLR 3211 [a] [1], [a] [7]). In support of their argument that there is no agreement to pay plaintiff a bonus or a particular bonus, defendants proffer the affidavit of the UBPAM chief operating officer, Kristy Rudel (Doc. 15), and a copy of the December 12, 2007 offer letter which in addition to setting forth her base salary and annual bonus for 2008, indicated that plaintiff was an at-will employee and that after her first year of employment, she would be eligible for an annual bonus based on her performance and the company's profitability, the amount of which would "be in the sole and absolute discretion of" UBPAM (Doc. 15-1, Rudel Affid. in Opp., ex. A, Offer letter). Rudel explains that in September

2009, UBPAM issued a revised employee handbook, which plaintiff acknowledged in writing on September 10, 2009, on a certification stating that she "read, understand, and will abide by" the policies and procedures including that the handbook did not create a guarantee of employment "or any other obligations between [her] and UBPAM, that UBPAM reserved the right "to change the policies set forth herein at any time, with or without notice to" her, and that there "may be additional practices of UBPAM that are not specifically mentioned in this handbook" (Doc. 15-1, Rudel Affid. in Opp. ¶ 9; Doc. 15-3, ex. C, Employee Handbook Certification). The handbook itself provides that employees "may be eligible for an annual discretionary bonus" but, except "as otherwise explicitly set forth in a written contract between UBPAM and its employee, no employee at UBPAM is entitled to any bonus payment in any amount"; the company "shall determine in its sole discretion whether to award a bonus . . . and the amount . . . and its determination in this regard shall be final." (Doc. 15-4, Rudel Affid. in Opp. ex. B, Handbook at p. 11).

Rudel states that UBPAM had for several years "participated in" the McLagan Compensation Survey, and in 2010 decided to purchase the survey results with the goal of "identifying market-level compensation targets" for its employees (Doc. 15-4, Rudel Affid. in Opp. ¶ 11). Rudel states that McLagan did not "create" a bonus plan for UBPAM, but rather its survey results informed the decisions of UBPAM and UBP concerning bonuses, decisions which remained in their "sole discretion" (Doc. 15-4, Rudel Affid. in Opp. ¶¶ 12,13). Rudel also states that neither UBPAM or UBP established a "non-discretionary" bonus plan (Doc. 15-4, Rudel Affid. in Opp. ¶ 12).

Rudel provides a copy of the November 19, 2010 letter addressed to plaintiff setting forth the 2010 total compensation target for her position as general counsel (Doc. 15-4, Rudel Affid.

in Opp. ex. D). The letter referred to the "analysis of industry-specific compensation trends" undertaken by UBPAM based on the McLagan survey, "to establish a target compensation number for each position in the Company" (Doc. 15-4, Rudel Affid. in Opp. ex. D). It noted that the "actual amount" of base salary and any bonus was "within the sole discretion of UBPAM" and would be conveyed to her by March 15, 2011, and also that the projected numbers were "subject to fluctuation" based on factors including individual performance and overall performance of the companies (Doc. 15-4, Rudel Affid. in Opp. ex. D). Rudel states that plaintiff returned the letter to her on the same day, with notations indicating that she, plaintiff, had been advised by a high level employee of UBP that there was "not a reason" she should not receive the "top quatrile bonus"; accordingly plaintiff changed the figures in the letter to reflect that her total compensation should be $860,000 rather than $500,000, and the target bonus $610,000 rather than $250,000 (Doc. 15-5, Rudel Affid. in Opp. ex. E).

Subsequently, plaintiff set forth in writing her understanding of what had been promised her compared to what she was being actually offered, stated that the recommendations by the McLagan company were "wrong" and much too low, and concluded that based on the promises made to her, she expected that her actual 2010 bonus, payable in March, "will be in line with what I was expressly promised" (Doc. 15-6, Rudel Affid. in Opp., ex. F, Letter of 01/05/2011). According to Rudel, at this point it was "clear" that plaintiff and UBPAM were not going to reach a mutual understanding as to her compensation, and thus UBPAM terminated her employment, although she was offered a separation package that was "more than the $610,000 'top quartile' bonus" plaintiff had referred to her in her notations to the November 19, 2010 compensation target letter (Doc. 15, Rudel Affid. in Opp. ¶¶ 17-18, 20). Plaintiff rejected this offer as being insufficient, her employment was terminated on March 2, 2011 and, because she

did not sign a release of claims letter, UBPAM did not pay her the separation package (Doc. 15, Rudel Affid. in Opp. ¶¶ 21-23).[3]

ANALYSIS

In assessing a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez,* 84 NY2d 83, 87-88 [1994] [citations omitted]; *see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]).

Where the ground for dismissal is founded upon documentary evidence, "the documents relied upon must resolve all of the factual issues as a matter of law" or dismissal will be denied (*Weiss v Cuddy & Feder*, 200 AD2d 665, 667 [2d Dept 1994]; *see* CPLR 3211 [a] [1]). Where the ground for dismissal is that the complaint fails to state a cause of action, the court determines, from the pleadings' four corners, if there are "'factual allegations [ ] discerned which taken together manifest any cause of action cognizable at law.'" (*Richbell Info. Servs. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 [1st Dept 2003], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; CPLR 3211 [a] [7]).

FIRST CAUSE OF ACTION: BREACH OF ORAL AGREEMENT TO PAY BONUS

To state a claim for breach of contract, the plaintiff must establish the existence of a valid contract, the plaintiff's performance of its obligations, the defendant's breach, and damages resulting from the breach (*see Morgan Stanley Altabridge Ltd. v ESE Funding SPC Ltd.*, 60

[3]According to Rudel, UBPAM later paid plaintiff a "discretionary bonus" of $250,000 because she "had worked through December 31, 2010; plaintiff accepted it "under protest" (Doc. 15, Rudel Affid. in Opp. ¶ 24).

AD3d 497, 497 [1st Dept 2009]). Although plaintiff attempts to establish otherwise, it is clear that if there were an oral agreement to change the manner in which UBPAM and UBP determined bonuses, in particular as to make them non-discretionary, such an agreement would fall under the aegis of the Statute of Frauds (General Obligations Law § 15-301). A written agreement that includes a prohibition against oral modification can be changed only by an executory agreement in writing and signed by the party against whom enforcement is sought (General Obligations Law § 15-301 [1]). Therefore, if the only proof of an alleged agreement to change the contracted terms is oral exchanges between the parties, "the writing controls" (*Rose v Spa Realty Assocs.*, 42 NY2d 338, 343 [1977]).

Plaintiff argues that the oral promises made to her fall into the exception to the general rule of the Statute of Frauds, because here the agreement was acted upon to completion, thus proving the existence of the oral modification (*see Rose v Spa Realty Assocs.*, at 343). She alleges that she fully performed under the terms of those promises. However, in order to obviate the requirement for a writing, by law she is also required to allege that her performance was "unequivocally referable to the oral modification" (*O'Reilly v NYNEX Corp.*, 262 AD2d 207, 207-208 [1st Dept 1999] [citing *Rose v Spa Realty Assocs.]*). Plaintiff has not met this burden. A plaintiff may not claim that there was an oral agreement on which she relied and performed accordingly, where that alleged oral modification did not require the plaintiff to do anything more than she was already required to do under the terms of the original written agreement (*see SAA-A, Inc. v Morgan Stanley Dean Witter & Co.*, 281 AD2d 201, 203 [1st Dept 2001]). That plaintiff continued to work at UBPAM is not sufficient to show that her conduct was "unequivocally referable" to the alleged promises (*see Hart v Windjammer Barefoot Cruises*, 220 AD2d 252 [1st Dept 1995]).

Plaintiff also claims that the non-discretionary bonus plan was shown at "presentations" to the UBPAM employees (Doc.9, Am. Compl. ¶ 21). Even if the presentations could be considered a written modification to the employee handbook and employment letter, the fact remains that plaintiff signed the Employee Handbook Certification acknowledging that UBPAM reserved the right to change policies "at any time," and "with or without notice" (Doc. 15-3, Rudel Affid. in Opp. ex. C). Thus, even if defendants had decided to implement a new system for awarding bonuses, according to the agreement signed by plaintiff, they could have then made a different policy decision at any time, to which plaintiff signed her acquiescence (*see Kaplan v Capital Co. of Am. Lic.*, 298 AD2d 110 [1st Dept 2002]; *lv denied* 99 NY2d 510 [2003]).

Plaintiff also argues that where a bonus constitutes "an integral part of plaintiff's compensation package," such as in the investment banking industry, then an oral agreement to pay a bonus may be enforced, citing in particular to *Credit Suisse First Boston Corp. v Cristanti*, Index No. 11475/2000 at 37-38, 47-48 (Sup. Ct. NY County 2001), *affd* 289 AD2d 83 [1st Dept 2001]). As set forth by the Appellate Division, the respondent in *Cristanti* was successful in arguing that based on industry practice and the established course of dealing, the bonus was an essential part of compensation, and that he therefore had an implied right to a bonus. Here, in contrast, the issue is not that defendants did not pay plaintiff a bonus, but that they did not pay what she believed she was entitled to receive. Thus, *Cristanti* is not on point.[4]

For these reasons, defendants' motion to dismiss the first cause of action is granted.

SECOND AND THIRD CAUSES OF ACTION: BREACH OF ORAL AGREEMENT TO PAY SEVERANCE PACKAGE; BREACH OF IMPLIED CONTRACT TO PAY SEVERANCE

[4]Although neither side raises the issue, the written documents pertaining to the awarding of bonuses state that any award is based in part on the profitability of the company.

The second and third causes of action are based on the allegations that at the time plaintiff's employment was terminated, to induce her to continue to work through March 31, 2011, defendant promised plaintiff "unconditionally" that she would be paid a severance package that was consistent with those provided to other UBPAM senior executives. The complaint does not otherwise indicate that a particular sum or range of sums was promised to her, but it does allege that the amount she was ultimately offered "was not in line" with what she had been promised and actually only approximated the amount she believes she should have received as her 2010 bonus based on the "non-discretionary bonus plan."

Defendants argue that these two causes of action should be dismissed as the complaint does not indicate that defendants breached a formal severance plan or policy, and therefore plaintiff's claim that the amount offered to her as a severance package was insufficient cannot be compared with any written standard. They also argue that the complaint does not establish the existence of an enforceable oral agreement concerning severance, citing *Hecht v Helmsley-Spear, Inc.*, 65 AD3d 951 (1st Dept 2009). In *Hecht*, the Appellate Division upheld summary judgment dismissing the breach of contract claim because the oral assurances of the payment of severance benefits lacked "actual terms as to the amount, form, and timing of payment of any compensation," nor was there mention of a methodology or custom that could determine the amount. Here, however, it is alleged that the oral agreement articulated a standard by which to calculate what she should have received, namely what defendants had provided as severance to past senior executives. Thus, there is at least a bottom line. This contrasts, for instance, with *Freedman v Pearlman*, 271 AD2d 301 [1st Dept 2000]), which held that an alleged oral contract promising the plaintiff "fair compensation" and that the defendant would "equitably divide the draw," contained terms "too indefinite" to be enforced (271 AD2d at 303), and with *Varney v*

Ditmars, 217 NY 223 (1916), which found that the promise of a salary increase where the plaintiff was told he could "depend upon [his employer, who] will see that you get a satisfactory amount," was too indefinite to form the basis of any obligation on the part of the defendants (217 NY at 229). Therefore, the complaint sufficiently alleges breach of an oral contract to pay sufficient severance, and this branch of defendants' motion is denied.

The third cause of action alleging breach of implied oral agreement, is pled "in the alternative" (Doc. 9, Am Compl. ¶ 54). An implied contract is one "not formally stated in words," but derived from the "presumed intention of the parties as indicated by their conduct" (*Lapine v Seinfeld*, 31 Misc 3d 736, 741 [Sup Ct New York County 2011] [citing *Jemzura v Jemzura*, 36 NY2d 496, 503-504 [1975]). Here, it is alleged that plaintiff remained at work until March 31, 2011 based on defendants' promise of a severance package in line with those of other senior executives, and then offered a lesser sum. These allegations are sufficient to establish a course of conduct (*see Guggenheimer v Bernstein Litowitz Berger & Grossman, LLP*, 11 Misc. 3d 926, 932 [Sup Ct NY County 2006]). Therefore, the branch of defendants' motion to dismiss the third cause of action is also denied.

FOURTH CAUSE OF ACTION: QUANTUM MERUIT - UNJUST ENRICHMENT

The complaint's fourth and fifth causes of action allege equitable claims sounding in quasi contract. A claim for quantum meruit must allege: (1) the performance of services in good faith; (2) the acceptance of those services by the entity to which they were rendered; (3) an expectation of compensation therefor, and (4) the reasonable value of the services (*Lehrer McGovern Bovis, Inc. v New York Yankees*, 207 AD2d 256, 259 [1st Dept 1994]). A claim of unjust enrichment must allege that the defendant received a benefit at the plaintiff's expense and that it is against equity and good conscience to permit the retention of that benefit by the

defendant (*Robertson v Wells*, ___ AD3d ___, 2012 NY Slip Op 3432 [2d Dept 2012]).

Where there is a valid and enforceable written agreement that governs a particular subject matter, any claim sounding in quasi contract for events arising out of the same subject matter will ordinarily be dismissed (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 [1987]; see *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561 [ ]). Defendants point to the employee handbook and employment letter which both address the subject of bonuses and clearly state they are "discretionary." Defendants argue that if the claim of an alleged oral agreement concerning payment of a bonus is dismissed, what remains are the terms of the writings of the handbook and employment letter, which requires that this cause of action be dismissed.

An employee has no enforceable right to compensation under a discretionary bonus plan (*see Namad v Salomon, Inc.* 74 NY2d 751 [1989] [plaintiff's claim that it was customary policy to award bonuses in an amount approximating his salary, was defeated by the employee contract stating that bonuses are discretionary]). Here, of course, plaintiff alleges that the bonus plan was orally modified to provide that she, and other UBPAM employees, would receive non-discretionary bonuses based on objective criteria, a claim that has been dismissed on grounds including the Statute of Frauds. Defendants point to two recent federal court cases which state that "the law is clear" that a plaintiff may not allege that his or her former employer was unjustly enriched at his or her expense when that former employee was paid a salary. In *Levion v Société Générale*, 822 F Supp 2d 390 (SDNY 2011), the plaintiff had alleged that he was guaranteed a bonus, but the express terms of his employment agreement limited guaranteed bonuses to prior years; the court held that because plaintiff was compensated for his work by receiving a salary, he had no claim in quantum meruit or unjust enrichment (822 F Supp at 405). In *Karmilowicz v*

Hartford Fin. Servs. Group, 11 Civ. 539 (CM) (DCF), 2011 U.S. Dist. LEXIS 77481 (SDNY 2011), the plaintiff's claim of unjust enrichment based on that he did not receive the incentive to which was entitled was dismissed in part based on the fact that the incentives were discretionary and that he had been paid a salary (2011 U.S. Dist. LEXIS 77481 at *31-33). As plaintiff was paid a salary, and bonuses were discretionary, it cannot be found that her employer was unjustly enriched or that she is owed in quantum meruit for the value of her services. Therefore, the branch of defendants' motion is granted and the fourth cause of action is dismissed.

FIFTH CAUSE OF ACTION: PROMISSORY ESTOPPEL

To establish a cause of action sounding in promissory estoppel, the complaint must allege a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on the promise (*Rogers v Town of Islip*, 230 AD2d 727, 727 [2d Dept 1996], citation omitted). This cause of action must be dismissed pursuant to *Dalton v Union Bank of Switzerland,* 134 AD2d 174, 176 (1st Dept 1987) (*see also Mayer v Publishers Clearing House*, 205 AD2d 506, 507 [2d Dept 1994]). *Dalton* held that there was no cause of action for promissory estoppel based on allegations that the employer promised the plaintiff, an employee at will, employment at a certain salary with certain other benefits, the plaintiff was induced to leave his former job and to forego other employment opportunities, and six months later, his employment was terminated. This factual situation is very similar to plaintiff's claim that based on promises of a certain amount of bonus, she remained with defendants even though she had been dissatisfied with the amount of her bonus in 2009, and did not pursue other opportunities for employment. Accordingly the fifth cause of action is dismissed.

SIXTH CAUSE OF ACTION: VIOLATION OF LABOR LAW § 193

Labor Law § 193 provides that employers shall not make deductions from employee wages except under certain circumstances. The complaint alleges that defendants did not pay her either a promised non-discretionary bonus or a non-discretionary contractual several package as promised (Doc. 9, Am. Compl. ¶¶ 72-73). Defendants argue that as to the bonus, there is no cause of action because according to the terms of the employment agreement, bonuses are discretionary, and a discretionary bonus is not considered "wages" under the Labor Law, citing *Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220, 223-224 (2000), and *Hunter v Deutsche Bank AG*, 56 AD3d 274, 274 (1st Dept 2008). As to the severance, they argue that plaintiff may not bring a claim under Labor Law § 193 because as an executive who earned over $900 a week, she is excluded from coverage pursuant to Labor Law § 198-c (3).[5]

Plaintiff does not dispute defendants' arguments as to the severance package, but argues that her claim as to the bonus is viable based on her allegation that the bonus was non-discretionary. However, defendants argue that because the parties fundamentally disagree on how her bonus should be calculated, her claim does not fall under Labor Law § 193 (1). They point to the discussion in *Jankousky v North Fork Bancorporation, Inc.*, 2011 U.S. Dist. LEXIS 29955 (SDNY 2011), which dismissed that plaintiff's claim concerning unpaid compensation because Labor Law § 193 (1) covers "only deductions from agreed upon wages." (2011 U.S. Dist. LEXIS 29955 at *10). In *Jankowsky* the plaintiff, a former branch manager of a bank, alleged that her employer improperly reduced the amount of her 2006 incentive compensation by removing a particular account from her control which had the effect of reducing the monetary base on which her incentive would be calculated; her employer then failed to pay her any of the

[5]Labor Law 198-c (3) provides that "benefits and wage supplements" do not apply to bona fide executives, administrative or professional capacity whose earnings are in excess of $900 a week.

incentive. So too here, the parties disagree as to the very premise on which her bonus for 2010 was to calculated. Thus, the claim does not fall under Labor Law § 193, and the sixth cause of action must be dismissed.

SEVENTH CAUSE OF ACTION: FRAUD

To state a claim for fraud, plaintiff must allege a material misrepresentation of a fact, known to be false, an intent to induce reliance, justifiable reliance, and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The complaint alleges that to induce plaintiff to remain in defendants' employ, defendants "repeatedly" promised her that they were conducting an independent survey of the market rate for each position in the asset management group at investment banks of a similar size, so as to ensure her of a "fair salary" in 2010, although allegedly they neither conducted nor intended to conduct this type of survey (Doc. 9, Am. Compl. ¶¶ 77-78). They then misrepresented to her that the survey results they received from McLagan were "fair and accurate" and had been verified by two independent consulting firms when in fact defendants "adjusted and readjusted the compensation figures" in order to meet UBP's expectations, and never had the survey verified (Doc. 9, Am. Compl. ¶ 79). Plaintiff relied on defendants' promises and "sustained substantial injury in an amount to be determined at trial" (Doc. 9, Am. Compl. ¶82).[6]

Defendants argue that plaintiff's claim is a restatement of her claim of breach of an oral agreement, citing *Smalley v Dreyfus Corp.*, 10 NY3d 55, 59 (2008), *rearg denied* 10 NY3d 852 (2008) (the fraud claim by at-will employees who had accepted positions with defendant,

[6]The allegations alleging plaintiff's detrimental reliance are quite thin: nowhere is it suggested that she had other employment offers and turned them down in reliance on defendants' promises, or that she would have left her employment had she known that the survey results as used by defendants would not give her wages a healthy boost. At the most, the complaint shows her dissatisfaction and unhappiness with her salary in 2009 and that she wanted more in 2010.

eschewed other opportunities based on promises that there would be no merger, and were then fired four years later after the company merged with another, was at its core a claim of reasonable reliance on the defendant's promises, with their injuries being termination, and was "at bottom an alleged breach of contract in the guise of a tort."). Plaintiff argues that she also relied not only what were misrepresentations as to the bonus calculation, but also defendant's statement that the non-discretionary bonus plan had been approved by UBP, when in fact UBP allegedly made adjustments to the survey results and thus the final numbers. In addition she alleges she was not told that her ability to be considered a top performer and earn the top-tier level of income "was a function of her relationship with the head of UBP's legal department in Geneva" (Doc. 18, Pl. Memo of Law p. 29).

Despite these claims of additional promises and deception, the seventh cause of action is a restatement of the breach of contract claim. These allegations all pertain to the manner in which the bonus was calculated, and are not extraneous to the claim of breach of contract.

Plaintiff also argues that she has alleged that when defendants made their promises on which she relied, they already had an intention not to implement the non-discretionary bonus plan, and contends that the present intention not to perform is actionable as fraud and is collateral to the terms of the contract, citing *Deerfield Commun. Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954 (1986) ("a promise * * * made with a preconceived and undisclosed intention of not performing it, * * * constitutes a misrepresentation"; 68 NY2d at 956, quotation and citation omitted), and *Manas v VMS Assoc., LLC*, 53 AD3d 451, 453-454 (1st Dept 2008), among others (Doc. 18, Pl. Memo in Opp. p. 29 n 100). However, as in *Manos*, the complaint here merely alleges that defendants made their promises without any intent to implement the new plan (Doc. 9, Am. Compl. ¶ 77). Such allegations are "merely general allegations that

defendants entered into a contract while lacking the intent to perform," and are insufficient to support a claim of fraud (*Manos* at 454, quotation and citation omitted). Therefore, the seventh cause of action is dismissed.

DEMAND FOR PUNITIVE DAMAGES AND ATTORNEY'S FEES

In addition, defendant seeks to strike the complaint's demand for punitive damages and attorney's fees. Plaintiff only disputes the request to strike the demand for punitive damages.

Punitive damages in New York are generally reserved for the vindication of a public right and where the defendant's conduct is malicious, willful, reckless or amounts to criminal indifference to a civil obligation. They are not allowed for the breach of a private contract, even if the failure to perform the obligations of a private agreement was undertaken in bad faith. Here, even accepting the plaintiff's allegations as true, she is not entitled to punitive damages. As for attorney's fees, she identifies no statute or rule upon which to support such a claim. Accordingly, the branch of defendants' motion seeking to dismiss plaintiff's demand for puntive damages and attorney's fees is granted.

PLAINTIFF'S REQUEST THAT SHE BE ALLOWED LEAVE TO AMEND

Pursuant to CPLR 3025(b), "leave to amend the pleadings shall be freely given, absent prejudice or surprise resulting from the delay" (*see McCaskey, Davies & Assoc., Inc., v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]). Plaintiff does not include a proposed second amended complaint as part of her motion. Her request is accordingly denied. It is

ORDERED that defendants' motion to dismiss the amended complaint is granted only to the extent that the first, fourth, fifth, sixth, and seventh causes of action are dismissed, and the demand for punitive damages and attorney's fees is stricken; and it is further

ORDERED that the remainder of the complaint is severed and continued under this index number, and defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 212, 60 Centre Street, on August 15, 2012, at 2:15 PM.

This constitutes the decision and order of the court.

Dated: June 25, 2012
New York, New York

J.S.C.

(2012 pt 12D&O_ 651262_2011_002jh