

Wilberding v Center Cap. Group, LLC

2013 NY Slip Op 32830(U)

October 30, 2013

Supreme Court, New York County

Docket Number: 650046/2012

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

BARBARA R. KAPNICK

PRESENT: _____
Justice

PART 39

Index Number : 650046/2012
WILBERDING, EDWARD DOUGLAS
vs.
CENTER CAPITAL GROUP
SEQUENCE NUMBER : 003
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 003

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
ACCOMPANYING MEMORANDUM DECISION

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

Dated: 10/30/13

[Signature] J.S.C.
BARBARA R. KAPNICK
J.S.C.

- 1. CHECK ONE: ... CASE DISPOSED
2. CHECK AS APPROPRIATE: ... MOTION IS: ... GRANTED IN PART
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 : IAS PART 39

-----X
EDWARD DOUGLAS WILBERDING,

Plaintiff,

- against -

CENTER CAPITAL GROUP, LLC, d/b/a
THE CENTERCAP GROUP, LLC, and
CC SECURITIES LLC,

Defendant.

DECISION/ORDER

Index No. 650046/12
Motion Seq. Nos.
003 and 004

-----X
BARBARA R. KAPNICK, J.:

In this action, plaintiff Edward Douglas Wilberding ("Wilberding") is suing his former employer to recover damages for alleged breach of an employment agreement and gender discrimination, among other claims. Defendant Center Capital Group, LLC, d/b/a The CenterCap Group, LLC ("CCG") makes this pre-answer motion to dismiss the Complaint, pursuant to CPLR 3211 (a) (1), based on documentary evidence, and CPLR 3211 (a) (7), for failure to state a cause of action. By separate motion, defendant CC Securities, LLC ("CC Securities") also moves to dismiss the Complaint on the same grounds. The motions are consolidated herein for disposition.

Background

Defendant CCG is a financial services company, which provides consulting, advisory and capital raising services to companies in

the real estate industry. Amended Complaint ("Am. Compl."), ¶¶ 2, 8. CCG was formed in 2009 by Deborah Smith ("Smith"), Karen Ward ("Ward") and June Yu ("Yu"), who are the owners, principals, and managing partners of CCG. *Id.*, ¶¶ 5, 7. Defendant CC Securities is a broker-dealer subsidiary of CCG, formed to offer securities and receive fees paid in connection with CCG's services. *Id.*, ¶ 3. Smith is Chief Compliance Officer, and Ward and Yu are managing members, of CC Securities. *Id.*, ¶ 5.

In February 2010, plaintiff was hired by CCG as Managing Director, a senior executive position, reporting to the managing partners. *Id.*, ¶ 15; see Employment Agreement, dated Feb. 3, 2010, Ex. A to Am. Compl., ¶ 3. Plaintiff signed a written employment agreement with CCG on February 8, 2010, which provided, among other things, that he would be paid a salary, as well as additional compensation, including fees such as a "Party Origination Fee," for introducing a new client to CCG which results in "successful consummation of the transaction" with the client, and an "Execution Fee," for the successful completion of certain client transactions. Am. Compl., ¶¶ 19-22; see Ex. 1 to Employment Agreement, ¶¶ 1-5. Under the terms of the Employment Agreement, plaintiff was to be paid such fees within 30 days of CCG's receiving payment, and, in the event of plaintiff's termination, other than for cause or voluntarily by him, he was entitled to payment of fees received by

CCG within three months of the termination of his employment. Am. Compl., ¶ 27; Employment Agreement, ¶ 9. The agreement further provided that if he was terminated by CCG, other than for cause, he was entitled to thirty days' written notice of the termination. Am. Compl., ¶ 26; Employment Agreement, ¶ 9.

Beginning in Spring 2010, plaintiff and Yu, who worked together and traveled together on business, became involved in a consensual intimate relationship, which ended by mutual agreement in or around January 2011. Am. Compl., ¶¶ 38, 40, 43, 50. Yu only told Smith and Ward about her relationship with plaintiff after it had ended. *Id.*, ¶ 51. According to the Complaint, following the disclosure of plaintiff's relationship with Yu, CCG implemented new procedures concerning his work functions, including that he would no longer be supervised by Yu and had no reporting obligations to her, that he and Yu were no longer permitted to travel together, and that only Ward and Smith would supervise and review his performance. *Id.*, ¶ 57.

Plaintiff alleges that he was required to sign a memorandum in March 2011, memorializing the changes in his work, and that after he did so, his role and responsibilities within CCG were substantially diminished. *Id.*, ¶¶ 58-61, 64. Plaintiff claims that he was "stripped of independent decision-making authority"

(*id.*, ¶ 68), discouraged from initiating contact with clients and prospective clients (*id.*, ¶ 69), isolated from information about pending transactions (*id.*, ¶ 70), and required to advise Ward of all communications and copy her on all e-mails he sent. *Id.*, ¶ 72. In April 2011, Smith told plaintiff to take a month off to study for a Financial Industry Regulatory Authority ("FINRA") exam, and right after he finished the exam, on May 6, 2011, his employment with CCG was terminated. *Id.*, ¶¶ 75-76, 80. Plaintiff alleges that in contrast to him, Yu's duties were not diminished, her access to information and clients was not curtailed, and her employment was not terminated. *Id.*, ¶¶ 84-89.

Plaintiff claims that he is entitled to "Origination and Execution fees associated with a number of consummated transactions which he originated and executed, and for which CenterCap received fees, prior to September 6, 2011." *Id.*, ¶ 94. The Amended Complaint identifies five transactions for which plaintiff claims he is owed compensation, including three which involve Buccini/Pollin, a real estate acquisition, development and management fund. Plaintiff claims that he is owed two payments of \$4,000 for a consulting and advisory project for a Buccini/Pollin hotel project (*id.*, ¶¶ 100-104); 20% of a \$900,000 fee collected by CCG for capital raising services provided to Buccini/Pollin (*id.*, ¶¶ 106-111); and \$50,000 for work on a joint venture transaction

with Albanese Corporation ("Albanese") for Buccini/Pollin. *Id.*, ¶¶ 112-119. While the Amended Complaint identifies two other transactions, involving Norwich Partners LLC and Pine Tree Commercial Realty, LLC, for which plaintiff alleges he is owed compensation, at oral argument on the instant motions, counsel for plaintiff acknowledged that there is no dispute that no funds were paid to CCG by Norwich Partners LLC and Pine Tree Commercial Realty, LLC, and thus that plaintiff was no longer pursuing his claims with respect to those transactions. See Transcript of Oral Argument ("Tr."), 26:20-24, October 18, 2012.

Plaintiff commenced this action in January 2012. The Amended Complaint, dated May 18, 2012, alleges five causes of action: 1) breach of contract; 2) breach of the covenant of good faith and fair dealing; 3) gender discrimination in violation of the New York State Human Rights Law ("NYSHRL") (Executive Law § 296); 4) gender discrimination in violation of the New York City Human Rights Law ("NYCHRL") (Administrative Code of the City of New York ["Administrative Code"] § 8-107); and 5) violation of New York Labor Law § 191.

Discussion

It is well settled that on a motion to dismiss pursuant to CPLR 3211, the pleadings are to be afforded a liberal construction.

See CPLR 3026. The court must "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); see also *People v Coventry First LLC*, 13 NY3d 108, 115 (2009); *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002). When documentary evidence is considered, dismissal is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); see also *Leon v Martinez*, 84 NY2d at 88.

However, while the pleading standard is a liberal one, "'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence' are not presumed to be true and accorded every favorable inference." *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999) (citation omitted), *affd* 94 NY2d 659 (2000); see also *Tal v Malekan*, 305 AD2d 281, 281 (1st Dept 2003); *lv den* 100 NY2d 513 (2003). Where a plaintiff cannot succeed upon "any reasonable view of the facts stated," dismissal of a claim pursuant to CPLR 3211(a)(7) is proper. *People v New York City Tr. Auth.*, 59 NY2d 343, 348 (1983).

Breach of Contract

A breach of contract claim must set forth the existence of a valid contract, plaintiff's performance of his obligations thereunder, defendant's breach and resulting damages. See *Morgan Stanley Altabridge Ltd. v ESE Funding SPC Ltd.*, 60 AD3d 497, 497 (1st Dept 2009); *Morris v 702 E. Fifth St HDFC*, 46 AD3d 478, 479 (1st Dept 2007). Plaintiff here alleges that defendants breached the terms of his Employment Agreement by failing to pay him Origination Fees and/or Execution Fees for new business relationships he introduced to CCG, which led to the consummation of several transactions. Am. Compl., ¶¶ 135-139.

The Employment Agreement provides that CCG would pay plaintiff a salary and additional compensation, as set forth in Exhibit 1 to the Employment Agreement. Among other fees, the agreement provides that plaintiff will earn a "Party Origination Fee" when he "either (i) seeks to introduce a Party to CCG; and/or (ii) seek[s] to introduce the Company to the Party," and the party is a new relationship, CCG is interested in pursuing engagement by the party, and plaintiff plays an active role in introducing the party to CCG leading up to the engagement. Exhibit 1 to Employment Agreement, ¶ 1. Provided that CCG is subsequently engaged by the party consequent to plaintiff's introduction, and provided that the engagement leads to payment for a consummated transaction (a

"Success Fee"), CCG agreed to pay plaintiff ten per cent of the "net aggregate fee" received by CCG. *Id.*

Also under Exhibit 1 to the Employment Agreement, plaintiff would receive an "Execution Fee" of twenty per cent of the "net aggregate fee," "[i]n the event that CCG shall have been engaged by a party to provide services consequent to which [plaintiff] has executed the transaction," and CCG receives a Success Fee in payment for a consummated transaction. Exhibit 1 to Employment Agreement, ¶ 4.

The Employment Agreement further provides that:

If this Agreement and your employment hereunder is [sic] terminated by CCG other than for Employee Cause or voluntarily by you prior to any Success Fee ... being paid to CCG, you shall be entitled to such Origination Fee, Reduced Origination Fee and/or Counter-Party Origination Fee ... otherwise earned if such Success Fee is paid to CCG within three (3) months of termination of your employment with the Company.

Employment Agreement, ¶ 9.

Plaintiff was terminated on May 6, 2011. The Employment Agreement provides that, other than for termination for cause, plaintiff was entitled to one month's notice of termination. *Id.* For purposes of this motion only, defendants therefore accept that

the three-month period for post-termination payments runs from June 6, 2011. Defendants argue that, nonetheless, documentary evidence conclusively establishes that plaintiff either received payment for the transactions at issue, or that CCG did not receive any payments for the transactions prior to September 6, 2011.

The Amended Complaint, as previously noted, identifies various transactions with Buccini/Pollin, Norwich Partners, and Pine Tree Commercial Realty. The transactions with Norwich Partners and Pine Tree Commercial Realty are no longer at issue, as indicated, *supra*. With respect to Buccini/Pollin, plaintiff alleges that he is entitled to fees for an initial consulting project (Am. Compl., ¶¶ 100-105), and a joint venture transaction (Am. Compl., ¶¶ 112-119). Plaintiff also alleges that he worked on another transaction with Buccini/Pollin, a large capital raise for restructuring existing hotel assets and for future hotel investments, which he alleges resulted in payment to CCG after September 6, 2011; plaintiff claims he is entitled to a fee for that transaction because Buccini/Pollin was required to make a minimum payment prior to September 6, 2011. *Id.*, ¶¶ 106-111; see 10-13, *infra*.

As to plaintiff's claim that he is entitled to two payments of \$4000 for the initial consulting fee, defendants contend that he was already paid this fee, and, in support, submit a copy of a

payroll statement, allegedly indicating a \$4000 "bonus" payment to plaintiff, and an e-mail exchange between plaintiff and Smith generally referencing "Buccini/Pollin compensation." See Ex. C to Connolly Reply Aff. in Support of CCG's Motion. These documents are not self-explanatory, however, and are not explained or interpreted by Smith or any other witness with personal knowledge.

Similarly, the invoices sent to Buccini/Pollin, purportedly with respect to the joint venture project, do not clearly identify what work they were for, and also are not explained by anyone with personal knowledge. Accordingly, on this pre-answer motion to dismiss, defendants' documents do not establish a defense as a matter of law to these breach of contract claims, and the first cause of action survives, except as to the claims arising out of the Norwich Partners and Pine Tree Commercial Realty transactions.

Breach of Covenant of Good Faith and Fair Dealing

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance. This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *511 W. 232nd Owners Corp.*, 98 NY2d at 153-154, quoting *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 (1995) (additional internal citations omitted); see

also *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 (1995); *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 (1978); *Jaffe v Paramount Communications*, 222 AD2d 17, 22-23 (1st Dept 1996). "This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." *Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 (2nd Dept 1999); (citing *Jaffe v Paramount Communications*, 222 AD2d at 22-23); see also *Elmhurst Dairy, Inc. v Bartlett Dairy, Inc.*, 97 AD3d 781, 784 (2nd Dept 2012). "The duty of good faith and fair dealing, however, is not without limits, and no obligation can be implied that 'would be inconsistent with other terms of the contractual relationship.'" *Dalton*, 87 NY2d at 389, quoting *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 (1983); see also *Vanlex Stores, Inc. v BFP 300 Madison II LLC*, 66 AD3d 580, 581 (1st Dept 2009); *Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 (1st Dept 2008).

"For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract" (*Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce*, 265 AD2d at 514), or "exercised a right

malevolently, for its own gain as a part of a purposeful scheme designed to deprive plaintiffs of the benefits" of the contract. *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 302 (1st Dept 2003). Generally, such a claim cannot be sustained where "it is premised on the same conduct that underlies the breach of contract cause of action and is 'intrinsically tied to the damages allegedly resulting from a breach of the contract.'" *MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 420 (1st Dept 2011), quoting *Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323 (1st Dept 2004); see also *Bostany v Trump Org. LLC*, 73 AD3d 479, 481 (1st Dept 2010); *Canstar v Jones Constr. Co.*, 212 AD2d 452, 453 (1st Dept 1995).

In this case, plaintiff alleges that he "introduced prospective customers to CenterCap in 2010 and 2011 which constituted new business relationships for CenterCap;" that he "played an active role in the introduction of these new business relationships ... which has led to engagements by CenterCap;" and that, "[i]n terminating Wilberding's employment, CenterCap acted in a fashion designed to cut off Wilberding from the full benefit of commissions earned ... but for which consummation and payment of success fees to CenterCap did not occur until after September 6, 2011." Am. Compl., ¶¶ 143-145. The one such transaction

identified by plaintiff involved capital raising for Buccini/Pollin. *Id.*, ¶¶ 106-111.

Plaintiff's claim, in essence, is that defendants violated the Employment Agreement when they did not pay him a fee to which he claims he was entitled, notwithstanding his acknowledgment that CCG received no payment before September 6, 2011. Although plaintiff recognizes, by acknowledging that no payment was received prior to September 6, 2011, that this transaction cannot be the basis for a breach of contract claim, the allegations track and are largely duplicative of the allegations underlying the breach of contract claims, and are "intrinsically tied to the damages" resulting from the alleged breach of contract. The allegations do not, therefore, provide a basis for a claim of breach of the implied covenant of good faith and fair dealing.

Gender Discrimination

Under the New York State and New York City Human Rights Laws, it is unlawful for an employer to fire or refuse to hire or employ, or otherwise discriminate in the terms, conditions and privileges of employment, because of, as relevant here, an individual's sex. Executive Law § 296 (1) (a); Administrative Code §8-107(1)(a). To establish a prima facie case of employment discrimination, a "plaintiff must show that (1) she is a member of

a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 (2004), citing *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 (1997); see also *Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270 n 2 (2006); *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009), lv den 14 NY3d 701 (2010).

Defendants do not dispute, for purposes of this motion, that plaintiff is a member of a protected class, was qualified to hold his position, and suffered an adverse employment action when he was terminated; plaintiff also alleges that he was subjected to other adverse employment actions, including substantially diminished responsibilities, which culminated in his termination. Defendants contend, however, that the fourth element cannot be established, because the Complaint alleges no facts that give rise to an inference that any of defendants' actions were taken against him because of his gender.

A plaintiff may raise an inference of discrimination for purposes of establishing a prima facie case by showing that "the

employer subjected him to disparate treatment, that is, treated him less favorably than a similarly situated employee outside his protected group." *Graham v Long Is. R.R.*, 230 F3d 34, 39 (2d Cir 2000); see also *Broich v Incorporated Vill. of Southampton*, 462 Fed Appx 39, 42 (2d Cir 2012), cert denied __ US __, 133 S Ct 527 (2012); *Ruiz v County of Rockland*, 609 F3d 486, 493-94 (2d Cir 2010). Here, by plaintiff's own description, he is asserting a "reverse" gender discrimination claim (see Plaintiff's Memo in Opp at 1), alleging that he was treated less favorably in the terms and conditions of his employment than a similarly situated female employee, namely Yu. More particularly, plaintiff alleges that, beginning in or around March 2011, following the dissolution of his personal relationship with Yu and her disclosure of their relationship to her business partners, he was subjected to adverse employment actions, including termination, to which Yu was not subjected.

To demonstrate disparate treatment, a plaintiff must show that he was "similarly situated in all material respects" to the individuals with whom he seeks to compare himself. *Graham v Long Is. R.R.*, 230 F3d at 39, quoting *Shumway v United Parcel Serv., Inc.*, 118 F3d 60, 64 (2d Cir 1997)); see also *Zuk v Onondaga County*, 471 Fed Appx 70, 71 (2d Cir 2012); *Shah v Wilco Sys., Inc.*, 27 AD3d 169, 177-178 (1st Dept 2005), lv *dism in part, den in part*,

7 NY3d 859 (2006). “[S]imilarly situated in all material respects does not mean all respects generally, but rather sufficiently similar ‘to support at least a minimal inference that the difference of treatment may be attributable to discrimination.’” *Hernandez v City of New York*, 2013 WL 593450, *4 (EDNY 2013), quoting *McGuinness v Lincoln Hall*, 263 F3d 49, 54 (2d Cir 2001); see also *Graham*, 230 F3d at 40. Thus, while a “plaintiff is not obligated to show disparate treatment of an *identically* situated employee” (*McGuinness*, 263 F3d at 54 [emphasis in original]), there must be . . . “‘a reasonably close resemblance of the facts and circumstances of plaintiff’s and comparator’s cases. . . .’” *Romage v MTA Long Is. R.R.*, 452 Fed Appx 70, 71 (2d Cir 2012).

“What constitutes ‘all material respects’ varies from case to case, but ‘must be judged based on [] whether the plaintiff and those he maintains were similarly situated were subject to the same workplace standards.’” *Moccio v Cornell Univ.*, 889 F Supp 2d 539, 574 (SDNY 2012), *aff’d* ___ Fed Appx ___ (2d Cir 2013) quoting *Graham*, 230 F3d at 40. “Examples of what constitutes a ‘material respect’ are holding the same positions of roughly the same rank, and being subject to the same performance review and disciplinary standards.” *Hernandez*, 2013 WL 593450, at *4; see *Ruiz v County of Rockland*, 609 F3d at 493-494 (2d Cir 2010); *Pierre v AngioDynamics, Inc.*, 2013 WL 1292141, *6, (NDNY 2013); *Deras v Metropolitan Transp.*

Auth., 2013 WL 1193000, *10, (EDNY 2013); *McDowell v North Shore - Long Is. Jewish Health Sys.*, 839 F Supp 2d 562, 569 (EDNY 2012). Although the determination of whether two employees are similarly situated often presents a question of fact for the jury (see *Feingold v New York*, 366 F3d 138, 154 [2d Cir 2004]; *Graham*, 230 F3d at 39), a court can properly grant summary dismissal “where it is clear that no reasonable jury could find the similarly situated prong met.” *Broich*, 462 Fed Appx at 42, quoting *Harlen Assocs. v Incorporated Vill. of Mineola*, 273 F3d 494, 499 n 2 (2d Cir 2001).

Plaintiff alleges that he was similarly situated to Yu in that her “function and work responsibilities at CenterCap were substantially similar to Wilberding’s, in the solicitation, development, and execution of transactions on behalf of the Company” (Am. Compl., ¶ 41), and her “responsibilities included coverage of the same real estate asset classes and geographical regions as Wilberding.” *Id.*, ¶ 42. He also alleges, however, that Yu was a partner and owner in CCG, that she hired him, and had the power to make all personnel decisions, including performance evaluations. *Id.*, ¶¶ 5, 15, 57. Given the significant differences in their positions, Yu is not an appropriate comparator and, therefore, cannot provide a basis for a disparate treatment claim. See *Deras*, 2013 WL 1193000, at *11, (significant difference in rank could explain difference in disciplinary treatment); *Anderson v*

Davis Polk & Wardwell LLP, 850 F Supp 2d 392, 407 (SDNY 2012). As has been stated, "the elastic nature of the similarly situated inquiry can only stretch so far" (*Foss v Coca Cola Enters.*, 2011 WL 1303346, *8 [EDNY 2011]), and an employee and his employer clearly are not similarly situated. Even if Yu, as a partner and owner of CCG, could be considered an "employee" under the NYSHRL and the NYCHRL (see *Germakian v Kenny International Corp.*, 151 AD2d 342, 343 [1st Dept 1989], *app den* 74 NY2d 615 [1989] ["[t]here may be instances where principals may be counted as employees for purposes of the Executive Law"]; but see *Weir v Holland & Knight, LLP*, 34 Misc 3d 1207[A] [Sup Ct, NY Co 2011] [law firm partner not an employee under NYSHRL and NYCHRL]), the allegations of the Complaint clearly demonstrate that Yu was not similarly situated to plaintiff.

Further, contrary to plaintiff's contention that his "cause of action of gender discrimination is not grounded on the dissolution of [his] relationship with Yu" (Memo in Opp., at 16), the Complaint alleges that adverse employment actions and "abrupt changes affecting [his] ability to work at CenterCap" (Am. Compl., ¶ 83) occurred only "after the disclosure to Smith and Ward by Yu of his personal, consensual, and intimate relationship with Yu" (*id.*), and that Yu was not treated in a similar manner, "despite the fact that she had been ... an equal participant in a prior personal,

consensual and intimate relationship with Wilberding.” *Id.*, ¶ 73. There are, notably, no allegations of any discriminatory treatment before March 2011.

In considering claims of sex discrimination under the NYSHRL and the NYCHRL, like claims under Title VII, the critical inquiry is “whether the plaintiff ... has been treated less well than other employees because of her [or his] gender.” *Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 (1st Dept 2009), *lv den* 13 NY3d 702 (2009); *see also Fattoruso v Hilton Grand Vacations Co., LLC*, 873 F Supp 2d 569, 576 (SDNY 2012), *aff’d* ___ Fed Appx ___ 2d Cir 2013. “The prohibitions against sex discrimination address themselves not to discrimination on account of one’s sexual relationships, but rather to discrimination based on one’s gender in and of itself.” *Mastrototaro v Consolidated Edison Co.*, 1990 WL 47709, *2 n 2, (SDNY 1990); *see also Kahn v Objective Solutions, Intl.*, 86 F Supp 2d 377, 380 (SDNY 2000); *DeCintio v Westchester County Med. Ctr.*, 807 F2d 304, 306 (2d Cir 1986) (“sex,” in Title VII context, “logically could only refer to membership in a class delineated by gender, rather than sexual activity regardless of gender”).

Courts, therefore, consistently have found that claims of discrimination based on termination or mistreatment, other than

sexual harassment, following the end of a voluntary intimate relationship between an employer and an employee, are not actionable as gender discrimination. See *Novak v Waterfront Com'n. of New York Harbor*, 928 F Supp 2d 723 (SDNY 2013); *Fattoruso v Hilton Grand Vacations Co., LLC*, 873 F Supp 2d 569, *supra*; *Kahn v Objective Solutions, Intl.*, 86 F Supp 2d 377, *supra*; *Mauro v Orville*, 259 AD2d 89, 92 (3d Dept 1999), *lv den* 94 NY2d 759 (2000); *cf. Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 332 (2003) (noting courts have "rejected sex discrimination claims where plaintiffs were terminated in the aftermath of consensual sexual relationships with their employers," and distinguishing those cases from case where pregnancy resulting from relationship was basis for termination).

Labor Law § 191

Article 6 of New York's Labor Law "governs employers' payment of wages and benefits to employees." *Bynog v Cipriani Group*, 1 NY3d 193, 198 (2003); *see also Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 614 (2008); *Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 223 (2000). Section § 191 of Article 6, entitled "Frequency of payments," requires employers to timely pay wages to certain categories of employees, including "Commission salespersons" (Labor Law § 191 [1] [c]), and "Clerical and other

worker[s]" (Labor Law § 191 [1] [d]). See *Wiggins v Hain Pure Protein Corp.*, 829 F Supp 2d 231, 241 (SDNY 2011).

As defined by Labor Law § 190, a commission salesperson is "any employee whose principal activity is the selling of any goods, wares, merchandise, services, real estate, securities, insurance or any article or thing and whose earnings are based in whole or in part on commissions." Labor Law § 190 (6). The statutory definition expressly excludes any "employee whose principal activity is of a supervisory, managerial, executive or administrative nature." *Id.* Labor Law § 190 (7) defines "Clerical and other worker[s]" to include all employees not included in earlier subcategories, "except any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars a week." "Employee," as otherwise used in Article 6, "means any person employed for hire by an employer in any employment." Labor Law § 190 (2); see generally *Tortorella v Postworks New York LLC*, 2011 WL 3020860, (Sup Ct, NY Co 2011).

Plaintiff alleges that he is an "employee" and a "commission salesperson" under Labor Law § 190 (Am. Compl. ¶ 161), and that defendants violated Labor Law § 191 by failing to pay Origination and Execution Fees owed to him under the terms of his Employment

Agreement.¹ *Id.*, ¶¶ 162-164. Plaintiff additionally seeks "unpaid wages, interest, attorneys' fees, and liquidated damages" under Labor Law § 198. *Id.*, ¶ 166.

Defendants contend that this claim should be dismissed because plaintiff has not alleged that there was a failure to make periodic payments, but, rather, that he was not paid certain fees allegedly owed to him according to the terms of the Employment Agreement. There is authority, however, that claims for such contractually agreed upon post-termination payments may fall within the ambit of Labor Law § 191. See *Arbeeny v Kennedy Exec. Search, Inc.*, 71 AD3d 177 (1st Dept 2010); *Firtell v Update, Inc.*, 17 Misc 3d 1101(A) (Sup Ct, NY Co 2007). Nonetheless, as defendants also contend, plaintiff's claim under Labor Law § 191 is not actionable because he does not fit into a category of workers to which the section applies.

While there has been disagreement among New York courts, both state and federal, about whether executives, managers, administrators, and supervisors are employees under Article 6 of the Labor Law (see *Pachter*, 10 NY3d at 615-616 [and examples cited

¹The original complaint asserted a cause of action for violation of Labor Law § 193. The Amended Complaint withdrew that claim, and substituted a cause of action under Labor Law § 191. See Memo in Opp., at 19; Tr., 34:2-4.

therein]; *Miteva v Third Point Mgt. Co.*, 323 F Supp 2d 573, 577-578 [SD NY 2004]), the Court of Appeals in *Pachter* conclusively held that "executives are employees for purposes of Labor Law, article 6, except where expressly excluded." 10 NY3d at 616; see *Farricker v Penson Dev., Inc.*, 2009 WL 860239, *7, (SDNY 2009) (executive not "categorically" excluded from definition of "employee" under Labor Law § 190 [2] and may be entitled to protection under Labor Law § 193). At the same time, the Court reaffirmed that "employees serving in an executive, managerial or administrative capacity do not fall under section 191 of the Labor Law." *Pachter*, 10 NY3d at 616; see also *Grober v Bronson*, 2013 NY Misc LEXIS 696, *21-22, 2013 NY Slip Op 30370(U), **16 (Sup Ct, NY Co 2013).

Here, the Employment Agreement, annexed to and made part of the Amended Complaint, provided that plaintiff was a "senior executive," earning more than nine hundred dollars a week, with "duties and responsibilities commensurate with those of a senior executive of CCG," reporting to and working with the managing partners on "marketing, origination, solicitation and execution of mergers and acquisitions advisory, debt advisory, capital raising and direct investment activities." Plaintiff does not contest that he acted in an executive capacity, and alleges no facts to the contrary. Rather, he alleges that his work was similar to that of a managing partner (Am. Compl., ¶ 41); that he had independent

decision-making authority (*id.*, ¶ 68) and unrestricted ability to solicit, pursue or conduct business on behalf of the company (*id.*, ¶ 65); and that he was CCG's primary business originator (*id.*, ¶ 94). Plaintiff's claim under Labor Law § 191 accordingly is dismissed. See *Schuit v Tree Line Mgt. Corp.*, 46 AD3d 405 (1st Dept 2007) (claim dismissed where plaintiff's contention he was not an executive was inconsistent with allegations and employment contract).

CC Securities

For the reasons stated above, the second, third, fourth and fifth causes of action are dismissed as against both defendants. As to the remaining cause of action, for breach of contract, defendants contend that the claim must be dismissed as against CC Securities because CC Securities was not a signatory to the Employment Agreement.

"It is well established that, generally, a party who is not a signatory to a contract cannot be held liable for breaches of that contract." *MBIA Ins. Corp. v Royal Bank of Canada*, 706 F Supp 2d 380, 396 (SDNY 2009); *Bellino Schwartz Padob Adv. v Solaris Mktg. Group*, 222 AD2d 313 (1st Dept 1995). Plaintiff nonetheless contends that CC Securities can be liable under the "single employer doctrine."

"The single employer doctrine is an exception to the doctrine of limited liability, which allows corporations to organize so as to isolate liabilities among separate entities." *Murray v Miner*, 74 F3d 402, 405 (2d Cir 1996). "Under the doctrine of limited liability, a corporate entity is liable for the acts of a separate, related entity only under extraordinary circumstances, commonly referred to as piercing the corporate veil.... Similarly, the law only treats the employees of a corporate entity as the employees of a related entity under extraordinary circumstances." *Id.* at 404 (internal citations omitted). "A 'single employer' situation exists 'where two nominally separate entities are actually part of a single integrated enterprise....' In such circumstances, of which examples may be parent and wholly-owned subsidiary corporations, or separate corporations under common ownership and management, the nominally distinct entities can be deemed to constitute a single enterprise." *Arculeo v On-Site Sales & Marketing, LLC*, 425 F3d 193, 198 (2d Cir 2005) (internal citations omitted).

The doctrine "originally was developed by the National Labor Relations Board [NLRB] as a means of determining whether two entities constituted a single employer in order to protect the collective bargaining rights of employees and to advance industrial stability." *Horizon Plastics, Inc. v Constance*, 2002 WL 398668, *3

n 4, (SDNY 2002) citing *Murray*, 74 F3d at 404. Thus, courts most commonly apply the doctrine in the context of labor disputes (see *Murray*, 74 F3d at 404 n 1), such as claims for breach of a collective bargaining agreement. See e.g. *Brown v Sandimo Materials*, 250 F3d 120 (2d Cir 2001); *Lihli Fashions Corp. v National Labor Relations Bd.*, 80 F3d 743, 747 (2d Cir 1996) (noting that determination that separate companies are a single employer is not enough to bind separate companies to CBA unless they also collectively represent an appropriate collective bargaining unit); *Hollow Metal Trust Fund v Elevator Entrances of N.Y., Inc.*, 2012 WL 75200, *4 n 2, (SDNY 2012); *Ferrara v Oakfield Leasing, Inc.*, 904 F Supp 2d 249, 261 (EDNY 2012). Courts also have applied the doctrine to employment discrimination claims brought under Title VII and other federal and state civil rights statutes, particularly for purposes of determining whether employees of separate entities can be aggregated for jurisdictional purposes. See e.g. *Laurin v Pokoik*, 2004 WL 513999, *4 (SDNY 2004) (Title VII and ADEA claims); *Benson v Otis Elevator Co.*, 2012 WL 4044619, *11-12 (SDNY 2012) (Title VII, NYSHRL and NYCHRL claims); see also *Arculeo*, 425 F3d at 197 (noting, in Title VII case, that "single employer" and "joint employer" doctrines, used in such contexts as union representation and Title VII liability, "might differ significantly in different contexts").

Generally, courts consider four factors to "determine whether two entities will be regarded as a single employer subject to joint liability for employment-related acts. They are: (1) interrelated operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership." *Murray*, 74 F3d at 404 (internal citations omitted). Although no one factor is determinative (*id.*), "[t]he critical question in single entity analysis is: 'what entity made the final decision regarding employment matters related to the person claiming discrimination?'" *Ingenito v Riri USA, Inc.*, 2013 WL 752201, *5, (EDNY 2013). Moreover, "regardless of the degree of control necessary to support a finding that two corporations acted as a single employer, the policy giving rise to the single employer doctrine is not implicated at all in the absence of an employer-employee relationship between the plaintiff and the affiliate of the defendant at the time of the alleged wrong." *Murray*, 74 F3d at 405.

CC Securities, admittedly a subsidiary of CCG, also undisputedly is a separate legal entity, and there are no allegations to the contrary. Although plaintiff alleges that CCG and CC Securities maintained the same offices, issued invoices to clients as a single entity, and were owned and controlled by the same three principals responsible for management and personnel

decisions (Am. Compl., ¶ 5), “the mere existence of common management and ownership are not sufficient to justify treating a parent corporation and its subsidiary as a single employer.” *Morangelli v Chemed Corp.*, 922 F Supp 2d 278, 286 (EDNY 2013) (citation omitted); see *Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 (1st Dept 2005) (parent and subsidiary or affiliated corporations are, as a rule, treated separately and independently so that one will not be held liable for the contractual obligations of the other absent a demonstration that there was an exercise of complete dominion and control; but evidence of domination alone does not suffice).

Defendants also have submitted uncontested documents demonstrating that CC Securities, although formed in 2009, was not conducting business until April 2011. See BrokerCheck Report, Ex. B to Buxton Reply Aff. in Further Support of CC Securities’ Motion. Nor does plaintiff allege that he was paid by CC Securities, or that CC Securities otherwise “was the final decision-maker with regard to the employment issue underlying the litigation.” *Morangelli*, 922 F Supp 2d at 286 (citation omitted).

It is, in any event, unclear whether the single employer doctrine applies to employees’ common law claims (see *Murray*, 74 F3d at 404 n 2; *Horizon Plastics, Inc.*, 2002 WL 398668, at *3 n 4;

Yoder v Novo Mediagroup, Inc., 2001 WL 62861, *4, (SDNY 2001) (noting it was possible), and, more particularly, whether it could apply to the circumstances here, involving a claim against a non-signatory subsidiary for breach of a contract signed by a parent company. As noted in an analogous, "reverse corporate veil piercing" situation, "the subsidiary cannot be held liable for the obligations of its parent, except in rare circumstances, such as when the identity of the actual party to a contract is sufficiently unclear." *In re Manhattan Woods Golf Club, Inc.*, 192 BR 80, 83 (SDNY 1996); see *In re Thomson McKinnon Sec., Inc.*, 149 BR 61, 64 (SDNY 1992) (subsidiary not liable under contract signed by parent company, even when employees did work for and were paid by subsidiary); see also *Antolino v Distribution Mgt. Consolidators Worldwide, LLC*, 2011 WL 6148826, (Sup Ct, NY Co 2011) (common ownership and common control not enough to assert cause of action against affiliated companies not signatories to contract). Plaintiff, therefore, must look only to CCG for relief.

Accordingly, the motion of defendant CC Securities is granted, and the Complaint is dismissed in its entirety as against CC Securities, LLC.

The motion of defendant CCG is granted in part and the second, third, fourth and fifth causes of action are dismissed as to defendant CCG.

The remaining cause of action for breach of contract against defendant CCG is severed and shall continue. Defendant CCG shall serve an Answer to this one cause of action within 30 days of the date of this Order.

Counsel shall appear for a preliminary conference in IA Part 39, 60 Centre Street, Room 208 on December 18, 2013 at 10:00 a.m.

This constitutes the decision and order of this Court.

Date: October 30, 2013



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.