Auffarth v Herald Natl. Bank
2015 NY Slip Op 31839(U)
September 30, 2015
Supreme Court, New York County
Docket Number: 600800/2010
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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PATRICIA AUFFARTH as the Executor of
HENRY AUFFARTH, MARSHALL PERRIN,
COSTAS ZIOZIS, CARL BRONSTEIN,
JOSEPH BARNETT, and LAWRENCE GORE.,

Plaintiffs,

-against-

HERALD NATIONAL BANK,

Defendant.

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Index No.: 600800/2010

DECISION AND ORDER

Motion Sequence No. 005

ANIL C. SINGH, J.

Herald National Bank ("Defendant" or "Bank") moves, pursuant to CPLR 3212, for summary judgment dismissing all remaining claims by the former officers of the bank, Joseph Barnett, Carl Bronstein, Marshall Perrin, Costas Ziozis, and Henry Auffarth's estate ("Plaintiffs"). Plaintiffs oppose the motion. Mr. Perrin and Mr. Ziozis cross-move pursuant to CPLR 3212 for summary judgment to dismiss the bank's counterclaims.

Background

The bank hired the plaintiffs between October 2008 and March 2009. It was a new bank, and its president and CEO, David Bagatelle, approached each plaintiff while the plaintiff was working at another financial institution. Mr. Bagatelle personally negotiated the plaintiffs' terms of employment. Upon agreeing on the terms of employment, Mr. Bagatelle contacted the bank's Head of Human Resources, Mary Ann Sleece, to draft the employment letter. Upon Mr. Bagatelle's approval, the bank sent the

contracts to the plaintiffs for signature. Each plaintiff worked as part of a "banking team" that reported directly to Mr. Bagatelle. The bank terminated the plaintiffs on February 12, 2010.

The relevant specifics of each plaintiff's employment agreement is set out below.

I. Joseph Barnett and Carl Bronstein

The facts and documents pertaining to Mr. Barnett and Mr. Bronstein are substantially similar. Mr. Bagatelle hired them at the same time to operate as part of the same banking team. Both worked for the Bank for eleven months until they were terminated. Both Mr. Barnett and Mr. Bronstein were hired on March 23, 2009 and terminated on February 23, 2010.

Mr. Barnett and Mr. Bronstein signed agreements with identical terms. Their compensation was in the form of "a base salary, an annual bonus, stock options grants and a benefits package". Each agreed to a starting annual salary of $200,000. Additionally, the Bank agreed that '[a]t the conclusion of each year of employment as [position at bank], we will review your base salary to determine if an increase is warranted". The contracts provides that each plaintiff was "entitled to a guaranteed cash bonus for each full year as follows: Year 1: $100,000 annually, payable at six (6) month intervals...etc".

Mr. Barnett's agreement also provided that he "shall receive" a grant of 10, 635 restricted stock "vesting ratably over a period of three years, beginning on the first anniversary date of the Effective Date".

Furthermore, both Mr. Barnett's and Mr. Bronstein's offer letter provided that: "Your employment with [the Bank] will be at-will. Therefore, you or [the Bank] may terminate your employment at any time and for any reason."

II. Costas Ziozis

Mr. Ziozis worked for the bank for 15.25 months. He was hired on November 3, 2008 and terminated on February 12, 2010. His compensation was in the form of "a base salary, an annual bonus, stock options grants and a benefits package". The agreement further provided that his "annual salary for each of the first two years will be $185,000". Additionally, the Bank agreed that '[a]t the conclusion of each year of employment as [position at bank], we will review your base salary to determine if an increase is warranted". The contract also provides that, "Mr. Ziozis will be entitled to a guaranteed cash bonus for each full year as follows: Year 1: $100,000 annually…".

Mr. Ziozis' contract also stated that "if [Mr. Ziosis] is terminated without cause as determined in the discretion of Heritage, during the first two full years of your employment, [the bank] will pay [Mr. Ziosis] a lump sum in a gross amount equal to one (1) times your Base Salary and Bonus…, less the amount of Base Salary and Bonus already paid during the first two years". This payment would be made in a lump sum within thirty days of termination. The bank also agreed to provide Mr. Ziozis with ninety days' notice of such termination.

Finally, the contract provided that, "Your employment with [the bank] will be at-will. Therefore, you or [the Bank] may terminate your employment at any time and for any reason during the first two years".

III. Marshall Perrin

Mr. Perrin worked for the bank for 15 months until his termination. He was hired on November 12, 2008 and terminated on February 12, 2010. The terms of his agreement was largely similar to Mr. Ziozis' except for two important distinctions, namely, (1) his agreed upon annual base salary for each of the first two years was $250,000, and (2) his agreement provides that, "Your employment with [the Bank] will be at-will. Therefore, you or [the Bank] may terminate your employment at any time and for any reason after the first two years."

Additionally, Mr. Perrin's agreement provided that he "shall receive" a grant of "2500 shares or the number of shares calculated at the closing price of Citi stock on October 24, 2008 times 1825 shares divided by 10, whichever is greater restricted stock, issuable when the Bank opens for business and vesting ratably over a period of three years, beginning on the first anniversary date of the Effective Date".

IV. Henry Auffarth

Mr. Auffarth worked for the bank for 11.5 months until his termination. Mr. Auffarth began working for the bank on March 2, 2009 and was terminated on February 12, 2010. His compensation was in the form of "a base salary, an annual bonus, stock and option grants and a benefits package". His contract provided that his annual base salary would be $250,000. The agreement also provided that Mr. Auffarth was "entitled to a guaranteed cash bonus for each full year...$250,000 annually, payable at six month intervals". Moreover, the agreement provided that if Mr. Auffarth is "terminated without cause during the first two years of employment, for each of those years [the bank] will pay [Mr. Auffarth] a lump sum in a gross amount equal to one (1) times your Base Salary

and Bonus..., less the amount of Base Salary and Bonus already paid during the first two years". This payment would be made in a lump sum within thirty days of termination. The bank also agreed to provide Mr. Auffarth with ninety days' notice of such termination."

Finally, the agreement provided that, "Your employment with [the Bank] will be at-will. Therefore, you or [the Bank] may terminate your employment at any time for cause."

V. Costas Ziozis' and Marshall Perrin's Advanced Bonus Payments

Mr. Ziozis and Mr. Perrin are plaintiffs who worked for the bank for more than a year. Both received two installments of bonus payment, the bank had both sign letters on September 4, 2009 acknowledging that the bonus had "not yet been earned" and that the bonuses set forth in the original contracts were "based upon your completing a full year of service...."

These letters are cited by the bank to resolve the ambiguity found by Justice Schweitzer in a prior decision concerning the disbursement of bonus payments. The bank contends that these letters demonstrate that these plaintiffs, as well as the three others, understood the bonus payments as being earned only upon completion of a full year of employment rather than as pro-rata entitlements.

These letters also form the basis of the bank's counterclaims against Mr. Ziozis and Mr. Perrin as they state, "if your team's original first full year targets/goals are not met, then you may be required to reimburse the bank the gross amount of the monies advanced pursuant to this..." As a result, the bank contends that Mr. Ziozis and Mr. Perrin are obligated to repay the $50,000 bonuses advanced to them on September 11, 2009.

Procedural History

Mr. Bronstein and Mr. Barnett were each employed for 11 months of their employment contracts, and seek 13 months of salary and 24 months of guaranteed bonus. Mr. Barnett is also seeking the 10, 635 restricted stock. Mr. Ziozis was employed for 15.25 months of his employment contract, and seeks 8.75 months of salary and 12 months of guaranteed bonus. Mr. Perrin was employed for 15 months of his employment contract, and seeks 9 months of salary and 12 months of guaranteed bonus. Mr. Perrin is also seeking 2,500 shares of restricted stock. Mr. Auffarth was employed for 11.5 months of his employment contract. Mr. Auffarth passed away on August 22, 2011. His estate seeks 12.5 months of salary and 24 months of guaranteed bonus.

The bank counterclaims against Mr. Perrin and Mr. Ziozis seeking reimbursement of the bonus payments advanced to them covering the latter half of the first-year.

On September 15, 2010, plaintiffs brought suit for breach of contract, violations of New York Labor Law Sections 191, 193, and 198, and fraudulent inducement. Justice Schweitzer dismissed the plaintiffs' claims for violations of NYLL 191; all plaintiffs' claims with respect to separation pay under NYLL 193; all plaintiffs' fraudulent inducement claims; and Mr. Auffarth's claim for breach of contract pertaining to life insurance benefits.

In this current motion, the claims before this court are: (1) plaintiffs' claims for breach of contract, (2) plaintiffs' claims for bonuses under NYLL 193 and 198, and (3) the bank's counterclaims against Mr. Perrin and Mr. Ziozis for early advanced bonus payments.

Legal Analysis

I. Summary Judgment Standard

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 [1985]. The failure to make such a showing requires denial of the motion. Id. Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]. Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. See Zuckerman v. City of New York, 49 N.Y.2d 557, 560 [1980]. "In determining whether summary judgment is appropriate, the motion could should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility". Garcia v. J.C. Duggan. Inc., 180 A.D.2 [1st Dep't 1992], citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 [1st Dep't 1989]. The court's role is "issue-finding, rather than issue- determination". Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 [1957] (internal quotations omitted).

Since the plaintiffs' agreements differ one from the other, this court will discuss the plaintiffs' claims separately.

II. Breach of Contract Claims

A. Parol evidence

As a threshold matter, plaintiffs argue that the agreements are not integrated and therefore, parol evidence should be considered. Notably, plaintiffs do not contend that the offer letters are "employment agreements". Instead, they contend that there is ambiguity

in the agreements and hence, parol evidence should be allowed. Whether the parties intended to be bound by a contract must be determined by an objective test and the inquiry as to such intent "centers upon ...whether there was a 'meeting of the minds' regarding the material terms of the transaction". TAJ Int'l Com, v. Edward G. Bashian & Sons. Inc.. 251 A.D.2d 98, 100 [1st Dept 1998]. "Whether or not a writing is ambiguous is a question of law to be resolved by the courts". W.W.W. Associates. Inc, v. Giancontieri, 77 N.Y.2d 157, 162 [1990]. "A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four comers of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." Id- "The use of parol evidence is admissible to clarify any ambiguity in what has been expressed." Schmidt v. Magnetic Head Coro., 97 AD 2d 151 [2d Dep't 1983]. However, "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." Intercontinental Planning. Ltd, v. Davstrom. Inc., 24 N.Y.2d 372, 379[1969].

B. At-will employment

Under New York Law, when an employment contract is "[a]bsent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party". TSR Consulting Servs. v. Steinhouse, 267 AD2d 25, 26 [1st Dep't 1999]. An at-will employment relationship may be "freely terminated by either party at any time for any reason or even for no reason" with limited exceptions not relevant here. Cron v Hargro Fabrics, 91 NY2d 362, 367 [1998]. In both

Lobosco v N.Y. Tel. Co./NYNEX. 96 NY 2d 312 [2001] and Spivak v J. Walter Thompson U.S.A, Inc., 258 AD 2d 364, 364 [1st Dept 1999], the courts held that terms stating that the employment is at-will will be upheld and that between the lines reading of contractual details will not undermine the clear meaning of the at-will clause.

C. "For cause" standard

Unless cause is specifically defined by the contract, courts generally afford discretion to employers' decisions. Where employment depends upon satisfactory performance by the employee, courts have held that it is the employers' prerogative to determine where the employee has, in fact, satisfied the terms of his or her employment. Golden v Worldvision Enters., 133 AD 2d 50, 51, [1st Dep't 1987]. This is particularly true in employer determinations concerning the performance of high-level managers. The Court in Golden said, "[e]fficient running of an enterprise demands a high degree of trust and cooperation among top personnel; thus upper echelon employees should perhaps have to overcome a higher hurdle to show that their discharge was abusive or retaliatory." Id. While an employer needs to demonstrate genuine dissatisfaction to meet the standard for cause, this only requires the production of evidence showing some basis for dissatisfaction with the employee's performance. Id. The employee can only refute this by proving that his discharge was motivated by bad faith, or arrived at by fraud or arbitrary action. Gitelson v Du Pont,17 NY2d 46, 49 [1966]. Here, neither fraud nor bad faith are implicated, so the issue is whether the bank's stated dissatisfaction was actually a guise for arbitrary behavior.

D. Breach of contract for bonuses

New York has a longstanding policy against the forfeiture of earned wages See Andrew Mirchel v. RMJ Securities, 205 AD2d 388 (1st Dept. 1994) citing Weiner v. Diebold Group, 173 AD2d 166, 177 (1st Dept. 1991). In Mirchel, an at-will employee sued to collect an earned bonus. The Appellate Division reversed the lower court's decision granting the employer summary judgment. The Court stated: "[W]hether unpaid incentive compensation under a defendant's bonus plan constitutes a discretionary bonus or earned wages not subject to forfeiture is an issue of fact. Employees in this State may enforce an agreement to pay an annual bonus made at the onset of the employment relationship where such bonus constitutes an integral part of plaintiff's compensation package" Id. at. 389. See also, Sipkin v. Major League Baseball Advance Media, 9 Misc. 3d 133(A), 2005 N.Y. Slip Op. 51648, at *1 [S.Ct. App. T. 1st Dep't 2005] ["When a bonus that is an integral part of a compensation package has already been earned by the time the employer decides not to pay it, the latter can no longer argue that such bonus is discretionary; at that point, failure to pay it constitutes a breach of the contract of employment"]; Simpson v. Lakeside Engineering, 26 AD 3d 882 [4th Dept 2006] [holding that an at-will employee is entitled to payment of a bonus as her compensation was unequivocally defined in terms of both salary and bonus].

E. New York Labor Law §193

New York Labor Law (NYLL) §193 states that, "No employer shall make any deduction from the wages of an employee" unless allowable under a specific list of exceptions not relevant here. The threshold question here is whether bonus is considered as wages. Pursuant to NYLL §190 (1), "wages means the earnings of an employee for

labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis". Case law from the Court of Appeals guide the court in this discussion. In Truelove v Northeast Capital & Advisory, 95 NY 2d 220 [2000], the court held that the employee's bonus did not fall within the meaning of "wages" in section 190(1) because it constituted "[discretionary additional remuneration, as a share in a reward to all employees for the success of the employer's entrepreneur-ship," whereas "the wording of the statute, in expressly linking earnings to an employee's labor or services personally rendered, contemplated] a more direct relationship between an employee's own performance and the compensation to which that employee [was] entitled". Based on the facts in Ryan v Kellogg Partners Inst. Servs., 19 NY 3d 1, 16 [2012], the Court of Appeals decided that a bonus payment fell within the definition of wages, holding that "[the employee's] bonus was "expressly link[ed]" to his "labor or services personally rendered...[the employee's] bonus had been earned and was vested before he left his job...; its payment was guaranteed and non-discretionary as a term and condition of his employment". Therefore, in New York, compensation – including bonuses – constitutes a "wage" once it is actually earned and vested.

F. New York Labor Law 198

The bank also moves to dismiss plaintiffs' claims for attorney fees brought under NYLL 198. The applicability of NYLL 198 depends on whether plaintiffs are successful in asserting their NYLL 193 claims.

G. Reimbursement of bonuses that have been advanced

The established law in New York is that "in the absence of a special agreement, an employer may not recover back wages or equivalent drawings paid during a period of

completed employment". Kleinfeld v. Roburn Agencies, Inc., 270 AD 509 [1st Dep't 1946]. See also, NorthWinds Renewables LLC v. Rheuben, 42 Misc. 3d 135(A), 984 N.Y.S.2d 633 [App. Term 2014] ["in the absence of an express or implied agreement to repay, an advance is generally not recoverable by an employer"]; Gray v. Lurie, 3 A.D.2d 956, 956 [3rd Dep't 1957] ["In the absence of a specific agreement to repay the amount of the advances, they were not recoverable by the employer, even though the employee left before the time when the total bonus was to be determined and paid"]. Therefore, if there is a specific agreement that an advance payment of wages or bonuses would be repaid, the courts do allow for the employer to recover the amount it is owed.

Application of the law to each plaintiff

I. Barnett & Bronstein

Mr. Barnett and Mr. Bronstein were each employed for 11 months of their employment contracts. They are seeking either (1) 13 months of salary and 24 months of guaranteed bonus or (2) eleven months' worth of their $100,000 guaranteed cash bonus for Year 1, and the damages available under NYLL 193 and 198.

First, the offer letters memorializes the terms of the employment that were negotiated between the bank and each plaintiff. It is undisputed that both sides had extensive discussions about the terms of the agreement which culminated in the drawing up of the letters. The parties signed off on the letters after revisions. The court finds that the offer letters reflects a clear and unambiguous agreement between the parties and therefore, extrinsic evidence will not be considered.

Second, Mr. Bronstein's and Mr. Barnett's agreements clearly state that their employment with the bank will be at-will. The bank claims that the agreements actually provides for a two-year fixed term. Mr. Bronstein and Mr. Barnett rely on extrinsic

evidence such as the counter-signed letters which they claim specify the terms of employment. As stated in International Planning Ltd, extrinsic evidence is not admissible to *create* an ambiguity in a complete agreement. Mr. Bronstein and Mr. Barnett also rely on the provisions in the agreement including the guaranteed bonus payments for Year 1 and Year 2, "assured salary review at the end of each year" and "vacation accrual per year that does not carry over to the next year". This court is not persuaded that these provisions present an issue of fact as to whether the agreement is at-will or for a fixed-term. Since the agreement is at-will, Mr. Bronstein and Mr. Barnett are not entitled to the thirteen months of salary for the months that they did not work.

Third, Mr. Bronstein and Mr. Barnett also claim that they are entitled to the guaranteed bonus for the 11 months that they worked at the bank. The bank claims that the bonus payments should not be considered as wages under NYLL 190(1) because it was conditioned on employment at the end of a given period and was discretionary. The bank also cites Truelove that "an employee's entitlement to a bonus is governed by the terms of the employer's bonus plan". However, Mr. Bronstein and Mr. Barnett contends that the bank accounted for accrual of bonuses over time by setting aside money each month towards the total amount of bonuses that needed to be paid. Moreover, they contend that the bank was required to pay the guaranteed cash bonus every six months. The bonuses are also "guaranteed" and the agreement does not state that it is discretionary. Therefore, there is a genuine issue of fact as to whether Mr. Bronstein and Mr. Barnett are entitled to the guaranteed bonus for the 11 months that they worked at the bank.

Fourth, Mr. Barnett claims that he should receive the grant of 10,635 shares of restricted stock. In particular, Mr. Barnett points the court to the fact that the agreement states that he "shall receive" the restricted stock. Furthermore, the agreement states that the restricted stock will be vested ratably over three years. The bank contends the stocks are not vested. The bank points to the Restricted Stock Award Agreement. However, that agreement was not signed by Mr. Barnett and will not be considered. Therefore, the bank's motion for summary judgment on Mr. Barnett's claim for the 10, 635 shares of restricted stock is denied.

Accordingly, the bank's motion for summary judgment dismissing Mr. Barnett's and Mr. Bronstein's claim for breach of contract with regards to the 13 months of salary and 13 months of guaranteed bonus after they were terminated is granted. However, the bank's motion for summary judgment dismissing Mr. Barnett's and Mr. Bronstein's claim for eleven months' worth of their $100,000 guaranteed cash bonus for Year 1, and the damages available under NYLL 193 and 198 is denied. Moreover, the bank's motion for summary judgment dismissing Mr. Barnett's claim for the 10,635 shares of restricted stock is denied. Furthermore, the bank's motion for summary judgment dismissing Mr. Barnett's claim for 10,635 shares of restricted stock is denied.

II. Costas Ziozis

Mr. Ziozis was employed for 15.25 months of his employment contract. He is seeking 8.75 months of salary and his guaranteed bonus either (1) under his separation pay provision or (2) under the terms of the agreement as a two year guaranteed contract. The bank seeks reimbursement from Mr. Ziozis for the bonus payments advanced to him covering the latter half of the first year.

Similar to Mr. Barnett and Mr. Bronstein, Mr. Ziozis' agreements clearly states that his employment is at-will, at least "during the first two years". Indeed, the contract further provides that with regards to the severance pay, termination without cause is "in the discretion of [the bank]". In this case, as provided for in the agreement, the bank in its discretion decided that Mr. Ziozis was terminated for cause.

Moreover, Mr. Ziozis also claims that he is entitled to his guaranteed bonus under NYLL 193. As we found with the previous plaintiffs, the bonus was linked to the labor and services personally rendered by the plaintiff. As explained in Truelove and Ryan, Mr. Ziosis is not entitled to the bonus for the months that he did not work. The question that remains is whether the bonus is pro-rated for each month. If it is pro-rated, the bank would owe Mr. Ziozis the bonus for 3.25 months. Therefore, there is a genuine issue of fact as to whether Mr. Ziozis is entitled to the guaranteed bonus for the 3.25 months since he has already been paid for the 12 months of the 15.25 months that he has worked.

The bank counterclaims that Mr. Ziozis owes it the bonus that it advanced for the latter half of the first month as he is not entitled to it due to his unsatisfactory performance. The bank refers the court to the letter agreement signed by Mr. Ziozis on September 4, 2009 when the second installment of the year's bonus was given to him. In the letter agreement, Mr. Ziozis acknowledges that the bonus had "not yet been earned" and that he agreed that "if [his] team's original first full year targets/ goals are not met, then [he] may be required to reimburse the bank the gross amount of the monies advanced". Based on New York case law, since there is a letter agreement explicitly giving the bank the authority to demand back the advanced bonus, the bank is allowed to

seek reimbursement. There is contention among the parties as to whether the first full year targets/ goals have been met by Mr. Ziozis. This is a triable issue of fact.

Accordingly, the bank's motion for summary judgment dismissing Mr. Ziozis' claim for breach of contract with regards to the 8.75 months of salary and guaranteed bonus when he did not work is granted. However, the bank's motion for summary judgment dismissing Mr. Ziozis' claim for the 3.25 months that he worked, and the damages available under NYLL 193 and 198 is denied. The plaintiff's motion for summary judgment dismissing the bank's counterclaim seeking the bonus payments advanced to Mr. Ziozis is denied.

III. Marshall Perrin

Mr. Perrin was employed for 15 months of his employment contract. He is seeking 9 months of his salary and guaranteed bonus (1) under his separation pay provision or (2) under the terms of agreement as a two year guaranteed contract. The bank seeks reimbursement from Mr. Perrin for the bonus payments advanced to him covering the latter half of the first year.

Mr. Perrin's agreement is ambiguous. On one hand, the agreement provides that his employment is at-will. On the other hand, it states that, "you or [the Bank] may terminate your employment at any time and for any reason *after* the first two years". (Emphasis added). This suggests that the employment was not at-will but fixed for a two year period. Since there is ambiguity as to whether Mr. Perrin's agreement is at-will, "parol evidence is admissible to clarify any ambiguity in what has been expressed". See Schmidt v. Magnetic Head Corp, 97 AD 2d 151 [2d Dep't 1983].

Mr. Perrin also claims that he should receive the grant of 2,500 shares of restricted stock. Mr. Perrin also points the court to the fact that the agreement states that he "shall receive" the restricted stock. Moreover, Mr. Perrin's agreement provides that "all unvested shares shall become vested immediately upon a change in control of the Bank or *termination*." (Emphasis added). The bank contends the stocks are not vested. Once again, the bank points to the Restricted Stock Award Agreement. However, that agreement was not signed by Mr. Perrin and will not be considered. Therefore, the bank's motion for summary judgment on Mr. Perrin's claim for the 2,500 shares of restricted stock is denied.

The bank counterclaims that Mr. Perrin owes it the bonus that it advanced for the latter half of the first month as he is not entitled to it due to his unsatisfactory performance. The bank refers the court to the letter agreement signed by Mr. Perrin on September 4, 2009 when the second installment of the year's bonus was given to him. In the letter agreement, Mr. Perrin acknowledges that the bonus had "not yet been earned" and that he agreed that "if [his] team's original first full year targets/ goals are not met, then [he] may be required to reimburse the bank the gross amount of the monies advanced." Based on New York case law, since there is a letter agreement explicitly giving the bank the authority to demand back the advanced bonus, the bank may seek reimbursement. There is contention among the parties as to whether the first full year targets/ goals have been met by Mr. Perrin. This is a triable issue of fact.

Accordingly, the bank's motion for summary judgment dismissing Mr. Perrin's claims for breach of contract and his claim under NYLL 193 and 198 is denied. Moreover, the bank's motion for summary judgment dismissing Mr. Perrin's claim for

the 2.500 shares of restricted stock is denied. The plaintiff's motion for summary judgment dismissing the bank's counterclaim seeking the bonus payments advanced to Mr. Perrin is denied.

IV. Henry Auffarth

Mr. Auffarth was employed for 11.5 months of his employment contract. He passed away on August 22, 2011. His estate seeks 12.5 months of his compensation under either (1) the terms of his two year agreement or (2) his separation pay provision.

Mr. Auffarth's agreement is also ambiguous. It states, in relevant part, "[y]our employment with [the Bank] will be at-will. Therefore, you or [the bank] may terminate your employment at any time *for cause*." [Emphasis added]. Therefore, there is ambiguity as to the precise nature of the agreement.

Moreover, the separation pay provision in Mr. Auffarth's agreement also provide that he is entitled to separation pay if he was terminated without cause. The parties dispute as to whether Mr. Auffarth was terminated for cause. The bank has offered substantial evidence that Auffarth failed to perform at the level of other similarly situated employees with respect to volumes of deposits and loans. The plaintiffs argue otherwise. This will be determined by the fact-finder.

Accordingly, the bank's motion for summary judgment dismissing Mr. Auffarth estate's claims for breach of contract and claims under NYLL 193 and 198 is denied.

Accordingly, it is

ORDERED that the bank's motion for summary judgment dismissing Mr. Barnett's and Mr. Bronstein's claim for breach of contract with regards to the 13 months

of salary and 13 months of guaranteed bonus after they were terminated is granted; and it is further

ORDERED that the bank's motion for summary judgment dismissing Mr. Barnett's and Mr. Bronstein's claim for eleven months' worth of their $100,000 guaranteed cash bonus for Year 1, and the damages available under NYLL 193 and 198 is denied; and it is further

ORDERED that the bank's motion for summary judgment dismissing Mr. Barnett's claim for 10,635 shares of restricted stock is denied; and it is further

ORDERED that the bank's motion for summary judgment dismissing Mr. Ziozis' claim for breach of contract with regards to the 8.75 months of salary and guaranteed bonus after he was terminated is granted; and it is further,

ORDERED that the bank's motion for summary judgment dismissing Mr. Ziozis' claim for the 3.25 months that he worked, and the damages available under NYLL 193 and 198 is denied; and it is further

ORDERED that Mr. Ziozis' motion for summary judgment dismissing the bank's counterclaim seeking the bonus payments advanced to Mr. Ziozis is denied;

ORDERED that the bank's motion for summary judgment dismissing Mr. Perrin's claims for breach of contract and his claim under NYLL 193 and 198 is denied; and it is further

ORDERED that the bank's motion for summary judgment dismissing Mr. Perrin's claim for 2,500 shares of restricted stock is denied; and it is further

ORDERED that Mr. Perrin's motion for summary judgment dismissing the bank's counterclaim seeking the bonus payments advanced to Mr. Perrin is denied; and it is further

ORDERED that the bank's motion for summary judgment dismissing Mr. Auffarth estate's claims for breach of contract and claims under NYLL 193 and 198 is denied.

Date: September 30, 2015
New York, New York

Anil C. Singh