

<b>Kolchins v Evolution Mkts. Inc.</b>
2015 NY Slip Op 32847(U)
October 22, 2015
Supreme Court, New York County
Docket Number: 653536/2012
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN Justice

PART 3

KOLCHINS, ANDREW

INDEX NO. 653536/2012

- v -

MOTION DATE 09/17/2015

EVOLUTION MARKETS INC.

MOTION SEQ. NO. 007

Table with 2 columns: Description of papers and No(s). Rows include Notice of Motion/Order to Show Cause - Affidavits - Exhibits (1), Answering Affidavits - Exhibits (2), Replying Affidavits (3), and Cross Motion (No).

Upon the foregoing papers, it is ordered that this motion is granted in accordance with the accompanying memorandum decision.

DATED: 10/22/2015

Eileen Bransten signature and name: EILEEN BRANSTEN, J.S.C.

- 1. CHECK ONE: [ ] CASE DISPOSED, [X] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [X] 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 PART 3

-----X  
ANDREW KOLCHINS,

Plaintiff,

- against -

Index No.: 653536/2012  
Mot. Seq. No.: 007  
Motion Date: 9/18/2015

EVOLUTION MARKETS INC. and ANDREW ERTEL,

Defendants.

-----X

**BRANSTEN, J.:**

This matter comes before the court upon Defendants Evolution Markets Inc. (“Evolution Markets”) and its President and CEO, Defendant Andrew Ertel’s partial motion to dismiss pursuant to CPLR 3211(a)(1) and (7). Defendants’ motion seeks dismissal of a portion of Count Two of the Complaint, which asserts a Labor Law claim as to the “Special Non-Compete Payment” allegedly owed to Plaintiff. For the reasons that follow, Defendants’ motion is granted.

**I. BACKGROUND<sup>1</sup>**

The facts of this case have been discussed extensively in this Court’s previous decisions on this matter and, more recently, by the First Department’s Opinion issued on

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<sup>1</sup> Unless otherwise stated, the facts described in this section are taken from the Third Amended Complaint (the “Complaint”). (Docket No. 115).

April 2, 2015. *See Kolchins v. Evolution Markets*, 128 A.D.3d 47 (1st Dep't 2015). Thus, only the details relevant to the instant motion are referenced herein.

This dispute stems from Plaintiff Andrew Kolchins's employment with Defendant Evolution Markets, which began in 2005. Throughout his tenure at Evolution Markets, Plaintiff ultimately became the manager of the firm's renewable energy markets group. On August 31, 2009, the parties entered into an employment agreement covering the three-year period ending on August 31, 2012 (the "2009 Agreement").<sup>2</sup> Under the 2009 Agreement, Plaintiff was compensated as follows: (i) a base salary of \$200,000 per year; (ii) a Sign On Bonus of \$750,000, payable in three installments (with \$300,000 due within 10 days of the employment agreement start date, and two equal installments of \$225,000 due on the first and second anniversaries of the 2009 Agreement); and (iii) a Production Bonus of at least 55% of net earnings received by the renewable energy markets group.

In addition, the 2009 Agreement provided that Plaintiff was entitled to a "Special Non-Compete Payment" (referred to herein as the "Payment"). This Payment is the main focus of Defendants' motion. Pursuant to the 2009 Agreement, the Payment would be due only in the event that Plaintiff was terminated "without cause" at any time *prior to* the termination of the three-year period. (Gutfleisch Affirm. Ex. E, p. 11).

In the summer of 2012, the parties began to negotiate a renewal agreement that would cover Plaintiff's employment with Evolution Markets for an additional three years.

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<sup>2</sup> Gutfleisch Affirm., Ex. E (Docket No. 116).

On June 15, 2012, Defendant Ertel e-mailed Plaintiff an offer of employment for the three-year period from September 1, 2012 through August 31, 2015. The offer stated that it was upon the same terms as the 2009 Agreement. Throughout June and July 2012, Plaintiff sought to negotiate more favorable terms. However, after Defendants refused to accept any changes to the 2009 Agreement, Plaintiff ceased negotiating and decided to accept Defendants' offer. On July 16, 2012 Plaintiff replied to Defendant Ertel's June 15 e-mail stating "I accept." Defendant Ertel responded with: "Mazel. Looking forward to another great run." Plaintiff contends that, as of July 16, 2012, there was a meeting of the minds and a valid, binding agreement to extend his employment upon the same terms as the 2009 Agreement (the "Extension Agreement").<sup>3</sup>

Nevertheless, after July 16, 2012, the parties engaged in several attempts to memorialize the agreement in a formal instrument, and Defendant sent Plaintiff a proposed draft based on the 2009 Agreement. Plaintiff returned the document with proposed changes, allegedly intending only to clarify language. In an e-mail on August 23, 2012, Plaintiff told Defendants: "Actually, I don't want to negotiate. I think we agreed to the terms. It is clarifying some old language."

However, Plaintiff alleges that Defendants subsequently tried to re-negotiate substantive terms of his employment that were inconsistent with the 2009 Agreement,

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<sup>3</sup> In upholding the denial of Defendants' previous motion to dismiss the breach of contract claims (Sequence No. 003), the First Department held that the "documentary evidence does not utterly refute plaintiff's factual allegations that the parties reached an agreement on the material terms." *Kolchins v. Evolution Markets, Inc.*, 128 A.D.3d 47, 50 (1st Dep't 2015). Accordingly, the Court held Plaintiff's breach of contract claim could not be dismissed as a matter of law. *Id.*

and thus contrary to the Extension Agreement reached by the parties' e-mails on July 16, 2012. Ultimately, on September 1, 2012, Defendants cut off negotiations and sent Plaintiff a letter stating that his employment had ceased as a result of the expiration of the 2009 Employment Agreement. According to Plaintiff, the letter ignored the existence of the binding Extension Agreement reached on July 16, 2012.

## II. PROCEDURAL HISTORY

Plaintiff filed its original complaint on October 19, 2012, alleging that he was entitled to the Special Non-Compete Payment because EvoMarkets breached the 2009 Employment Agreement. On April 2, 2015, the First Department granted in part Defendants' motion dismissing Plaintiff's claim for breach of the 2009 Employment Agreement with respect to the Special Non-Compete Payment. *Kolchins v. Evolution Markets*, 128 A.D.3d 47, 65 (1st Dep't 2015). The court held that the 2009 Employment Agreement provided for the Payment only "[i]n the event' that plaintiff was 'terminated by [defendant] *prior to* the Ending Date without cause.'" *Id.* (emphasis added). Because the Agreement ended on August 31, 2012, and Plaintiff was not terminated until one day later, the First Department found that Plaintiff was not terminated *prior to* the Ending Date and therefore he was not entitled to the Special Non-Compete Payment. Notably, Plaintiff had not pled a Labor Law claim in his original complaint.

Plaintiff filed his Third Amended Complaint on May 18, 2015, asserting a claim for the Special Non-Compete Payment and claiming that although the payment is not

owed under the 2009 Agreement, it is owed under the Extension Agreement because he was fired on September 1, 2012, which was “prior to” August 31, 2015, the end of the Extension Agreement. (Compl. ¶ 45).

### III. LEGAL STANDARD

Defendants move to dismiss the Complaint pursuant to CPLR § 3211(a)(1) and (7), based upon documentary evidence and for failure to state a claim upon which relief may be granted. A motion to dismiss must be denied if the factual allegations contained “within the pleadings’ four corners ... manifest any cause of action cognizable at law.” *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002). The facts alleged in the complaint must be accepted as true, and the plaintiff accorded the benefit of every possible favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). Whether a plaintiff can ultimately establish its allegations may not be considered when deciding a motion to dismiss. *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). “Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.” *David v. Hack*, 97 A.D.3d 437, 438 (1st Dep’t 2012).

Moreover, dismissal pursuant to CPLR § 3211(a)(1) is warranted only if the documentary evidence utterly refutes plaintiff’s factual allegations, *Greenapple v. Capital One, N.A.*, 92 A.D.3d 548, 550 (1st Dep’t 2012), and “conclusively establishes a defense to the asserted claims as a matter of law.” *Weil, Gotshal & Manges, LLP v. Fashion*

*Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 270 (1st Dep't 2004). If the documentary evidence disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211 (a)(1) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action. See *McGuire v. Sterling Doubleday Enters., L.P.*, 19 A.D.3d 660, 661-62 (1st Dep't 2005).

#### IV. DISCUSSION

Defendants move to dismiss that portion of Count Two of the Complaint that alleges a Labor Law claim related to the Special Non-Compete Payment. Count Two of the Complaint asserts violations of the Labor Law based on Defendants' failure to pay Plaintiff (i) the Special Non-Compete Payment, and (ii) the Production Bonus. The Court notes that Defendants do not seek dismissal of Plaintiff's Labor Law claim related to the Production Bonus. (Defs. Br. Supp. at 3, n. 5). In addition, Defendants do not seek dismissal of any portion of Count One of the Complaint. Accordingly, this motion is concerned only with that branch of the Complaint that asserts a Labor Law claim based on the Special Non-Compete Payment.

Plaintiff concedes that the First Department's ruling bars its claim to the Special Non-Compete Payment under the 2009 Agreement. However, Plaintiff argues that if it proves its claim that the parties entered into the Extension Agreement, Plaintiff's termination on September 1, 2009 occurred "prior to" the Ending Date of the Extension Agreement, which would have been August 31, 2015. Thus, Plaintiff asserts it is owed

the Special Non-Compete Payment under the Extension Agreement, and that Defendants violated N.Y. Labor Law Sections 193 and 198 by refusing to make the Payment.

*a. Count Two Seeks the Payment Arising From the Extension Agreement*

First, Defendants argue that Plaintiff's Labor Law claim related to the Payment fails because Count Two of the Complaint asserts a claim to the Payment "under the 2009 Employment Agreement." (Compl. ¶ 49). Defendants contend that the language of Count Two re-pleads the claim that has already been dismissed by the First Department. Plaintiff argues the Complaint states a claim to the Payment under the 2012-2015 Extension Agreement, and is not duplicative of the previously dismissed cause of action.

The Court concludes that the Complaint alleges a Labor Law claim as to the Special Non-Compete Payment originating from the 2012-2015 Extension Agreement. Plaintiff does not dispute that the second cause of action of the Complaint refers to the Payment "under the 2009 Employment Agreement." (Compl. ¶ 49). However, the Second Cause of Action also "repeats, realleges, and incorporates each and every allegation above as if fully set forth herein." (Compl. ¶ 47). Accordingly, the allegations of Count Two "must be construed in connection with the allegations" incorporated by reference. *Bogardus v. New York Life Ins. Co.*, 101 N.Y. 328, 341 (1886); *see also In re Cocolicchio*, 6 Misc. 3d 1041(A), at 6 (Sup. Ct. N.Y. Cnty 2005) ("Giving the complaint a liberal construction ... the opening paragraphs of both pleaded causes of action incorporate all the factual allegations of the complaint."). In addition, at this stage the

facts alleged in the complaint must be accepted as true, and the plaintiff accorded the benefit of every possible favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994).

In Paragraph 45 of the Complaint (incorporated by reference into the Second Cause of Action), Plaintiff concedes the claim to the Special Non-Compete Payment is not viable under the 2009 Agreement, but alleges that “because Mr. Kolchins’ employment term was extended by the Extension Agreement, his September 1, 2012 firing was ‘prior to’ the end of the term.” (Compl. ¶ 45). Given Plaintiff’s concession, a reading of Count Two finding that it asserts the Payment based on the 2009 Agreement would contradict the Complaint. Moreover, Plaintiff incorporates its allegations on Paragraph 45 that the Payment is due under the Extension Agreement. Accordingly, the Court concludes the Complaint is clear that Plaintiff bases his Labor Law claim related to the Payment on the allegations that his employment was extended through 2015 by the Extension Agreement.

*b. Plaintiff Cannot Assert a Labor Law Claim Related to Severance Pay*

Defendant argues that Plaintiff cannot assert a Labor Law claim based on the separation or severance pay. For the following reasons, the Court agrees.

“Wages” are defined as “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.” N.Y. Labor Law § 190(1). “Wages” also include “benefits or wage supplements,” *id.*, which are in turn defined to include “*separation ... pay.*” N.Y.

Labor Law § 198-c(2) (emphasis added). Thus, many employees can assert Labor Law claims for regular wages *and* for separation payments, which are also considered “wages.”<sup>4</sup>

Significantly, however, Section 198-c continues: “This section shall not apply to any person in a bona fide executive, administrative, or professional capacity whose earnings are in excess of nine hundred dollars a week.” N.Y. Labor Law § 198-c(3). Accordingly, courts applying the Labor Law hold that executives who earn more than \$900 a week cannot assert a claim related to severance payments under Section 198. *Fraiberg v 4Kids Entertainment, Inc.*, 75 A.D.3d 580, 583 (2d Dep’t 2010) (“[A]lthough the plaintiff was generally covered by the protections of Labor Law article 6, she could not assert a claim thereunder to compel the payment of her severance package” because she was an executive earning more than the statutory amount.); *see also Monagle v. Scholastic, Inc.*, 2007 WL 766282, at 2 (S.D.N.Y. 2007) (holding that an executive earning more than the statutory amount was excluded from coverage by Section 198-c).

Plaintiff does not dispute that he was an executive, and that he earned well over \$900 a week. Accordingly, the Court determines that Plaintiff is excluded from asserting a claim to separation or severance pay under Labor Law § 198-c(3).

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<sup>4</sup> Labor Law § 198(1-a) provides that in an action in which the employee prevails, the employee may recover “the full amount of any underpayment,” reasonable attorney’s fees, prejudgment interest, as well as “liquidated damages equal to one hundred percent of the total amount of the wages found to be due.” Accordingly, a prevailing employee may recover double the amount of any underpaid wages. N.Y. Labor Law § 198.

c. *The Special Non-Compete Payment is a Separation or Severance Payment*

Next, the Court must determine whether the Special Non-Compete Payment is a “wage” or a “separation payment” under New York Labor Law. If the Payment is considered a “separation payment,” Plaintiff cannot assert a Labor Law claim as to the Payment because he was an executive who earned more than \$900 a week. *See* N.Y. Labor Law § 198-c(3).

Defendants argue that the Payment is a “separation payment” because it was not based on services rendered. Plaintiff counters that the Payment is earned compensation based on Plaintiff’s completed transactions, and therefore is a “wage” for purposes of the Labor Law. For the following reasons, the Court concludes that the Payment constitutes a separation or severance payment.

New York Labor Law defines “wages” as “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.” N.Y. Labor Law § 190(1) (emphasis added). “Wages” also include “benefits or wage supplements,” *id.*, which in turn include “*separation or holiday pay.*” N.Y. Labor Law § 198-c(2) (emphasis added). While the term “separation pay” is not defined in the statute, Black’s Law Dictionary defines “Severance Pay” as “[m]oney (apart from back wages or salary) that an employer pays to a dismissed employee ... Also termed *separation pay.*” *Severance Pay, Black’s Law Dictionary* (10th ed. 2014) (emphasis in original); *see Rosner v. Metropolitan Property and Liability Ins. Co.*, 96 N.Y.2d 475, 480 (2001) (“In the absence of any controlling

statutory definition, we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as ‘useful guideposts’ in determining the meaning of a word or phrase.”).

The provision for the Special Non-Compete Payment is found in Exhibit A to the 2009 Employment Agreement. It states, in relevant part:

*In the event you have been terminated by Evolution prior to the Ending Date without cause or you terminate your employment hereunder for Good Reason, and provided that you abide by the terms of Section 6.1 during the Non-Compete Period, you shall be paid bonus compensation in respect of transactions (i) that you brokered during the period of your employment and (ii) for which any contingency associated with Evolution’s right to receive payment is satisfied during the Non-Compete Period ... The compensation contemplated hereunder shall be calculated consistent with the calculation of your bonus compensation during the last trimester you were an employee of EvoMarkets.*

(Gutfleisch Affirm., Ex E, p. 11) (emphasis added).

First, it is clear from the language of the Agreement that the Special Non-Compete Payment is not “back wages” or “salary,” and that by its own terms the Payment is “money ... that an employer pays to a dismissed employee.” Severance Pay, *Black’s Law Dictionary* (10th ed. 2014). However, Plaintiff argues that the Special Non-Compete Payment is a “wage” because its calculation is based on “transaction (i) that [Plaintiff] brokered during the period of your employment.” *Id.* Plaintiff contends that the Payment constitutes commissions brokered before his employment ended. The Court disagrees.

While Plaintiff correctly notes that the Payment’s calculation was based on transactions brokered during his employment, the plain language of the 2009 Agreement unambiguously states that the Payment is contingent upon plaintiff’s termination, and

would not otherwise be paid even if Plaintiff fully performed under the Agreement and completed all his job duties. Indeed, even if Plaintiff “earned” millions of dollars in commissions during the relevant time period, they would not be paid unless Plaintiff was terminated in accordance with Special Non-Compete Payment clause. Accordingly, the Court concludes the Payment did not constitute remuneration for services rendered. *See Claim of Katz*, 191 A.D.2d 865, 866 (3d Dep’t 1993)(“Neither disability payments ... nor severance pay ... constitute remuneration for work.”).

Moreover, Plaintiff’s argument here is identical to his argument that was already rejected by the First Department – i.e., that the Payment was “earned compensation” because its calculation was based on Plaintiff’s bonus for completed transactions. (Gutfleisch Reply Aff.,<sup>5</sup> Ex. A, at 20). The Appellate Division explicitly held that Plaintiff was not entitled to the Payment because he was not fired “prior to” the end of the term, despite the fact that Plaintiff had completely performed all its job duties throughout the entire term of the 2009 Employment Agreement. *Kolchins v. Evolution Markets, Inc.*, 128 A.D.3d 47, 50 (1st Dep’t 2015).

For the foregoing reasons, the Court concludes the Special Non-Compete Payment constitutes “separation” or severance pay under Labor Law § 198-c. As noted above, Plaintiff cannot assert a Labor Law claim as to severance pay because he was an executive earning over \$900 a week. Accordingly, the Court determines that the portion

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<sup>5</sup> Docket No. 121.

of Count Two of the Complaint, which asserts a Labor Law claim as to the Special Non-Compete Payment, must be dismissed pursuant to CPLR 3211(a)(1) and (7).

V. **CONCLUSION**

Accordingly, it is hereby

ORDERED that Defendants' Motion to Dismiss is granted insofar as it seeks dismissal of Plaintiff's Labor Law claim based upon the Special Non-Compete Payment (part of Count Two); and it is further

ORDERED that the action is severed and continued as to Plaintiff's remaining claims, for Breach of Contract (Count 1) and Labor Law based upon the Production Bonus (part of Count 2); and it is further

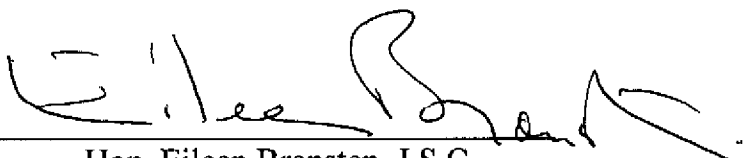
ORDERED that the parties are directed to appear for a Compliance Conference in Room 442, 60 Centre Street, on Tuesday, December 8, 2015 at 11:00 a.m.

This constitutes the decision and order of the Court.

Dated: New York, New York

October 22, 2015

ENTER:

  
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Hon. Eileen Bransten, J.S.C.