Eagle v Emigrant Capital Corp.
2016 NY Slip Op 30195(U)
February 3, 2016
Supreme Court, New York County
Docket Number: 650314/2013
Judge: Marcy S. Friedman
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

DAVID EAGLE,

Plaintiff,

– against –

EMIGRANT CAPITAL CORP.,

Defendant.

Index No.: 650314/2013

DECISION/ORDER

In this breach of contract action, plaintiff David Eagle seeks compensation in the form of carried interest from his former employer, defendant Emigrant Capital Corp. (ECC). ECC moves, pursuant to CPLR § 3212, for summary judgment dismissing all of plaintiff's claims.

The following facts are undisputed unless otherwise noted: ECC is a Small Business Investment Corporation that invests funds in private companies, known as portfolio companies. (Joint Statement of Undisputed Material Facts [Joint Statement] ¶ 1.) Plaintiff joined ECC in July 2008 as a Senior Associate on an at-will basis. (Id. ¶¶ 6-7.) During his employment, he reported to and assisted Ken Walters, the Senior Managing Director of ECC, in managing ECC's portfolio companies. (Id. ¶ 8-9; Suppl. Statements ¶ 7.[1])

The terms of plaintiff's employment are set forth in an Offer Letter dated July 3, 2008. (Joint Statement ¶ 5; Offer Letter [Gigante Aff., Ex. B].) The letter states the amount of plaintiff's base compensation. As to bonus compensation, the letter provides, among other things: "You will be eligible to participate in Emigrant Bank's bonus program; however, any

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[1] As used in this decision, the citation "Suppl. Statements" refers to Defendant's Statement of Undisputed Material Facts (Dkt. 35), and the responsive paragraphs of Plaintiff's Counter-Statement of Undisputed Material Facts (Dkt. 46). This court approved the submission of these Supplemental Statements to the Joint Statement of Undisputed Material Facts.

bonus is discretionary and subject to satisfactory performance." The letter further states that the "target bonus" for plaintiff's position is equal to 100% of his annual salary. As to carried interest, the letter provides:

> "You [plaintiff] will also be eligible to participate in [ECC's] carried interest plan, at a level determined by Executive Management. Additional information about this plan will be provided to you at a later date."

"'Carried interest' is a form of profit-sharing for portfolio company investments made by ECC." (Joint Statement ¶ 4.) As executed on May 11, 2007, ECC's Employee Carried Interest Plan (CIP) provided that participation in the plan was limited to employees of ECC designated by ECC's Board of Directors "in its sole discretion," and that "[t]he Board shall also determine, in its sole discretion, the relative interest of each Participant in the Carried Interests . . . for each transaction." (CIP § 3 [Gigante Aff., Exh. A.) At the time plaintiff was hired, the CIP fully allocated profit-sharing interests in identified portfolio companies to certain named employees. It is undisputed that ECC never approved a "level" (i.e., percentage) at which plaintiff would participate in a carried interest plan (Suppl. Statements ¶ 33), and that plaintiff resigned from ECC in 2011, without ever having received any carried interest compensation.

The complaint alleges five causes of action: a first for breach of contract; a second for unpaid wages under Section 198 of the New York Labor Law; a third for unjust enrichment; a fourth for fraudulent inducement; and a fifth for an accounting.

Discussion

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion,

regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact.' (CPLR 3212, subd. [b].)" (Zuckerman, 49 NY2d at 562.)

Breach of Contract

Plaintiff's breach of contract cause of action is based on the allegation that ECC breached its employment contract (i.e., the Offer Letter) with plaintiff by failing to comply with its obligation that plaintiff "participate in a CIP." (Compl. ¶ 26.) In moving for summary judgment, ECC contends that the parties never reached agreement on the material terms of plaintiff's participation in a carried interest plan – specifically, "the amount of carried interest he would receive or the portfolio company investments on which he would participate." (Def.'s Memo. in Supp. at 11.) Plaintiff argues in opposition that he was expressly promised carried interest compensation, and that the mere failure of the Offer Letter to set forth the precise amount of that compensation does not render the agreement unenforceable or a mere agreement to agree. (Pl.'s Memo. in Opp. at 8.)

It is well settled that "before the power of law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained." (Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, 52 NY2d 105, 109 [1981].) As the Court of Appeals has held:

> "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms. This requirement assures that the judiciary can give teeth to the parties' mutually agreed terms and conditions when one party seeks to uphold them against the other. Generally, courts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract."

(Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp., 93 NY2d 584, 589 [1999] [internal citation omitted], rearg denied 93 NY2d 1042.) "[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable." (Martin Delicatessen, 52 NY2d at 109.) The issue of whether an enforceable contract exists "is generally one of law, properly determined on a motion for summary judgment." (Central Fed. Sav., F.S.B. v National Westminster Bank, U.S.A., 176 AD2d 131, 132 [1st Dept 1991].)

The court finds that ECC makes a prima facie showing of entitlement to summary judgment. Plaintiff's Offer Letter provides merely that he "will [] be eligible to participate" in ECC's carried interest plan, "at a level determined by Executive Management," with additional information to be "provided . . . at a later date." Nothing in the language of the Offer Letter supports plaintiff's contention that he was offered an immediate, vested right to carried interest compensation. Nor does plaintiff submit evidence which raises a triable issue of fact as to whether his eligibility to participate in ECC's carried interest plan ever ripened into an entitlement to such compensation.

Plaintiff cites evidence, including an email and deposition testimony from ECC executives, indicating that ECC contemplated and even expected that plaintiff would participate in a carried interest plan at some time in the future. For example, plaintiff submits an email from Walters, his immediate supervisor and the Senior Managing Director of ECC (Suppl. Statements ¶ 7), in which Walters writes that "[t]he idea was that he [Eagle] would participate in any new transactions sourced while he was a member of the group." (Kaiser Aff., Exh. C.) Plaintiff also cites deposition testimony from William Staudt, Vice Chairman of ECC's parent company and the recipient of the above email, that the intent was "not to include David [Eagle] in deals already on the books, but any new transactions," and that "this would be consistent with the

modus operandi, if you will, of a person joining a private equity firm." (Staudt Dep. at 45-46 [Gigante Aff., Exh. H].)

Significantly, however, plaintiff forthrightly admits that the parties never reached agreement on the material terms of his carried interest participation on any specific investment. In his responses to ECC's Statement of Undisputed Material Facts, plaintiff thus admits, for example, that "[a]lthough the Offer Letter stated that he would be eligible to participate in the [CIP], there was no level (i.e., percentage) agreed to, and that issue was specifically referenced as a matter to be determined by Executive Management." (Suppl. Statements ¶ 33.) Plaintiff further admits that he "never reached an agreement with ECC on the level of his participation, or the allocations he would receive, in a carried interest plan." (Id. ¶ 46.) He acknowledges that "[d]uring his employment with ECC, [he] never had any discussion with Mr. Walters or Mr. Staudt about the level at which he would participate in a carried interest plan" or "the vesting schedule or any other terms that would apply to his alleged participation in a carried interest plan." (Id. ¶¶ 44-45.) Plaintiff also specifically admits that "Executive Management had the discretion to determine [his] level of participation" (id. ¶ 41), and that he "can present no evidence that ECC ever made a determination as to the level at which Plaintiff would be eligible to participate in a carried interest plan." (Id. ¶ 49.)

It is further undisputed that Walters asked plaintiff in May 2010 to prepare a schedule identifying "follow-on investments" made in ECC portfolio companies after March 2008. (Id. ¶ 59.) Although plaintiff listed himself on the schedule as one of several employees eligible to receive carried interest on the investments, he admits that he did not identify any specific percentages to be allocated, "because the determination of any allocations to be made was a 'management decision.'" (Id. ¶¶ 62-63; Schedules [Gigante Aff., Ex. D].)

The court rejects plaintiff's categorical argument that "employment agreements that set forth categories of compensation but do not specify the precise amounts of that compensation are not agreements to agree but rather enforceable contracts." (Pl.'s Memo. in Opp. at 8.) On the contrary, it is well-settled that a term as to price, or amount of compensation, is material, and that a contract will be unenforceable if the contract is not "definite" as to such a term. (Martin Delicatessen, 52 NY2d at 109-110 [price for renewal lease of real property]; Cooper Sq. Realty, Inc. v A.R.S. Mgt., Ltd., 181 AD2d 551, 551 [1st Dept 1992] [brokerage commission].) The requirement of definiteness is designed to ensure that a court, in intervening, is not "imposing its own conception of what the parties should or might have undertaken, rather than confining itself to the implementation of a bargain to which they have mutually committed themselves." (Martin Delicatessen, 52 NY2d at 109; see also Mocca Lounge, Inc. v Misak, 94 AD2d 761, 762-763 [2d Dept 1983] [declining to supply material terms, the Court holding that "the void [was] too great, the omissions [were] too noticeable and the risk of ensnaring a party in a set of contractual obligations that he never knowingly assumed [was] too serious"].)

The requirement of definiteness can, however, be met, not only by an "explicit contract term" specifying the amount to be paid, but also where "'a methodology for determining the [missing term] [can be found] . . . within the four corners of the [contract]," or where the contract "'invite[s] recourse to an objective extrinsic event, condition or standard on which the amount was made to depend.'" (166 Mamaroneck Ave. Cop. v 151 E. Post Rd. Corp., 78 NY2d 88, 91-92 [1991], quoting Martin Delicatessen, 52 NY2d at 110.) As this Department has further explained, where a contract does not expressly state an amount of compensation to be paid, resort may be had to custom and usage to calculate the compensation, but only if there is "custom and usage evidence to establish an extrinsic standard which is 'fixed and invariable' in

the industry in question." (Cooper Sq. Realty, Inc., 181 AD2d at 551, quoting Hutner v Greene, 734 F2d 896, 900 [2d Cir 1984].)

In the context of compensation agreements, New York courts have long held that a promise to give an equity interest or share of profits is unenforceable where the promise lacks definiteness as to the precise form, amount, or accrual of such compensation. (See, e.g., Varney v Ditmars, 217 NY 223, 225-26, 227 [1916] [affirming dismissal of action at trial, on the ground that defendant's promise to "'give you [plaintiff] a fair share of my profits'" was "vague, indefinite and uncertain" and could not "be computed from anything that was said by the parties or by reference to any document, paper or other transaction"]; Benham v eCommission Solutions, LLC, 118 AD3d 605, 606-07 [1st Dept 2014] [holding, on summary judgment motion, that parties had a "mere 'agreement to agree'" that plaintiff should receive equity stake in defendant company, as the "failure of the parties to agree on the precise form of the equity stake cause[d] plaintiff's contract claim to fail for lack of definiteness in the material terms of her equity compensation"]; Glanzer v Keilin & Bloom, L.L.C., 281 AD2d 371, 371-72 [1st Dept 2001] [affirming dismissal of breach of contract claim based on defendants' promise to pay plaintiffs an "equity interest" in investment banking firm, the Court reasoning that "the terms used to describe plaintiffs' rights under the alleged contract—'substantial income,' 'market rate,' 'equity interest'—[were] too indefinite to permit enforcement"]; see also Foster v Kovner, 2012 WL 251568 [Sup Ct, NY County, Jan. 18, 2012, No. 601349/2006] [Kapnick, J.] [on motion for summary judgment, stating in dictum that even if plaintiff was promised a "10% equity share" in company, "[t]he absence of agreement on the material terms necessary to define the scope and nature of [plaintiff's] equity interest render[ed] it illusory," the Court noting that the parties had considered "a variety of vesting, buy-back, forfeiture and other options relating to equity

interests" that were never accepted or implemented]; Van Diepen v Baeza, 1998 WL 199909, *8 [SD NY, Feb. 26, 1998, No. 96 Civ 8731] [Stein, J.] [on summary judgment motion, holding under New York law that agreement that plaintiff would have a "'participatory interest'" in fund was indefinite, as the evidence "d[id] not address what that ownership percentage was to be"].)

In the present case, there is no competent evidence of an agreed-upon methodology or standard by which the court might determine what carried interest should have been awarded. Plaintiff relies, rather, on his affidavit in opposition to ECC's motion, in which he asserts that an interest of "at least one-third (1/3) of any profits" on the investments identified in his schedules would be "perfectly reasonable and fair," as well as "completely in line with the customs and norms in the private equity industry," given the work he performed and the number of other employees he believed to be entitled to carried interest. (Eagle Aff. ¶¶ 10, 12.) Even if this affidavit is properly considered,[2] plaintiff does not provide any evidentiary support for his conclusory assertion as to the percentage of interest to which he would be entitled. Nor does he so much as contend that a one-third allocation is a "fixed and invariable" custom in the industry. (See Cooper Sq. Realty, Inc., 181 AD2d at 551.)

Plaintiff further contends that, although ECC "was obligated to confer in good faith," there was nothing left to negotiate between the parties because "the level of [his] participation was to be set by [ECC's] Board of Directors." (Pl.'s Memo. in Opp. at 1.) The court rejects this apparent contention that it was unnecessary for the parties to reach a meeting of the minds on the terms of the asserted agreement to pay plaintiff carried interest. To the extent that plaintiff

[2] There is substantial authority that affidavits inconsistent with, and tailored to avoid the consequences of earlier deposition testimony, cannot be considered on a summary judgment motion. (See, e.g. Fields v Lambert Houses Redevelopment Corp., 105 AD3d 668, 671 [1st Dept 2013]; Beahn v New York Yankees Partnership, 89 AD3d 589 [1st Dept 2011].) The parties have not addressed whether plaintiff's affidavit is inconsistent with his prior deposition testimony.

contends that there was an obligation on ECC's part to exercise its discretion in good faith, and to set a level for plaintiff's participation in a carried interest plan, this contention is also unavailing.

As discussed above, the CIP in effect at the time plaintiff was hired provided that ECC's Board of Directors would determine, in its sole discretion, the relative interest of each participant in the CIP. Even assuming that the duty of good faith and fair dealing "can coexist in this context with a right of unfettered discretion" (see Hunter v Deutsche Bank AG, New York Branch, 56 AD3d 274, 274 [1st Dept 2008] [dismissing action for payment of discretionary bonus]), there is nothing on the face of the Offer Letter or in the record which would enable the court to objectively determine the carried interest compensation that ECC should have paid. Critically, even when a contract expressly requires a defendant to make a reasonable, good faith effort to perform its obligations – including an obligation to undertake good faith negotiations – "a clear set of guidelines against which to measure a party's best efforts is essential to the enforcement of such a clause." (Bernstein v Felske, 143 AD2d 863, 865 [2d Dept 1988]; Mocca Lounge, Inc., 94 AD2d at 763 [same]; see also Mark Bruce Intl., Inc. v Blank Rome, LLP, 60 AD3d 550, 551 [1st Dept 2009] [where the parties left for future determination the fee to be paid for plaintiff's services, the Court held that "[t]he standard of reasonableness . . . was not made objective by the implied duty to determine the amount of the fee in good faith"].)

Plaintiff not only fails to submit evidence from which the court could objectively determine the terms of plaintiff's compensation under a carried interest plan, but also fails to submit evidence which shows, or raises a triable issue of fact as to whether, ECC failed to act in good faith. As this Department has held, "simply because [] negotiations ultimately failed, it cannot be said that defendant acted in bad faith." (Mode Contempo, Inc. v Raymours Furniture

Co., Inc., 80 AD3d 464, 465 [1st Dept 2011].)

The cases cited by plaintiff are not to the contrary. (See Pl.'s Memo. in Opp. at 7-8.) For example, in Knapp v McFarland (344 F Supp 601 [SD NY 1971], affd in part, revd in part 457 F2d 881 [2d Cir 1972], cert denied 409 US 850), the Court held that that a defendant's promise to pay plaintiff an "'upward adjustment'" of attorney's fees upon the achievement of a "'good result'" was an enforceable contract. The Court broadly described New York cases as holding that the principle that "agreements to agree" are unenforceable "has no application in the context of interpreting employment contracts which include open additional compensation clauses." (Id. at 611-612.) As discussed above (supra at 6-8), this statement does not accurately reflect New York law. The statement is also inconsistent with current Second Circuit authority construing New York law. (See KJ Roberts & Co., Inc. v MDC Partners, Inc., 605 Fed Appx 6, 7 [2d Cir 2015] [on the authority of Express Indus. & Terminal Corp. (93 NY2d 584, supra), holding that contract for incentive payment was unenforceable because the parties never agreed either to a material term, i.e., the method for calculating the payment, or to "an objective, extrinsic standard for determining the missing term"].) In any event, the Court in Knapp expressly found an enforceable contract because, "although the [] language contemplated and required further specification in order to be enforceable, the parties subsequently supplied the equivocal undefined terms." (344 F Supp at 611.) Here, in contrast, it is undisputed that the parties never reached a subsequent agreement as to the missing terms.

Similarly, in Guggenheimer v Bernstein Litowitz Berger & Grossmann LLP, 11 Misc3d 926 [Sup Ct, NY County, Feb. 24, 2006]), an action by an employee for bonus compensation on which plaintiff also relies, this court (Fried, J.) noted that, "as a general rule, an employee has no enforceable right to compensation under a discretionary compensation or bonus plan." (Id. at

930-931.) The Court also cited Knapp for the general proposition that "[e]mployment contracts that contain open additional compensation clauses are nonetheless binding contracts." (Id. at 932.) The Court found, however, that there was "an issue of fact as to whether the representations made to plaintiff compel a conclusion that the bonus was vested and mandatory, as opposed to discretionary and forfeitable" (id. at 931), as well as whether "there exist sufficiently definite guidelines to enable a court to supply a bonus figure," given the parties' prior course of conduct (id. at 932-33). As held above, no such questions of fact exist in this case.

Finally, plaintiff contends that executives of ECC have offered conflicting explanations or excuses as to why plaintiff was never awarded carried interest compensation – including that the reference in plaintiff's Offer Letter to carried interest compensation was a drafting error (Pl.'s Memo. in Opp. at 9), and that the type of investments on which plaintiff primarily worked (so-called "follow-on investments") were excluded from the plan. (Id. at 9-10.) These arguable inconsistencies cannot suffice to raise a triable issue of fact, given that it is undisputed that the parties never reached an agreement on the other material terms of the compensation, such as plaintiff's level of participation.

The issue, ultimately, "is not whether the law can operate to flesh out the agreement, rather, it is whether there was a meeting of the minds in the first place." (Argent Acquisitions, LLC v First Church of Religious Science, 118 AD3d 441, 445 [1st Dept 2014].) It would be an impermissible encroachment into the bargaining process for the court to imply a duty of compensation whenever an employer states that an employee is among a class of persons who may, at some future time, be awarded profit-based compensation. Absent an agreement on the material terms of such compensation, plaintiff's expectations "were just that – expectations,

which are not the equivalent of a contract." (See Levion v Societe Generale, 822 F Supp 2d 390, 400 [SD NY 2011], affd 503 Fed Appx 62 [2d Cir 2012].) The court will accordingly grant summary judgment to ECC dismissing the first cause of action.

New York Labor Law Claim

In his second cause of action, plaintiff seeks liquidated damages pursuant to New York Labor Law § 198 (1-a) for ECC's failure to pay him carried interest compensation. (See Compl. ¶¶ 31, 33-34.) As an initial matter, recovery under Section 198, a costs and remedies provision, is "limited to actions for wage claims founded on the substantive provisions of Labor Law article 6." (Gottlieb v Kenneth D. Laub & Co., Inc., 82 NY2d 457, 464 [1993], rearg denied 83 NY2d 801 [1994].)

Labor Law § 190 (1) 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." As the Court of Appeals held in Truelove v Northeast Capital & Advisory, Inc. (95 NY2d 220 [2000]), "[c]ourts have construed this statutory definition as excluding certain forms of 'incentive compensation' that are more in the nature of a profit-sharing arrangement and are both continent and dependent, at least in part, on the financial success of the business enterprise." (Id. at 223-224.) In concluding that the defendant's bonus/profit-sharing arrangement did not constitute wages, the Truelove Court noted that the "declaration" of the bonus pool was dependent on the "employer's overall financial success," rather than on the "personal productivity" of the employee. (Id. at 224; see also Guiry v Goldman, Sachs & Co., 31 AD3d 70, 73 [1st Dept 2006], appeal withdrawn 7 NY3d 809 [holding that deferred awards of stock and stock options "bear[] the hallmark of incentive compensation" under Truelove, in that their "value to the recipient depends on the firm's 'overall

financial success,' not simply on the employee's 'personal productivity'"]; Gunthel v Deutsche Bank AG, 32 AD3d 335, 337 [1st Dept 2006] [holding on the authority of Truelove that "bonus awards under the [defendants'] carried interest plans "do not constitute 'wages' under Labor Law § 190 (1)"].[3])

Plaintiff cites no case in which a Court has found carried interest compensation to constitute wages under New York's Labor Law. Moreover, plaintiff admitted at his deposition that there are "hundreds of different things" that can affect the pool of funds used for a carried interest plan by influencing the sale price of a portfolio company upon a liquidity event, including "market forces . . . industry forces, [and] profitability forces." (Eagle Dep. at 47-48 [Gigante Aff., Exh. G].) On the above authority, the court accordingly holds that the carried interest compensation that plaintiff seeks does not qualify as wages under Labor Law Article 6. Summary judgment will be granted dismissing plaintiff's second cause of action.

Unjust Enrichment

Plaintiff's third cause of action pleads that ECC received the benefit of Plaintiff's labor, skill, and activities, and has been unjustly enriched by the amount that plaintiff would have received under a carried interest plan. (Compl. ¶¶ 36-38.)

"The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in equity and good conscience should be paid to the plaintiff." (Corsello v Verizon New York, Inc., 18 NY3d 777, 790 [2012], rearg denied 19 NY3d 937 [internal quotation marks and citation omitted].) However, "unjust enrichment is not a catchall cause of action to be used when

[3] The lower Court in Gunthel reasoned that such bonus awards did not constitute wages because they "depended on factors outside plaintiffs' actual work: the financial success of the assets Deutsche Bank purchased, and, thus, the success as an investment entity." (Gunthel v Deutsche Bank AG, 2005 WL 6229842 [Sup Ct, NY County, Aug. 9, 2015, No. 603668/04] [Moskowiz, J.], mod on other grounds 32 AD3d 335, supra.)

others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." (Id.)

Having failed to establish a contractual right to carried interest compensation based on the indefinite and discretionary nature of defendant's promise, plaintiff cannot simply repackage the same allegations as a claim for unjust enrichment. (See id. ["An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim"]; Benham, 118 AD3d at 607; see also De Madariaga v Union Bancaire Privee, 103 AD3d 591, 591 [1st Dept 2013], lv denied 21 NY3d 854 [dismissing unjust enrichment claim where payment of bonus was entirely discretionary]; Kaplan v Capital Co. of Am., 298 AD2d 110, 111 [1st Dept 2002], lv denied 99 NY2d 510 [2003] [same].)

There is also substantial authority that an unjust enrichment claim is unavailable to recover compensation in the form of a bonus or equity interest unless the services performed by the plaintiff were "'so distinct from the duties of his employment and of such nature that it would be unreasonable for the employer to assume that they were rendered without expectation of future pay.'" (Freedman v Pearlman, 271 AD2d 301, 304 [1st Dept 2000], quoting Robinson v Munn, 238 NY 40, 43 [1924]; LaJaunie v DaGrossa, 159 AD2d 349, 350 [1st Dept 1990] [a quantum meruit claim requires "that the allegedly uncompensated duties (performed) were distinct in character from those duties for which plaintiff was compensated"]; Foster v Kovner, 2012 WL 251568, supra; see also Levion, 822 F Supp 2d at 405.)

Plaintiff does not contend that the services on which his unjust enrichment claim is based were distinct from the general duties of his employment, for which he was paid a salary. Rather, he acknowledges that "[a]ll of the services that Plaintiff performed for ECC . . . were within the

scope of his employment as an ECC employee." (Joint Statement ¶ 10.) The third cause of action will therefore be dismissed.

Plaintiff's Remaining Claims

In response to this motion, plaintiff withdrew his fourth cause of action for fraudulent inducement. (Pl.'s Memo. in Opp. at 2 n 1.) He further abandoned his fifth cause of action, for an accounting, by failing to address it in his opposition papers. (See Gary v Flair Beverage Corp., 60 AD3d 413, 413 [1st Dept 2009]; Genovese v Gambino, 309 AD2d 832, 833 [2d Dept 2003].) ECC will therefore be granted summary judgment on plaintiff's fourth and fifth causes of action.

Accordingly, it is hereby

ORDERED that the motion of defendant Emigrant Capital Corp. for summary judgment is granted in its entirety; and it is further

ORDERED that the clerk is directed to enter judgment in favor of defendant, dismissing the complaint with prejudice.

This constitutes the decision and order of the court.

Dated: New York, New York
February 3, 2016

MARCY FRIEDMAN, J.S.C.