Ruiz v Lenox Hill Hosp.
2016 NY Slip Op 30552(U)
April 1, 2016
Supreme Court, New York County
Docket Number: 160377/15
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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CARLOS E. RUIZ, M.D., PH.D,

Index No. 160377/15

Plaintiff,

-against-

DECISION/ORDER

LENOX HILL HOSPITAL, NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC., LENOX HILL INTERVENTIONAL CARDIAC & VASCULAR SERVICES, P.C. and DR. S. JACOB SCHEINERMAN,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Carlos E. Ruiz, M.D., Ph.D ("Dr. Ruiz") commenced the instant action seeking damages arising out of a breach of an employment agreement. Defendants Lenox Hill Hospital (the "Hospital"), North Shore-Long Island Jewish Health System, Inc. ("North Shore"), Lenox Hill Interventional Cardiac & Vascular Services, P.C. and S. Jacob Scheinerman, M.D. ("Dr. Scheinerman") (collectively referred to as "defendants") now move for an Order (1) pursuant to CPLR §§ 3211(a)(1) and (7) dismissing the complaint; and (2) pursuant to CPLR § 3001 declaring that Dr. Ruiz has no entitlement to severance payments and/or severance benefits pursuant to Section III of Dr. Ruiz's employment agreement dated December 19, 2011. The

motion is resolved as set forth below.

The relevant facts according to the complaint are as follows. Dr. Ruiz has been practicing medicine for forty years and was hired by the Hospital in or around 2006. From 2006 until 2011, Dr. Ruiz served as the Hospital's Director of the Division of Structural and Congenital Heart Disease, Department of Interventional Cardiology. In 2011, Dr. Ruiz was promoted to Director of Congenital and Structural Heart Disease for the entire North Shore University Health System, which includes eighteen hospitals. He was hired in that position pursuant to a written contract of employment for five years dated December 19, 2011 (the "Contract").

In or around January 2015, defendant Dr. Scheinerman replaced the long-standing Chairman of the Department of Cardiothoracic Surgery. Thereafter, plaintiff filed a complaint against Dr. Scheinerman with the Hospital's human resources department for alleged breaches of proper and ethical conduct, including allegedly signing off on procedure reports for procedures in which Dr. Scheinerman was not involved and for informing Dr. Ruiz's patient's family about the outcome of a procedure not performed by Dr. Scheinerman. However, prior to the completion of the investigation regarding plaintiff's complaints, Dr. Scheinerman allegedly retaliated against plaintiff for making the complaints by terminating him without cause and immediately expelling him from the Hospital. Plaintiff also alleges that defendants kept his personal computers, violated his privacy by looking at their contents and refused to give the property back to him for two months, all for the purpose of punishing the plaintiff.

Thereafter, plaintiff commenced the instant action asserting causes of action for violation of New York Labor Law ("Labor Law") § 740, violation of Labor Law § 741, breach of contract, conversion, trespass to chattel and a declaratory judgment that he is entitled to the severance

package set forth in the Contract and severance agreement, without executing a general release. Defendants move to dismiss the complaint and for a declaration that plaintiff is not entitled to severance payments and/or severance benefits pursuant to Section III of the Contract.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). However, "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009). Further, in order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

As an initial matter, defendants' motion to dismiss the complaint's first cause of action alleging a violation of Labor Law § 740 on the ground that it fails to state a claim is denied. Pursuant to the Whistleblower Act, an employee may bring an action against his employer if the employer takes "any retaliatory personnel action against [said] employee because such employee...discloses, threatens to disclose to a supervisor or to a public body an activity, policy

or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety." Labor Law § 740(2)(a). However, a complaint that alleges a violation of the Whistleblower Act based on the discharge of an employee which occurs as a result of a report of any illegal activity or violation of public policy that does not directly affect the health and safety of the public does not satisfy the statute. *See Lamagna v. New York State Ass'n for Help of Retarded Children, Inc.*, 158 A.D.2d 588 (2d Dept 1990); *see also Leibowitz v. Bank Leumi Trust Co. of New York*, 152 A.D.2d 169 (2d Dept 1989). "The statutory language of 'substantial and specific danger to the public health and safety' is not defined in the whistleblower statute. Courts have consistently held that the statute addresses only traditional 'public health and safety' concerns." *Villarin v. Rabbi Haskel Lookstein School*, 96 A.D.3d 1, 5 (1st Dept 2012). However, "any claim that an alleged wrongdoing would create a substantial and specific danger to the public health or safety must be based on more than 'mere speculation.'" *Id.* at 7. Further, "[t]he plain language of [the statute] does not impose any requirement that a plaintiff identify the specific 'law, rule or regulation" violated as part of a section 740 claim." *See Webb-Weber v. Community Action for Human Servs., Inc.*, 23 N.Y.3d 448, 452 (2014).

Here, the court finds that the complaint's first cause of action sufficiently states a claim for a violation of Labor Law § 740. The complaint alleges that "Dr. Scheinerman engaged in continuing professional misconduct when, after he promised to call upon [plaintiff] to debrief [a] patient's family jointly, he purposefully conducted the debriefing alone, and...falsely held himself out to be the operating physician when he was not"; that "Dr. Scheinerman falsely represented that he had knowledge of the procedure when he was not the operating physician doing the procedure, and Dr. Ruiz, was prevented from initially communicating the proper

information to the patient's family;" that "Dr. Scheinerman improperly signed procedure reports for procedures even though [he] did not perform the procedure and was not even present"; that "Dr. Scheinerman also engaged in professional misconduct when, in response to Dr. Ruiz's criticism of Dr. Scheinerman's evasive and improper activity, he told Dr. Ruiz that as the chairman, he can 'do whatever [he] want[s],' although the complained of conduct was in disregard of proper patient care standards and procedures"; and that "[s]uch conduct created a substantial and specific danger to the public health or safety because of the risk that incorrect information could have been communicated." The complaint also alleges that "Dr. Scheinerman caused Dr. Ruiz to be immediately fired without cause and escorted out of the Hospital for making a legitimate disclosure of Dr. Scheinerman's improper conduct to Human Resources." Finally, the first cause of action alleges that such conduct violated New York Education Law ("Education Law") § 6530, which governs the conduct of professionals, including physicians, licensed in New York. Specifically, Education Law § 6530(2) prohibits "practicing the profession fraudulently or beyond its authorized scope." As the court must, on a motion to dismiss, take the above allegations as true, the court finds that said allegations are sufficient to state a claim pursuant to Labor Law § 740 as they allege that plaintiff complained to the Hospital's human resources department about Dr. Scheinerman's alleged professional misconduct in improperly signing procedure reports and falsely representing knowledge of procedures to a patient's family, which, if true, could present a significant threat to public health, and that he was terminated because of his reporting of same.

Further, defendants' motion to dismiss the complaint's second cause of action alleging a violation of Labor Law § 741 on the ground that it fails to state a claim is denied. "Labor Law § 741, often referred to as the Health Care Employee Whistleblower Act, offers special protection

to health care employees who 'perform[] health care services.'" *Minogue v. Good Samaritan Hosp.*, 100 A.D.3d 64, 69 (2d Dept 2012)(citing Labor Law § 741(1)(a)). Specifically, Labor Law § 741(2) provides that "no employer shall take retaliatory action against any employee because the employee...discloses or threatens to disclose to a supervisor, or to a public body an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care." "A cause of action alleging a violation of Labor Law § 741(2) differs from a cause of action alleging a violation of Labor Law § 740(2) in that such a complaint is required to allege only a good faith, reasonable belief that there has been a violation of the applicable standards, rather than an actual violation." *Pipia v. Nassau County*, 34 A.D.3d 664, 666 (2d Dept 2006). "A complaint asserting a violation of Labor Law § 741(2)(a) must nonetheless allege conduct that 'constitutes improper quality of patient care,' which is defined as 'any practice, procedure, action or failure to act of an employer which violates any law, rule, regulation or declaratory ruling adopted pursuant to law, where such violation relates to matters which may present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient.'" *Minogue*, 100 A.D.3d at 70 (citing Labor Law § 741(1)(d)).

Here, the court finds that the complaint's second cause of action sufficiently states a claim for a violation of Labor Law § 741. The complaint alleges that Dr. Scheinerman falsely held himself out to the family of a patient to be the operating physician when he was not; that he falsely represented that he had knowledge of the procedure when he did not; that he improperly signed procedure reports when he was not the doctor who performed the procedure; that his actions went "beyond the authorized scope of his role in the procedure which...constituted a significant threat to the health of the patient"; and that "[s]uch conduct created a substantial and

specific danger to the public health or safety because of the risk that incorrect information could have been communicated." The complaint further alleges that plaintiff disclosed Dr. Scheinerman's conduct to the human resources department because "he reasonably believed, in good faith, that [defendant's] behavior constituted improper quality of patient care." Finally, the complaint alleges that he was terminated based on the complaints made to the human resources department. As the court must, on a motion to dismiss, take the above allegations as true, the court finds that said allegations are sufficient to state a claim pursuant to Labor Law § 741.

Defendants' assertion that the second cause of action fails to state a claim because it fails to allege that Dr. Scheinerman spoke with a patient, but rather only the patient's family, and thus, there can be no "improper quality of patient care," is without merit. Although the complaint does not allege actions by Dr. Scheinerman directed at the patient specifically, defendants have not established that the alleged actions would not have an effect on patient care as a matter of law. Indeed, a patient's family might play a large role in a patient's care insofar as the family might be making medical decisions for the patient and information provided by a doctor might help them make these decisions. Thus, incorrect information, or information provided by a doctor who was unfamiliar with the procedure could present a substantial and specific danger to the public health or safety or a significant threat to the health of a specific patient.

Defendants' motion to dismiss the complaint's remaining causes of action for breach of contract, conversion, trespass to chattel and a declaratory judgment on the ground that these claims are waived pursuant to Labor Law § 740(7) is denied. Pursuant to Labor Law § 740(7),

> Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract; except that the institution of an action in

> accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law.

Courts have interpreted this statutory provision "to bar only those claims 'arising out of the retaliatory personnel action.'" *Gaughan v. Nelson*, 1995 WL 575316 *6 (S.D.N.Y. 1995)(citing *Fischer v. Homes for the Homeless, Inc.*, 1994 WL 319166 *2 (S.D.N.Y. 1994). *See also Kraus v. Brandsetter*, 185 A.D.2d 302, 303 (2d Dept 1992)(holding that Labor Law § 740(7)'s "waiver only applies to those causes of action relating to retaliatory discharge.") "[C]auses of action sounding in tort which are separate and independent from the cause of action to recover damages for retaliatory termination" are not waived if the plaintiff commences a lawsuit pursuant to Labor Law § 740. *Kraus*, 185 A.D.2d at 303. Indeed, the First Department has found that the waiver provision in the statute does not apply to causes of action which are separate and independent from a retaliation cause of action. *See Seung Won Lee v. Woori Bank*, 131 A.D.3d 273, 277 (1st Dept 2015)("Central to the assessment of the scope of this waiver is the purpose of the statute, both with respect to the abuse it is intended to remedy and the relief it provides...The statute specifically addresses the termination of an employee who witnesses and reports misconduct. It is not so broad as to encompass [all circumstances]....") "It has been observed that the purpose of the waiver is to prevent duplicative recovery, a policy that is not offended when redress is sought for injury under a claim that is distinct from a statutory cause of action predicated on wrongful termination." *Id.* (internal citations omitted). Claims will not be considered waived by section 740(7) if they "concern injury sustained as a result of the reported misconduct, not simply the statutorily protected loss of employment as a consequence of complaining to management about such misconduct." *Id.* at 278.

In the instant action, the court finds that the complaint's remaining causes of action for

breach of contract, conversion, trespass to chattel and a declaratory judgment are not waived by Labor Law § 740(7) as they are not claims arising out of the alleged retaliatory personnel action and are separate and independent from the cause of action to recover damages for retaliatory termination under the Labor Law. As an initial matter, plaintiff's fifth and sixth causes of action for conversion allege that after plaintiff was terminated, the Hospital refused to return his personal computers to him and refused to allow him access to his personal computers, which contained certain scholarly materials, without justification. Additionally, plaintiff's seventh cause of action for trespass to chattel alleges that after he was terminated, the Hospital interfered with plaintiff's possession of two Mac Pro Personal Computers as well as an imaging workstation and three computer monitors, retained and damaged these items without plaintiff's consent and refused to return them to plaintiff. Further, plaintiff's third and fourth causes of action for breach of contract allege that the Contract was breached when defendants failed to provide plaintiff with the requisite notice of his termination so that he could inform his patients and when defendants failed to pay plaintiff his 2014 bonus for the first quarter of 2015 and one year's salary based on the alleged success of a structural heart program with which plaintiff was involved. Finally, plaintiff's eighth cause of action seeks a declaratory judgment that plaintiff is entitled to the severance package set forth in his Contract and severance agreement, without executing a general release. Such causes of action are not waived as they are not merely premised on plaintiff's claim of termination in retaliation for his reporting of defendant Dr. Scheinerman's alleged professional misconduct. Any assertion by defendants that the third, fourth, fifth, sixth, seventh and eighth causes of action are entirely based on plaintiff's claim of retaliatory termination because portions of the complaint state defendants' alleged misconduct

was done "in retaliation" is without merit as the First Department has held that "the mere incorporation by reference of various allegations in the complaint alleging retaliation in [other] causes of action does not warrant a contrary conclusion." *Id.*

The court next turns to defendants' motion to dismiss the complaint as against defendant Dr. Scheinerman individually. As an initial matter, defendants' motion to dismiss plaintiff's third and fourth causes of action for breach of contract as against Dr. Scheinerman individually and plaintiff's eighth cause of action for a declaratory judgment as against Dr. Scheinerman individually on the ground that Dr. Scheinerman was not a party to the Contract is granted without opposition.

However, defendants' motion to dismiss plaintiff's first cause of action for a violation of Labor Law § 740 as against Dr. Scheinerman individually on the ground that he was not plaintiff's "employer" under the statute is denied. It is well-established that only an "employer" can be liable for alleged unlawful retaliation under Labor Law § 740. *Salimi v. N.Y. Methodist Hosp.*, 45 A.D.3d 559, 560 (2d Dept 2007)("the Supreme Court properly dismissed the third cause of action based upon violation of Labor Law §§ 740 and 741 insofar as asserted against all of the defendants, except [the employer defendant], because the plaintiff had no employee-employer relationship with any party other than [that entity].") Pursuant to Labor Law § 740(1)(b), "[e]mployer means any *person*, firm, partnership, institution, corporation, or association that employs one or more employees" (emphasis added). Courts have used an "'economic realities' test to determine whether a given individual is an employer." *Noble v. 93 University Place Corp.*, 303 F.Supp.2d 365, 376 (S.D.N.Y. 2003). The factors courts take into consideration under this test include: "whether the alleged employer (1) had the power to hire

and fire the employees, [and] (2) supervised and controlled employee work schedules or conditions of employment." *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999). Additionally, "[i]t is well settled that an individual employee...may be joined as a party defendant in a lawsuit [pursuant to Labor Law § 740] if it is alleged that the individual personally profited from the acts that are complained." *Granser v. Box Tree S.*, 164 Misc.2d 191, 202 (Sup. Ct. N.Y. County 1994).

Here, defendants' motion to dismiss the first cause of action for a violation of Labor Law § 740 as against Dr. Scheinerman is denied as they have failed to establish, as a matter of law, that Dr. Scheinerman was not plaintiff's "employer" under the statute. Although the complaint alleges that plaintiff was hired by the Hospital, it also alleges that Dr. Scheinerman is the Chairman of the Department; that he was responsible for firing plaintiff and denying plaintiff access to his personal property; and that Dr. Scheinerman personally profited from the acts complained of by plaintiff in that he avoided the investigation of such complaints. Such allegations are sufficient to allege that Dr. Scheinerman was plaintiff's employer under the statute. *See Noble*, 303 F.Supp.2d at 376 ("Burgess is the Chairman of the Board of University...Noble asserts that [plaintiff] reported to Burgess and that Burgess retained supervisory, hiring, and firing powers over the employees at University's stores. Under the economic realities test, it is therefore inappropriate to dismiss Burgess as a defendant in Noble's Section 740 claim.")

Additionally, defendants' motion to dismiss plaintiff's second cause of action for a violation of Labor Law § 741 as against Dr. Scheinerman individually on the ground that he was not plaintiff's "employer" under the statute is denied. It is well-established that both an

"employer" and an employer's "agent" can be held liable for alleged unlawful retaliation under Labor Law § 741. *See Sulieman v. Roswell Park Cancer Institute*, 2008 WL 2690278 *15 (W.D.N.Y. 2008), which states as follows:

> Regardless of the literal scope of the term 'employer" as used in § 741, the legislative history of § 741 supports a finding that agents and supervisors were intended by the New York Legislature to be held liable in such whistle blowers actions. *See, e.g.*, N.Y. Legis. Serv. Governor's Bill Jacket, 2002 A.B. 9454, ch. 24 (Westlaw) (Summary of Provisions-providing '[e]ffective immediately upon enactment, this bill [§ 741]...expands the definition of employer to include employer's agents'...and Memorandum to James M. McGuire, Counsel to the Governor, from Dennis P. Whalen, Executive Deputy Commissioner of New York Department of Health-stating '[t]his "whistleblowers protection bill" would provide health care services [to] employees with explicit statutory protections against retaliation by employers or *supervisors* for identifying and reporting "improper quality of patient care" to any public body.'

Indeed, in addition to its definition of "employer," § 741 defines an "agent" as "any *individual*, partnership, association, corporation, or group of persons acting on behalf of an employer" (emphasis added). Labor Law § 741(1)(c).

Here, defendants' motion to dismiss the second cause of action for a violation of Labor Law § 741 as against Dr. Scheinerman individually is denied as they have failed to establish, as a matter of law, that Dr. Scheinerman was not plaintiff's employer's "agent" under the statute. The complaint alleges that Dr. Scheinerman was the Chairman of the Department, that he had supervisory control over plaintiff in that he was the one responsible for terminating the plaintiff and keeping the plaintiff from accessing his personal property. Thus, the court finds that plaintiff has sufficiently alleged that Dr. Scheinerman is the Hospital's agent for purposes of the statute.

Further, defendants' motion to dismiss plaintiff's fifth and sixth causes of action for conversion and the seventh cause of action for trespass to chattel as against Dr. Scheinerman individually on the ground that they fail to state a claim is denied. "The rule is clear that, to establish a cause of action in conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question...to the exclusion of the plaintiff's rights." *Fiorenti v. Central Emergency Physicians*, 305 A.D.2d 453, 454 (2d Dept 2003), citing *Independence Discount Corp. v. Bressner*, 47 A.D.2d 756, 757 (2d Dept 1975); *see also Fitzpatrick House III, LLC v. Neighborhood Youth & Family Servs.*, 55 A.D.3d 664 (2d Dept 2008). To hold a corporate employee liable for conversion, a plaintiff need only allege that the individual participated in the actual conversion. *See Ingram v. Machel & Jr. Auto Repair, Inc.*, 148 A.D.2d 324 (1st Dept 1989). Additionally, in order to state a claim for trespass to chattel, a plaintiff must allege that the defendant "intentionally, and without justification or consent, physically interfered with the use and enjoyment of personal property in [the plaintiff's] possession, and that [the plaintiff] was harmed thereby." *Sch. of Visual Arts v. Kuprewicz*, 3 Misc.3d 278, 281 (Sup. Ct. N.Y. County 2003). Essential to pleading a cause of action for trespass to chattel is the allegation that there was "harm to the condition, quality or material value of the chattels at issue." *J. Doe No. 1 v. CBS Broadcasting Inc.*, 24 A.D.3d 215 (1st Dept 2005). However, in the computer and database context, "evidence of mere possessory interference is sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels." *Register.com, Inc. v. Verio, Inc.*, 126 F.Supp.2d 238, 250 (S.D.N.Y. 2000).

Here, the court finds that the complaint sufficiently states a claim against Dr.

Scheinerman individually for conversion and trespass to chattel. Specifically, the complaint alleges that plaintiff owned the computers and property at issue; that "Dr. Scheinerman [kept] Dr. Ruiz's personal computers, violating Dr. Ruiz's privacy by looking at their contents, and by refusing to give the property back to Plaintiff for two months, all for the purpose of punishing Plaintiff"; that when plaintiff "sought to retrieve his Personal Computers, he was denied permission at the instructions of Dr. Scheinerman"; and that "Defendants[] refus[ed] to immediately forward Dr. Ruiz['s] email correspondence."

Finally, the court turns to defendants' motion for an Order pursuant to CPLR § 3001 declaring that Dr. Ruiz has no entitlement to severance payments and/or severance benefits pursuant to Section III of the Contract and finds that it must be denied as procedurally improper. Defendants cannot move for a declaratory judgment without first asserting a counterclaim for such relief and then moving for summary judgment on that counterclaim. *See Van Deventer v. CS SCF Mgmt. Ltd.*, 2006 WL 6157483 (Sup. Ct. N.Y. County 2006), *aff'd*, 47 A.D.3d 503 (1st Dept 2008).

However, to the extent defendants move to dismiss plaintiff's eighth cause of action for a declaratory judgment that he is entitled to the severance package set forth in the Contract, without executing a general release, on the ground that it fails to state a claim, such motion is granted. It is undisputed that pursuant to the Contract, Dr. Ruiz was required to sign a general release, which would release defendants from any and all claims, as a condition precedent to receiving his severance package. Specifically, the Contract provides, in pertinent part, as follows:

> All Severance Payments and Severance Benefits are subject to your execution and delivery of a comprehensive general release to the

> Hospital and NSLIJ, which release shall be satisfactory to them in form and substance, and which shall specifically exclude the Severance Payments and Severance Benefits hereunder.

As it is undisputed that plaintiff has not signed a general release, this court finds, as a matter of law, that he is not entitled to the severance package pursuant to the Contract and thus, his eighth cause of action must be dismissed.

Plaintiff's assertion that there is an issue of fact as to whether he is entitled to the severance package based on defendants' misconduct, which excuses him from complying with the Contract's requirement that he execute a general release, is without merit. The entire purpose of the Contract's general release requirement is that plaintiff may only receive the severance package at issue if he agrees not to bring a lawsuit against defendants for any such misconduct. Interpreting the provision any other way would defeat the purpose of the condition precedent to which the parties agreed when they entered into the Contract.

Accordingly, defendants' motion to dismiss the complaint is granted solely to the extent described herein. This constitutes the decision and order of the court.

Dated: 4/1/16

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.