

Zdanowitz v Queens-Long Is. Med. Group, P.C.

2022 NY Slip Op 32050(U)

July 1, 2022

Supreme Court, New York County

Docket Number: Index No. 159574/2017

Judge: Sabrina Kraus

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

JOEL ZDANOWITZ

Plaintiff,

- v -

QUEENS-LONG ISLAND MEDICAL GROUP, P.C. D/B/A
ADVANTAGECARE PHYSICIANS, P.C.,

Defendant.

-----X

INDEX NO. 159574/2017

MOTION DATE 10/18/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

Plaintiff is a doctor who was employed for a few years by defendant on a part time basis. Plaintiff was fired y defendant in August 2015. Plaintiff commenced this action asserting age discrimination and seeking damages under the New York City Human Rights Law and for breach of contract.

PENDING MOTION

On May 20, 2021, defendant moved for summary judgment and dismissal of this action. On October 18, 2021, the court (Kelly, J) heard oral argument and reserved decision.

The action was subsequently reassigned to this court.

The motion is granted to the extent set forth below.

ALLEGED FACTS

Defendant Queens Long Island Medical Group d/b/a Advantage Care Physicians, P.C. (ACP) is a physician practice with multiple facilities throughout the New York metropolitan area. In late 2012, ACP acquired several medical practice groups in Brooklyn, Manhattan, Staten Island, and Queens and Long Island. One of those medical practice groups was Queens-Long Island Medical Group (QLIMG) which had an office in Forest Hills, New York. The medical practice groups formed City Care Physicians, which in 2013 began to do business under the name of ACP.

Plaintiff began his employment with QLIMG in Forest Hills pursuant to an employment agreement signed on February 9, 2011. Pursuant to the 2011 Employment Agreement, Plaintiff agreed to render professional services in the specialty of Hematology-Oncology on a part-time basis for up to nineteen hours per week. Under the agreement, Plaintiff was to be reimbursed for his services at a rate of \$130 per clinical session hour, which included “all office work...” and office procedures performed in QLIMG’s medical offices.

QLIMG scheduled Plaintiff to work 19 hours a week, but Plaintiff asserts he worked approximately 33 hours per week. Plaintiff’s schedule was Tuesday and Wednesday from 8:30 a.m. to 4:30 p.m. and Friday from 9:00 a.m. to 12:00 p.m., during which he saw patients that QLIMG scheduled for him, and he also saw patients for two to three hours per day outside of his schedule. Plaintiff asserts he performed a variety of job duties aside from seeing patients outside of his schedule including reviewing laboratory results, imaging results, CAT scans, MRIs, and PET scans, taking notes of patient encounters, inputting chemotherapy orders, returning patient phone calls, and obtaining pre-authorizations for drugs, which he did at his office. Because QLIMG scheduled Plaintiff’s patients during his official schedule, Plaintiff alleges he performed

his office work outside of his official hours. Plaintiff advised Dr. Carlos Hleap, QLIMG's CEO, that he worked between 30-33 hours each week at the office. During Plaintiff's employment, QLIMG created time sheets reflecting the number of patients he saw during his official schedule.

Defendant alleges the only records Plaintiff has produced to date documenting his hours show only nineteen hours worked in a given week.

On December 10, 2012, at the age of 61, Plaintiff entered into a part-time physician agreement with City Care Physicians, which ultimately became ACP, pursuant to which Plaintiff was engaged as a part-time physician with the same specialty.

Under the 2012 Employment Agreement, Plaintiff was entitled to a one-time "pro-rata recruitment incentive payment based upon seventy thousand dollars (\$70,000.00), as set forth herein, payable in three installments" in January, March, and July of 2013. Plaintiff received half said amount. Defendant alleges that as a part-time physician working only twenty hours per week, that's all Plaintiff was entitled to under the contract.

Under the 2012 Employment Agreement, Plaintiff was also eligible to participate in physician benefits, including personal time, sick days, and personal days, as long as he worked more than twenty hours per week.

At the end of 2013 or beginning of 2014, ACP offered Plaintiff the position of Associate Director of Hematology and Oncology, which would have been a full-time position. Plaintiff alleges he agreed to take the position and contacted Dr. Burgos to accept the position but that Dr. Burgos, never returned his call, and he never got the promotion. Defendant alleges Plaintiff declined the offer.

In July 2015, ACP instituted the Physician Non-Team Player project, which is described in a letter from Nicolle Comeforo (Comeforo), ACP's Director of Provider Relations, to Drs.

Burgos and Kernisant, ACP's Senior Vice President, President/Chief Medical Officer and Executive Director, Practice Operations respectively. Comeforo, ACP's Human Resources Business Partner wrote that she was "following up" regarding the "progress on the Physician Non-Team Player project" they were working on. She identified the doctors to be terminated: Drs. Brenner, Bartol, Daly, Zdanowitz, Persico, Lundie and Spanos.

On August 28, 2015, Tom Marino (Marino), ACP's Vice President of Operations for the Queens region, and Comeforo, ACP's Human Resources Business Partner, provided 60 days' written notice to Plaintiff that his employment would be terminated effective October 28, 2015. The letter did not give any reason for his termination. Marino testified, that the decision to eliminate Plaintiff's position was made by Dr. Lesly Kernisant, ACP's Executive Director, Practice Operations, Dr. Ali Ameri, ACP's chair of the Hematology/Oncology department, and Dr. Gilbert Burgos, ACP's Executive Director, Medical Management. Marino was also sometimes involved in position elimination of physicians; in that he would analyze operational efficiencies and evaluate physician productivity and the region's budget in connection with recommending a position to be eliminated.

In 2015, the Forest Hills office of ACP had two full-time and two part-time physicians in the Hematology/Oncology department. Defendant alleges that as part of a broader company initiative to review part-time positions, Marino recommended to Drs. Kernisant and Ameri that patient volume within the Hematology/Oncology department could be handled by one full-time physician rather than two part-time physicians. These doctors made the decision, in consultation with Dr. Burgos, to terminate both Plaintiff and another part-time physician, Dr. Jane Daly, who was 66 years old at the time she was fired. Plaintiff and Dr. Daly were replaced by Dr. Dhvani Thakker, a full-time physician who was 32 at the time she was hired.

In August 2015, Defendant terminated Dr. Shanta Bajaj. Dr. Bajaj was a full-time physician and was 71 at the time she was terminated. Dr. Zeitlin told Dr. Bajaj when terminating her that ACP “wanted to present a younger face.”

ACP terminated the physicians in the Physician Non-Team Player project around the time of Plaintiff’s termination. Between September 2015 and January 2016, five doctors were fired by ACP and with the exception of Dr. Bartol they were between the ages of 64 and 74.

Several physicians who are older than Plaintiff or within five years of his age remained employed at ACP as of January 2019 both at the Forest Hills location of ACP and within ACP’s Hematology/Oncology department. One part-time physician remained employed in ACP’s Hematology/Oncology department through 2019.

After Plaintiff was given notice of his termination in August 2015, he contacted Comeforo to ask about his paid time off (PTO) balances. Comeforo confirmed that he would be paid for accrued but unused PTO. ACP alleges its PTO policy provides that PTO is frontloaded in advance at the beginning of each calendar year, but employees accrue a pro-rated amount of their overall PTO entitlement each pay period, however this is not specified in the contract between the parties. Defendant alleges Plaintiff was entitled to accrue up to 100 hours of PTO, but acknowledges that through May 2015, Plaintiff had been accruing PTO at the same rate as full-time employees. Thereafter, ACP unilaterally reset Plaintiff’s 2015 potential accruals retroactive to January 2015.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman*

v. City of New York, 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). However, “[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez*, 68 NY2d at 324). “[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion” (*People v Grasso*, 50 AD3d 535,544 [1st Dept 2008]).

“On a motion for summary judgment, the court’s function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact” (*Martin v Citibank, N.A.*, 64 AD3d 477,478 [1st Dept 2009]; see also *Sheehan v Gong*, 2 AD3d 166,168 [1st Dept 2003] [“The court’s role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues”], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

The City Human Rights Law serves a broad remedial purpose and requires “an independently liberal construction in all instances.” *Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29, 34 (1st Dept. 2011). Because of its “uniquely broad and remedial purposes,” the NYCHRL is more protective of workers than other discrimination laws. *Id.*

In cases involving claims of employment discrimination there is a “need for caution about granting summary judgment to an employer in a discrimination case where ... the merits turn on a dispute as to the employer’s intent.” *Tolbert v. Smith*, 790 F.3d 427, 434 (2d Cir. 2015) (citation omitted). Nonetheless, “a plaintiff must provide more than conclusory allegations to resist a motion for summary judgment.” *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008). Ultimately, the test for summary judgment “is whether the evidence can reasonably support a verdict in plaintiff’s favor.” *James v. N.Y. Racing Ass’n*, 233 F.3d 149, 157 (2d Cir. 2000).

Hongmei Li v. Cushman & Wakefield, Inc., No. 16CV2484 (DLC), 2017 WL 1740440, at *3 (S.D.N.Y. May 3, 2017).

To defeat summary judgment, Plaintiff must first establish a *prima facie* case. “To meet this burden, plaintiff must show that (1) he is a member of a protected class; (2) he was qualified to hold the position; (3) he was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination.” *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012]. This burden is on the plaintiff at this stage is “*de minimus*.” *Bennett*, 92 AD3d 29, 38.

Plaintiff meets three elements of his *prima facie* case because he was 64 years at the time of his termination, was qualified to hold his position that he had held for 4 years without any performance concerns and was terminated. *Rollins v Fencers Club, Inc.*, 128 AD3d 401, 401 [1st Dept 2015]. Plaintiff satisfies the fourth prong because ACP replaced him with Dr. Thakker, who is 32 years younger than Plaintiff. *Hosking v Mem. Sloan-Kettering Cancer Ctr.*, 186 AD3d 58, 67 [1st Dept 2020]; *Sklaver v. Casso-Solar Corp.*, No. 02-CV-9928 (WCC), 2004 WL 1381264, at *6 (S.D.N.Y. May 15, 2004).

Additionally, Dr. Zeitlin’s comment to Dr. Bajaj, who was 71 years old at her termination, that ACP wanted to “present a younger face,” also supports an inference of discrimination. *Rollins*, 128 AD3d at 401. This comment “directly reflect[s] age-based discriminatory bias.” *Id.* at 402.¹

¹ Although this comment is arguably hearsay, a court may rely on hearsay “to deny a motion for summary judgment provided that this evidence does not form the sole basis for the Court’s determination.” *Wertheimer v New York Prop. Ins. Underwriting Ass’n*, 85 AD2d 540, 541 [1st Dept 1981]; *Bishop v Maurer*, 106 AD3d 622, 622 [1st Dept 2013].

ACP's arguments challenging the inference of discrimination are unavailing. First, it argues that the inference should be rejected because Dr. Kernisant supposedly made the decision to terminate Plaintiff, but Marino merely testified that the "final decision was probably made between Dr. Kernisant and [another doctor]." Marino also does not explain how he knew who made the final decision. Additionally, "the fact that the individual defendants were approximately the same age as the plaintiff does not render the cause of action insufficient." *Kassapian v City of New York*, 155 AD3d 851, 854 [2d Dept 2017] (citing *Rollins*, 128 AD3d at 402).

Second, ACP claims it could not have fired Plaintiff because of his age when it offered him a full-time position fewer than two years earlier, but Plaintiff alleges ACP withdrew that offer and declined to make it again when it terminated Plaintiff, even though it claims that it converted his position to full-time.

Because Plaintiff has established a *prima facie* case for disparate treatment based on age, Defendant must proffer a legitimate business reason for terminating Plaintiff. *Primmer v. CBS Studios, Inc.*, 667 F.Supp. 2d 248, 261 [SDNY 2009]. If Defendant can do so, Plaintiff must show that the reason is pretextual "by reliance on the evidence comprising the prima facie case, without more." *Id.* Under NYCHRL, Plaintiff needs to produce "pretext evidence (or otherwise), or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by discrimination." *Bennett*, 92 A.D.3d at 39. Plaintiff must only produce some evidence to suggest that one of Defendant's reasons is "false, misleading, or incomplete." *Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 201 [1st Dept 2015]. Evidence of pretext "should in almost every case indicate to the court that a motion for summary judgment must be denied." *Bennett*, 92 A.D.3d at 44. "This is because once a plaintiff introduces

pretext evidence, a host of determinations properly made only by a jury come into play, such as whether a false, misleading, or incomplete explanation constitutes evidence of consciousness of guilt, an attempt to cover up the alleged discriminatory conduct, or an improper discriminatory motive coexisting with other legitimate reasons.” *Cadet-Legros*, 135 AD3d 200 (internal quotations omitted).

The NYCHRL does not require a plaintiff at the pretext stage to provide evidence that the pretext was a coverup for discrimination. In *Bennett*, the First Department explicitly rejected the view that a plaintiff must show both that the defendant’s reason was false and that the reason was a pretext for discrimination. *Bennett*, 92 A.D.3d at 41-44.7 All a plaintiff must do to avoid summary judgment is show a reason is false, misleading, or incomplete. *Bennett*, 92 A.D.3d at 43. ACP claims it terminated Plaintiff for operational reasons, specifically that “two part-time Hematology/Oncology physicians could be replaced by one full-time physician.”

ACP stated it terminated Plaintiff because it decided in its business judgment that it would no longer have part-time hematology-oncology specialists. Comeforo, also claimed that ACP terminated all part-time employees around the time it fired Plaintiff. However, in 2015, ACP employed Dr. Shah, a part-time Hematologist/Oncologist who was 13 years younger than Plaintiff, and he worked until the end of 2019, four years after ACP terminated Plaintiff.

There is also documentary evidence that contradicts ACP’s purported reason for terminating Plaintiff. According to Marino, the only reason ACP terminated Plaintiff because it wanted to consolidate his and Dr. Daly’s part-time positions into a single full-time position. But Plaintiff was terminated as part of the “Physician Non-Team Player Project.” Indeed, Dr. Burgos criticized Comeforo for including Dr. Spanos, a full-time Hematologist/Oncologist, in the Physician Non-Team Player Project because Dr. Spanos was willing to “carry his share of the

load.” The implication is that the other doctors were not team players willing to carry their share of the load. There is no evidence that Plaintiff was not a team player. Plaintiff never received any negative performance reviews or performance improvement plans. Nor does ACP provide any evidence that Plaintiff was unwilling to do his job. The Physician Non-Team Player Project, which appeared to focus on poor performance by employees, cuts against Marino’s testimony that ACP terminated Plaintiff solely because it eliminated his position. That ACP included different types of physicians in the Physician Non-Team Player Project also reflects that the Project was about more than eliminating two part-time Hematologist/Oncologists at one of ACP’s locations. As noted earlier, the Project included part-time and full-time physicians, General Surgeons, Hematologist/Oncologists, and Podiatrists, and physicians who had performance problems and those who did not.

ACP also provides no contemporaneous evidence to support that it eliminated Plaintiff’s position for financial reasons. ACP did not even submit an affidavit or sworn testimony from the supposed decisionmakers. Instead, ACP relies entirely on Marino who merely testified about recommendations he gave based on unspecified data and hearsay conversations he supposedly had with decisionmakers. These conversations are hearsay since they are provided for the truth of the matter asserted, namely that Drs. Kernisant and Ameri decided to terminate Plaintiff. They are therefore inadmissible to support a summary judgment motion. *Peckman v Mut. Life Ins. Co. of New York*, 125 AD2d 244, 247 [1st Dept 1986].

Additionally, there is no contemporaneous evidence that ACP terminated Plaintiff because it wished to convert his part-time position to a full-time position. There are no reports, emails, memos, text messages or any other written evidence discussing eliminating Plaintiff’s position aside from the email referring to the Physician Non-Team Player Project, which does

not mention why Plaintiff's job was being eliminated. The lack of documentation establishes pretext. *Lake v Town of Southold*, 189 AD3d 1588, 1593 [2d Dept 2020]; *Lyman v New York and Presbyt. Hosp.*, 30 AD Cases 1113 [SDNY July 14, 2014]; *Flores v Buy Buy Baby, Inc.*, 118 F Supp 2d 425, 431 [SDNY 2000]; *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 39 (2d Cir. 1994). It is reasonable to assume that a medical provider as large as ACP would maintain a paper trail when it terminates multiple employees at once.

A finding of pretext is further warranted because ACP never offered the full-time position to Plaintiff or Dr. Daly. Instead it hired Dr. Thakker who was half Plaintiff's age. There are disputed questions of fact on this point. ACP provides no explanation for why it did not offer Plaintiff the full-time position even though he was qualified for the position. ACP alleges it had offered it to him a few years earlier, and Plaintiff had declined the position at that time. Plaintiff alleges he had accepted the position, but that ACP never followed through.

In *Hongmei Li v Cushman & Wakefield, Inc.*, 2017 WL 1740440 [SDNY May 3, 2017], the plaintiff brought an age discrimination claim under the NYCHRL because she was terminated. The defendant argued that it had a legitimate reason for terminating plaintiff because it had converted her position to a junior position; and after a reorganization, it did not have sufficient work for both the plaintiff and a coworker performing the same job duties. The court denied summary judgment because the defendant had failed to explain why it did not permit the plaintiff to take the junior job; and why it terminated the plaintiff instead of another employee. *Id.* ACP's alleged failure to offer Plaintiff the full-time position is even more relevant given ACP's acknowledged policy of to offer full-time positions to part-time physicians when eliminating their positions. ACP's alleged to follow its own policies supports pretext. *Sklaver v Casso-Solar Corp.*, 02-CV-9928 (WCC), 2004 WL 1381264, at *9 [SDNY May 15, 2004].

Based on the foregoing, Defendant's motion for summary judgment as to the discrimination claim is denied. While Defendant has articulated non-discriminatory reasons for Plaintiff's termination, Plaintiff has presented sufficient evidence to require a jury to determine whether Defendant acted with discriminatory intent.

***Plaintiff's Claim for Alleged Violations Of New York Labor Law
Must Be Dismissed Because §§ 191 And 193 Do Not Apply to This Action***

Plaintiff claims that Defendant violated the NYLL "including § 193" by "failing to pay" Plaintiff wages and paid time off. The only NYLL Plaintiff references in his complaint are Sections 190 (1), 193, and 198. However, as Section 193 covers "deductions" and not wholesale failure to pay wages, that statute does not apply to Plaintiff's case.

Under Section 193, "[n]o employer shall make any deduction from the wages of an employee, except deductions which . . . are expressly authorized in writing by the employee and are for the benefit of the employee." NYLL § 193. Liability under Section 193 is not triggered where an employer fails to pay an employee all the wages he has earned, rather, it merely restricts "deductions" from wages. *Id.* This is because "New York Courts recognize that the purpose of Section 193 is to 'place the risk of loss for such things as damages or spoiled merchandise on the employer rather than the employee.'" *Goldberg v. Jacquet*, 667 Fed. App'x 313, 314 (2d Cir. 2016) (*quoting Gold v. Am. Med. Alert Corp.*, No. 14 Civ. 5485, 2015 WL 4887525 at *5 (S.D.N.Y. Aug. 17, 2015)). Further, New York state and federal courts have uniformly agreed that "a wholesale withholding of payment is not a 'deduction' within the meaning of Labor Law § 193." *Perella Weinberg Partners LLC v. Kramer*, 153 A.D.3d 443, 449 (1st Dep't 2017); *see also Kolchins v. Evolution Mkts, Inc.*, 182 A.D.3d 408, 409 (1st Dep't 2020); *Goldberg*, 667 Fed. App'x at 314; *Gold*, 2015 WL 4887525, at *5. As the Second Circuit explained in *Goldberg*:

In order to state a claim for a violation of NYLL § 193, a plaintiff must allege a specific deduction from wages and not merely a failure to pay wages. A ‘deduction’ is more targeted and direct than the wholesale withholding of wages and New York courts recognize that the purpose of section 193 is to place the risk of loss for such things as damaged or spoiled merchandise on the employer rather than the employee.

667 Fed. Appx. at 314.

Plaintiff’s complaint and his testimony describe that while he was only contracted to work for nineteen hours under his contract with QLIMG effective between February 2011 and December 2012, he regularly worked approximately 33 hours and he was never paid for that time, as well as that he did not receive payment for certain paid time off he claims he was owed. These claims do not amount to a deduction of wages. Such an alleged failure to pay is not akin to deductions for insurance premiums, gym memberships, tuition, or day care, and it was not intended to offset a “loss [due to] such things as damaged or spoiled merchandise.” *Goldberg*, 667 Fed. Appx. at 314. Regardless of whether Plaintiff received payments to which he was entitled, his wages were not reduced in the manner prohibited by Section 193. Accordingly, Plaintiff does not have a legally viable claim under Section 193.

Further, to the extent that Plaintiff’s claim could be read as pleading a violation of NYLL § 191, that section also does not apply to this case because it excludes from its ambit clerical workers or other workers employed in a “professional capacity” who make more than \$900 a week.

Article 6 of the New York Labor Law is the source for regulation of the payment of wages by employers to employees. Section 190 of the Labor Law sets forth definitions that apply specifically and exclusively to Article 6. Section 190(2) defines “employee” as “any person employed for hire by an employer in any employment,” and Section 190(3) defines “employer” to “include[d] any person, corporation, limited liability company, or association employing any

individual in any occupation, industry, trade, business or service.” Section 190 then defines four specific subcategories of employees, including “clerical or other worker” to which the provisions of Article 6 apply. NYLL § 190(4)-(7).

Section 191, titled “Frequency of payments,” states that “[e]very employer shall pay wages in accordance with the following provisions,” and then lists the requirements for paying manual workers, railroad workers, commission salespersons, and clerical or other workers. NYLL § 191. Section 191 thus provides that only the four enumerated subcategories of employees – manual workers, railroad workers, commission salesman, and clerical and other workers – are able to assert a cause of action under Section 191. *Id.* Of these, the only category that potentially could be applicable to Plaintiff is “clerical and other worker.” However, Section 190(7) defines “clerical or other worker” as all employees who do not classify as manual workers, railroad workers, or commissioned salesman, except “any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars a week.” NYLL § 190(7).

Courts in the First Department have repeatedly affirmed dismissal of Section 191 claims by professional employees whose earnings exceed the weekly salary threshold. See eg *Rifkinson-Mann v. Kasoff*, 266 A.D.2d 517, 518 (2d Dep’t 1996); *Eden v. St. Luke’s Roosevelt Hosp. Cent.*, 96 A.D.3d 614, 615 (1st Dep’t 2012). Plaintiff fits within the professional exemption, and his earnings even at 19 hours a week place him high above the \$900 per week threshold provided for by Section 191. Accordingly, Plaintiff cannot maintain a claim under Section 191.

Because Section 198 sets forth remedies only after showing a violations of Sections 191 and 193 and neither of those sections are relevant here, Plaintiff’s NYLL claims must be dismissed. “It is settled that section 198 does not ‘permit recovery . . . on a common-law

contractual remuneration claim’ as the recovery of attorney’s fees and liquidated damages is ‘limited to actions for wage claims founded on the substantive provisions of Labor Law article 6.’” Gold, 2015 WL 4887525, at *2 (quoting *Gottlieb v. Kenneth D. Laub & Co.*, 82 N.Y.2d 457, 464- 65 (1993)).

Therefore, Plaintiff is not entitled to Section 198’s liquidated damage and attorneys’ fees remedies because he can not show that Defendant violated the substantive provisions of Section 191 or Section 193. *Id.*

Plaintiff is also not entitled to relief under Section 198 for the additional reason that NYLL § 198-c(1), which requires an “employer who is party to an agreement to pay or provide benefits or wage supplements [including vacation pay])... to provide such benefits or furnish such supplements,” does not apply to any person in a bona fide professional capacity whose earnings are in excess \$900 a week. *See Naderi v. N. Shore-Long Island Jewish Health Sys.*, 135 A.D.3d 619, 620 (1st Dep’t 2016).

Plaintiff argues that the Court of Appeals’ decision in *Gottlieb v. Kenneth D. Laub & Co., Inc.*, 82 N.Y.2d 457 (1993), which held that Section 198 does not provide its own right of action, is no longer controlling. However, the First Department has continued to follow *Gottlieb* since the Unpaid Wages Prohibition Act of 1997 was enacted, despite the additional language that Act added to Section 198. *See, e.g., Zito v. Fischbein, Badillo, Wagner & Harding*, 35 A.D.3d 306, 307 (1st Dep’t 2006); *De La Cruz v. Caddell Dry Dock & Repair Co.*, 22 A.D.3d 404, 406 (1st Dep’t 2005) Accordingly, Section 198 does not provide a cause of action that is not premised on another provision of Article 6.

As Plaintiff does not have a legally viable claim under either Section 191 or Section 193, he is not entitled to the remedies under Section 198.

Plaintiff's Claim for Breach of Contract Must Be Dismissed Because ACP Did Not Breach Any Contract to Provide Wages or a Recruitment Incentive

To prevail on a breach of contract action, a plaintiff must establish the existence of a valid contract, his performance of his obligations under the contract, and a defendant's breach and resulting damages. *Morris v. 702 East Fifth St. HDFC*, 46 A.D.3d 478, 479 (1st Dep't 2007).

Plaintiff claims that he is owed compensation for the difference between the nineteen hours per week dictated by his 2011 Employment Contract with ACP, and thirty-three hours per week he claims he regularly worked for 92 weeks. There is no evidence in the record, beyond Plaintiff's testimony, that he was not paid for that time. Plaintiff testified that he told Dr. Hleap, the then-CEO of QLIMG, that he regularly worked thirty-three hours, rather than the nineteen for which he was scheduled. He also admitted that he never told Dr. Hleap, or anyone at ACP for that matter, that he had not been paid for working that additional time. There is no other evidence in the record that Plaintiff consistently worked thirty-three hours per week beyond this communication with Dr. Hleap. Plaintiff's timesheets produced from that time period show that he was only logging nineteen hours worked per week. Plaintiff does not provide any explanation as to why he would have worked so many hours for so many years without asking for payment for same.

Further, Plaintiff contracted specifically to provide services for up to nineteen hours in his 2011 Employment Agreement and there is no indication that ACP would compensate for more hours if he unilaterally decided to work more hours. This is not a case involving unpaid overtime, for example, where statutory requirements provide for payment for overtime premiums to be paid if worked, even if not authorized. Here, ACP and Plaintiff expressly entered into an agreement engaging Plaintiff to work for up to nineteen hours per week and obligating ACP to pay for up to nineteen hours per week. Without more, Plaintiff cannot meet his burden to show

that ACP breached the 2011 Employment Contract with respect to his compensation and this part of his breach of contract claim must be dismissed.

Despite never once raising the issue while he was employed at ACP, Plaintiff claims he was owed half of a \$70,000 recruitment incentive provided for in his 2012 Employment Agreement. Plaintiff's 2012 Employment Agreement clearly states not that Plaintiff is entitled to \$70,000 but that he was entitled to a "pro-rata recruitment incentive payment based upon seventy thousand dollars." The plain language interpretation of this section of the contract is that Plaintiff's incentive would be reduced to a *pro-rata* amount based on his part-time status, and he was only entitled to \$35,000. As Plaintiff admitted in his deposition that he received \$35,000, there is no issue of material fact for trial as to this portion of his breach of contract claim and it is dismissed.

Defendant's Motion to Dismiss Plaintiff's PTO Claims Is Denied As There are Material Questions of Fact to be Determined at Trial

Plaintiff alleges that his part-time physician contract, the 2012 Employment Contract, entitled him the same benefits as a full-time physician. The only section of the contract that addresses vacation, or sick/personal days provides that a physician is eligible for physician benefits as long as he works more than 20 hours a week, "is otherwise eligible and desires to be covered". It also clearly provides that the benefits are subject to "coverage and terms and conditions as PC shall determine from time to time." Nowhere does the agreement address the specific amount of PTO days a part-time physician can accrue.

ACP allowed Plaintiff to accrue 200 PTO hours each year until the middle of 2015 when it unilaterally reduced those hours to 100 purportedly because he was a part-time physician. Then it only paid him for a portion of the hours Plaintiff alleges it owed him. ACP acknowledges its records regarding PTO were inaccurate leading to the alleged overpayment through 2015.

As the employment contract was not specific in regards to the amount of PTO Defendant was entitled to and as Plaintiff was given the same PTO as full time physicians through at least 2015 there is a question of fact as to the PTO Plaintiff is entitled under the term of the contract which are ambiguous in this regard.

Moreover, Plaintiff argues that even if his PTO was appropriately reduced *pro rata*, he is still entitled to additional payment for same. Plaintiff alleges that in 2015 when ACP reduced Plaintiff's PTO entitlement from 200 hours annually to 100, it neglected to modify his PTO usage from 2014 and therefore improperly deducted an extra 12 hours of PTO that Plaintiff did not use. ACP then improperly paid Plaintiff for only 26.85 hours, even though he had accrued 48.51 hours when ACP terminated him. ACP therefore owes Plaintiff, at a minimum, for 21.66 PTO hours.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that Defendant's motion for summary judgment is granted to the extent of dismissing Plaintiff's Second Cause of Action in its entirety, and the breach of contract claims in the third cause of action for earned wages and incentive payments; and it is further

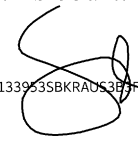
ORDERED that the balance of the motion is denied; and it is further

ORDERED that, within 20 days from entry of this order, Defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this constitutes the decision and order of this court.



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7/1/2022

DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE