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

**PRESENT:** **HON. VERNA L. SAUNDERS, JSC** **PART** **36M**
*Justice*

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MARC KUSHNER,
Plaintiff,

- v -

CARTER LEDYARD & MILBURN LLP,
Defendant.

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**INDEX NO.** 654432/2021

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11 were read on this motion to/for **DISMISS**.

In July 2021, plaintiff Marc Kushner commenced this action by summons and complaint against his former employer, defendant Carter Ledyard & Milburn LLP (CLM), alleging that his one-year contract automatically renewed and was in effect when defendant reduced his base salary and failed to abide by the termination provision, requiring that termination be "for cause" and upon 60 days' notice. The four-count verified complaint asserts causes of action for: (1) breach of contract; (2) violation of Labor Law § 193; (3) defamation; and (4) violation of Labor Law § 198 (NYSCEF Doc. Nos. 1-2, *summons and complaint*).

CLM moves to dismiss the complaint pursuant to CPLR 3211(a)(7) (NYSCEF Doc. No. 4, *notice of motion*).

As an initial matter, this court shall only address the breach of contract claim because plaintiff, in opposition to the instant motion, withdraws the third and fourth causes of action. Plaintiff explains that his damages, under the third cause of action for defamation, are due to be reimbursed, as withdraws this claim as moot. Plaintiff withdraws the fourth cause of action for violation of Labor Law § 198 after "due considerations of the authorities cited by defendant" (NYSCEF Doc. No. 10, plaintiff's brief in opposition at 7-8). As concerns the second cause of action for violation of Labor Law § 193, by stipulation dated May 31, 2022, the parties have discontinued it with prejudice (NYSCEF Doc. No. 12, *stipulation of discontinuance*). Accordingly, CLM's motion to dismiss is granted to the extent of dismissing the second, third and fourth causes of action.

By "Admission Agreement," dated February 1, 2017 ("2017 Agreement"), defendant agreed to engage plaintiff as a "Special Partner of the Firm and chair of the Firm's Tax department . . . for a term ending March 31, 2018 ('Ending Date')" (NYSCEF Doc. No. 7 ¶ 1, *2017 Agreement*; 2 ¶ 7, *complaint*). In pertinent part, the 2017 Agreement provides as follows:

> "If the Firm wishes to enter into a further agreement with the New Partner, it shall propose terms and conditions at least sixty (60) days before the Ending Date. In December 2017 the Firm's Executive Committee will determine, in its sole discretion, whether

> it will recommend to the Firm's Equity Partners that they should elect him an Equity Partner in the Firm. If no further agreement is reached between the New Partner and the Firm concerning the New Partner's relationship to the Firm, as of the Ending Date the New Partner shall cease to be a Partner of the Firm" (2017 Agreement, ¶ 1; *see* complaint, ¶¶ 9, 10).

In other pertinent part, the 2017 Agreement provides for a base salary of $25,000.00 per month in addition to twenty-five (25%) percent of all fee collections that plaintiff originates (2017 Agreement, ¶ 2 [b]; *see* complaint, ¶¶ 7, 18). The 2017 Agreement also states that defendant may terminate the agreement for cause and upon sixty (60) days' notice (2017 Agreement, ¶ 6 [a]; *see* complaint, ¶ 24).

The agreement does not contain an integration clause or any language requiring that changes be made in writing (*see generally* 2017 Agreement; complaint, ¶¶ 26, 27).

Allegedly on February 25, 2018, 34 days before the "Ending Date" on March 31, 2018, a member of defendant's Executive Committee e-mailed plaintiff with proposed new contract terms ("First Extension Proposal"), which were substantially different from the 2017 Agreement (complaint, ¶ 12). Plaintiff states that he did not sign the First Extension Proposal and that defendant did not bring up the proposal again (*id.*). Plaintiff alleges that, after March 31, 2018, the parties continued to abide by the terms of the 2017 Agreement for an additional one-year term, with defendant continuing to identify him as a partner and chair of its tax department (*id.*, ¶ 13).

On March 21, 2019, ten days before the expiration of the purported second one-year term, a member of CLM's Executive Committee allegedly e-mailed plaintiff with proposed changes to his contract ("Second Extension Proposal") (*id.*, ¶ 14). Plaintiff avers that he did not sign the Second Extension Proposal and that defendant made no further inquiries on the subject (*id.*, ¶ 15). Plaintiff further alleges that he continued in his position as a partner and chair of defendant's tax department, with both sides adhering to the terms of the 2017 Agreement (*id.*, ¶ 16).

On January 15, 2020, plaintiff alleges that defendant paid him a bi-monthly base salary of $10,000.00, thereby, unilaterally reducing his monthly base salary from $25,000.00 to $20,000.00, in breach of the 2017 Agreement (*id.*, ¶ 17).

Plaintiff alleges that the final day of the third year-long term, March 31, 2020, "passed without either party giving notice of termination or objecting to their respective continued performance thereunder" (*id.*, ¶ 19). Plaintiff avers that he continued to be identified as a partner and chair of defendant's tax department until April 13, 2020, when CLM informed him, by e-mail, that his base salary would be eliminated as of April 16, 2020 (*id.*, ¶ 21), and that he would "not have to function as a service tax partner and instead [would] be expected to focus on [his] own practice" (*id.*, ¶ 23). According to plaintiff, he was not given any cause, as defined in the 2017 Agreement, with the e-mail "citing only the coronavirus pandemic's adverse impact upon . . . CLM's finances" (*id.*, ¶ 21).

Defendant argues that because the agreement was for a specific term and provided a procedure to be followed in the event the parties wished to enter further agreement, the lack of an oral or written agreement to extend the 2017 Agreement, means that it expired as a matter of law on March 31, 2018. In addition, defendant argues that, even assuming the 2017 Agreement was capable of renewal by the parties' continued adherence to its terms, no such adherence is pleaded. It points to the allegations that CLM reduced plaintiff's base salary in January 2020 and eliminated his base salary and changed his role in April 2020, and argues that such conduct negates any implied intent to renew the 2017 Agreement.

Plaintiff responds that the common-law rule, which presumes that an employment contract for a specific term automatically renews for a one-year term when the employee continues in his position at the end of the term, applies here. Plaintiff argues that while more recent cases rarely apply this presumption, this is because modern employment contracts contain language that expressly rebuts the presumption, contain integration clauses, and require that changes be in writing. Plaintiff contends that, because the 2017 Agreement contains no such language, the common-law presumption is operative, and the 2017 Agreement renewed for three successive one-year terms. Plaintiff also argues that defendant's intent to renew the 2017 Agreement is demonstrated through the facts that the firm retained plaintiff in his position as a partner and the chair of its tax department and only proposed new terms shortly before the expiration of the renewed one-year terms. Lastly, plaintiff argues that defendant may not use its breaches of the 2017 Agreement as evidence of its termination.

Where an employment agreement is for a definite term, upon expiration of that term, should the employee remain with the employer on the same terms, the common law recognizes a presumption that the parties intend to renew the contract and a one-year agreement to continue under the same terms is implied. (*see Goldman v White Plains Ctr. for Nursing Care, LLC*, 11 NY3d 173, 177 [2008]; *Perlick v Tahari, Ltd.*, 293 AD2d 275, 276 [1st Dept 2002].) However, "the common-law rule cannot be used to imply that there was mutual and silent assent to automatic contract renewal when an agreement imposes an express obligation on the parties to enter into a new contract to extend the term of employment" (*Goldman*, 11 NY3d at 178). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012] [internal quotation marks and citation omitted].)

Here, the common-law presumption is operative. The 2017 Agreement is for a definite term, "ending March 31, 2018" (2017 Agreement, ¶ 1). Thus, unless the parties expressed a contrary intention, their continued performance would have created an implied contract on the same terms for successive one-year terms. (*see Goldman*, 11 NY3d at 177; *Perlick*, 293 AD2d at 276). Defendant does not point to anything in the 2017 Agreement that rebuts this presumption. While the 2017 Agreement partially provides for a process to extend the relationship, stating that "[i]f the Firm wishes to enter into a further agreement . . . it shall propose terms and conditions at least sixty (60) days before the Ending Date" (2017 Agreement, ¶ 1), it does not provide for what happens in the event that the firm fails to do so. Likewise, while it states that, "[i]f no further agreement is reached . . . concerning [plaintiff's] relationship to the Firm," plaintiff "shall cease to be a Partner of the Firm" as of the ending date, it does not state how "further agreement" is to

be reached or what form it should take (*id.*). Moreover, the 2017 Agreement does not: provide that all obligations between the parties are at an end upon the expiration of the initial term; contain an integration clause; and/or require that all changes be made in writing.

Generally, in cases holding that automatic renewal may not be implied, such language is present. For example, in *Goldman*, the court held that the common-law presumption was rebutted "where the employer and employee agree[d] that the contract memorializes their understanding, [could] be modified only in writing and expire[d] on a specified date absent additional negotiations for a new agreement" (11 NY3d at 178). The contract in that case also provided that, upon expiration, "the employer would have no further obligations to plaintiff other than compensating her for accrued salary and benefits" (*id.* at 177). Likewise, in *Holahan v 488 Performance Group, Inc.*, the court held that the "breach of contract claim fail[ed] as a matter of law," because the employment agreement "unambiguously provided that any extension of the agreement needed to be in writing" and no such writing existed (140 AD3d 414, 414 [1st Dept 2016]; see *A Great Choice Lawncare & Landscaping, LLC v Carlini*, 167 AD3d 1363, 1364-1365 [3d Dept 2018] [concluding that there was no contract to breach following the end date, where "the employment agreement ma(de) clear that its terms constitute(d) the entire contract, provide(d) for no renewals beyond the one-year renewal term and only permit(ed) modifications to the agreement, such as extending its provisions, if made in writing"]; *see also Wood v Long Is. Pipe Supply, Inc.*, 82 AD3d 1088, 1089 [2d Dept 2011] [finding that no employment agreement existed at the time of the plaintiff's termination, where the agreement "clearly expressed that the term of the plaintiff's employment was for five years [,] . . . that the written agreement completely encompassed the agreement between them" and that "any changes to the contract were required to be in writing"].) Here, unlike the cited cases, nothing on the face of the agreement unambiguously indicates that the parties understood that the 2017 Agreement would end unless there was an express renewal. Accordingly, the common-law presumption of an automatic one-year renewal is applicable (*see Goldman*, 11 NY3d at 178 [explaining that the application of the common-law presumption of automatic renewal was appropriate in cases where "its application did not contradict any express provision of the agreements"].)

Plaintiff sufficiently alleges that the 2017 Agreement renewed for two successive one-year terms, once on April 1, 2018, and again on April 1, 2019, by alleging that he continued in his position as a partner and chair of the firm's tax department, receiving the previously agreed upon compensation, until January 2020 (*see Perlick*, 293 AD2d at 276 [finding that the plaintiff's breach of contract claim was viable if the writing at issue "constituted an employment contract with a term of one year" as then plaintiff would have been employed for two one-year terms]). Therefore, plaintiff's allegation that—in January 2020, during the second renewal period—CLM unilaterally reduced his monthly base salary by $5,000.00, states a claim for breach of contract.

However, the downward adjustment to plaintiff's salary in January 2020 also negates any implied agreement to renew the 2017 Agreement for a third one-year term. No such renewal can be implied as of April 1, 2020. (*see Schiano v Marina, Inc.*, 103 AD3d 462, 463 [1st Dept 2013] [explaining that changes to the plaintiff's pay and responsibilities constituted "material changes," preventing automatic renewal of the employment agreement]; *Curren v Carbonic Sys., Inc.*, 58 AD3d 1104, 1108 [3d Dept 2009] [finding that salary increases "constituted changes in material

terms of the contract, further supporting the finding that the parties did not intend the contract to automatically renew"].) Upon the expiration of the second one-year term, on March 31, 2020, plaintiff became an at-will employee (*see Schiano*, 103 AD3d at 463). As of April 1, 2020, there was no contract in effect for defendant to breach. Therefore, plaintiff's allegation, that, in April 2020, defendant terminated the 2017 Agreement without sufficient notice and without cause, does not state a claim for breach of contract (*see id.* [explaining that once the plaintiff's employment became at-will, "her termination would not constitute a breach of contract"]; *see also Curren*, 58 AD3d at 1108-1109 [same]).

The court notes defendant's contention that the First and Second Extension Proposals demonstrate that CLM did not intend to adhere to the 2017 Agreement beyond its expiration (*see* NYSCEF Doc. No. 8, CLM's brief at 8 n 7). However, as CLM does not demonstrate that the parties deviated from the terms of the 2017 Agreement, it fails to rebut the presumption that the agreement was impliedly renewed. For the foregoing reasons, to the extent the first cause of action for breach of contract is premised on alleged breaches that occurred after April 1, 2020, the claim is dismissed. Accordingly, it is hereby

**ORDERED** that the motion to dismiss is granted to the extent of dismissing the first cause of action, to the extent it is based on breaches that occurred after April 1, 2020, and the second, third, and fourth causes of action of the complaint; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant; and it is further

**ORDERED** that defendant is directed to serve an answer to the complaint within twenty (20) days after service of a copy of this order with notice of entry; and it is further

**ORDERED** that counsel are directed to appear remotely for a preliminary status conference on March 15, 2023, details which shall be provided no later than March 13, 2023.

**January 6, 2023**

**HON. VERNA L. SAUNDERS, JSC**

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| **CHECK ONE:** | | **CASE DISPOSED** | | | X | **NON-FINAL DISPOSITION** | |
| | | **GRANTED** | | **DENIED** | X | **GRANTED IN PART** | **OTHER** |
| **APPLICATION:** | | **SETTLE ORDER** | | | | **SUBMIT ORDER** | |
| **CHECK IF APPROPRIATE:** | | **INCLUDES TRANSFER/REASSIGN** | | | | **FIDUCIARY APPOINTMENT** | **REFERENCE** |