SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** 34M
Justice

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DAMIAN NOTO,

Plaintiff,

- v -

PLANCK, LLC, DMEP CORPORATION, HAWKING LLC

Defendant.

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INDEX NO. 155149/2022

MOTION DATE 11/23/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for DISMISS.

In June 2022, plaintiff Damian Noto commenced this litigation against defendants Planck, LLC (d/b/a Patch Media), DMEP Corporation (d/b/a Hale Global), and Hawking LLC (d/b/a Market News International, or "MNI"), alleging that Patch Media (hereinafter, "Patch") and owners of Hale Global agreed, but failed, to pay him commissions and additional equity in MNI for his expertise in the media industry. Based on these allegations, plaintiff has asserted six causes of action: (1) breach of contract; (2) violation of unspecified Labor Law provisions; (3) retaliation under Labor Law §215; (4) retaliation under the New York State Human Rights Law ("NYSHRL"); (5) retaliation under the New York City Human Rights Law ("NYCHRL"); and (6) *quantum meruit*. In mot. seq. 001, each of these causes of action are the subject of defendants' motion to dismiss pursuant to, variously, CPLR 3211 (a) (5), and (a) (7). Plaintiff opposes the motion in its entirety. For the following reasons, defendants' motion is granted in part.

BACKGROUND

In 2014, plaintiff began working for Patch Media in accordance with an employment agreement signed by the plaintiff and Charles Hale, Patch's CEO and managing partner. (NYSCEF doc. no. 1 at ¶ 6, complaint; NYSCEF doc. no. 10, employment agreement.) The agreement provides for a base salary, a guaranteed bonus determined as a fixed percentage of said salary, and "10 fully vested Class C Unit(s) of equity in [Patch]." (NYSCEF doc. no. 10.) The agreement further describes plaintiff's employment as "at-will." (*Id.*)

According to plaintiff, after he began working for Patch, Charles Hale agreed to provide plaintiff with an additional 75 units of equity in the company, but Hale did not reduce this promise to a written document. (NYSCEF doc. no. 1 at ¶ 8.) In 2016, Warren St. John took over Hale's duties as Patch's CEO. Shortly thereafter, St. John sought plaintiff's expertise in increasing Patch's advertising revenue and agreed to pay plaintiff a ten-percent commission on

the gross revenue that Patch received from his "then existing and future sales and revenue partnerships he personally generated." (*Id.* at ¶9.) Plaintiff alleges that he accepted this proposal, but St. John and Patch refused to provide written confirmation of the oral agreement for the commissions and later failed to tender the commissions owed. (*Id.* at ¶¶10-11.) Later in 2016, former CEO Hale and his partner Bruce Hill, who together own Hale Global, approached plaintiff to "assist them in their efforts to turn around the financial performance of one of their operating companies, MNI." (*Id.* at ¶16.) They promised that in return for his work, plaintiff would receive a three percent equity interest in MNI. (*Id.*) Plaintiff accepted the offer, however neither Hale nor Hill nor Hale Global provided plaintiff with written confirmation of the agreement. According to plaintiff, when Hill was pressed, he told plaintiff something to the effect of "we will get you the agreement, but don't worry about it, even if I have to pay you out of my own pocket you will receive your equity in Market News." (*Id.* at ¶20.) Despite these assurances, plaintiff never received the equity interest in MNI. (*Id.*)

In 2018, Hale and Hill requested plaintiff assist Patch's outside counsel in investigating complaints of sexual harassment against St. John. (*Id.* at ¶37-38.) As part of the investigation, outside counsel interviewed plaintiff about the allegations. (*Id.*) According to the complaint, St. John learned of plaintiff's involvement and thereafter refused to provide the documentation plaintiff was seeking concerning the commissions agreement. Plaintiff brought the alleged retaliation to the attention of Abe Brewster and CEO Hale, but neither they nor Patch took further action.

On February 19, 2021, newly promoted Patch CEO Robert Cain gave plaintiff a negative performance review—this, allegedly just days after plaintiff sought to have Patch provide him with a written commission agreement. (*Id.* at ¶21.) Then, on March 12, 2021, Patch terminated plaintiff's employment. (*Id.* at ¶22.) Plaintiff asserts that Patch based his firing on his alleged failure to meet revenue generation expectations, but in reality, plaintiff recently generated a $10 million contract that would have required Patch to pay him a $500,000 commission the very day he was fired. (*Id.* at 23.)

As described *supra*, plaintiff asserts six causes of action over defendants' failure to: (1) provide the 75 units of equity in Patch that CEO Haleagreed to provide; (2) pay commissions owed as part of plaintiff's agreement to increase the company's advertising revenue; (3) give the three-percent equity interest in MNI; and (4) alleged unlawful termination. These causes of action include for breach of contract, violations of New York's Labor Law, retaliation, and *quantum meruit*. On this motion sequence, defendants move to dismiss each cause of action under CPLR 3211, which plaintiff entirely opposes. In its opposition, however, plaintiff submits a supplemental affidavit that asserts additional facts omitted from the complaint. The relevant allegations in the supplemental affidavit and supporting documentation are listed below:

(1) Under former CEO Rob Cain, Patch's Head of Finance Team sent a "Commission Plan" to plaintiff, which reflects Patch's attempt to increase plaintiffs' target advertising revenue. (NYSCEF doc. no. 17 at ¶¶3-4, Noto's Supplemental Affidavit.)
(2) The Commission Plan memorializes, or at least reflects, the 10% commission rate as part of his total compensation package. (*Id.* at ¶5; *see also* NYSCEF doc. no. 19, Commission Plan.)

(3) Plaintiff discussed St. John's pattern of retaliatory behavior with Charles Hale, including repeated yelling and interference with plaintiff's deals. (*Id.* at ¶9.)
(4) Patch and Hale intended for plaintiff to receive commissions from consummated deals after plaintiff's employment with Patch ended. (*Id.* at 19.)
(5) Bruce Hill sent emails requesting plaintiff send the signed documents for the 75 units of Class C equity. Plaintiff sent those documents in response, but Hill never signed them. (NYSCEF doc. no. 23, Exhibit F; NYSCEF doc. no. 24, Exhibit H.)
(6) Patch invoices from October through December 2020 reflect supplemental compensation as commissions paid to plaintiff. (NYSCEF doc. no 26, invoices.)
(7) A Patch excel document reflects that Noto was granted 75 units of equity. (NYSCEF doc. no. 27.)
(8) Cain, in an email to plaintiff, acknowledges part of plaintiff's compensation was in the form of commission. He writes, "Hi Damian, I apologize for not getting back to you regarding your commission. We have made some positive adjustments to your commission." (NYSCEF doc. no. 29, Cain Email.)

Defendants admit that the Court may consider these additional facts in assessing the merits of this motion. (NYSCEF doc. no. 38 at 7, Def. reply memo of law; *see Nonnon v City of New York*, 9 NY3d 825, 827 [2007] ["While affidavits may be considered [on a CPLR 3211 motion to dismiss] … they are generally intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims"].)

DISCUSSION

Motion to Dismiss Under CPLR 3211 (a) (5)—Statute of Frauds

Defendants contend that plaintiff's breach-of-contract cause of action should be dismissed as New York's statute of frauds makes all three promises—for 75 units of equity in Patch, 10% commission, and 3% equity in MNI—unenforceable. New York General Obligations Law section 5-701 (a) (1) and (a) (10) are the relevant statute-of-frauds provisions. They provide:

> "(a) Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing…if such agreement, promise or undertaking:
>
> (1) By its terms is not to be performed within one year from the making thereof; …
>
> (10) Is a contract to pay compensation for services rendered in negotiating…of a business opportunity, business, its good will, inventory, fixtures, or an interest therein." (General Obligations Law § 5-701.)

The Ten-Percent Commission Agreement

Defendants argue that § 5-701 (a) (1) requires the alleged agreement to compensate plaintiff with ten-percent commission on personally generated advertising revenue to be memorialized in writing, and that, since it was not, the agreement is unenforceable. The Court

only partially agrees. Under §5-701 (a) (1), an oral agreement that cannot be performed within a year of its creation is void—or, as the First Department put it, the application of § 5-701 (a) (1) "is limited to contracts that 'have absolutely no possibility in fact and law of full performance within one year'" (*Gural v Drasner*, 114 AD2d 25, 26 [1st Dept 2013].) The statute does not include those agreements which are simply not likely to be performed, nor those that are not expected to be performed within the space of a year. (*Id.*; *Lichtman v Estrin*, 282 AD2d 326, 328 [1st Dept 2001] [Where a provision that appears by its terms capable of performance within a year or where there is a contingency which may or may not happen within the year, the statute of frauds does not apply].)

The determination of whether an alleged oral contract can possibly be performed within one year of its making is not conducted by looking back at the actual performance; rather, it requires an analysis of what was possible, looking forward from the day the contract was entered into. (*Id.* at 28.) In conducting the requisite analysis, one important attribute of the oral agreement that courts look to is whether it grants the defendant the power to terminate their obligations within that first year without breaching the agreement. (*See Apostolos v R.D.T Brokerage Corp.*, 159 AD2d 62, 64-65 [1st Dept 1990].) Where the defendant is powerless to terminate the agreement within the one year, the statute of frauds applies. (*Id.*) As such, a promise to pay commissions that extend indefinitely, dependent solely on the acts of third parties and beyond the control of the defendant, is generally within the statute and must be in writing. (*Id.*, citing *Zupan v Blumberg*, 2 NY2d 547 [1957].)

The Court undoubtedly recognizes that plaintiff's agreement to be compensated in commissions fits this latter category of oral contracts. Paragraph 26 of the complaint demonstrates that plaintiff is, in essence, alleging a promise from defendants to pay commissions indefinitely. (NYSCEF doc. no. 1 at ¶26 [Defendant refused to pay "in willful disregard of its legal obligations…and the monies due Mr. Noto remain due and outstanding and *will continue to accrue as revenues are received.*" (Emphasis added)]; *see also* NYSCEF doc. no 17 at ¶19 ["As to my post-termination commissions, my agreement was clear. Mr. Hale stated to me on repeated occasions that he wanted to hire me at Hale Global where they would assume my Patch agreement and continue to pay commissions I was entitled to for consummated deals which would survive the end of my employment at Patch."]). Moreover, the extent to which defendant would be liable on the agreement is solely dependent on the third-party advertisers that plaintiff personally signed to Patch and how long those advertises engaged defendants' services. However, the Court is not persuaded that the entirety of the agreement comes within the statute of frauds.

In this case, the facts reveal that plaintiff's employment contract was "at-will" and provided defendants the ability to terminate his employment at any time with or without cause (NYSCEF doc. no. 10)—an employment agreement that does not fall within the statute of frauds. (*See Strauss v Fleet Mortg. Corp.*, 282 AD2d 736, 736 [2d Dept 2001] ["At-will employee commissions earned during the period of his or her employment is capable of performance within one year and does not violate the statute of frauds"].) Moreover, during the period of plaintiff's employment, the agreement to provide compensation in the form of commissions appears to be coterminous with his employment contract in that pay stubs and emails from Patch executives allegedly reflect both the obligation to pay plaintiff his salary and a ten-percent

commission. (*See* NYSCEF doc. no. 19, 26.) Since defendants retained the power to terminate the employment contract throughout its entire existence and could likewise terminate plaintiff's ability bring in new advertising revenue (and thereby limit his commissions), the Court finds that defendants' agreement to pay commissions for personally generated advertising revenue during the course of his employment was not within the statute of limitations. Put slightly differently, the agreement for commissions during his employment was as equally at will as his employment agreement. However, the Court finds that the commissions based on advertising revenue after he was terminated to be within the statute and thus a writing was required.

Defendants' opposition to severing the oral agreement into two components is based on the idea that once a court determines that the statute of fraud applies to an agreement, it holds for all parts of that agreements as well. In citing *Club Chain of Manhattan, Ltd. v Christopher & Seventh Gourmet, Ltd.* (74 AD2d 277, 284 [1st Dept 1980]), defendants contend the agreement here is voided by the statute of frauds for all purposes and, thus, it cannot be the basis for any rights, obligations, or claims that plaintiff might assert. This argument, however, ignores the line of cases that apply the doctrine of severability to agreements otherwise within the statute. As the First Department in *Apostolos* explained the doctrine:

> "Where an agreement is a severable one, i.e., susceptible of division and apportionment, having two or more parts not necessarily dependent upon each other, that part which, if standing alone, is not required to be in writing, may be enforced, provided such apportionment…may be accomplished without doing violence to its terms." (159 AD2d 62 at 65-66.)

In *Apostolos*, the First Department held that one part of an oral agreement—the part where plaintiff was to be compensated in commissions during an oral employment arrangement that defendant could terminate at will—was not subject to the statute of frauds (and thus, enforceable), but the other part—where the defendant promised to pay a percentage of the commission earned after termination when third parties renewed their insurance contract—required a writing (and therefore, was not enforceable). (*Id.* at 64-66.) In the court's words, "since defendant was free to decline the placement of new [insurance] policies at any time, that part of the agreement was capable of performance within a year and not prescribed by the statute. With respect to the second part…since renewals were solely dependent upon the acts of third parties, it would be barred by the statute." (*Id.*) Similarly, here, defendants were free to terminate plaintiff's employment at any time and thereby limit itself from owing plaintiff future commissions. This part of the agreement is not proscribed by the statute of frauds. But the latter part—whereby defendants became obligated to plaintiff so long as his clients continued with Patch—is proscribed. (*See Strauss*, 282 AD2d at 736 [Holding that the commissions to be recovered were not earned during plaintiff's employment and therefore had to have been in writing to satisfy the statute of frauds].)

As to plaintiff's contention that either partial performance or emails and other communications remove the entire agreement from within the statute of frauds, the Court is not persuaded. Partial performance, as defendants correctly point out, does not apply to 5-701 (a) (1). (*Castellotti v Free*, 138 AD3d 198, 203 [1st Dept 2016].) Further, the emails from Cain and Hill do not satisfy the statute of frauds. Even assuming the communications demonstrate the

existence of an agreement for commissions during plaintiff's employment (which to be clear is not evident since the communications do not reflect an agreed upon percentage), the communications omit crucial terms as to whether defendants would owe commissions after plaintiff's termination. (*See* NYCEF doc. no. 29, email from Rob Cain ["We have made some positive adjustments to your commission. Once we have the BoD plan approved, I will review it with you."], NYSCEF doc. no. 23, email from Bruce Hill ["Could you please send me in PDF form all the Grant Agreements you have signed?"].) These communications do not reveal any information about the nature of the agreement post-termination, and therefore, do not save this portion from the statute of frauds.

Defendants also contend that §5-701 (a) (10) is applicable to the ten-percent commission agreement, or at least the part not within §5-701 (a) (1). The Court disagrees. First, defendants make no attempt to argue that the commissions were promised in return for the negotiation of a "business opportunity." Defendants do not describe how it could be that plaintiff "identified or analyzed" a business opportunity that resulted in the "eventual formation" of a business arrangement (generally considered a transaction resulting in the acquisition of an existing enterprise or the formation of a new one) with defendant. (*Petkanas v Petkanas*, 2014 NY Slip Op 33137 [U] *5-6 [Sup. Ct., Queens County 2014], citing *Gutkowski v Steinbrenner*, 680 F Supp 2d 602, 613 [SDNY 2010].) This is especially true as plaintiff was already employed by Patch.

Second, none of the cases defendants cite support the proposition that an employment compensation arrangement comes within the statute of frauds. *Leist v JMC Pharmacy Inc.* (163 AD3d 431 [1st Dept 2018]) merely states the statute of frauds bars the plaintiff's claim for breach of an oral commission agreement without describing the terms or conditions of the agreement. For authority, *Leist* cites to *Fitz-Gerald v Donaldson, Lufkin & Jenrette* (294 AD2d 176, 176 [1st Dept 2002]), but that case concerns plaintiff's attempt to recover a certain finder's fee for a business opportunity. In *Lerch v Ark Restoration & Design Ltd.* (137 AD3d 637, 637 [1st Dept 2016]), §5-701 (a) (10) barred enforcement of the agreement because the commission allegedly owed to the plaintiff was as compensation for the negotiation and sale of an expensive piece of jewelry to a third party. And in *MP Innovations, Inc. v Atlantic Horizon Intl. Inc.*, 72 AD3d 571 [1st Dept 2010], the plaintiff alleged a breach of contract "based on allegations that it presented defendant with a marketing concept" and that "defendants orally agreed to sell the product and to pay plaintiff a percentage of all sales generated." (*Id.* at 572.) Quite obviously, the circumstances of someone selling a business opportunity to another is different from, here, plaintiff receiving commissions based upon business he personally generates as part of his employment contract with defendant. (*See Murphy v CNY Fire Emergency Servs.*, 225 AD2d 1034, 1034 [4th Dept 1996] [§5-701 (a) (10) not applicable where plaintiff merely alleges that he rendered services in the regular course of his employment for which has not been fully paid]; *Kuo v Wall St. Mtge. Bankers, Ltd.* 65 AD3d 1089, 1089 [2d Dept 2009] [Oral employment agreement not subject to statute of frauds under (a) (10)].) Because plaintiff claims that the commissions were owed based on work he performed as part of his regular employment, §5-701 (a) (10) does not govern this claim.

The 75 Units of Equity in Patch and Three-Percent Equity in MNI Agreements

For this same reason described above, plaintiff's breach-of-contract claim for the 75 units of equity and three-percent equity in MNI in return for his assistance in helping turn around that entities' financial performance is not subject to §5-701 (a) (10). Defendants argue that this section bars oral equity grants as well, but the case law they cite is simply immaterial to the instant motion. In *Andrews v Cerberus Partners* (271 AD2d 358 [1st Dept 2000]), a plaintiff alleged he was owed a 15% equity interest as a "result of the information he departed to defendant concerning the business it eventually purchased." Again, what sets this case apart from *Andrews* is that, here, there are no allegations that plaintiff was negotiating a business opportunity and that plaintiff maintained an employer-employee relationship with defendants. These agreements are not void by the statute of frauds either.

Motion to Dismiss Under CPLR (a) (7)—Failure to State a Cause of Action

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015].) The courts' inquiry is limited to assessing the legal sufficiency of the plaintiff's pleadings; accordingly, its only function is to determine whether the facts as alleged fit within a cognizable legal theory. (*JF Capital Advisors*, 25 NY3d at 764.)

To the extent that defendants challenge whether the complaint gives them sufficient notice as to each of plaintiff's cause of action for breach of contract, their arguments are unavailing.

The Court dismisses as unopposed plaintiff's breach-of-contract cause of action based on the agreements for commissions and for 75 units of equity as against Hale Global and MNI, as they were not parties to these agreements; similarly, the Court dismisses as unopposed, plaintiff's breach-of-contract cause of action based on the three-percent equity agreement against Patch and MNI, as they were not parties to this agreement.

Whether the Agreement for 75 Units of Equity is Supported by Consideration

To sufficiently plead breach of contract, the plaintiff must allege, obviously, the existence of a valid contract, which means they must also allege there was valid consideration in return for defendants' promise. (*See Halliwell v Gordon*, 61 AD3d 932, 933 [2d Dept 2009]; *Vista Food Exch., Inc. v BenefitMall*, 138 AD3d 535, 536 [1st Dept 2016] ["Consideration sufficient to create a contract 'consists either of a benefit to the promisor or a detriment to the promisee'" (citations omitted)].)

In his complaint, plaintiff alleges that he was hired in late January 26, 2014, and that soon thereafter, Charles Hale "agreed to grant Mr. Noto an additional 75 units of [Patch], though Patch never provided any documents or other written acknowledgement." (NYSCEF doc. no. 1 at ¶8.) In the affidavit, plaintiff adds, "My two equity claims…were intended as further compensation to me for my continued, additional efforts on behalf of Patch, as well as my added responsibilities for MNI." (NYSCEF doc. no 17 at ¶21.) Defendants contend that these

allegations do not indicate a promise from plaintiff to (a) do something which he was not already obligated to do or (b) forgo certain rights to his legal detriment, and therefore, plaintiff has not alleged the existence of a valid agreement for these equity units. More specifically, while acknowledging that an at-will employees' decision to "continue employment" or "refrain from leaving" may constitute valid consideration (*see Halliwell v Gordon*, 61 AD3d 932, 933 [2d Dept 2009]), defendants argue that plaintiff never really offered consideration of this type. Rather, since he had just been hired by Patch, plaintiff was never considering leaving when he was offered the additional 75 units, meaning the "continued, additional efforts" amount to obligations that plaintiff already committed to performing in his employment contract.

The Court agrees. In the absence of allegations as to how plaintiff's employment changed—for example, that defendants required plaintiff to take on new responsibilities or a new position, that the work was somehow more demanding or his performance expectations changed—the Court cannot find that, in exchange for the 75 units, plaintiff promised anything other than to perform obligations already expected of him. The argument, made in opposition, that plaintiff "refrained from resigning," thereby creating consideration, is unpersuasive: there are no allegations that plaintiff contemplated resigning or believed it to be an option at that time because, again, plaintiff had just begun working for Patch. Since contracts must be supported by valid consideration to be enforceable, and plaintiff has not sufficiently pled this element of a contract, defendants have demonstrated entitlement to dismissal of plaintiff's breach of contract claim based on this alleged agreement.

Labor Law § 191, § 191-c, and § 215 Violations[1]

First, under Labor Law § 191, defendants acknowledge that pleading a Labor Law § 191 violation mirrors pleading a breach-of-contract cause of action. (*See Zuckerman v GW Acquisition LLC*, 2021 U.S. Dist. LEXIS 178873 at *35 [SDNY 2021] ["[A] claim under section 191(1)(c) rises and falls with plaintiff's claim for breach of contract, and [any] failure to establish a contractual right to wages necessarily precludes a statutory claim under New York's labor law"]; *see also Tierney v. Capricorn Investors, L.P.*, 189 AD2d 629, 632 [1st Dept 1993] ["The plaintiff cannot assert a statutory claim for wages under the Labor Law if he has no enforceable contractual right to those wages"].) Here, such an acknowledgement is fatal to their argument. Since defendants' entire argument as to why plaintiff cannot recover under Labor Law § 191 is their theory that plaintiff has no breach-of-contract claim that survives the statute of frauds, and this, as the Court's previous discussion demonstrates, is untrue, defendants are not entitled to a dismissal under § 191 of plaintiff's breach-of-contract claim for commissions due during his employment or the three-percent equity agreement.

The same reasoning applies to plaintiff's retaliation claim under Labor Law § 215. § 215 prohibits an employer from discharging or retaliating against an employee because that employee has made a complaint against his employer alleging, in good faith, that the employer has violated

[1] In paragraphs 30-32 of the complaint, plaintiff alleges an unspecified violation of New York Labor Law. (Plaintiff's third cause of action is for retaliation under Labor Law §215.) Defendants speculate that § 191 and §191-c are the most likely sections that plaintiff refers to in these paragraphs. In its opposition, plaintiff appears to confirm that § 191 is one violation. As discussed *infra*, plaintiff does not address defendants' arguments as to § 191-c, and as such, any claim thereunder is dismissed.

New York's Labor Law. (*See* NY Labor Law § 215.) Defendants contend that where a plaintiff premises a retaliation claim on non-payment of commissions under § 191, plaintiff must demonstrate entitlement to those commissions.[2] (NYSCEF doc. no. 11 at 21-22, def. memo of law.) Such an argument would perhaps be persuasive where defendant has shown the oral agreements fall entirely within the statute of frauds (*see Kelley v Bryan Ins. Agency, Inc.* (176 AD3d 1042, 1046 [2d Dept 2019]), however, defendants have failed, as of now, to show that plaintiff is not entitled to the commissions or three-percent equity interest in MNI under §191.

As to plaintiff's claim under Labor Law § 191-c, defendants have established that the section does not apply to them. This section provides that a "principal" shall pay a "sales representative" all earned commission within five days after the representative's termination or, in certain circumstances, within five days after the commissions become due. (Labor Law § 191-c.) However, § 191-a of that same law, entitled "Definitions," defines a principal as a person or company engaged in the business of manufacturing. Here, defendants are not engaged in manufacturing. Plaintiff does not address defendants' arguments on this point. Accordingly, any claim based upon § 191-c is dismissed.

NYSHRL and NYCHRL Retaliation Cause of Action

For retaliation claims under the NYSHRL to survive a CPLR 3211 (a) (7) motion to dismiss, a plaintiff must allege that: (1) he has engaged in protected activity, (2) his employer was aware that he participated in such activity, (3) he suffered an adverse employment action based upon his activity, and (4) there is a causal connection between the protected activity and the adverse action. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004].) Under the NYCHRL, the plaintiff need not plead that he suffered an adverse employment action, only that his employer "took an action that disadvantaged" him or that the retaliation was "reasonably likely to deter a person from engaging in protected activity." (*Harrington v City of New York*, 157 AD3d 582, 684 [1st Dept 2018].) With employment discrimination claims, courts use the lenient notice pleading standard. (*Thomas v Mintz*, 182 AD3d 490, 490 [1st Dept 2020], citing *Petit v Department of Educ of the City of N.Y.*, 177 AD3d 402, 403 [1st Dept 2019].)

First, plaintiff's cause of action for retaliation under both the NYSHRL and the NYCHRL is dismissed as against Hale Global as it was never plaintiff's employer.[3] (*See Miller* v *City of Ithaca*, 179 A.D3d 1235, 1238 [3d Dept 2020] ["Inasmuch as the City was no longer plaintiff's employer . . . such conduct could not constitute an adverse employment action"].) Second, against Patch, plaintiff's retaliation causes of action are also dismissed. Defendants contend plaintiff has failed to plead a causal relationship between the protected activity (in this case, the complaint regarding St. John's behavior towards him) and the adverse action (supposedly Patch, Hale, and St. John's refusal to sign memorializations of the oral agreements).

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[2] Because the Court rejects defendants' argument on other grounds, the Court need not wade too far into the accuracy of the statement that plaintiff must demonstrate entitlement to the commissions to plead a Labor Law claim for retaliation. However, as described in the statute, plaintiff need only have a good faith and reasonable belief that defendants were violating a section of the Labor Law and that plaintiff made a complaint thereon.

[3] Defendants also assert that the causes of action should be dismissed against MNI but from the pleadings, it does not appear that plaintiff asserted these causes of action against MNI. (*See* NYSCEF doc. no. 1 at ¶40 ["defendants Planck and Hale Global are liable"] and ¶43["defendants Planck and Hale Global are liable"].) Regardless, plaintiff does not have a cause of action against MNI for retaliation.

(NYSCEF doc. no 11 at 23.) More specifically, they assert that the alleged adverse action, if it can be considered as such, was occurring both before and after plaintiff complained to Hale, meaning defendants' alleged refusal to sign the documents is unconnected to the complaint made against St. John. Plaintiff, outside of stating that the allegations easily satisfy the liberal pleading standard of CPLR3211, makes no counter argument. Accordingly, because "an employer's continuation of a course of conduct that had begun before the employee complained does not constitute retaliation" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 129 [1st Dept 2012]), plaintiff has not demonstrated a causal connection between the protected activity and the challenged conduct and therefore, plaintiff has not properly pled a retaliation claim under either NYSHRL or NYCHRL.

Quantum Meruit Cause of Action

Defendants do not dispute that plaintiff has pled the elements of a *quantum meruit* cause of action, i.e., that plaintiff performed services on defendants' behalf in good faith and with the expectation that he would be compensated for such services. Rather, defendants' posit three arguments as to why plaintiff's *quantum meruit* claim is precluded by the employment contract and/or the statute of frauds: (1) plaintiff's employment contract governs work he performed on behalf of Patch; (2) the statute of frauds precludes recovery on claims brought under *quantum meruit* to the same degree as would be precluded under a breach of contract theory; and (3) the work performed for commission and three-percent equity in MNI were essentially indistinguishable from work performed according to the employment contract. (NYSCEF doc. no. 11 at 26-28.) None of these arguments are availing. As to (1) and (3), the complaint lays out a dispute as to whether the employment agreement governs the entirety of plaintiff's work in return for commissions and three-percent equity and whether the additional work performed—which plaintiff describes as essentially another full-time job—was indistinguishable from the contractually obligated work. Given this, the Court cannot determine whether the services rendered by plaintiff to defendant "fell squarely within the contractually obligated duties of plaintiff's employment." (*See Zito v Fischbein, Badillo, Wagner & Harding*, 35 AD3d 306, 307 [1st Dept 2006].) As to (2), the Court has already discussed at length that certain portions of plaintiff's causes of action are not barred by the statute of frauds, and therefore the *quantum meruit* claim is not either.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that defendants Planck, LLC, DMEP Corporation, and Hawking LLC's motion to dismiss pursuant to CPLR 3211 (a) (5) is granted to the extent that the statute of frauds precludes liability as to commissions accruing after plaintiff was terminated; and it is further

ORDERED that defendants' motion to dismiss under CPLR 3211 (a) (7) is granted as to plaintiff's breach-of-contract claim against Hale Global and MNI for commissions, regardless of when they accrued, and against Patch Media and MNI based upon the agreement to provide a three-percent equity interest in MNI;

ORDERED that defendants' motion to dismiss under CPLR 3211 (a) (7) is granted as to plaintiff's breach-of-contract claim against all defendants based upon the promise to give him a

75 unit interest in Patch Media; and it is further

ORDERED that defendants' motion to dismiss based on CPLR 3211 (a) (7) is granted as to plaintiff's claims for retaliation under the NYSHRL and NYCHRL, and granted as to plaintiff's cause of action based upon defendants' alleged Labor Law § 191-c violation; and it is further

ORDERED that all parties shall appear at 60 Centre Street, Courtroom 341 on April 4, 2023, at 10 a.m. for a status conference with the Court; and it is further

ORDERED that counsel for defendants shall serve a notice of entry along with a copy of this Decision and Order, on all parties within ten (10) days of entry.

This constitutes the Decision and Order of the Court.

3/20/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

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