Perez v Premier Home Health Care Servs., Inc.
2024 NY Slip Op 35463(U)
August 7, 2024
Supreme Court, Westchester County
Docket Number: Index No. 67127/2023
Judge: Gretchen Walsh
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION
---X
CESAR PEREZ,

Plaintiff,

-against -

PREMIER HOME HEALTH CARE SERVICES, INC.,

Defendant.
---X

Index No. 67127/2023
Motion Seq. No. 2
Motion Date: 5/10/2024

WALSH, J.

The following e-filed documents, listed in NYSCEF by document numbers 14-45, were read on this motion by Defendant Premier Home Health Care Services, Inc. ("Defendant" or "Premier") made pursuant to CPLR 3212 for an order granting summary judgment dismissing the Amended Complaint of Plaintiff Cesar Perez ("Plaintiff" or "Perez"). Plaintiff opposes Defendant's motion.

Upon the foregoing documents, and for the reasons stated herein, Defendant's motion shall be granted.

BACKGROUND

Plaintiff commenced this action by filing his Summons and Complaint on September 20, 2023. The parties stipulated to extend Defendant's time to respond to the Complaint and on November 29, 2023, Defendant filed its motion to dismiss. The Court held a Preliminary Conference on December 20, 2023 and Plaintiff was granted leave to amend his Complaint, which occurred on February 22, 2024, thereby mooting Defendant's motion to dismiss. It was agreed during a follow-up conference that Defendant would answer the Amended Complaint and Defendant was granted leave to file a motion for summary judgment, which Defendant filed on March 29, 2024. The Court granted a stay of discovery pending its determination on Defendant's motion for summary judgment.

A. The Allegations Contained in the Pleadings

In his Amended Complaint, Plaintiff alleges that he commenced employment with Defendant as its General Counsel on or about September 2009 (NYSCEF Doc. No. 11 at ¶ 8). He asserts that on or about March 1, 2020, the parties entered into a three-year Employment Agreement that was retroactive to January 1, 2020 (the "Agreement") (*id.* at ¶¶ 9-12). He alleges that under the Agreement's terms, his role was that of General Counsel working out of Defendant's offices located at 1065 Avenue of the Americas, 5 Bryant Park, 5th Floor, New York, NY (*id.* at ¶ 13). Plaintiff asserts that the "Term" and "Employment Year" ran from January 1 to December 31 of any given calendar year and that his Base Salary was: (1) Year 1: $350,000; (2) Year 2: $375,000; and (3) Year 3: $400,000 (*id.* at ¶¶ 15-16). According to Plaintiff, although he worked during Year 1 (2020) and Year 2 (2021), on October 4, 2022, Defendant's CEO Arthur Schwabe ("Schwabe") verbally terminated Plaintiff's employment by informing Plaintiff that Defendant could no longer afford a General Counsel and that he should no longer report to the office (*id.* at ¶¶ 21-22). Plaintiff claims that thereafter, he did not return to Defendant's offices and he ceased all meaningful work (*id.* at ¶ 23). It is Plaintiff's position that he was functionally terminated because he was stripped of all his authority as General Counsel and Defendant "breached its contract with Plaintiff by materially changing Plaintiff's duties as Defendant's General Counsel" (*id.* at ¶¶ 24-25). Plaintiff further asserts that Defendant failed to provide Plaintiff with the termination letter annexed as Exhibit A to the Agreement (*id.* at ¶ 26).

As further evidence of his termination, Plaintiff relies on Schwabe's statements made during a telephone conference before a federal district court judge (Hon. John G. Koeltl) on or about October 28, 2022 in which Schwabe denied that Defendant had an in-house attorney (i.e., Plaintiff) stating "[t]hat person is no longer with the company" (*id.* at ¶ 35). Plaintiff claims that based on this statement, he was "publicly stripped of his authority and position as Defendant's General Counsel and was therefore no longer employed in the capacity required in his Agreement" (*id.* at ¶ 38). According to Plaintiff: (1) Defendant did not issue any documentation that Plaintiff was terminated for cause; (2) Defendant did not terminate Plaintiff with "Reasonable Cause"; and (3) Defendant was not terminated due to death or disability (*id.* at ¶¶ 42-45).

Plaintiff further alleges that Defendant failed to follow Section 10 of the Agreement entitled "Severance Payments," which requires if Defendant terminates Plaintiff without Reasonable Cause, Plaintiff was entitled to Severance Payments and that Defendant was required to provide Plaintiff with the letter attached as Exhibit A to the Agreement notifying Plaintiff of his termination and his eligibility for severance payments if he executes the Form of Separation and Release Agreement (the "Release") (*id.* at ¶¶ 50-51). Plaintiff asserts that instead of following the requirements of Section 10, Defendant terminated Plaintiff's employment orally on October 4, 2022 and followed it up with a letter dated November 28, 2022 in which Defendant stated that "This letter serves as confirmation of your termination with Premier Health Care Services, Inc. effective December 30, 2022" (*id.* at ¶¶ 56, 61). Plaintiff claims that December 30 and December 31, 2022 are dates within the Term as defined in the Agreement and that "[s]ince Defendant no longer employed Plaintiff on December 31, 2022, Plaintiff's employment was terminated during the Term" (*id.* at ¶¶ 62-65).

Plaintiff asserts a First Cause of Action for breach of contract. In it, Plaintiff alleges that: (1) Defendant promised Plaintiff that he would receive severance and other benefits if he was terminated during the Term of the Agreement; (2) Plaintiff was terminated without cause during the Term of the Agreement; (3) Plaintiff fully performed the Agreement; (4) Defendant failed to pay Plaintiff the severance and benefits owed; and (5) Plaintiff's failure to perform the condition precedent in the Agreement (i.e., the signing of the Release) is excused based on Defendant's failure to furnish Plaintiff with Release as required by the Agreement (*id.* at ¶¶ 68-74). As such, Plaintiff contends that Defendant breached the Agreement.

On March 5, 2024, Defendant filed its Answer in which Defendant denied the material allegations of Plaintiff's Amended Complaint and asserted 12 affirmative defenses.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. *Defendant's Contentions in Support of Its Motion*

In support of its motion, Defendant submits: (1) a Rule 19-A Statement of Material Facts ("Def's SMF"); (2) an Affidavit of Jeannie O'Sullivan sworn to on March 26, 2024 ("O'Sullivan Aff."), together with its attached exhibits; (3) an affirmation of Jerold F. Goldberg, Esq. dated March 29, 2024, together with its attached exhibits; and (4) a memorandum of law dated March 29, 2024 ("Def's Mem.").

In her affidavit, O'Sullivan avers that she is Defendant's Chief Human Resources Officer and that she has held this position since November 5, 2001 (O'Sullivan Aff. at ¶ 2). She states that the statements she makes in her affidavit are "based upon my role at Premier as well as my review of Premier's business records, internal systems, and documents maintained in the ordinary course of business, all of which I have access to in the course and scope of my employment, as well as upon my personal knowledge" (*id.*). O'Sullivan confirms Plaintiff's account of the date of his employment, his position as General Counsel and the parties' entry into the Agreement (*id.* at ¶¶ 4-7). O'Sullivan states that Plaintiff does not dispute that he was employed throughout Years 1 and 2 of the Term and O'Sullivan "confirm[s] based on review of Premier's books and records that Mr. Perez was employed during Years 1, 2 and 3 of the Term and he was paid his salary, benefits and reimbursed his expenses through the end of Year 3 of the Agreement. He also provided services to Premier throughout all three years of the Agreement" (*id.* at ¶ 9). She further recounts Schwabe's version of the conversation he had with Perez on October 4, 2022, but because this is hearsay, it is not recited herein. In essence, O'Sullivan confirms Plaintiff's position that Plaintiff was advised that his Agreement would not be renewed at the end of the Agreement's three-year term because Defendant could no longer afford a General Counsel, and that the reason Plaintiff was told he no longer needed to come into the office was as a courtesy to give Plaintiff time to find another job (*id.* at ¶¶ 10-11). In support of her contention that Plaintiff continued to engage in work on behalf of Premier, O'Sullivan attaches various emails evidencing Plaintiff's work on behalf of Premier in November and December 2022 (*id.* at ¶¶ 14-18 and Exhibits B-E attached thereto). She avers that by letter dated November 28, 2022 (attached as Exhibit H), Defendant notified Plaintiff that his employment would end at the end of the Agreement's Term (i.e., Friday December 30, 2022), which was the last working day of 2022 (*id.* at ¶ 19).

O'Sullivan attests to Plaintiff's submission of his expense report for reimbursement for the month of December 2022 (attached as Exhibit I) for which Plaintiff's expenses were reimbursed (*id.* at ¶ 20). She further attests to Plaintiff's sending of an email dated December 8, 2022 in which Plaintiff acknowledged that his last day with Defendant would be December 30, 2022 (*id.* at ¶ 21).

O'Sullivan avers that Plaintiff was paid all that was owed in terms of compensation, expenses and benefits and she attaches Plaintiff's pay statements and expense reports as exhibits (*id.* at ¶¶ 23-24). Finally, O'Sullivan asserts that Defendant received the return of Plaintiff's company laptop in January 2023, and that Plaintiff never complained prior to the end of the Agreement's Term that his employment had been terminated within the Term (*id.* at ¶¶ 25-26).

In its memorandum of law, Defendant argues that because the undisputed facts show that Plaintiff was an employee through the Agreement's Term and was not terminated, Plaintiff is not owed the severance sought in this action.

First, as its procedural argument, Defendant asserts that the Amended Complaint should be dismissed because Plaintiff merely cherry picks provisions of the Agreement and fails to attach a copy of the Agreement to his Amended Complaint (Def's Mem. at 4-5).

Second, Defendant argues that under the express terms of the Agreement, Defendant has no obligation to pay Plaintiff severance unless he was terminated without Reasonable Cause during the Agreement's Term, which did not occur. Defendant points out that Plaintiff does not plead that: (1) he was not paid all the compensation owed for Employment Year 3; or (2) he ceased all work prior to the end of the Term since he only alleges that he ceased all meaningful work and Defendant has provided evidence of the work Plaintiff continued to perform during the Term (*id.* at 5). As such, in accordance with well settled precedent, Defendant argues that because the Agreement contains a fixed term, the employment terminated on the date specified in the Agreement (*id.*). Defendant further points out that Plaintiff admits that Defendant notified him on November 28, 2022 that he would remain employed through the last working day of the year (December 30, 2022) (i.e., through the end of the Agreement's Term) and Plaintiff's argument that he was terminated without cause prior to the expiration of the Term because his last day should have been Saturday December 31, 2022 rather than Friday December 30, 2022 is patently absurd (*id.* at 5-6).[1]

Third, Defendant distinguishes the cases cited in Plaintiff's Amended Complaint and argues: (1) Plaintiff cannot claim that he was constructively discharged because that occurs only where an employee quits in response to working conditions that are so poor that no reasonable person would stay and here, it is undisputed that Plaintiff did not quit and he continued to receive his salary, accrued vacation and his expenses through the expiration of the Agreement's Term (*id.* at 7); and (2) Plaintiff's argument concerning Defendant's alleged prevention of the happening of a condition precedent (i.e., the provision of the Release [Exhibit A to Agreement]) is nonsensical since the requirement to provide Exhibit A was only triggered if Plaintiff was entitled to severance, which did not occur; or (3) alternatively, to the extent the Court does not disregard Plaintiff's condition precedent argument, "the Court should find that Mr. Perez forfeited his right to the

[1]As discussed infra, the Court agrees and finds Plaintiff's argument on this point without any merit and insufficient to create a triable issue of fact.

severance by failing to execute the Release in his possession[2] since March 2020 as a required condition precedent to severance benefits and dismiss his breach of contract claim in any event" (*id.* at 10-11)

B. Plaintiff's Contentions in Opposition

In opposition, Plaintiff submits: (1) a Response to Def's SMF ("Plf's SMF Response"); (2) an Affirmation of Danilo Bandovic, Esq. dated April 30, 2024 ("Bandovic Opp. Aff."); (3) an Affirmation of Cesar Perez, Esq. dated April 29, 2024, together with its attached exhibits; (4) a Supplemental Corrected Affirmation of Cesar Perez, Esq. dated May 1, 2024 ("Perez Opp. Aff."); and (5) a memorandum of law in opposition ("Plf's Opp. Mem.").

The sole purposes of the Banovic Affirmation are to explain why Plaintiff did not attach the Agreement to his Amended Complaint and that if the Court views this an issue, that Plaintiff be permitted to submit a Second Amended Complaint attaching same; and (2) if the Court finds that there is no genuine issue of material fact that Plaintiff was indeed terminated without Reasonable Cause during the Term, that the Court treat Plaintiff's opposition as a cross-motion seeking summary judgment in Plaintiff's favor (Bandovic Opp. Aff. at ¶¶ 4, 6).

In his Affirmation, Plaintiff avers that during his 13 years of employment, he received no writeups or bad performance reviews and that he faithfully served Defendant (Perez Opp. Aff. at ¶ 4). He avers that during his employment, he had to work outside of regular business hours and, therefore, his last day of work for Defendant would have been Saturday, December 31, 2022 (*id.* at ¶ 6).

According to Plaintiff, the Term of the Agreement ran from January 1, 2020 through December 31, 2022 (*id.* at ¶¶ 10-13). Plaintiff avers that following a disagreement he had with Schwabe in June 2021, O'Sullivan notified Plaintiff that forthwith, he was to report to O'Sullivan rather than Schwabe as required by the Agreement (*id.* at ¶ 15). He further contends that in September 2021, he received an organizational chart that showed that he reported to O'Sullivan and that in response, he emailed O'Sullivan complaining that his Agreement stated he reported to Schwabe and that the organizational chart needed to be corrected, but O'Sullivan never responded to his email (*id.*).

Plaintiff recites his understanding of his entitlement to severance under the Agreement including that Defendant provide him with the Release (*id.* at ¶ 20). He avers that he worked the entirety of Years 1 and 2, but that in August 2022, Schwabe attempted to force Plaintiff to represent Defendant in a class action arbitration and that he resisted because he was not experienced in class action litigation (*id.* at ¶ 23). He avers that in an email exchange with Schwabe over this issue (attached as Ex. G), Schwabe stated that if this was Plaintiff's position, he should consider a company that would meet his legal role and responsibilities and that in response, Plaintiff stated

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[2] According to Defendant, at the time Plaintiff signed the Agreement on March 11, 2020, there was a full complete Release with all material terms included and the only information required to be filed in was the date of the Release, the date Plaintiff's employment ended, and Plaintiff's signature (NYSCEF Doc. No. 32 at 11).

that if Schwabe was terminating him, he had to have cause and simply because Plaintiff was not equipped to handle a class action arbitration did not provide Defendant with such cause (*id.* at ¶ 24). Plaintiff avers that on October 4, 2022, Schwabe terminated his employment without Reasonable Cause by calling him and telling him that Defendant could no longer afford a General Counsel and that Plaintiff no longer needed to report to the office so Plaintiff could focus on finding another job (*id.* at ¶¶ 25-26). He claims that following the termination, he "was removed from all management meetings and [his] responsibilities were materially changed. [He] did not speak to Mr. Schwabe again until October 28, 2022, when he told [Plaintiff] that [he] was not aggressive enough and that was why [he] was no longer with the company" and then hung up on him (*id.* at ¶¶ 27). Perez next attempts to diminish the tasks O'Sullivan claims he performed through the end of Year 3 (*id.* at ¶¶ 30-33). Plaintiff recounts what Schwabe said to Judge Koeltl on October 28, 2022 (i.e., that Defendant no longer had in-house counsel and Plaintiff was no longer with the company) and, in support, he attaches a copy of the transcript of that hearing as Exhibit B to his Affirmation (*id.* at ¶¶ 36-40). He further attaches an email he exchanged with opposing counsel in that federal litigation, which was cc'd to Schwabe, in which Plaintiff told that opposing counsel that he was no longer Defendant's in-house counsel and he attaches a copy of that email as Exhibit D (*id.* at ¶ 48). He avers that Schwabe never corrected his representation despite having been cc'd on that email (*id.* at ¶ 49). Plaintiff attaches a similar email he sent to Arbitrator Scheinman (cc'd to Schwabe and O'Sullivan) in which Plaintiff stated that he was no longer Defendant's in-house counsel and that neither Schwabe nor O'Sullivan corrected his representation to the arbitrator (*id.* at ¶¶ 50-51).

Plaintiff requests that the Court disregard O'Sullivan's Affidavit because it contains hearsay and because her statements are directly contradicted by what Schwabe stated at the conference in federal court (*id.* at ¶ 54). He also points out that her representation that Plaintiff reported to Schwabe is false because following his disagreement with Schwabe in June 2021, O'Sullivan told Plaintiff that he was reporting to her (*id.* at ¶ 55). He avers that because Defendant terminated him, he lost the ability to earn any potential bonus incentives through the end of the Term and he suffered personal and professional embarrassment (*id.* at ¶¶ 56-57). According to Plaintiff, Defendant "cannot be allowed to choose between leaving [him] on the books in a 'lame duck' capacity or terminating [him] and paying a penalty" and the Agreement he signed "does not contemplate this *quasi*-garden leave" (*id.* at ¶¶ 59-60). It is Plaintiff's position that the Agreement did not allow Defendant to materially alter his position and continue to pay him and Defendant should not be permitted to "blue-pencil" in a quasi-garden leave when no such language is included in the Agreement (*id.* at ¶ 60). He concludes by stating that he is entitled to the severance and benefits set forth in the Agreement (*id.* at ¶ 62).

The crux of Plaintiff's legal argument is that the evidence he submits establishes the elements necessary for Plaintiff to recover based on Defendant's breach.

Plaintiff asserts that under a contract of employment for a definite term, an employee may not be terminated in the absence of just cause and that the undisputed evidence (e.g., Schwabe's testimony before the federal court that Plaintiff was no longer employed as in-house counsel) establishes that Schwabe terminated Plaintiff during the Agreement's defined term (Plf's Opp.

Mem. at 6-7). Plaintiff points out that if an employer seeks to terminate an employee who has such a definite term employment contract without cause, the employer may do so provided that the employee's relinquishment of this legal protection is supported by consideration such as a severance package (*id.* at ¶ 9).

In addition to the evidence supporting that he was terminated without Reasonable Cause prior to the end of the Term, Plaintiff contends that he has also presented evidence that Defendant breached the Agreement by materially altering Plaintiff's employment responsibilities (*id.* at ¶ 10). According to Plaintiff, "[t]he O'Sullivan Affidavit offers zero evidence to clarify which position Mr. Perez held at the end of the Term. Was Mr. Perez Premier's General Counsel or its janitor. This purposeful lack of clarity related to this crucial fact is fatal to Premier's defense and is sufficient to deny Premier's Motion" (*id.* at 13).

In response to Defendant's contention that by not complaining, Plaintiff somehow waived the breach of contract claim, Plaintiff first disputes that he never complained and he further argues that the Agreement does not require Plaintiff to complain or make a claim of breach during the Term and, in any event, this argument is moot based upon Plaintiff's timely commencement of this action (*id.* at 14-15).

In support of his claim that Defendant prevented performance of the condition precedent to the severance (i.e., the execution of the Release), Plaintiff points out that the Release had to be provided to Plaintiff by Defendant since it is "in the form of a letter of termination to be signed and dated by Mr. Schwabe" and it was not until November 30, 2022 that Defendant sent Plaintiff the termination letter which terminated Plaintiff during the Term because he would no longer be employed on a date during the Term (i.e., December 31, 2022) (*id.* at 17). Plaintiff contends that Defendant's obligation to provide Plaintiff with the Release was triggered on October 4, October 28 and November 30 and its failure to do so itself constitutes a breach (*id.* at 17). Plaintiff further argues that Defendant's failure to provide Plaintiff with the Release excuses Plaintiff's failure to sign same (*id.* at 18). Plaintiff repeats his argument set forth in his affirmation that the O'Sullivan Affidavit should be ignored as inadmissible and lacking credibility (*id.* at 19).

According to Plaintiff, "**[i]f Premier's Motion is granted, employers will find it more cost effective to sideline employees subject to a term employment agreement than to pay them contractual severance**. The unintended effect would be a dramatic restructuring of well-established New York precedent concerning term employment contracts. Such a reading of the Agreement lacks mutuality . . . [and] [t]his is why New York courts have consistently held that a material change in employment title or responsibilities during a term employment contract results in a breach where a penalty must be paid by the employer. This is the reason the Agreement enumerates Mr. Perez's position, duties, responsibilities, reporting structure, and provides for a severance as a penalty for a material change without reasonable cause . . . This court must consider the wide-ranging implications of a decision to grant Premier's Motion as a fundamental re-writing of decades-old New York precedent on term employment contracts" (*id.* at 22-23).

C. Defendant's Reply

In further support of its motion, Defendant submits a reply to memorandum of law dated May 9, 2023 ("Def's Reply Mem.").

In reply, Defendant argues that Plaintiff's opposition fails to present evidence creating a triable issue of fact because it is undisputed that: "(i) Mr. Perez remained an employee of Premier through the duration of the Agreement's Term; (ii) Mr. Perez was paid everything owed as a W-2 employee through the Term's duration; (iii) Mr. Perez remained on all Premier benefit plans through the Term; (iv) Mr. Perez continued to engage in legal work on Premier's behalf through the Term; and (v) Mr. Perez did not quit, cease work, or refuse any compensation prior to the Term's expiration, negating any inference of a constructive discharge during the Term" (Def's Opp. Mem. at 1). In response to Plaintiff's contention that he lost the opportunity to receive an incentive bonus, Defendant points out that the Agreement makes clear that the right to a potential incentive bonus is entirely dependent upon Premier's performance and "[g]iven Premier's inability to continue to support the General Counsel position due to its financial condition, it goes without saying it did not surpass the earnings necessary to require payment of any incentive compensation to Mr. Perez under the Agreement"[3] (*id.*).

Defendant argues that Plaintiff admits that on October 4, 2022, Schwabe advised him that due to Defendant's financial condition, it was unable to afford a General Counsel (which is set forth in O'Sullivan's Affidavit) and that Plaintiff should begin looking for another job based on Defendant's inability to renew the Agreement (which is also set forth in the O'Sullivan Affidavit). Defendant asserts that without any documentary evidence, Plaintiff nevertheless argues that he was terminated during this conversation and, in any event "it is obvious that ***not*** telling someone they are fired and at the same time ***continuing to pay them*** demonstrates that their employment was ***not*** terminated" (*id.* at 2). According to Defendant, it is undisputed that Plaintiff was paid through the end of December and continued to perform work for Defendant thus supporting that Plaintiff's employment was not terminated prior to the end of the Term (*id.* at 2-3).

Regarding Schwabe's statements during the conference before Judge Koeltl, Defendant argues that Schwabe's statements were not made under oath and instead were comments made during a conference in which Defendant's then-counsel, Holland & Knight LLP, was seeking to be relieved as Defendant's counsel. The petitioner's counsel who was seeking to confirm the arbitration award objected to Schwabe's request for a brief adjournment to retain new counsel arguing before Judge Koeltl that it was unnecessary as Premier had in-house counsel to represent its interests. In response, Schwabe told Judge Koeltl that Premier did not have in-house counsel, which Defendant contends was true since Plaintiff had refused to represent Defendant in this class

[3] The Court disregards this purported fact because Defendant provides no evidence to support it. Nevertheless, because Plaintiff fails to allege in his Amended Complaint that Defendant met the EBITDA requirements for Plaintiff to be entitled to earn this Incentive Compensation for Year 3 and because he fails to submit evidence that Defendant met this EBITDA requirement, this purported fact is irrelevant to the Court's determination because there is no basis for the Court to find a triable issue of fact concerning Plaintiff's entitlement to the Incentive Compensation.

action (*id.* at 4). Defendant further points out that despite these statements, nothing changed regarding Plaintiff's employment following that court conference as he remained employed, continued to receive his salary and benefits, and continued to communicate on Defendant's behalf and provide legal services (*id.* at 4).

Defendant repeats its arguments concerning why any claim of constructive discharge is inapplicable (i.e., essential to this claim is that the employee leave their employment which did not occur) (*id.* at 5). According to Defendant, if Defendant breached the Agreement in this regard, Plaintiff had to choose between continuing performance or refusing to continue performance and because Plaintiff continued to perform his job and accept payments and benefits for that performance for the duration of the Term, Plaintiff "waived any right to claim he was terminated during the Term or that Premier breached the Agreement entitling him to severance" (*id.* at 6).

Defendant further disputes Plaintiff's assertion that the damages for discharging an employee prior to the expiration of an employment agreement for a definite term always involves severance by arguing that the damages in that situation "is the remainder of the contract ***minus*** any income the discharged employee could or does earn during the remainder of the term" and "[a]dditional severance above these default damages is not warranted and is only intended in a situation where the employee is discharged, stops performing work, and stops being paid prior the agreement's expiration—something that did not happen here" (*id.* at 7). It is Defendant's position that if Plaintiff wanted to obtain his severance because Defendant placed him in a lame duck status, he should have taken an affirmative action against the purported breach by quitting, refusing compensation and seeking severance, which he failed to do (*id.*).

Finally, Defendant distinguishes the cases on which Plaintiff relies.

STANDARD OF REVIEW

The legal standards to be applied on a motion for summary judgment are well settled. The proponent of a motion for summary judgment "bears the initial burden of demonstrating its *prima facie* entitlement to the requested relief" (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47 [2d Dept 2011]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]).

Once the moving party has made a prima facie showing of entitlement to summary judgment, the burden of production shifts to the opponent, who must go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Reyes,* 83 AD3d at 50; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). A party opposing summary judgment may not rest on mere conclusions or unsupported assertions; rather the party must "affirmatively demonstrate the merit of its claim or defense" (*Collado v Jiacono*, 126 AD3d 927, 928 [2d Dept 2015]; *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 [1st Dept 1984], *affd* 62 NY2d 938 [1984]).

"It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega,* 18 NY3d at 504). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Pizzo-Juliano v Southside Hosp*., 129 AD3d 695 [2d Dept 2015]; *William J. Jenack Estate Appraisers & Auctioneers, Inc.,* 22 NY2d 470). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]; *Collado,* 126 AD2d 926). In reviewing a motion for summary judgment, the Court must accept as true the evidence presented by the nonmoving party and must deny the motion "if there is any doubt as to the existence of a triable issue" (*Herrin v Airborne Freight Corp*., 301 AD2d 500, 501 [2d Dept 2003]; *see also Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

The threshold inquiry in a motion for summary judgment involving a contract dispute is whether the contract is free from ambiguity such that its provisions may be enforced without resort to extrinsic evidence. The interpretation of an unambiguous contract is a question of law for the court (*Kass v Kass*, 91 NY2d 554 [1998]; *Taussig v Clipper Group, L.P.*, 13 AD3d 166 [1st Dept 2004], *lv denied* 4 NY3d 707 [2005]; *1550 Fifth Ave. Bay Shore, LLC v 1550 Fifth Ave., LLC*, 297 AD2d 781 [2d Dept 2002], *lv denied* 99 NY2d 505 [2003]). In construing an unambiguous contract, "the intention . . . may be gathered from the four corners of the instrument and should be enforced according to its terms" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). A contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning ...." (*Greenfield v Philles Records, Inc*., 98 NY2d 562, 570 [2002]). Parol evidence cannot be used to create an ambiguity where the words of the parties' agreement are otherwise clear and unambiguous (*Innophos, Inc. v Rhodia, S.A.*, 38 AD3d 368 [1st Dept 2007], *affd* 10 NY3d 25 [2008]). "On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied" (*American Express Bank, Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *lv denied* 77 NY2d 807 [1991]). "Where consideration of a contract as a whole resolves the ambiguity created by one clause, there is no occasion to consider extrinsic evidence of the parties' intent" (*Hudson-Port Ewen Assoc., L.P. v Kuo*, 78 NY2d 944, 945 [1991]).

DISCUSSION

"'The essential elements of a breach of contract cause of action are "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages"'" (*Ripa v Petrosyants*, 203 AD3d 768, 769-770 [2d Dept 2022], *quoting Stewart v Berger*, 192 AD3d 940, 941 [2d Dept 2021], *quoting Liberty Equity Restoration Corp. v Maeng-Soon Yun*, 160 AD3d 623, 626 [2d Dept 2018]; *see also Brualdi v IBERIA, Lineas Aereas de España, S.A.*, 79 AD3d 959 [2d Dept 2010]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc*., 69 AD3d 802 [2d Dept 2010]).

The Agreement employing Plaintiff as Defendant's General Counsel provides for a three-year Term effective January 1, 2020 unless terminated sooner in accordance with the Agreement

(NYSCEF Doc. No. 19 at § 2). Term is defined as the period during which Plaintiff was employed pursuant to the Agreement and Employment Year is defined as each year of the Term following the effective date (January 1, 2020) (*id.*). Section 3 of the Agreement is entitled "Duties and Title" and provides that Plaintiff "shall have such responsibilities and duties as are commensurate with the position of General Counsel **and as may be designated from time to time by the Chief Executive Officer or the Board of Directors** . . . You shall report to the Chief Executive Officer" (*id.* at § 3). In addition to the base salary for each Employment Year, the Agreement states that provided that Plaintiff's Employment Year has not been terminated for Reasonable Cause, Plaintiff was also entitled to Incentive Compensation ($50,000) at the end of the Employment Year if Defendant achieved the performance goals set forth in Exhibit B to the Agreement (*id.* at § 4[b]). Those performance goals were predicated on Defendant's earnings before interest, taxes, depreciation and amortization ("EBITDA") as being: (1) $34.45 million or more for Employment Year 1; (2) $36.517 million or more for Employment Year 2; and (3) $38.708 million or more for Employment Year 3 (*id.*, Ex. B).

Section 10 is entitled "Severance Payments" and provides that if Plaintiff was terminated

> without Reasonable Cause[4] during the Term . . . in addition to payment of the Accrued Obligations, [Plaintiff] shall be entitled to severance payments in the form of (i) continuation for a period of one year of [his] then-current Base Salary; (ii) payment by PREMIER of premiums for the benefits set forth in Section 5 of this Agreement for [Plaintiff] and [his] family for a period of one year; and (iii) payment of the Incentive Compensation, to the extent earned in accordance with Exhibit B attached hereto, applicable to the entire Employment Year during which such termination occurs (collectively, "Severance Payments"); provided that you sign the Form of Separation and Release Agreement attached hereto as Exhibit A and becomes effective and irrevocable in accordance with the terms thereof (*id.* at § 10).

Here, Plaintiff's Agreement required that Defendant employ Plaintiff for a three-year period from January 1, 2020 to December 31, 2022. In support of its motion, Defendant has submitted evidence establishing its prima facie entitlement to summary judgment because: (1) Plaintiff remained employed as Defendant's General Counsel throughout the Term; (2) Plaintiff was paid all the compensation to which he was entitled under the Agreement;[5] and (3) Defendant did not terminate Plaintiff's employment during the Term (i.e., Plaintiff's employment terminated

[4] Section 7 of the Agreement explains the meaning of termination based on Reasonable Cause (NYSCEF Doc. No. 19 at § 7).

[5] Although Plaintiff avers that because Defendant terminated him, he lost the ability to earn any potential bonus incentives through the end of the Term (Perez Opp. Aff. at ¶¶ 56-57), Plaintiff presents no evidence that Defendant had met its EBITDA goal for Employment Year 3 which would have entitled Plaintiff to the Incentive Compensation. Nor does Plaintiff allege that Defendant met the EBITDA goal for Year 3. As such, the Court does not credit Plaintiff's argument.

based on the expiration of the Term and the non-renewal of the Agreement). Although Plaintiff is correct that O'Sullivan's recounting of Schwabe's statements concerning his conversations with Plaintiff are hearsay and are inadmissible for purposes of this motion, the admissible evidence attached to O'Sullivan's affidavit in the form of: (1) the Agreement, including its plain terms defining the three-year Term (NYSCEF Doc. No. 19); (2) the earnings statements and expense reports reflecting Defendant's payment of Plaintiff's base salary and expenses during the entirety of the Term (NYSCEF Doc. Nos. 27-30); (3) the emails reflecting that Plaintiff continued to perform duties as Defendant's General Counsel well into December 2022, even if, as Plaintiff contends, those responsibilities were at a much diminished level (NYSCEF Doc. Nos. 20-24); and (4) Defendant's letter dated November 28, 2022 in which Defendant confirms Plaintiff's termination effective December 30, 2022 (the "Termination Letter") (NYSCEF Doc. No. 26). Although Plaintiff argues that he was terminated during the Term because the Termination Letter states that his last date of employment was December 30, 2022 rather than the correct last day of the Term (i.e., December 31, 2022), the Court rejects this argument as entirely specious as the last workday in December was Friday December 30, 2022 and, in any event, Plaintiff was paid through December 31, 2022 since his last paycheck was for the pay period 12/25/22-1/7/22 (NYSCEF Doc. No. 29).

It is well settled "that when an employment contract contains a fixed term, the employment terminates on the date specified in the contract" (*Yule v New York Chiropractic College*, 43 AD3d 540, 542 [3d Dept 2007]). This case is analogous to the facts of *Yule*. In that case, plaintiff entered into an employment contract with defendant that had a term that expired on August 31, 2006. There were three events of termination: (1) "if the position was to be substantially modified or eliminated 'during the term of this appointment,' defendant was required to notify plaintiff six months in advance of such event"; (2) "'[u]nder normal circumstances,' notice of continuation, alteration or nonrenewal was to be 'issued no later than June 1, 2006, which [was] 3 months prior to the expiration of [plaintiff's current appointment'"]; and (3) "if termination was for cause, 'including performance which [was] less than satisfactory to [defendant],' defendant was to provide plaintiff with 'notice of immediate dismissal'" (*Yule*, 43 AD3d at 541). Because of performance issues, plaintiff was placed on probation for six months starting on January 17, 2006. On July 20, 2006, defendant notified plaintiff that "her employment was terminated effective at the expiration of the contract term on August 31, 2006" or, alternatively, plaintiff was offered another position at the same salary and benefits as her current position (*id.* at 541). Plaintiff declined the offer and sued defendant for six months' salary and accrued vacation time and benefits. The trial court granted defendant's motion for summary judgment. On appeal, the Appellate Division, Third Department affirmed the trial court's dismissal finding that "'[p]laintiff was employed for the full time for which she had been hired [i.e., plaintiff's contract was for a definite term expiring on August 31, 2006] and was paid accordingly. Defendant promised no more than that' . . . Plaintiff's employment was not prematurely terminated during the course of her contractual term of appointment, nor, as the documentary evidence establishes, was the position eliminated. Thus, none of the termination provisions of the contract was triggered" (*id.* at 542, *quoting Brumbach v Rensellaer Polytechnic Inst.*, 126 AD2d 841, 842 [3d Dept 1987]).

Here, as in *Yule*, Defendant advised Plaintiff in October 2022 that it could no longer afford a General Counsel position, that it would not be renewing Plaintiff's Agreement, and that Plaintiff did not need to report in-person to the office so that Plaintiff could spend time looking for another position. By letter dated November 28, 2022, Defendant confirmed that Plaintiff's termination would occur on December 30, 2022 and Plaintiff was employed until the expiration of the Term and was paid all compensation owed. As such, Defendant has established, prima facie, that it did not breach the Agreement because it did not terminate Plaintiff without Reasonable Cause during the Term.

In opposition, Plaintiff fails to submit evidence creating a triable issue of fact. The only evidence Plaintiff provides which he contends supports Defendant's termination on October 4, October 28, or November 30 is: (1) an email exchange in August 2022 in which Schwabe suggests to Plaintiff that he start looking for another position because Plaintiff was unwilling to represent Defendant in a federal class action lawsuit and Plaintiff responds by reminding Schwabe that Plaintiff could only be terminated during the Term for Reasonable Cause and that his refusal to represent Defendant in such a class action would not constitute Reasonable Cause (NYSCEF Doc. No. 43); (2) Plaintiff's statement in his affirmation that during an October 4, 2022 conversation with Schwabe, Schwabe "terminated his employment without reasonable cause" by telling Plaintiff could no longer afford a General Counsel and that he no longer needed to report to the office so Plaintiff could focus on finding another job (Perez Opp. Aff. at ¶¶ 25-26); (2) Plaintiff's statement in his affirmation that following the October 4th conversation, Plaintiff "was removed from all management meetings and [his] responsibilities were materially changed. [He] did not speak to Mr. Schwabe again until October 28, 2022, when he told [Plaintiff] that [he] was not aggressive enough and that was why [he] was no longer with the company" and then hung up on him (*id.* at ¶¶ 27); (3) Plaintiff's statement in his affirmation (as confirmed by the transcript of the conference – NYSCEF Doc. No. 38) that at a conference before Judge Koeltl on October 28, 2022, Schwabe informed the judge that Defendant no longer had in-house counsel and Plaintiff was no longer with the company[6] (*id.* at ¶¶ 36-40); and (4) in two emails Plaintiff wrote to opposing

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[6] The Court has reviewed the transcript of this conference and it is evident that Schwabe, who was appearing unrepresented on behalf of Premier, was irritated because he believed Premier had been wrongfully assessed millions of dollars in the class action/arbitration and because he was unhappy with the representation of outgoing counsel Holland & Knight. During the conference, Schwabe was seeking a brief adjournment to retain new counsel and for the new counsel to have time to respond to the petition to confirm the arbitration award. However, petitioner's counsel objected to the court awarding Premier additional time arguing that Premier could be represented by its in-house counsel. In response, Schwabe stated that Premier could not afford in-house counsel stating that Premier no longer had in-house counsel. As explained by Defendant, this statement, while inexact, was actually true because Plaintiff had advised Premier in August 2022 that he would not represent Premier in the class action litigation. Given the context of this exchange and Schwabe's frustration with Perez's refusal to be involved in the representation of Premier, this exchange cannot be used as evidence that Plaintiff had been terminated without Reasonable Cause during the Agreement's Term. Nor can Plaintiff rely on Schwabe's and/or O'Sullivan's failure to correct his representation to others that he was no longer Premier's in-house counsel. Plaintiff sent these

counsel in the federal action (November 9, 2022) and to the arbitrator (December 1, 2022), Plaintiff represented that he was no longer Defendant's in-house counsel and despite being cc'd on these emails, Schwabe did not correct him (*id.* at ¶¶ 46-51; NYSCEF Doc. Nos. 40, 41). However, even accepting these facts as true for the purposes of this motion, they do not establish a triable issue of fact.

The Court does not agree that the law providing that where "'an employee is under a contract to fill a particular position, any material change in his duties or significant reduction in rank may be treated by the employee as a breach of contract'" (*Lynch v Pharm. Discovery Corp.*, 208 AD2d 906, 906 [2d Dept 1994], *quoting Hondares v TSS-Seedman's Stores, Inc.*, 151 AD2d 411, 413 [1st Dept 1989]; *see also Rudman v Cowles Communications, Inc.*, 30 NY2d 1 [1972]) supports Plaintiff's claim of breach of contract because: (1) the Agreement specifically provides that Plaintiff "shall have such responsibilities and duties . . . **as may be designated from time to time by the Chief Executive Officer"** (NYSCEF Doc. No. 19 at § 3), and, therefore, Schwabe had every right to advise Plaintiff on October 4, 2022 that he should work from home and thereafter assign Plaintiff whatever duties he saw fit; and (2) even if Plaintiff's responsibilities were materially changed and/or his rank reduced, Plaintiff waived the right to sue for breach by failing to refuse to perform work or resign and immediately demanding his severance.[7] "It is well settled that when one party breaches an executory contract, the adverse party has a choice—to treat the entire contract as broken and sue immediately for the breach or reject the proposed breach and continue to treat the contract as valid . . . The adverse party must, however, make an election and

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emails to prevent the attorneys and the arbitrator from cc'ing him on any further correspondence in federal arbitration/litigation.

[7] The cases on which Plaintiff relies are inapposite because in those cases unlike this case, the disgruntled employee resigned and sued for breach or else refused to perform the diminished duties and was then discharged (*Hondares*, 151 AD2d 411; *Karas v H.R. Labs., Inc.*, 271 AD 530 [2d Dept 1946]; *Rudman*, 30 NY2d 1). In *Zeumer v Fire Burglary Instruments, Inc.* (210 AD2d 318[2d Dept 1994]), plaintiff had a two-year contract with defendants Fire Burglary Instruments, Inc. and FBX Corp. (together "FBX") to serve as VP of Operations at an annual salary of $99,800 plus an incentive bonus "of up to $4,000 per month provided certain production efficiency and shipping goals . . . [were] achieved" (*Zeumer*, 210 AD2d at 318). After Plaintiff had been employed by 14 months, FBX was acquired by another company and the manufacturing operations were transferred from FBX and plaintiff was assigned other tasks. At the end of his two-year contract, plaintiff did not receive an incentive bonus for his last 10 months of his employment because during that time, he had no manufacturing or shipping responsibilities to entitle him to that bonus. In that case, because defendants had unilaterally changed plaintiff's responsibilities which prevented plaintiff from earning the incentive bonus, plaintiff was awarded $16,000 based on a finding that he would have been entitled to a bonus for four of the months during which he was prevented from performing the duties that would have entitled him to the incentive bonus. As set forth herein, Plaintiff neither alleges nor provides any evidence that he would have been entitled to the Incentive Compensation in Year 3 because Defendant met the EBITDA requirement found in Ex. B to the Agreement.

cannot 'at the same time treat the contract as broken and subsisting. One course of action excludes the other'" (*Inter-Power of N.Y., Inc. v Niagara Mohawk Power Corp.*, 259 AD2d 932, 934 [3d Dept 1999], *lv denied* 93 NY2d 812 [1999], *quoting Strasbourger v Leerburger*, 233 NY 55, 59 [1922]). If Plaintiff believed that Defendant breached the Agreement in October 2022 when Schwabe began to diminish his responsibilities and thereby terminated him without Reasonable Cause, it was incumbent upon Plaintiff to elect to notify Defendant of its breach by either refusing to perform the work or resigning and then demanding the severance under the Agreement. Instead, Plaintiff acquiesced to his new role with diminished authority by performing the work requested and by taking his salary for over two months after the alleged breach (*MacFarlane & Assocs., Inc. v Noxell Corp.*, 1994 WL 369324 [SDNY 1994]; *Lazard Frères & Co. v Crown Sterling Mgmt., Inc.*, 901 F Supp 133 [SDNY 1995]). Accordingly, even if Plaintiff presented evidence that Agreement required that Plaintiff perform certain duties but Defendant denied Plaintiff the right to perform those duties in breach of the Agreement (which Plaintiff failed to do), Plaintiff nevertheless waived any claim that Defendant breached the Agreement by reducing Plaintiff's duties and role as General Counsel.

Finally, regarding Plaintiff's assertion that Defendant prevented Plaintiff from performing the condition precedent to his entitlement to severance, this argument is moot based upon this Court's determination that the severance provision was never triggered. Furthermore, even if the severance provision had been triggered because Defendant terminated Plaintiff without Reasonable Cause during the Term, this action would need to be dismissed because there is no evidence that Plaintiff provided a copy of the Release signed by him, which was a condition precedent to his right to severance. A condition precedent "'must occur before a duty to perform a promise in the agreement arises'" (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995] [citations omitted]). "However, if the condition precedent could not be fulfilled because the defendant prevented or hindered its occurrence, defendant must still perform" (*CVC Claims Litig. LLC v Citicorp Venture Capital Ltd.*, 2006 WL 1379596 at *4 [SDNY 2006]).

Based on the plain language of the Agreement, Plaintiff had to provide Defendant with a signed Release to be entitled to severance. Although Plaintiff argues that his obligation to sign the Release was excused because Defendant prevented the occurrence of this condition precedent because Defendant did not provide him with the Release dated and signed by the CEO, Plaintiff fails to present any evidence supporting that Defendant had such an obligation. The Agreement's plain terms state that severance was due "provided that you sign the Form of Separation and Release attached hereto as Exhibit A" (NYSCEF Doc. No. 19 at § 10), the "you" refers to Plaintiff and does not require that Defendant furnish a signed and dated Release, particularly because Plaintiff was already furnished with the Release when he signed the Agreement in March 2020.

This case is analogous to *Napoli v Deluxe Corporation* (2019 WL 2579348 [EDNY 2019]). In *Napoli*, plaintiff demanded severance payments but did not provide the necessary release required by the employment agreement in order to receive the severance payments. Plaintiff claimed that this failure to provide the necessary release was not in breach of the employment agreement because defendant was instrumental in preventing the occurrence of a condition precedent by not presenting plaintiff with the release. The federal district court rejected plaintiff's argument stating that "[t]his doctrine is not implicated here as there is nothing in either the complaint or in Plaintiff's papers to suggest that Defendants had a duty to supply him with a release or that they did anything to prevent or hinder him from executing one and providing it to them" (*Napoli*, 2019 WL 2579348 at *5). Here, as in *Napoli*, there is nothing in the Agreement requiring that Defendant supply the Release nor has Plaintiff presented any evidence that Defendant did anything to prevent or hinder Plaintiff from executing the Release.

Similarly, in *Mullinix v Mount Sinai School of Medicine* (2015 WL 328050 [SDNY 2015]), defendant sent plaintiff a release with material terms that differed from the original agreement but advised plaintiff that it was subject to a 21-day negotiation period. Plaintiff did not sign the release nor engage in negotiations during the 21-day period. Instead, plaintiff sued for breach of contract. In dismissing plaintiff's complaint based on plaintiff's failure to satisfy the condition precedent of signing the release, the court held that defendant's offering plaintiff with an agreement with additional material terms did not amount to frustration or a prevention of the condition precedent, especially because defendant expressly informed plaintiff that it was willing to negotiate the terms. According to the court, plaintiff should have responded in some way, either by trying to negotiate or signing the release, which plaintiff failed to do.

Based on the foregoing, even if the severance provision had been triggered, this action would have to be dismissed because Plaintiff failed to satisfy the condition precedent set forth in the Agreement by providing Defendant with a signed copy of the Release (*Napoli*, 2019 WL 2579348; *Mullinix*, 2015 WL 328050; *see also O'Grady v BlueCrest Capital Mgt. LLP*, 646 Fed Appx 2 [2d Cir 2016]; *Kaul v Hanover Direct, Inc.*, 148 Fed Appx 7 [2d Cir 2005]).

Finally, the Court agrees with Defendant that to the extent Plaintiff is seeking severance based upon a claim of constructive discharge,[8] this doctrine is inapplicable because: (1) reduced responsibilities and workload are insufficient to meet constructive discharge standards; and (2) Plaintiff did not resign and leave his job during the Agreement's Term (*Morris v Schroder Cap. Mgmt. Intl.*, 7 NY3d 616 [2006]; *Nelson v HSBC Bank USA*, 41 AD3d 445 [2d Dept 2007]; *Stetson v. NYNEX Serv. Co.*, 995 F2d 355, 360 [2d Cir 1993]; *ESPN, Inc. v Office of Commr. of Baseball,* 76 F Supp 2d 383 [SDNY 1999]). Constructive discharge occurs when "[an] employer deliberately made working conditions so intolerable that he or she was forced into involuntary resignation" (*Morris*, 7 NY3d at 621). To meet this standard, a plaintiff-employee must show that the working conditions were so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign (i.e., that the employer deliberately and intentionally created intolerable workplace conditions) (*Morris*, 7 NY3d 616).[9] "The constructive discharge test is not met if the employee is simply dissatisfied with the change in his job assignments" (*id.* at 622).

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[8] It does not appear that Plaintiff is making such a claim because it is not asserted in either Plaintiff's Amended Complaint or its opposition to the motion.

[9] In *Morris*, plaintiff-employee argued that defendant forced him to resign by significantly diminishing his job responsibilities and reducing the amount of assets over which he had control from approximately $7.5 billion to $1.5 billion to such an extent that plaintiff believed he was in a dead-end job (*Morris*, 7 NY3d 616). The Court of Appeals rejected Morris's claim of constructive discharge because even assuming the employer purposely reduced his job

Furthermore, constructive discharge is inapplicable because, under the doctrine of election, the non-breaching party must choose either to terminate the contract immediately and recover liquidated damages or to continue the contract and recover solely for the breach, if there is one (*ESPN, Inc.*, 76 F Supp 2d at 387). In *ESPN*, the court explained that the party must "make an election and cannot 'at the same time treat the contract as broken and subsisting'" (*id.* at 387, *quoting Inter-Power of N.Y.*, 259 AD2d at 934). Thus, a party's decision to continue the contract prevents that party from terminating the contract based upon that breach. Here, Perez cannot claim constructive discharge because after he learned of the alleged breach, he continued to perform his job and accepted the salary and benefits that Defendant remitted to him. Upon Defendant's alleged breach (i.e., its alleged termination of Plaintiff without Reasonable Cause), it was incumbent upon Plaintiff to resign and to sue for the severance he believed was due. Instead, he stayed at the job, performed work, and received his salary and benefits through the end of the Term. Because the non-breaching party must choose between two courses of action, Plaintiff's decision to continue performing his job and retain the salary paid prevents him from bringing a constructive discharge claim.

Based upon the foregoing, Defendant's motion for summary judgment shall be granted.

CONCLUSION

For all the foregoing reasons, it is hereby

ORDERED that the motion by Defendant Premier Home Health Care Services, Inc. for an order granting it summary judgment dismissing the Amended Complaint of Plaintiff Cesar Perez is granted and the Amended Complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
August 7, 2024

ENTER:

HON. GRETCHEN WALSH, J.S.C.

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responsibilities, "[his] work conditions were not so intolerable that a reasonable person would have been forced to leave the job" (*id.* at 620 [citations omitted]).

TO:

DERER SMITH LAW GROUP, PLLC
Attorneys for Plaintiff
By: Danilo Bandovic, Esq.
1 Penn Plaza, Suite 4905
New York, NY 10119

GREENBERG TAURIG LLP
Attorneys for Defendants
By: Jerold F. Goldberg, Esq.
900 Stewart Avenue, 5th Floor
Garden City, NY 11530

Nicholas A. Corsano, Esq.
One Vanderbilt Avenue
New York, NY 10017