

**Di Bari v Morellato & Sector USA, Inc.**

2012 NY Slip Op 32122(U)

August 9, 2012

Supreme Court, New York County

Docket Number: 0109387/2008

Judge: Jeffrey K. Oing

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

PRESENT: JEFFREY K. OING  
J.S.C. Justice

PART 49

Index Number : 109387/2008  
DI BARI, SEBASTIANO  
vs  
MORELLATO & SECTOR USA  
Sequence Number : 004  
REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*"This motion is decided in accordance with the annexed decision and order of the Court."*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

AUG 10 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/9/12

JEFFREY K. OING  
J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

-----x  
SEBASTIANO DI BARI,

Plaintiff,

-against-

MORELLATO & SECTOR USA, INC. (f/k/a  
QUADRANTE, INC.) d/b/a SECTOR GROUP  
USA AND MORELLATO, S.p.A. (f/k/a  
SECTOR GROUP, S.p.A.)

Defendants.  
-----x

Index No.: 109387/08

Mtn Seq. No. 004

DECISION AND ORDER

**FILED**

AUG 10 2012

NEW YORK  
COUNTY CLERK'S OFFICE

JEFFREY K. OING, J.:

Plaintiff, Stephano DiBari, moves, pursuant to CPLR 2221, for an order granting reargument of that branch of this Court's decision and order, entered on October 17, 2011, which dismissed plaintiff's third cause of action under Article 6 of the Labor Law.

#### Background

Plaintiff is a former Chief Financial Officer and Vice President of defendant Morellato & Sector USA ("Sector USA"). Sector USA is the U.S. subsidiary of co-defendant Morellato S.p.A. ("Morellato"). Morellato is a creator, manufacturer and retailer of jewelry and wristwatches. Sector USA employed plaintiff from February 2004 through February 2007. This action stems from that employment.

Plaintiff and defendants entered into an employment contract, dated February 2004 (the "employment agreement"). Pursuant to the employment agreement, defendants agreed to, inter

alia, pay plaintiff certain guaranteed bonus payments based on pre-determined targets tied to defendants' annual earnings.

In or about February of 2007, plaintiff and defendants terminated their employment relationship. The parties entered into a severance agreement, dated February 22, 2007 (the "severance agreement"), which provided that defendants would (1) pay plaintiff a bonus payment for 2006 once budget data to determine correct amount became available, and (2) that defendants would pay plaintiff's legal fees in a then-ongoing arbitration commenced jointly against defendants and plaintiff while plaintiff was still in defendants' employ (the "arbitration").

Plaintiff commenced this action asserting three causes of action: (1) breach of the severance agreement by failing to pay plaintiff his bonus; (2) breach of the severance agreement by failing to pay plaintiff's defense costs in the arbitration; and (3) violation of Labor Law §§ 190, et seq.

In motion sequence no. 003, DiBari moved for summary judgment on all three causes of action. Upon the conclusion of the May 27, 2011 oral argument, this Court dictated a decision and order on the record, which denied that branch of the motion with respect to the first cause of action, and granted that branch of the motion concerning the second of action on the issue of liability, leaving the amount of damages to be determined at trial. Although defendants did not cross-move for summary judgment for an order dismissing plaintiff's third cause of

action, this Court searched the record (CPLR 3212(b)) and dismissed plaintiff's third cause of action alleging violation of Article 6 of the New York Labor Law.

#### Discussion

To sustain a motion for reargument, a plaintiff must demonstrate that the Court either: (1) overlooked or misapprehended the relevant facts; or (2) misapplied a controlling principle of law (William P. Paul Equip. Corp. v Kassis, 182 AD2d 22, 27 (1st Dept 1992)). New arguments that were not previously advanced may not be brought up on reargument, nor may a reargument motion be used as a vehicle to repeat or reargue what has already been considered and determined (Id., Foley v Roche, 68 AD2d 558 [1st Dept 1979]).

Plaintiff argues that an "executive" such as him is an "employee" within the meaning of Labor Law § 190(2) and is, thus, afforded the protections of Article 6 of the Labor Law unless specifically excluded from protection under a specific provision (Pachter v Bernard Hodes Group, Inc., 10 NY3d 609 [2008]). The argument is persuasive.

Here, the complaint sets forth in general terms that defendants have violated "Labor Law §§ 190, et seq." Plaintiff's counsel argues that such generalization incorporates a violation of Labor Law § 193. In that regard, the section 193 claim is based on defendants' alleged failure to pay plaintiff bonuses due to him pursuant to the employment and severance agreements.

Section 193 provides that an employer shall not "make any deduction from the wage of an employee," except as expressly permitted in that section. Critically, section 193 does not exclude executives from protection, unlike, e.g., section 198-c (Pachter, supra, 10 NY3d at 616). Additionally, a bonus payment that is "already due and vested" may constitute a "wage" under the labor statute (Ryan v Kellogg Partners Institutional Servs., 19 NY3d 1, 16 [2012]).

Here, in light of the fact that plaintiff's 2006 bonus was non-discretionary and guaranteed as a condition of his employment, the bonus was earned and vested before he left his position with Sector USA. Accordingly, plaintiff is not precluded by virtue of his position as an executive from asserting a section 193 claim for non-payment of his guaranteed bonus.

Accordingly, plaintiff's motion for reargument is granted, and upon reconsideration, plaintiff's third cause of action for violation of § 193 is hereby reinstated.

Accordingly, it is

ORDERED that the motion of plaintiff for leave to reargue its motion for summary judgment is granted; and it is further

ORDERED that, upon reargument, the Court vacates that branch of the prior order, entered October 17, 2011, as it concerns plaintiff's third cause of action only, and it is further

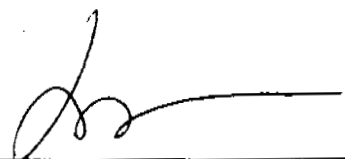
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ORDERED that plaintiff's third cause of action for violation of Article 6 of the Labor Law, Section 193, is reinstated; and it is further

ORDERED that the parties are directed to contact Part 48 at 646-386-3265 to schedule a status conference within 20 days of service of a copy of this decision, with notice of entry, upon defendants.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/9/12



HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING  
J.S.C.

**FILED**

**AUG 10 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**