SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 63

JESSICA SILLARO,

Plaintiff,

- against -

EDUCATIONAL HOUSING SERVICES, INC.,

Defendant.

Index No.: 153577/14

DECISION/ORDER

COIN, ELLEN, J.:

In this action, plaintiff Jessica Sillaro sues her former employer under Labor Law §§ 191 and 193 to recover allegedly unpaid wages. Defendant moves pursuant to CPLR 3212 for summary judgment dismissing the complaint.

Background

The material facts in this case are largely undisputed. Defendant Educational Housing Services, Inc. (EHS or the company) is a not-for-profit corporation that provides housing and student life services to college students and interns in New York City. Plaintiff was employed by EHS as a Marketing Associate from 2003 to 2006, and as Director of Marketing from October 2007 until she resigned in December 2013. Plaintiff's duties and responsibilities as Director of Marketing, as she described them, included overseeing group contracts, organizing tours of school buildings, being in charge of all marketing materials, overseeing the website, and producing a "view book." Plaintiff's Deposition (Pl. Dep.), Ex. A to Affirmation of Julie Zong in Opposition to

Defendant's Motion (Zong Aff.), at 25-26, 157-158. She testified that she occasionally visited schools to recruit students, although that was mostly handled by the marketing associates, and "wasn't really what [she] did" as Director of Marketing. *Id.* at 158-160.

The terms of plaintiff's employment, including the amount of her salary, were set forth in an offer letter dated October 1, 2007 (offer letter). *See* Offer Letter, Ex. D to Affirmation of Steven Seltzer in Support of Defendant's Motion (Seltzer Aff.). The offer letter also provided that after completing a 90-day introductory period, she would "be eligible for a commission package," which was not otherwise detailed in the letter. *Id.*

In 2004 or 2005, EHS introduced an incentive bonus plan for employees in its marketing department, to reward employees when the company achieved specific revenue goals. Affidavit of Joseph LaVacca in Support of Defendant's Motion (LaVacca Aff.), ¶ 3. A written bonus plan, the EHS Marketing Team Incentive Bonus Plan (MTIBP), was distributed each year to eligible employees, setting out the year's revenue goals and providing the formula for calculating the year's bonus, and the dates of quarterly MTIBP payments. *See* 2009 MTIBP, Ex. H to Seltzer Aff.; 2008, 2010, 2011 MTIBPs, Exs. A, B, C to LaVacca Aff. Each bonus plan indicated that it was for a particular year, and ended on December 31 of the year. The bonus given to employees ranged

from 10% to 50% of the employee's salary, depending on the revenue goals achieved. Plaintiff testified that she received bonus payments in 2004, 2005, and 2006, and in every quarter from 2007 through 2011, but received no bonus payments in 2012 or 2013.

According to LaVacca, EHS's Controller, in 2011, EHS's board of directors, unhappy that bonuses were being given when the company's revenue had declined, decided to discontinue offering a bonus plan, and did not distribute a written bonus plan or otherwise offer a bonus in 2012 or 2013, or any time after 2011. LaVacca Aff., ¶ 9. EHS did not inform plaintiff or other marketing team members that the bonus plan was being discontinued. *Id.*, ¶ 10.

According to plaintiff, she made inquiries to her supervisor and others throughout 2012 and 2013 about why she had not received bonus payments, but was unable to get an explanation or any information as to the status of the bonuses. Affidavit of Jessica Sillaro (Pl. Aff.), ¶¶ 18-24. She testified that she was told by her supervisor, Faye Bean, in late 2012, and by Lavacca, in January 2013, that she would no longer be getting a bonus (Pl. Dep. at 91-92, 97), but was not directly told until December 2013, when she met with Jeffrey Lynford, president of EHS as of November 2012, that the bonus incentive plan had been discontinued, and no payments would be made to her for 2012 and

2013 or going forward. *Id.* at 138-139, 145. In response, plaintiff resigned at the end of December 2013.

Plaintiff commenced this action in April 2014, claiming that EHS owes her payments of at least $90,000 for 2012 and 2013. The complaint alleges three causes of action, for failure to timely pay commissions in violation of Labor Law § 191 (first); failure to provide her with a written commission agreement for 2012 and 2013, in violation of Labor Law § 191 (c) (second); and unlawful deductions from her wages of the bonus payments for 2012 and 2013, in violation of Labor Law § 193 (third).

Legal Standards

It is well settled that, on a motion for summary judgment, the moving party must, by submitting evidentiary proof in admissible form, make a prima facie showing that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law. *See* CPLR 3212 (b); *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Once such showing is made, the burden shifts to the opposing party to demonstrate, also by submitting evidentiary proof in admissible form, that material issues of fact exist which require a trial of the action. *See Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 (2015); *Jacobsen*, 22 NY3d at 833; *Alvarez*, 68 NY2d at 524. The evidence must be viewed in a light

most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978). The nonmoving party must show, however, "the existence of a bona fide issue raised by evidentiary facts." *Id.* at 231; *see IDX Capital, LLC v Phoenix Partners Group LLC*, 83 AD3d 569, 570 (1st Dept 2011), *affd* 19 NY3d 850 (2012). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Labor Law

"Article 6 of the Labor Law governs employers' payment of wages and benefits to employees" (*Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]), and "sets forth a comprehensive set of statutory provisions enacted to strengthen and clarify the rights of employees to [such payment]." *Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 223 (2000). Labor Law § 191 requires employers to timely pay wages to certain categories of employees, including "commission salespersons." Labor Law § 191 (1) (c). The statute defines "commission salesperson" as "any employee whose principal activity is the selling of any goods, wares, merchandise, services, real estate, securities, insurance or any article or thing and whose earnings are based in whole or in part

on commissions," but expressly excludes any "employee whose principal activity is of a supervisory, managerial, executive or administrative nature." Labor Law § 190 (6); *see Wilberding v Center Capital Group, LLC*, 2013 WL 5912140, 2013 NY Misc LEXIS 5150, *23, 2013 NY Slip Op 32830(U) (Sup Ct, NY County 2013). "Section 193 prohibits an employer from making 'any deduction from the wages of an employee' unless permitted by law or authorized by the employee for certain payments made for the employee's benefit." *Ryan v Kellogg Partners Inst. Servs.*, 19 NY3d 1, 16 (2012), quoting Labor Law § 193 (1) (a), (b); *see Truelove*, 95 NY2d at 223; *Matter of Hudacs v Frito-Lay, Inc.*, 90 NY2d 342, 346-347 (1997).

"Wages," as defined in Labor Law § 190 (1), are "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." While the statutory definition of "wages" is broad, it is not so expansive as to "include every form of compensation paid to an employee." *Truelove*, 95 NY2d at 224. Generally, bonuses and other forms of "incentive compensation" that are "'based on factors falling outside the scope of the employee's actual work'" and are "both contingent and dependent, at least in part, on the financial success of the business enterprise," are excluded. *Id.* 95 NY2d at 223-224 (citation omitted); *see Dean Witter Reynolds, Inc. v*

Ross, 75 AD2d 373, 381 (1st Dept 1980) ("The term 'wages,' despite its broad definition does not encompass an incentive compensation plan"); *see also Gunthel v Deutsche Bank AG*, 32 AD3d 335, 337 (1st Dept 2006) (bonus awards under carried interest profit-sharing plans did not constitute "wages" under Labor Law § 190 [1]).

Courts have concluded, therefore, "'that if an employee has a fixed method of compensation by salary, bonus, commission or otherwise, and additional compensation is dependent on a factor outside the employee['s] actual work, then such compensation is not wages but merely incentive or supplemental compensation.'" *Bader v Wells Fargo Home Mtge., Inc.*, 773 F Supp 2d 397, 416 (SD NY 2011) (citation omitted). In *Truelove*, for example, the Court held that a bonus plan, dependent only on the employer's financial success and not based on the employee's individual productivity, was outside the meaning of "wages" in Labor Law § 190 (1) "because it constituted '[d]iscretionary additional remuneration, as a share in a reward to all employees for the success of the employer's entrepreneurship,' whereas 'the wording of the statute, in expressly linking earnings to an employee's labor or services personally rendered, contemplat[ed] a more direct relationship between an employee's own performance and the compensation to which that employee [was] entitled." *Ryan*, 19 NY3d at 16, quoting *Truelove*, 95 NY2d at 224; *see Dean Witter*

Reynolds, 75 AD2d at 382 (incentive payments not wages where dependent on group output and not earned if production goals not reached); *Levion v Societe Generale*, 822 F Supp 2d 390, 404 (SD NY 2011), *affd* 503 Fed Appx 62 (2d Cir 2012) (bonus payments not wages under Labor Law where payments dependent on the success of an entire group and were not commissions based purely on an employee's own personal productivity); *Ireton-Hewitt v Champion Home Builders Co.*, 501 F Supp 2d 341, 353 (ND NY 2007) (bonus not wages where plan does "not predicate bonus payments upon a plaintiff's own personal productivity nor give a plaintiff a contractual right to bonus payments based on his productivity")(citation omitted). In comparison, in *Ryan*, the Court held that a bonus constituted wages under Labor Law § 190 (1) where payment was guaranteed, in a fixed amount, as a substitute for half of the employee's salary, regardless of the company's performance, and was expressly linked to his personal labor and services. 19 NY3d at 16.

A plaintiff, moreover, "cannot assert a statutory claim for wages under the Labor Law if he has no enforceable contractual right to those wages." *Tierney v Capricorn Investors, L.P.*, 189 AD2d 629, 632 (1st Dept 1993); *see O'Grady v BlueCrest Capital Mgt. LLP*, 646 Fed Appx 2, 4 (2d Cir 2016); *Karmilowicz v Hartford Fin. Servs. Group, Inc.*, 494 Fed Appx 153, 158 (2d Cir 2012). Thus, "[a]n employee's entitlement to a bonus is governed by the

terms of the employer's bonus plan" (*Hall v United Parcel Serv., Inc.*, 76 NY2d 27, 36 [1990] [citation omitted]), and "only exists where the terms of the relevant contract require it." *Vetromile v JPI Partners, LLC*, 706 F Supp 2d 442, 448 (SD NY 2010); *see Bader*, 773 F Supp 2d at 407-408; *see also Gennes v Yellow Book of N.Y., Inc.*, 23 AD3d 520, 521 (2d Dept 2005) ("[w]hether a commission is earned is dependent upon the terms of the agreement providing for such commission"). "To be considered along with the above rules, however, is the long standing policy against the forfeiture of earned wages which applies to earned, uncollected commissions as well." *Weiner v Diebold Group*, 173 AD2d 166, 167 (1st Dept 1991), citing *Cohen v Lord, Day and Lord*, 75 NY2d 95, 101-102 (1989); *see Johnson v Ultravolt, Inc.*, 2015 WL 403314, *2, 2015 US Dist LEXIS 10422, *5 (ED NY 2015).

"To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 (1999); *see Levion*, 822 F Supp 2d at 397. "[D]efiniteness as to material matters is of the very essence in contract law." *Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 (1981). "In short, it means that a court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to." *Matter of 166*

Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp., 78 NY2d 88, 91 (1991). "[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable." *Martin Delicatessen*, 52 NY2d at 109; *see generally Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 482 (1989).

Discussion

Chiefly at issue in this case is whether there was a contract to provide bonus incentive payments in 2012 and 2013 and whether the bonus incentive payments were "wages" within the meaning of the Labor Law. In support of its motion, defendant argues that plaintiff had no contractual right to bonuses in 2012 and 2013, and the bonuses do not qualify as wages under Labor Law §§ 191 and 193. Defendant also contends that even if the bonus payments were construed as wages, plaintiff was not a "commission salesperson" entitled to the protections of Labor Law § 191.

It is undisputed that the offer letter provided that plaintiff would be eligible for a commission plan, but does not promise or guarantee any payment, and does not set forth any details or specific criteria of such plan. The offer letter's general indication that plaintiff would be eligible for a bonus incentive payment thus is too indefinite to constitute an enforceable contract term. *See Leschak v Raiseworks, LLC*, 2016 US Dist LEXIS 31785, *14-16 (SD NY 2016) (agreement did not "require" payment of bonus where it provided plaintiff was

"eligible" for bonus); *Valentine v Carlisle Leasing Intl. Co.*, 1998 WL 690877, *4, 1998 US Dist LEXIS 15581, *11 (ND NY 1998) (same). While it also is not disputed that defendant had a bonus incentive plan in place from 2004 to 2011, and written plans, with specific bonus formulas, were distributed to eligible employees, including plaintiff, each year, each plan clearly indicated that it was for a particular calendar year. Nothing in the language of the written plans indicates that a bonus was guaranteed in subsequent years or would be extended indefinitely. *See Levion*, 822 F Supp 2d at 397-398. LaVacca testified that the bonus incentive plan was discontinued after 2011 due to concerns of EHS's board of directors about the company's revenue, and no plan was distributed or otherwise offered or promised in 2012 or 2013. Deposition of Joseph LaVacca (LaVacca Dep.), Ex. E to Seltzer Aff., at 30, 33-34; LaVacca Aff., ¶¶ 9, 11,12. In view of this evidence, defendant has made a prima facie showing that plaintiff had no contractual right to bonus incentive payments for 2012 and 2013. *See Hunter v Deutsche Bank AG, N.Y. Branch*, 56 AD3d 274 (1st Dept 2008).

In opposition, while plaintiff asserts that the offer letter created a contract between her and EHS, she apparently recognizes that there was no written agreement providing for bonuses in 2012

and 2013. *See* Memorandum of Law in Opposition, at 10-11.[1] Instead, she argues that "there was a contract implied-in-fact or one that was enforceable under New York law for quantum meruit and promissory estoppel." *Id.* at 11.

"A contract implied in fact may result as an inference from the facts and circumstances of the case, although not formally stated in words, and is derived from the 'presumed' intention of the parties as indicated by their conduct." *Jemzura v Jemzura*, 36 NY2d 496, 503-504 (1975) (internal citations omitted); *see Leibowitz v Cornell Univ.*, 584 F3d 487, 506-507 (2d Cir 2009); *Bader*, 773 F Supp 2d at 413. "[A] contract implied in fact[] rests upon the conduct of the parties and not their verbal or written words. It is a true contract based upon an implied promise" (*Parsa v State of New York*, 64 NY2d 143, 148 [1984]), "as binding as one that is express, and similarly 'requires such elements as consideration, mutual assent, legal capacity and legal subject matter.'" *Leibowitz*, 584 F3d at 506-507, quoting *Maas v Cornell Univ.*, 94 NY2d 87, 94 (1999).

Here, plaintiff fails to present evidence sufficient to raise a triable issue of fact as to whether there was a valid contract, actual or implied, for bonus payments that "extended

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[1]The complaint also alleges no cause of action for breach of contract; to the contrary, the second cause of action is based on defendant's alleged failure to provide a written agreement for 2012 and 2013.

beyond the clear durational terms" of the yearly agreements. *Levion*, 822 F Supp 2d at 402. To the extent that plaintiff argues that bonuses were granted based on a fixed formula and were not discretionary, that argument does not address or alter the conclusion that there was no contract in effect in 2012 and 2013. "A guaranteed bonus in year one, followed by comparable bonuses in years two and three, does not create an entitlement to an equal bonus in years four and beyond" (*id.* at 400), unless, again, "the terms of the relevant contract require it." *Vetromile*, 706 F Supp 2d at 448.

Plaintiff's claim that she relied on receiving a bonus in 2012 and 2013, based on her supervisor's statement that she, too, expected one, and because company executives were not clear about the status of such bonuses, is insufficient to raise a triable issue of fact as to whether there was a promise for or conduct indicating that there would be bonuses in 2012 and 2013. Thus, plaintiff's "expectations concerning . . . [her 2012 and 2013] bonus were just that – expectations, which are not the equivalent of a contract." *Levion*, 822 F Supp 2d at 400; *compare Cuttino v West Side Advisors, LLC*, 101 AD3d 567, 568 (1st Dept 2012) (triable issues of fact about whether 2007 compensation agreement extended into 2008 where payments were given out in 2008 reflecting continued application of 2007 agreement).

Alternatively, plaintiff claims that she is entitled to

recover money damages based on the quasi-contractual doctrines of promissory estoppel and quantum meruit. Although these claims were not alleged in the complaint, the court briefly addresses them here.

"'Promissory estoppel is a legal fiction designed to substitute for contractual consideration where one party relied on another's promise without having entered into an enforceable contract.'" *Bader*, 773 F Supp 2d at 414 (citation omitted). Promissory estoppel requires evidence of a "clear and unambiguous" promise, "reasonable and foreseeable reliance" on the promise, and damages resulting from the reliance. *Urban Holding Corp. v Haberman*, 162 AD2d 230, 231 (1st Dept 1990); *see Broughel v Battery Conservancy*, 2009 WL 928280, *8-9, 2009 US Dist LEXIS 35048, *24 (SD NY 2009). Contrary to plaintiff's argument, the offer letter does not include, and plaintiff otherwise makes no showing that defendant made, a clear and unambiguous promise to offer a bonus plan in 2012 and 2013. Nor, as noted above, does plaintiff demonstrate reasonable reliance.

"The doctrine of quantum meruit or quasi contract was developed by the law in order to make sure that a person who receives the benefit of services pays the reasonable value of such services to the person who performed them." *Zolotar v New York Life Ins. Co.*, 172 AD2d 27, 33 (1st Dept 1991), citing *Bradkin v Leverton*, 26 NY2d 192, 196 (1970); *see also Clark-*

Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388-389 (1987). "To be entitled to recover damages under the theory of quantum meruit, a plaintiff must establish: '(1) the performance of services in good faith, (2) the acceptance of services by the person or persons to whom they are rendered, (3) the expectation of compensation therefor, and (4) the reasonable value of the services rendered.'" *Thompson v Horowitz*, 141 AD3d 642, 644 (2d Dept 2016) (citations omitted); *see Lehrer McGovern Bovis, Inc. v New York Yankees*, 207 AD2d 256, 259 (1st Dept 1994). "A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment." *Clark-Fitzpatrick*, 70 NY2d at 388 (citations omitted).

Where, however, a plaintiff is paid a salary, it has been held that "a plaintiff may not allege that his [or her] former employer was 'unjustly' enriched at his [or her] expense." (*Levion*, 822 F Supp 2d at 405, citing *Karmilowicz*, 2011 WL 2936013, at *12, 2011 US Dist LEXIS 77481, at 31-32*), unless the plaintiff demonstrates "that the work performed exceeded the scope of the role for which she was compensated." *Scarpinato v 1770 Inn, LLC*, 2015 WL 4751656, *4, 2015 US Dist LEXIS 105428, *13 (ED NY 2015); *see De Madariaga v Union Bancaire Privée*, 2012 WL 8466699, *7, 2012 NY Misc LEXIS 6125, *20, 2012 NY Slip Op

33183(U) (Sup Ct, NY County 2012), *affd in part and mod in part* 103 AD3d 591 (1st Dept 2013); *Levion*, 822 F Supp 2d at 405; *see also Eagle v Emigrant Capital Corp.*, 2016 WL 410072, *7, 2016 NY Misc LEXIS *21, 2016 NY Slip Op 30195(U) (Sup Ct, NY County 2016). Plaintiff was paid a salary, does not claim that she performed work outside of the scope of her duties as Director of Marketing, and does not offer evidence to show that her salary did not constitute reasonable value for the services she provided. *See Levion*, 822 F Supp 2d at 405; *see also Econn v Barclays Bank PLC*, 2010 WL 9008868, *5, 2010 US Dist LEXIS 143063, *14 (SD NY 2010) ("'[r]eceipt of a fixed salary generally negates any inference that a separate incentive payment or purely discretionary bonus constitutes wages'" [citation omitted]). Accordingly, plaintiff's claims under Labor Law §§ 191 and 193 for unpaid wages cannot be maintained.

Moreover, regardless of whether there was any contractual basis for plaintiff's claim, she does not demonstrate that the unpaid bonuses constitute wages under the Labor Law, "[her] 'commission' nomenclature notwithstanding." *Hunter*, 56 AD3d at 274. The payments were not tied directly to her individual productivity, but were based on the efforts of the marketing team, and on the overall financial success of the company. *See Beach v Touradji Capital Mgt., LP*, 128 AD3d 501, 501 (1st Dept 2015); *Levion*, 503 Fed Appx at 64. Evidence also does not show

that the bonuses were a guaranteed or fixed, non-discretionary term or condition of plaintiff's employment, even if each separate bonus plan contained a fixed formula for calculating bonuses. The payments thus were more "in the nature of incentive compensation . . . not included in the definition of 'wages' under Labor Law § 190." *Marsh v Prudential Sec.*, 1 NY3d 146, 154 (2003), citing *Truelove*, 95 NY2d at 224; *see Winters v American Express Tax & Bus. Servs.*, 2007 WL 632765, *10, 2007 US Dist LEXIS 13564, *31-32 (SD NY 2007); *compare Schutty v Pino*, 1997 WL 363812, *3, 1997 US Dist LEXIS 9266, *7-8 (SD NY 1997) (where bonus was guaranteed in offer letter as term and condition of employment, based on fixed formula, for years 1993 and 1994, court found nonpayment of 1994 bonus was breach of contract and unpaid bonus constituted "wages" under Labor Law § 198).

In view of the above, the court does not reach the issue of whether plaintiff could be deemed a "commission salesperson" under Labor Law § 191 (c), noting only that the finding that the bonus incentive plan "does not constitute 'wages' within the meaning of Labor Law article 6 would remain the same even if plaintiff were within the class of persons protected by article 6." *Guiry v Goldman, Sachs & Co.*, 31 AD3d 70, 71 n 1 (1st Dept 2006).

Accordingly, it is

ORDERED that defendant's motion for summary judgment is

granted; and it is further

ORDERED that the complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly.

Dated: March 3, 2017

ENTER:

HON. ELLEN M. COIN, A.J.S.C.