SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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ANDREW KOLCHINS,

Plaintiff,

Index No. 653536/2012
Mot. Seq. Nos. 014-015

- against -

EVOLUTION MARKETS INC. and ANDREW ERTEL,

Defendants.

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EVOLUTION MARKETS INC.,

Plaintiff,

Index No. 651271/2013

- against -

ANDREW KOLCHINS, TITAN ENERGY MARKETS, LLC, and JOHN DALL,

Defendants.

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BRANSTEN, J.

In this consolidated action,[1] *inter alia*, to recover damages for breach of contract, Andrew Kolchins, Titan Energy Markets, LLC ("Titan"), and John Dall, move, pursuant to CPLR 3212, for summary judgment dismissing Evolution Markets Inc.'s ("Evolution Markets") Second Amended and Supplemental Complaint under Index No. 651271/2013

[1] By Stipulation and Order, signed by this Court on July 15, 2015, Action No. 1 (Index No. 653536/2012) and Action No. 2 (Index No. 651271/2013) were consolidated for all purposes, including discovery, motions, and trial. (Action No. 1, NYSCEF No. 123.)

(Action No. 2), and Evolution Markets cross-moves for summary judgment on its second cause of action in that complaint (Mot. Seq. No. 014).

Evolution Markets and Andrew Ertel move, pursuant to CPLR 3212, for summary judgment dismissing Andrew Kolchin's Third Amended Complaint filed under Index No. 653536/2012 (Action No. 1), and Evolution Markets moves for summary judgment in its favor on its first cause of action in the Second Amended and Supplemental Complaint filed under Action No. 2 (Mot. Seq. No. 015).

I. BACKGROUND

This case arises from an employment dispute between Andrew Kolchins and his former employer, Evolution Markets. Evolution Markets structures and brokers transactions in the global environmental and energy commodity marketplace. It also develops energy and environmental risk management strategies for large companies.

Kolchins worked for Evolution Markets from August 2005 until 2012. On September 1, 2009, Evolution Markets promoted Kolchins from the position of broker to managing director. In December 2009, Kolchins was promoted to the position of

manager of Evolution Markets U.S. Renewable Energy Brokerage Business. Kolchins entered into successive employment agreements with Evolution Markets in 2005, 2006, and 2009.

A. The 2009 Agreement

The agreement he entered into in 2009 covered the period from September 1, 2009 through August 31, 2012 (the "2009 Agreement"). (Kolchins Affidavit ("Kolchins Affid.") Ex. A, NYSCEF Doc. No. 230.)[2] The 2009 Agreement provided that it would automatically renew for a one-year term, unless either party notified the other, in writing at least 60 days before August 31, 2012, that it did not wish to renew. (2009 Agreement § 2.4.)

Under the 2009 Agreement, Kolchins' compensation package included a $200,000 annual base salary, a $750,000 sign on bonus, and a production bonus. (2009 Agreement, Ex. A.) The 2009 Agreement set forth terms pursuant to which Kolchins was eligible to receive the production bonus, which was "based on [his] performance" each trimester and would be "paid within two months of the close of a given trimester." Under the 2009

[2] Record citations to "NYSCEF Doc. No. __" refer to docket entries in Action No. 1, unless otherwise noted.

Agreement, "[t]he total bonus pool available to the Eastern U.S. renewable energy brokerage desk [which Kolchins managed] . . . [would] be no less than 55% of the Net Earnings of [that desk]." (*Id.*)

Further, while Kolchins was an "at will" employee, the 2009 Agreement provided that he would be entitled to certain benefits if he were terminated without "Cause" or he ceased employment for "Good Reason" and complied with certain restrictive covenants. Those benefits included a "Special Non-Compete Payment." The "Special Non-Compete Payment" was defined as "bonus compensation in respect of transactions: (i) that [Kolchins] brokered during the period of [his] employment and (ii) for which any contingency associated with [his] right to receive payment is satisfied during the Non-Compete Period." (*Id.*)

The 2009 Agreement contained restrictive covenants. These provisions of the agreement provided that in the event Kolchins left Evolution Markets' employ, he may not (1) work for a competitor within 6 months of leaving Evolution Markets' employ; (2) use Evolution Markets' client list or communicate with its clients for 9 months; (3) disclose Evolution Markets' confidential information; or (4) solicit Evolution Markets' employees for 18 months. (*See* 2009 Agreement § 6.) The 2009 Agreement further states, in this regard, that Kolchins

> may not communicate with [Evolution Markets'] Clients . . . . During the Non-Compete Period [six months after leaving Evolution Markets] and the three months thereafter, you will not, directly or indirectly, (a) solicit business or (b) have any direct or indirect business dealings or communications directly or indirectly, with any client with whom you have had any contact or whose existence you became aware during the 180 days immediately preceding your Last Day.

(2009 Agreement § 6.2.)

B. The Purported Extension Agreement

As already noted, the 2009 Agreement had an "Ending Date" of August 31, 2012. On June 15, 2012, Evolution Markets' Chief Executive Officer, Andrew Ertel, sent an e-mail to Kolchins which stated: "The terms of our offer are the same [as the] terms of your existing contract (other than a clarification around the issue of departed members of the team), and include: [a] 3 year term[,] $200,000 base salary[,] $750,000 sign on bonus . . . [,] $750,000 per year minimum cash compensation[, and the same] production bonus." (NYSCEF Doc. No. 337.) Ertel added, "[a]ny further questions, let me know but u [sic] do have your existing contract." (*Id.*)

On June 22, 2012, Kolchins wrote a letter to Evolution Markets' General Counsel, Benjamin Zeliger, stating: "Please accept this letter as notification per section 2.4 of my existing employment agreement that I do not wish to extend my employment agreement

under the existing terms." (NYSCEF Doc. No. 380.) According to Kolchins, this was a notification to Evolution Markets that he did not want the 2009 Agreement to automatically renew for only a one-year term under section 2.4. Kolchins maintains that this is consistent with the fact that the parties were discussing extending his employment for a three-year term, as evidenced by Ertel's offer in his June 15, 2012 e-mail.

On July 16, 2012, Kolchins replied to Ertel's June 15, 2012 e-mail, stating: "I accept." Ertel responded: "Mazel. Looking forward to another great run." (NYSCEF Doc. No. 337.) Kolchins alleges this July 16, 2012 email exchange confirmed an agreement to extend his employment for an additional three-year term, and he refers to the July 16th email exchange as the "Extension Agreement."

In the ensuing weeks, Kolchins and Zeliger communicated by e-mail and in person, attempting to reduce the parties' mutual understanding to a more formal written instrument. Their attempts proved unsuccessful. Evolution Markets sent Kolchins a proposed draft based on the 2009 Agreement. Kolchins returned the document with proposed changes, allegedly intending only to clarify language. In an e-mail on August 23, 2012, Kolchins stated: "Actually, I don't want to negotiate. I think we agreed to the terms. It is clarifying some old language." (NYSCEF Doc. No. 277.)

According to Kolchins, Evolution Markets subsequently tried to re-negotiate substantive terms of his employment that were inconsistent with the 2009 Agreement, and, thus contrary to the agreement reached in the parties' e-mails on July 16, 2012. Kolchins alleges that while he was on vacation over Labor Day weekend, he informed Evolution Markets that he wanted to resume discussing the contractual "documentation issues" upon his return to the office on Tuesday, September 4, 2012.

However, on September 1, 2012, while Kolchins was still on vacation, Ertel called Kolchins informing him that his employment with Evolution Markets "is ended today." (Call Transcript at 2:24-3:5, NYSCEF Doc. No. 387). Also, by letter, dated September 1, 2012, Evolution Markets advised Kolchins that his employment had "ceased" as a result of the expiration of the 2009 Employment Agreement. (NYSCEF Doc. No. 385.) That letter stated:

> On June 22, 2012, you notified us that you do not wish to extend (i.e., renew) your Employment Agreement . . . . Since then, despite our efforts, you have not entered into a new written employment agreement with us. That is unfortunate, but your decision. However, as a result of your decisions, the Ending Date under your Employment Agreement was yesterday, August 31, 2012. As a result, your employment . . . has ceased effective today. That said, we remind you of, and expect you to abide by, your ongoing obligations under your Employment Agreement, including without limitation those set forth in Section 6 [restrictive covenants], which [we] will enforce. . . .

> While we believe the cessation of your employment is not a termination . . . , and instead a non-extension of your Employment Agreement at your choice, without prejudice to [our] positions, in an effort to avoid any dispute, and fully reserving all of its rights and claims, [we] will nonetheless pay you: (i) thirty days base salary and benefits in lieu of notice; and (ii) your base salary during the Non-Compete Period so long as you execute and return to [us] the enclosed General Release.

(*Id.*) According to Kolchins, the letter ignored the existence of the Extension Agreement, as per the July 16, 2012 email exchange.

C. ***Kolchins v. Evolution Markets et al.* (Action No. 1)**

On October 9, 2012, Kolchins commenced Action No. 1 against Evolution Markets under Index No. 653536/2012. As relevant here, the first cause of action in the original complaint was for breach of contract and sought damages for "benefits to which [Kolchins] is entitled under the 2009 Employment Agreement as extended by the Extension Agreement." (NYSCEF Doc. No. 23.) The second cause of action was for unjust enrichment based upon Evolution Markets' failure to pay the production bonus and special noncompete payment to Kolchins.

On November 30, 2012, Evolution Markets moved, pursuant to CPLR 3211, to dismiss the first two causes of action. (NYSCEF Doc. No. 25.) In support of its motion,

Evolution Markets submitted, among other things, copies of correspondence between the parties, arguing that the Extension Agreement was non-binding. Regarding Kolchins' claim for breach of the 2009 Agreement, Evolution Markets argued that Kolchins had "forfeited his right to the monies" because his employment ended before the contractual due date of the production bonus and special noncompete payment.

By Decision and Order entered August 22, 2013, this Court dismissed the unjust enrichment claim on the ground that the claim was precluded by the existence of the 2009 Agreement and denied Evolution Market's motion to dismiss the first cause of action for breach of contract. *See Kolchins v. Evolution Markets Inc.*, 2013 WL 4494380 (Sup. Ct. N.Y. Cnty. Aug. 19, 2013). Evolution Markets appealed the portion of the Order that denied its motion to dismiss the breach of contract claim.

The Appellate Division, First Department modified this Court's August 22, 2013 Order, by dismissing so much of that cause of action as sought to recover the special noncompete payment under the 2009 Agreement,[3] and otherwise affirmed,

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[3] With respect to the special noncompete payment, the Appellate Division determined that the 2009 Agreement provided for this payment to be made only "[i]n the event" that Kolchins was "terminated by [Evolution Markets] prior to the Ending Date without cause." Since it was undisputed that Kolchins' employment terminated on September 1, 2012, after the 2009 Agreement's "Ending Date" of August 31, 2012, he was not entitled to any special noncompete payment under the 2009 Agreement. *See*

concluding: "we agree with Supreme Court that the disputed emails and other correspondence do not utterly refute [Kolchins'] allegations that the parties reached an agreement on the material terms of the contract renewal." *See Kolchins v. Evolution Mkts., Inc.*, 128 A.D.3d 47, 59 (1st Dep't 2015).

The Court further noted "upon this record, no evidence has been shown that either party expressly reserved the right not to be bound prior to the execution of a formal writing. Nor does the language in their correspondence indicate an unambiguous intent not to be bound until a formal writing was executed by the parties." *Id.* at 60-61. In addition, the First Department found that Ertel's June 15, 2012 email, which was intended to be an offer, and Kolchins' acceptance of that offer, "militates toward [Kolchins'] contention that the parties initially did reach an agreement on all material terms, even though there might not have been a meeting of the minds on all details of the agreement." *Id.* 61-63.

Finally, the First Department concluded that even if the parties never entered into an extension of the 2009 Agreement, it would nevertheless find that the documentary evidence submitted by Evolution Markets did not establish, as a matter of law, that

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Kolchins v. Evolution Mkts., Inc., 128 AD3d 47, 64 (1st Dep't 2015).

Kolchins was not entitled to a production bonus for work done prior to termination of the 2009 employment agreement. *See id.* at 64. The First Department reasoned "if [Kolchins'] contention is correct that the production bonus was actually earned through his own performance, [he] would be entitled to such bonus as wages, which are not subject to forfeiture . . . . Thus, given the conflicting language concerning the nature of the bonus payment, this issue presents a question of fact." *Id.*

The First Department granted Evolution Markets leave to appeal to the Court of Appeals, certifying the question of whether its Order was properly made. On March 29, 2018, the Court of Appeals affirmed, answering the certified question in the affirmative. *See Kolchins v. Evolution Mkts., Inc.*, 31 N.Y.3d 100 (2018). Addressing the enforceability of the Extension Agreement, the Court of Appeals concluded that "based on all the documentary evidence proffered by [Evolution Markets], a reasonable fact-finder could determine that a binding contract was formed." *See id.* at 107.

The Court of Appeals further noted that since "it is possible to draw competing inferences based on the totality of the parties' communications as set forth in this record — which does not otherwise reflect that [Evolution Markets] expressly reserved the right not be bound except in a formal written document — [Evolution Markets] has not met its

burden to conclusively refute the allegations of the complaint that the parties entered into a new contract." *See id.* at 108.

The Court of Appeals also determined that the courts below correctly denied Evolution Markets' motion to dismiss as it relates to Kolchins' claim for a production bonus. The Court of Appeals held:

> Contrary to [Evolution Markets's] argument here, *the terms of the 2009 Agreement do not conclusively establish that the Production Bonus was not vested and earned as of the contract's Ending Date.* That Agreement expressly provided that [Kolchins] was 'eligible to be paid a bonus on a trimester basis *based on [his] performance*.' Although the Agreement sets forth a calculation for the 'total bonus pool' available as a percentage of net earnings of the renewable energy brokerage desk, [Kolchins] managed that desk. Significantly . . . *there is language in the 2009 Agreement that could be read as providing that [Kolchins'] bonus was predicated on his personal productivity, rather than solely on [Evolution Markets's] overall success. Moreover, the language of the 2009 Agreement does not conclusively establish that the bonus was discretionary. . . .*
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> *To the extent the Production Bonus was not discretionary and, instead, was based only on [Kolchin's] performance as a manager during his final trimester of employment —a question not conclusively answered by the language of the Agreement —the bonus could constitute nonforfeitable 'wages.'* In that event, any provision of the 2009 Agreement that would operate to deny [Kolchins] those wages after they were

> 'earned' based on the timing of payment would be void as against public policy under article 6 of the Labor Law. Therefore, [Evolution Markets] has failed to meet its burden of establishing, as a matter of law, that [Kolchins] was not entitled to the Production Bonus, and its motion to dismiss on this ground was correctly denied"

Id. at 109-110 (emphasis added).

1. *The Third Amended Complaint*

While the appeal to the Court of Appeals was still pending, Kolchins filed a Third Amended Complaint on May 18, 2015. (NYSCEF Doc. No. 115.)[4] The first cause of action in the Third Amended Complaint seeks to recover damages for breach of contract. In that cause of action, Kolchins alleges that Evolution Markets breached the Extension Agreement by failing to pay him the benefits to which he is entitled to thereunder in the event he is terminated without cause. (*Id.* ¶ 44.)

Kolchins alleges that Evolution Markets breached its contractual obligations "by failing to pay the second trimester Production Bonus owed under the 2009 Employment Agreement and the Special Non-Compete payment owed under the contract as that

[4] Kolchins filed a Second Amended Complaint on April 22, 2015, which was subsequently withdrawn and replaced by the Third Amended Complaint.

contract is extended by the Extension Agreement." (*Id.* ¶ 45.) Kolchins alleges that the second trimester production bonus was fully earned, vested and accrued by August 31, 2012 and is, therefore, owed under the 2009 Agreement. In addition, Kolchins alleges he is owed the special non-compete payment. Although the 2009 Employment Agreement provides that such payment is payable only if Kolchins is terminated "prior to the Ending Date without cause," Kolchins alleges his employment date was extended by the Extension Agreement and therefore his September 1, 2012 termination occurred prior to the ending date of the Agreement. (*Id.*)

The second cause of action alleges that Evolution Markets and Ertel violated Labor Law § 193. In this regard, Kolchins asserts that his second trimester production bonus under the 2009 Agreement constitutes "wages" under the Labor Law and the failure to pay these benefits to him constitutes an "unauthorized deduction from or charge against his wages" in violation of Labor Law § 193. (*Id.* ¶ 50.) Further, he asserts that under Labor Law § 198(1), he is entitled to an award of attorney's fees and liquidated damages. (*Id.*)[5]

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[5] In count two of the Third Amended Complaint, Kolchins also alleged a Labor Law claim related to the special non-compete payment. By order, dated October 22, 2015, this court granted Evolution Markets' motion to dismiss this portion of count two, on the ground that the special non-compete payment constituted "separation" or severance pay under Labor Law § 198-c and therefore, Kolchins could not assert a Labor Law claim as to such payment because he was an executive who earned more than $900 a week.

D. *Evolution Markets v. Kolchins et al.* ("Action No. 2")

On October 15, 2012, Kolchins filed a motion in Action No. 1 for a preliminary injunction, pursuant to CPLR 6301, preventing Evolution Markets from enforcing the restrictive covenants in the 2009 Employment Agreement, thereby permitting him to work as an analyst for one of Evolution Markets' clients, Nexant. Evolution Markets opposed the motion, arguing that Kolchins' employment with Nexant violated the terms of the 2009 Agreement. Kolchins countered that the 2009 Agreement was unenforceable to the extent that it prevents him from working in a non-competitive capacity for one of Evolution Markets' clients.

By Decision and Order, dated March 5, 2013, this court, *inter alia*, granted Kolchins' motion for a preliminary injunction. (NYSCEF Doc. No. 38.) For the purposes of that motion, the Court found that the duration and geographical scope of the restrictive covenants were reasonable. The court concluded, however, that Kolchins established a likelihood of success on the merits, inasmuch as he sufficiently showed that he was not using Evolution Markets' client contacts to Evolution Markets' competitive disadvantage and, therefore, Evolution Markets had no legitimate interest in preventing

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Kolchins v. Evolution Mkts. Inc., 2015 NY Slip Op 32847(U) (Sup. Ct. N.Y. Cnty. 2015). Notably, on that motion, Evolution Markets did not seek dismissal of any portion of the first cause of action for breach of contract.

Kolchins from working for Nexant. Further, the Court determined that Kolchins showed that he would suffer irreparable harm absent a preliminary injunction and that the equities weighed in his favor.[6]

Shortly thereafter, on April 9, 2013, Evolution Markets commenced Action No. 2, under Index No. 651271/2013, against Kolchins, Titan, and John Dall, alleging that in the March 5, 2015 Decision and Order, this Court "upheld the validity of the nine month client non-solicit" and that despite the "unambiguous, reasonable and bargained for contractual client non-solicitation provision, and [this Court's ruling] upholding it, Kolchins – individually and/or through his newly formed company, Titan, and his former Evolution Markets colleague, Dall – violated and continues to violate his obligations." (Second Amended and Supplemental Complaint ¶¶ 3-4, Action No. 2 NYSCEF Doc. No. 23.)

Specifically, Evolution Markets alleged that on March 4, 2013, Kolchins announced via a press release that he had formed Titan, "a financial services company that will focus on institutional brokerage and advisory services for the environmental and energy markets" and touted that he "had spent seven years building and managing an

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[6] By Order dated February 26, 2015, this court denied Evolution Markets' motion seeking relief from, and vacatur of, the March 5, 2013 Order. *See Kolchins v. Evolution Mkts. Inc.*, 2015 WL 865250, at *3 (Sup. Ct. N.Y. Cnty. Feb. 26, 2015).

award-winning REC brokerage desk." (*Id.* ¶ 45; NYSCEF Doc. No. 389 (Press Release).) Evolution Markets alleged that Titan is a direct competitor and shortly after and/or as part of forming Titan, Kolchins hired Dall as an employee. According to Evolution Markets, Titan and Dall have been soliciting business of Evolution Markets' clients and have had business dealings and communications with Evolution Markets' clients, in violation of the 2009 Agreement's non-compete provisions.

II. DISCUSSION

A. Legal Standard on Summary Judgment

"It is well settled that summary judgment is a drastic remedy that should be employed only when there is no doubt as to the absence of triable issues." *See Aguilar v. City of New York*, 162 A.D.3d 601, 601 (1st Dep't 2018). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *See Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012) (quoting *Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 339 (2011)) (internal quotation marks omitted). The proponent of the "motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Winegrad v.*

N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). "Once this showing has been made . . . , the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez*, 68 N.Y.2d at 324.

"It is not the court's function on a motion for summary judgment to assess credibility." *Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 631 (1997). "[T]he court's function is issue finding rather than issue determination." *See Genesis Merch. Partners, L.P. v. Gilbride, Tusa, Last & Spellane, LLC*, 157 A.D.3d 479, 481 (1st Dep't 2018). The motion "must be denied where there is any doubt as to the existence of a triable issue or where the issue is arguable." *See id.*

B. Motion Sequence No. 014

In Motion Sequence No. 014, Kolchins, Titan, and Dall move, pursuant to CPLR 3212, for summary judgment dismissing the Second Amended and Supplemental Complaint filed against them by Evolution Markets in Action No. 2. Evolution Markets cross-moves, pursuant to CPLR 3212, for summary judgment on its second cause of

action in that complaint. For the following reasons, Kolchins, Titan, and Dall's motion is granted. Evolution Markets' cross-motion is denied.

1. *Breach of Contract*

In the first cause of action, Evolution Markets seeks to recover damages for Kolchins' alleged breach of the non-compete clauses in the 2009 Agreement. Kolchins, Titan, and Dall contend that the first cause of action should be dismissed on the ground that the non-compete clauses are not enforceable. They argue, among other things, that a restrictive covenant may not be enforced against an employee who is fired without cause.

Evolution Markets argues in opposition that Kolchins was not involuntarily terminated. Rather, Kolchins notified Evolution Markets on June 22, 2012 that he did not wish to extend his employment agreement under its existing terms and after negotiations to enter into a new agreement failed, the existing agreement expired on September 1, 2012. Therefore, Kolchins was not terminated without cause. Evolution Markets further contends that even assuming Kolchins was terminated without cause, the covenants are enforceable because there is no *per se* rule against enforcement of restrictive covenants where termination is without cause. For the following reasons, the Court concludes that

Evolution Markets' contentions are without merit and Kolchins is entitled to dismissal of the first cause of action on the ground that the restrictive covenants are unenforceable.

a. *Restrictive Covenants*

"[P]owerful considerations of public policy . . . militate against sanctioning the loss of a man's livelihood . . . . So potent is this policy that covenants tending to restrain anyone from engaging in any lawful vocation are almost uniformly disfavored and are sustained only to the extent that they are reasonably necessary to protect the legitimate interests of the employer and not unduly harsh or burdensome to the one restrained." *Post v. Merrill Lynch, Pierce, Fenner & Smith*, 48 N.Y.2d 84, 86-87 (1979) (internal quotation marks and citations omitted)*; see Morris v. Schroder Capital Mgmt. Int'l*, 7 N.Y.3d 616, 620 (2006) ("noncompete clauses in employment contracts are not favored and will only be enforced to the extent reasonable and necessary to protect valid business interests").

The Appellate Division, First Department has held that a restrictive covenant not to compete is unenforceable where "the employer . . . does not demonstrate continued willingness to employ the party covenanting not to compete." *Buchanan Capital Mkts., LLC v. DeLucca*, 144 A.D.3d 508, 508 (1st Dep't 2016) (quoting *Post*, 48 N.Y.2d at 89)

(internal quotation marks omitted); *see Marsh USA, Inc. v. Alliant Ins. Serv., Inc.*, 49 Misc. 3d 1210(A), 3 (Sup. Ct. N.Y. Cnty. 2015); *see also Arakelian v. Omnicare, Inc.*, 735 F. Supp. 2d 22, 40 (S.D.N.Y. 2010).

Evolution Markets relies on decisions from other courts which it contends stand for the proposition that restrictive covenants are not *per se* unenforceable in New York against an employee who has been terminated without cause. *See Brown & Brown, Inc. v. Johnson*, 115 A.D.3d 162, 170 (4th Dep't 2014), *rev'd in part* 25 N.Y.3d 364 (2015); *Eastman Kodak Co. v. Carmosino,* 77 A.D.3d 1434, 1436 (4th Dep't 2010); *Comgroup Holding LLC v. Greenbaum*, 2013 WL 2356291 (Sup. Ct. N.Y. Cnty. May 24, 2013) (Friedman, J.); *Linium, LLC v. Teeter*, 2014 WL 285027 (Sup. Ct. N.Y. Cnty. Jan. 22, 2014) (Teresi, J.); *Hyde v. KLS Professional Advisors Group, LLC*, 500 F. App'x 24 (2d Cir 2012); *Hall v. Edgewood Partners Ins. Ctr., Inc.*, 878 F.3d 524 (6th Cir 2017). However, this Court is not bound by such authority. It is bound to apply the law as promulgated by the Appellate Division, First Department. *See D'Alessandro v. Carro*, 123 A.D.3d 1, 6 (1st Dept 2014).

Therefore, the question is whether Kolchins has tendered sufficient evidence to demonstrate the absence of any material issues of fact as to whether Evolution Markets lacked a "continued willingness" to employ him. *See Buchanan*, 144 A.D.3d at 508.

This Court finds that Kolchins has satisfied his burden. In support of his contention that Evolution Markets lacked a continued willingness to employ him, Kolchins relies on, among other things, the following excerpts from the deposition testimony of Andrew Ertel, Evolution Market's Chief Executive Officer:

> Q. . . . why specifically did you not want [Kolchins] to return to the office [after the expiration of the existing agreement on August 31, 2012]?
>
> A. [ERTEL] Because Mr. Kolchins had destroyed his relationship with senior management at Evolution and that we were not willing to continue on with the negotiations *and that we were not willing to allow him to continue on as an at will employee.*
>
> Q. *You certainly could have allowed him to continue on as an at will employee; right?*
>
> A. *We had the right.*
>
> Q. *But you choose not to exercise that right?*
>
> A. *Correct.*
>
> Q. And that's because he had . . . blown up his relationship with senior management?
>
> A. *We had made the decision to move on without him.*

Q. Right. I'm just trying to get to the bases of that decision?

A. *We had decided to move on without him*

(Hamid Affirm. Ex. A at 225:22-226:20 (NYSCEF Doc. 228) (emphasis added).)

Kolchins also submits his own affidavit, wherein he affirms that during the final week of August 2012, he was on a previously approved vacation, but continued to work on brokering transactions for Evolution Markets and to communicate with Evolution Markets about formally memorializing the agreement they had reached as to his continued employment. (Kolchins Affid. ¶ 18, NYSCEF Doc. No. 230.) He fully expected to return to work after his vacation, on September 4, 2012, at which time he thought he would continue working for the company and to continue discussing a formal document governing the terms of his continued employment. (*Id.*)

On September 1, 2012, in the midst of his vacation, he was shocked to receive a phone call from Ertel informing him that his employment with Evolution Markets was ended. The transcript of the September 1, 2012 phone call, which Evolution Markets recorded and Kolchins submits in support of his motion, includes the following colloquy:

> [ERTEL]: . . . we've tried to reach an agreement on a new contract, we haven't been able to do so. You know, vis-a-vis your notifications, *your employment with Evolution is ended today*. So, I was calling to let you know this, and we'll be sending a letter . . . .

> [KOLCHINS]: Are you guys really serious?
>
> [ERTEL]: Completely serious.
>
> * * * *
>
> [KOLCHINS]: Guys, I mean, I'm – do you understand, like, I'm sitting on my . . . vacation. . . . I'm freaking out here. I have no idea what you guys are saying to me. Like, . . . we've agreed. You know, my last conversation with Ben was, I feel like our commercial terms were agreed to . . . . I've been on vacation for two weeks, busting my ass for you guys. What - this is what I said, like, *this is where I want to be. What - what are you guys doing to me* on my vacation when I'm busting my ass for you guys? I don't understand what's going on. I'm in total . . . shock.
>
> * * * *
>
> [ERTEL]: Hey Andrew? I think this is all symptomatic of the long-term relationship that we've had and I think *we're moving on*"

(Kolchins Affid. Ex. B (emphasis added).)

In addition to relying on Ertel's deposition and the transcript of the phone call, Kolchins points out that Evolution Markets continued to pay him his base salary for six months after August 31, 2012. He highlights that under Section 6.1(b) of the 2009 Agreement, he was entitled to such payments only if he was terminated without cause,

not if his employment ceased as a result of the expiration of his contract. The Court notes, however, that in the September 1, 2012 letter terminating his employment, Evolution Markets reserved its rights and claims in this regard.

Nevertheless, this Court concludes that Kolchins established, *prima facie*, that despite his continued desire to work for Evolution Markets, Evolution Markets did not have a continued willingness to employ him. In opposition to Kolchins' *prima facie* showing, Evolution Markets fails to raise an issue of fact. Evolution Markets asserts that it did not terminate Kolchins. It points out that Kolchins notified it by letter, dated June 22, 2012, that he did not wish to extend his employment agreement under its existing terms. After the ensuing negotiations failed, his existing agreement expired. Therefore, Evolution Markets contends, it never fired Kolchins. This Court disagrees.

Notwithstanding the fact that Kolchins' existing employment agreement expired and also that the parties dispute whether an agreement to extend his employment was reached, Evolution Markets could have continued Kolchins' employment on an at-will basis. Given Kolchins' willingness to continue his employment with Evolution Markets, this was, in essence, an involuntary discharge. Therefore, the covenants are unenforceable on the ground that Evolution Markets did not have a continued willingness to employ Kolchins. In light of this determination, the remaining contentions raised by

the parties regarding the enforceability of the restrictive covenant need not be reached. The first cause of action in the Second Amended and Supplemental Complaint filed in Action No. 2 is dismissed.

2. *Tortious Interference with Contract*

The second and third causes of action allege that Titan and Dall, respectively, tortiously interfered with the restrictive covenants in Kolchins' 2009 Agreement. Since the restrictive covenants are unenforceable, the second and third causes of action are also dismissed and Evolution Markets's cross motion for summary judgment on the second cause of action is denied. *See Savannah Bank v. Sav. Bank of Fingerlakes*, 261 A.D.2d 917, 918 (4th Dept 1999) (dismissing claims based on unenforceable restrictive covenant); *see also Jaffe v. Gordon*, 240 A.D.2d 232, 232 (1st Dept 1997) (dismissing tortious interference with contract claim based on lease upon finding that the lease was unenforceable).

3. *Unjust Enrichment*

The fourth cause of action seeks to recover damages for unjust enrichment against Kolchins and Titan, based upon allegations that they were unjustly enriched by profiting

from their relationships with Evolution Markets' clients in violation of the restrictive covenants. "The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009). Here, Evolution Markets' claim that Kolchins' and Titan's enrichment is "unjust" is premised upon Kolchins' alleged violation of the restrictive covenants contained in his employment agreement. Since these covenants are unenforceable, this cause of action is dismissed.

4. *Tortious Interference with Business Relations*

In the fifth cause of action, Evolution Markets seeks to recover damages for tortious interference with business relations against Kolchins and Titan. Kolchins and Titan demonstrated that they did not engage in conduct that "amount[ed] to a crime or an independent tort" or that they acted "for the sole purpose of inflicting intentional harm on [Evolution Markets]," rather than out of "normal economic self-interest." *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190 (2004); *see NBT Bancorp v. Fleet/Norstar Fin. Grp.*, 87 N.Y.2d 614, 624 (1996). In opposition, Evolution Markets failed to raise an issue of fact. Therefore, the fifth cause of action is dismissed.

C. Motion Sequence No. 015

In Motion Sequence No. 015, Evolution Markets and Ertel move, pursuant to CPLR 3212, for summary judgment dismissing the Kolchins' Third Amended Complaint filed in Action No. 1, and for summary judgment on Evolution Markets's first cause of action in the Second Amended and Supplemental Complaint filed by Evolution Markets in Action No. 2.

In light of this Court's determination in Motion Sequence No. 014, which dismissed Evolution Markets' first cause of action, the branch of Evolution Markets' and Ertel's motion for summary judgment on their first cause of action in Action No. 2 is denied. *See* Part II(B)(1)(a), *supra.* For the reasons that follow, the remainder of the motion is granted in part and denied in part.

1. *The Production Bonus*

The 2009 Agreement sets forth the terms under which Kolchins was eligible to receive a production bonus which was "based on [his] performance" each trimester, to be "paid within two months of the close of a given trimester." In his first cause of action for breach of contract, Kolchins seeks to recover production bonus payments allegedly still

owed to him under the 2009 Agreement.[7] The 2009 Agreement states that "in order to be eligible to receive any Production Bonus . . . you must be actively employed . . . at the time of our firm-wide bonus payment dates." It is undisputed that Kolchins was not so employed when the bonus at issue was paid. Kolchins contends, however, that since Labor Law § 193, prohibits employers from making any deductions from wages, withholding such payments would violate the Labor Law. In the second cause of action, Kolchins alleges a violation of Labor Law § 193 based upon Evolution Markets' failure to pay him the production bonus allegedly still owed to him.

The payment of wages by employers is regulated by Article 6 of the Labor Law. Labor Law § 193 provides that "[n]o employer shall make any *deduction* from the wages of an employee" except those permitted by law or expressly authorized by the employee (emphasis added). "Wages" are defined as "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." *See* Labor Law § 190(1). "[T]he Labor Law does not

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[7] The first cause of action for breach of contract also seeks to recover special noncompete payments Kolchins claims he is owed under the Extension Agreement. Evolution Markets does not raise an argument directed specifically at this branch of the breach of contract claim. Thus, the Court will not address this branch of Kolchins' breach of contract claim on the instant motion.

consider as 'wages' subject to the statute '[d]iscretionary additional remuneration, as a share in a reward to all employees for the success of the employer's entrepreneurship'". *Wachter v. Kim*, 82 A.D.3d 658, 663 (1st Dept 2011) (quoting *Truelove v. Ne. Capital & Adv.*, 95 N.Y.2d 220, 224 (2000)).

a. *Whether the Production Bonus Was Discretionary*

Evolution Markets argues that the Court of Appeals decision in this action, which concluded that issues of fact existed as to whether the production bonus was discretionary and, therefore, not protected by Labor Law § 193, is not determinative because the instant motion implicates a different standard of review than the one brought pursuant to CPLR 3211. In particular, it emphasizes that on a motion to dismiss, pursuant to CPLR 3211, the court is only assessing the adequacy of the complaint and a plaintiff is accorded the benefit of every possible favorable inference. In contrast, on a motion for summary judgment, the court assesses the sufficiency of the parties' evidence. Evolution Markets highlights that since it moved for dismissal pursuant to CPLR 3211, the parties have engaged in extensive discovery, which, it asserts, conclusively establishes that the production bonus was, in fact, discretionary.

Evolution Markets' initial burden on this motion is to proffer sufficient evidence to demonstrate the absence of any material issues of fact. As the Court of Appeals determined, the 2009 Agreement does not clearly indicate that the production bonus was discretionary. In support of its position that it was discretionary, Evolution Markets relies primarily on correspondence indicating that Ertel sometimes reviewed and approved bonus payments before they were issued.

The Court is authorized to analyze extrinsic evidence to resolve contract ambiguities. *See Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 570 (2002). However, even assuming that the Court may infer from the communications that the production bonus was discretionary, the evidence submitted by Kolchins, including the language in prior agreements and the manner in which the production bonus was actually determined and paid up until the second trimester of 2012, support the opposite conclusion. The court notes, in this regard, that in determining a motion for summary judgment, the evidence must be viewed in a light most favorable to the nonmoving party, *see Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012), and a motion for summary judgment should not be granted where conflicting inferences may be drawn from the evidence. *See Singletary v. Alhalal Rest., Inc.*, 163 A.D.3d 738, 739 (2d Dept 2018); *Secom Int'l Inc. v. A.C.E. Elevator Co.*, 266 A.D.2d 111, 111 (1st Dept 1999). Therefore,

at this stage, the Court cannot conclude, as a matter of law, that the production bonus was discretionary.

b. *Whether Evolution Markets Withholding the Production Bonus Was a Deduction from Wages Pursuant to Labor Law § 193*

Evolution Markets and Ertel assert that even assuming the production bonus was not discretionary and, instead, based only on Kolchins' performance as a manager during his final trimester of employment, they are still entitled to summary judgment dismissing the Labor Law claim because Evolution Markets' *withholding* of the production bonus does not constitute an unauthorized "*deduction*" from wages within the meaning of Labor Law § 193. Furthermore, since the breach of contract claim relies on the production bonus constituting "wages" within the meaning of Labor Law § 193, both claims should be dismissed. This court agrees with their assertion.

The First Department has held that "a wholesale withholding of payment is not a 'deduction' within the meaning of Labor Law § 193." *See Perella Weinberg Partners LLC v. Kramer*, 153 A.D.3d 443, 449-50 (1st Dep't 2017); *Goldberg v. Jacquet*, 2015 WL 5172939, at *2 (S.D.N.Y. Sept. 3, 2015), *aff'd*, 667 F. App'x 313 (2d Cir. 2016); *Gold v. Am. Med. Alert Corp.*, 2015 WL 4887525, at *2-3 (S.D.N.Y. Aug. 17, 2015). Kolchins argues that because the Court of Appeals already decided, on Evolution

Markets' motion to dismiss, that he has a viable Labor Law § 193 claim, the instant motion cannot be decided on this basis. However, the question whether Evolution Markets' non-payment of Kolchins' production bonus qualifies as a "*deduction* from wages," within the meaning of Section 193 of the Labor Law was not at issue on the prior motion. Furthermore, when that motion was decided, the complaint did not include a cause of action for violation of Labor Law § 193.

The court further notes that, Labor Law § 191 authorizes a cause of action to be brought for *nonpayment* of wages by employees identified in that section, which include, among others, manual workers, railroad workers, commission salespersons, and clerical and other workers. Section 191 does not apply to executives. *See Pachter v. Bernard Hodes Grp., Inc.*, 10 N.Y.3d 609, 615 (2008), *rearg. denied*, 11 N.Y.3d 751 (2008); *Goldberg*, 667 F. App'x at 314 n.1. Permitting a former executive, such as Kolchins, to recover unpaid wages under Section 193 would create an exception that would effectively swallow the limitation in Section 191 as to the categories of workers authorized to sue for unpaid wages." *See Goldberg*, 667 F. App'x at 314 n.1; *see also Pachter*, 10 N.Y.3d at 615-16 (2008) (noting that Labor Law § 191 does not include executives).

Therefore, the second cause of action for violation of the Labor Law is dismissed and the first cause of action for breach of contract, insofar as it seeks to recover the unpaid production bonus, is also dismissed.

c. *Attorneys' Fees and Liquidated Damages*

Finally, since Kolchins does not have a viable claim under Labor Law § 193, his request for attorneys' fees and liquidated damages under Labor Law § 198 also fails inasmuch as "the remedies provided in section 198 were intended to be limited to claims based upon substantive violations of the article." *See Gottlieb v. Kenneth D. Laub & Co.*, 82 N.Y.2d 457, 463 (1993).

2. *The Extension Agreement*

The first cause of action also sets forth a breach of contract claim stemming from Evolution Markets' failure to honor the Extension Agreement. Evolution Markets contends that the Extension Agreement is not a legally enforceable agreement because the parties did not intend to be bound until after the execution of a formal writing. As detailed above, on Evolution Markets's motion to dismiss, the Court of Appeals concluded that "based on all the documentary evidence proffered by [Evolution Markets],

a reasonable fact-finder could determine that a binding contract was formed." *Kolchins v. Evolution Mkts., Inc.*, 31 N.Y.3d at 107. The Court of Appeals further noted that since "it is possible to draw competing inferences based on the totality of the parties' communications as set forth in this record — *which does not otherwise reflect that [Evolution Markets] expressly reserved the right not be bound except in a formal written document* — [Evolution Markets] has not met its burden to conclusively refute the allegations of the complaint that the parties entered into a new contract." *Id.* at 108 (emphasis added).

The same competing inferences can be drawn from the record on the instant motion. Evolution Markets and Ertel contend that they established on this motion that the parties did not intend to be bound by the Extension Agreement until after the execution of a formal written agreement. In this regard, they rely on correspondence indicating that the parties expected the Extension Agreement would be reduced to a formal writing and signed by the parties.

"[I]f the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed. Certainly, when a party gives forthright, reasonable signals that it means to be bound only by a written agreement, courts should

not frustrate that intent." *Stonehill Capital Mgmt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 451 (2016).

The correspondence submitted by Evolution Markets indicates that the parties contemplated that the Extension Agreement would be reduced to a formal writing. However, none of the correspondence submitted by Evolution Markets constitutes a forthright signal that Evolution Markets meant to be bound only by a written agreement. There is a distinction

> between a 'preliminary agreement contingent on and not intended to be binding absent formal documentation,' which is not enforceable, and a 'binding agreement that is nevertheless to be further documented,' which is enforceable with or without the formal documentation. The former is established by a showing that a party made an explicit reservation that there would be no contract until the full formal document is completed and executed. But, the mere fact that the parties intended to draft [a] formal [written agreement] *is not alone* enough to imply an intent not to be bound except by a fully executed document.

Kowalchuk v. Stroup, 61 A.D.3d 118, 123 (1st Dept 2009) (emphasis in original and internal citations omitted).

In sum, a finding of whether there was an intent to contract is dependent on evidence, concerning the course of conduct and communications between the parties, from which differing inferences may be drawn. Therefore, a question of fact exists

precluding summary judgment on this issue. *See Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp.*, 41 N.Y.2d 397, 400 (1977) ("while it is the responsibility of the court to interpret written instruments, where a finding of whether an intent to contract is dependent as well on other evidence from which differing inferences may be drawn, a question of fact arises"); *Mallad Constr. Corp. v. Cnty. Fed. Sav. & Loan Ass'n*, 32 N.Y.2d 285, 291 (1973) (a question of fact arises as to the parties' intent to enter into an enforceable obligation "where the intent must be determined by disputed evidence or inferences outside the written words of the instrument"). Therefore, Evolution Markets' and Ertel's motion to dismiss the first cause of action for breach of contract arising from the Extension Agreement is denied.

3. *Andrew Ertel's Personal Liability*

Ertel argues he cannot be held personally liable for Evolution Markets' alleged breach of Kolchins' employment contract because he was not a party to that agreement. Therefore, he asserts, the first cause of action should be dismissed insofar as asserted against him.

It is well settled that an individual may not be held personally liable on the contracts of their corporations. *Stern v. H. DiMarzo, Inc.*, 77 A.D.3d 730, 730-31 (2d

Dep't 2010). Furthermore, officers, directors or employees of a corporation do not become liable for inducing the corporation to breach its contract merely because they made decisions and took actions that resulted in the corporation's breaching its contract. *See Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp.*, 296 A.D.2d 103, 109-10 (1st Dep't 2002). An officer or director of a corporation, may only be held liable for a corporation's contractual obligations if his or her activity involves separate tortious conduct or results in personal profit. *See Stern*, 77 A.D.3d at 731.

Kolchins neither alleges that Ertel acted in other than a corporate capacity, nor presents evidence that Ertel's activities involved separate tortious conduct or otherwise resulted in personal profit. Therefore, there is no basis upon which to hold Ertel personally liable for Evolution Markets' breach of contract. As such, the first cause of action is dismissed insofar as it is asserted against Ertel in his individual capacity.

Lastly, Ertel contends that he cannot be held individually liable for Evolution Markets' alleged violation of the Labor Law because he is not an "employer" within the meaning of article 6. Having dismissed the cause of action for violation of the Labor Law, this contention need not be reached.

III. CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that the motion by Andrew Kolchins, Titan Energy Markets LLC, and John Dall for summary judgment dismissing the Second Amended and Supplemental Complaint in Action No. 2 (Index No. 651271/2013) (Mot. Seq. No. 014) is GRANTED and that Complaint is dismissed; and it is further

ORDERED that the cross-motion by Evolution Markets Inc. for summary judgment on the second cause of action in Action No. 2 (Index No. 651271/2013) (Mot. Seq. No. 014) is DENIED; and it is further

ORDERED that the motion for summary judgment by Evolution Markets, Inc. and Andrew Ertel (Mot. Seq. No. 015) is GRANTED IN PART, insofar as it seeks dismissal of:

(1) the Third Amended Complaint in Action No. 1 (Index No. 653536/2012) as asserted against Andrew Ertel, in his individual capacity;

(2) so much of the first cause of action for breach of contract in that Complaint as seeks to recover production bonus payments allegedly still owed to Andrew Kolchins under the 2009 Agreement; and

(3) the second cause of action in that Complaint, which seeks damages for violation of the Labor Law in Action No. 1, and the motion is otherwise DENIED.

ORDERED that the action is severed and continued as to Andrew Kolchins' remaining claim for breach of contract in Action No. 1 (Index No. 653536/2012), insofar as asserted against Evolution Markets Inc.; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York

December 28, 2018

ENTER:

HON. EILEEN BRANSTEN
J.S.C.