[* 1]

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

PRESENT: SALIANN SCARPULLA J.S.C. Justice PART 52

Index Number : 601909/2005

RYAN, DANIEL

VS.

KELLOGG PARTNERS INSTITUTIONAL

SEQUENCE NUMBER : 007

OTHER RELIEFS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

FILED

JAN 06 2010

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 1/4/10

Saliann Scarpulla

SALIANN SCARPULLA J.S.C.

J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

----------X

DANIEL RYAN,

Plaintiff,

Index No. 601909/05

-against-

KELLOGG PARTNERS INSTITUTIONAL SERVICES,

Defendant.

----------X

For the Plaintiff: Thomas S. Rosenthal, Esq.
Law Offices of Thomas S. Rosenthal
11 Broadway, Suite 2150
New York, NY 10019

For the Defendant: Kevin J. O'Connor,Esq.
Peckar & Abramson, P.C.
41 Madison Avenue, 20th Floor
New York, NY 10010

PRESENT: HON. SALIANN, SCARPULLA, J.S.C.:

This action came before me for a jury trial in April/May, 2009. In his complaint, plaintiff Daniel Ryan ("Ryan") alleged four causes of action against defendant Kellogg Partners Institutional Services ("Kellogg"): failure to pay wages in violation of the New York State Labor Law; breach of contract to pay wages; retaliatory discharge in violation of the New York Labor Law; and defamation. In its answer, Kellogg asserted three counterclaims against Ryan: defamation; tortuous interference with employment relationships, and tortuous interference with prospective business relationships.

When the parties appeared for trial, Kellogg made a "motion in limine," which was, in large part, a motion for summary judgment dismissing the complaint.[1] I granted in part and denied in part the motion in limine and proceeded with the trial.

At trial, the parties presented two starkly different versions of events. Briefly, Ryan testified that in the spring of 2003 he was approached by Kellogg's managing partner Kevin Butler ("Butler") about leaving his employment with another brokerage firm and working for Kellogg, a start-up venture. At the time, Ryan was earning $300,000, comprised of a base salary of $150,000 and a year-end bonus of $150,000, provided that he remain for the year. Ryan testified that he and Butler agreed that Ryan's compensation at Kellogg was to be $350,00 for calendar year 2003, broken up into two parts: $175,000 to be paid out during the year, and a non-discretionary $175,000 bonus to be paid out at year-end or in the beginning of 2004.

Ryan further testified that, at the end of 2003, Butler informed him that Kellogg had not begun its operation on the New York Stock Exchange as early as anticipated, and that, therefore, Kellogg was not in a position to pay Ryan the required $175,000 bonus. Butler told Ryan that Kellogg would pay Ryan the non-discretionary $175,000 bonus at the end of 2004 instead. Ryan agreed to continue to work at Kellogg through 2004, with the

---

[1] After the jury was selected and the parties appeared before ready me for trial, Kellogg's attorneys presented me with a "motion in limine," which included ten exhibits and was accompanied by a twenty page memorandum of law. In this motion, Kellogg sought to preclude most of Ryan's evidence on several grounds, including that Ryan's claims were barred by the Statute of Frauds.

understanding that his non-discretionary $175,000 bonus would be paid out at the end of calendar year 2004.

Ryan testified that after working the entirety of 2004 at Kellogg, he was not paid the $175,000 bonus at the end of the year. In February 2005, Ryan was terminated. Ryan testified that Butler told him at the time that he was being terminated because things were not working out and the parties were going in different directions. Ryan later found out that on his "U5,"[2] Kellogg had listed company disparagement and insubordination as the reasons for Ryan's termination. Ryan denied that he had ever made disparaging remarks about Butler or Kellogg, even after being told that he was not going to receive his $175,000 bonus at the end of 2004.

Butler, Kellogg's main witness, contradicted Ryan in almost every possible way. Butler denied that he and Ryan had ever even discussed, much less agreed to Kellogg's payment to Ryan of a $175,000 bonus. Butler also denied that he had ever agreed to pay Ryan a non-discretionary bonus in 2004. Finally, Butler testified that he terminated Ryan in 2005 after he had heard that Ryan disparaged him and Kellogg to other brokers on the floor of the New York Stock Exchange. Butler testified that, after Ryan was terminated, Kellogg lost business from one of its major clients. Butler believed that Ryan had been disparaging him and Kellogg to an employee of that client.

---

[2] "U5" is short-hand for the Uniform Termination Notice of Securities Industry Registration Form, a form which the NASD requires its member firms to fill out whenever a registered representative of the member firm is terminated.

After the parties rested I directed a verdict dismissing Ryan's retaliatory discharge cause of action, severed Ryan's defamation cause of action for post-verdict consideration, and also directed a verdict dismissing Kellogg's counterclaims for defamation, tortuous interference with employment relationship and tortuous interference with prospective business relationships.

I submitted the issues of Labor Law/breach of contract failure to pay wages and willful failure to pay wages under the New York Labor Law to the jury. The jury unanimously found that Kellogg had breached its agreement with Ryan to pay him his $175,000 bonus, but found that the breach was not willful.

Kellogg now moves pursuant to CPLR 4404(a) for judgment notwithstanding the jury's verdict or for a new trial on the following grounds: 1) Ryan's breach of an oral contract to pay wages cause of action must be dismissed because the evidence showed that the alleged oral contract was supported only by past consideration, which is insufficient consideration as a matter of law; 2) I failed to charge the jury concerning the Statute of Frauds and other General Obligations Law defenses, and also gave a "patently objectionable" jury charge with respect to the breach of oral contract cause of action; 3) Ryan's breach of oral contract cause of action is barred by the Statute of Frauds and therefore must be dismissed as a matter of law; 4) Ryan failed to prove his breach of oral contract cause of action by a preponderance of the evidence; and 5) my evidentiary rulings at trial "permit[ted]

Ryan to hold himself out as the poster child of financial health" and resulted in a "manifestly unjust decision," which requires that Ryan be afforded a new trial.

Ryan opposes Kellogg's motion and moves for the following relief: 1) entry of judgment on the jury's verdict in favor of Ryan on the breach of agreement to pay Ryan his $175,000 bonus; 2) a hearing on Ryan's demand for attorneys fees in connection with his claim of unpaid wages under the New York Labor Law; and 3) judgment notwithstanding the verdict on his cause of action for willful violation of the New York Labor Law.

In its motion, Kellogg does not challenge my directed verdict dismissing Kellogg's counterclaims, nor does Ryan challenge my dismissal of the retaliatory discharge cause of action. Moreover, both parties agreed at trial that, as to Ryan's claim that he was defamed by Kellogg's statement on Ryan's "U5" that he was terminated for disparagement and insubordination, Ryan is only entitled to a "name clearing" hearing. *See Rosenberg v. Metlife, Inc.*, 8 N.Y.3d 359, 368 (2007). Thus, the main thrust of Kellogg's motion and Ryan's cross-motion is whether Ryan has sustained his burden of proving an enforceable oral agreement to pay him a non-discretionary bonus, and whether Ryan sustained his burden of proving that Kellogg breached that agreement. Secondarily, the parties disagree as to whether my failure to charge the jury on the Statute of Frauds and other New York General Obligations Law defenses and exclusion of certain evidence warrants a new trial in the interests of justice.

Kellogg contends that I should have directed a verdict for Kellogg after Ryan rested, because, even accepting the jury's findings of fact, Ryan's claims are barred as a matter of law. I note, however, that "[t]here is little to gain and much to lose by granting the motion for judgment as a matter of law after much of the evidence has been submitted to the jury and before the jury has rendered a verdict . . . If the appellate court disagrees, there is no verdict to reinstate and the trial must be repeated. '[T]he better practice is to submit the case to the jury which, in some instances, may obviate the need for a motion by returning a defendant's verdict.'" *Jacino v. Sugerman,* 10 A.D.3d 593, 594-5 (2d Dep't 2004), *quoting Rosario v. City of New York,* 157 A.D.2d 467, 472 (1990); *see also Austin v. Consilvio,* 295 A.D.2d 244 (1st Dep't 2002).

In accordance with the foregoing, I now review, post-jury verdict, Kellogg's and Ryan's motions for judgment notwithstanding the jury's verdict

A. <u>The Enforceability of Ryan's Oral Agreement With Kellogg</u>

Kellogg argues that, as testified by Ryan, his non-discretionary bonus was supported only by past consideration and is therefore unenforceable under New York General Obligations Law § 5-1105. Kellogg also argues that Ryan's non-discretionary bonus claim is barred as a matter of law by the Statute of Frauds, New York General Obligations Law 5-701. Additionally, Kellogg argues that its alleged agreement to pay Ryan the non-discretionary bonus in 2004 constituted an oral modification to his original oral agreement, which is barred by New York General Obligations Law § 5-1103.

In opposition, Ryan argues that Kellogg has waived reliance upon any New York General Obligations Law provisions, because Kellogg failed to plead them as affirmative defenses in its answer. Ryan further argues that his 2003 agreement with Kellogg was fully capable of being performed within one year, as was his 2004 agreement with Kellogg. Finally, Ryan argues that, as his testimony shows, the consideration for the agreement to pay him a non-discretionary bonus was not past consideration, but current and ongoing consideration. Thus, Ryan argues, Ryan's and Kellogg's oral agreement to pay Ryan a non-discretionary bonus is not barred by any provision of the New York General Obligations Law.

Review of Kellogg's answer shows that, despite pleading thirty-two affirmative defenses, Kellogg failed to plead the Statute of Frauds or any other similar affirmative defense under the New York General Obligations Law ("GOL"). While Kellogg did plead specific affirmative defenses under the New York Labor Law (twenty-seventh and twenty-ninth affirmative defenses), the New York Workers Compensation Law (eighteenth affirmative defense), and the Statute of Limitations (twentieth affirmative defense) there is not a single mention of any defense under the GOL.[3]

---

[3] Kellogg even asserted the affirmative defenses of contributory negligence (fourteenth and thirty-first affirmative defenses) and assumption of risk (fifteenth and thirty-second affirmative defenses), two affirmative defenses not generally associated with a breach of contract action.

The closest Kellogg comes to pleading any defense based upon the unenforceability of Ryan's non-discretionary bonus agreement is its fifth affirmative defense, in which Kellogg merely asserts that Ryan did not have a "valid or enforceable contract of employment." This vaguely pled affirmative defense is wholly insufficient to give Ryan notice that Kellogg was disputing the enforceability of Ryan's bonus under the GOL because it was not in writing and/or only supported by past consideration.[4]

Where, as here, a defendant fails to raise the Statute of Frauds and similar GOL defenses as affirmative defenses in its answer, the defendant waives reliance upon these defenses at trial. *23/23 Communications Corp. v. General Motors Corp.*, 257 A.D.2d 367 (1st Dep't 1999); *Bryant v. Broadcast Music, Inc.*, 27 A.D.3d 683 (2d Dep't 2006); *Con-Solid Contracting, Inc. v. Litwak Development Corp.*, 236 A.D.2d 437 (2d Dep't 1997); *Admae Enterprises, Ltd. v. Smith*, 222 A.D.2d 471 (2d Dep't 1995). Having not pled any GOL affirmative defense in its answer, Ryan may not now rely on alleged GOL defenses to overturn the jury's verdict.

Even if Ryan had properly asserted these GOL defenses for the first time at trial, I find that nothing in the GOL prevents enforcement of the oral agreement the jury found existed between Kellogg and Ryan. Kellogg argues that, as testified by Ryan, Kellogg's agreement to pay Ryan a non-discretionary bonus was in exchange for Ryan's agreement to leave his

---

[4] Kellogg did not make a motion for summary judgment prior to trial, so neither the court nor Ryan had an opportunity to evaluate the applicability of any potential GOL defenses prior to trial.

previous employer and to work for Kellogg. Kellogg concludes that Ryan's agreement is only supported by past consideration and was therefore required to be, but was not, reduced to a writing. *See* GOL § 5-1105.

After reviewing Ryan's testimony (which was accepted by the jury), I find that Ryan did not testify that the only consideration for the non-discretionary bonus was his agreement to leave his previous employment. Ryan's testimony made clear that the amount of the bonus (one-half his salary) was due, in part, to Kellogg's recognition that Ryan was leaving behind a substantial bonus from his previous employer. However, Ryan also testified that the non-discretionary bonus was in consideration of his agreement to work for Kellogg for the remainder of 2003. Ryan further testified that Kellogg's agreement to pay him the non-discretionary bonus in 2004 was in consideration for his agreement to work at Kellogg throughout 2004. Thus, the consideration was contemporaneous and forward looking. The oral agreement, as testified to by Ryan, was not supported solely by past consideration, thus the failure to reduce the agreement to a writing did not violate GOL § 5-1105 as a matter of law.

Similarly, I find that Kellogg's agreement to pay Ryan a non-discretionary bonus in 2003, and later agreement to pay Ryan a non-discretionary bonus in 2004, were both agreements capable of being performed within one year, and therefore not violative of the Statute of Frauds. In *Cron v. Hargro Fabrics, Inc.*, 91 N.Y.2d 362 (1998), the Court of Appeals reiterated that the courts have long interpreted the Statute of Frauds "to encompass

only those contracts which, by their terms, 'have absolutely no possibility in fact and law of full performance within one year.'" *Cron,* 91 N.Y.2d at 366, *quoting D&N Boening v. Kirsch Beverages,* 63 N.Y.2d 449, 454 (1984).

As Ryan testified, Kellogg's agreement to pay him a non-discretionary bonus could have, and should have, been fully performed in one year, had Kellogg paid Ryan the non-discretionary bonus at the end of calendar year 2003 or the beginning of calendar year 2004. Also, Kellogg's agreement to pay Ryan the non-discretionary bonus in 2004 could have, and should have, been fully performed in 2004, had Kellogg performed as promised.[5]

In sum, I find that Kellogg waived reliance upon any GOL defenses by failing to plead them in its answer. Further, I find that, even if Kellogg properly asserted these GOL defenses for the first time at trial, the provisions of the GOL requiring certain contracts to be in writing do not bar enforcement of Kellogg's oral agreement to pay Ryan a non-discretionary bonus.

B. **The Parties' Contentions That The Jury's Verdict Is Against the Weight of the Evidence**

Kellogg argues that I should set aside the jury's verdict in Ryan's favor on the breach of contract cause of action because no rational jury could have found in his favor on that

---

[5] Ryan testified that Kellogg's agreement to pay Ryan a non-discretionary bonus in 2004 was supported by separate and new consideration, *i.e.,* Ryan's agreement to work at Kellogg through 2004. Thus, the 2004 agreement was not merely a modification of Kellogg's 2003 agreement to pay Ryan a non-discretionary bonus, and in these circumstances GOL § 5-1103 is not controlling.

claim. Ryan argues that I should set aside the jury's verdict in Kellogg's favor on the willful failure to pay wages claim because no rational jury could have found in Kellogg's favor on that claim.

A trial court should only grant a motion for judgment as a matter of law, notwithstanding the jury's verdict, when "upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party." *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556 (1997); *see also Alexander v. Eldred,* 63 N.Y.2d 460 (1984). In reviewing a party's request for judgment as a matter of law, the trial court is required to view the testimony at trial in a light most favorable to the non-moving party. *Szczerbiak,* 90 N.Y.2d at 556; *Lopez v. New York City Transit Authority,* 60 A.D.3d 529 (1st Dep't 2009). Finally, "in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict." *Nicastro v. Park,* 113 A.D.2d 129, 133 (2nd Dep't 1985), *see also McDermott v. Coffee Beanery, Ltd.,* 9 A.D.3d 195 (1st Dep't 2004).

Here, viewed in the light most favorable to Ryan, the jury had a rational basis for concluding that Kellogg, by Butler, promised Ryan a $175,000 non-discretionary bonus for year-end 2003, and then again promised Ryan a non-discretionary $175,000 bonus for year-end 2004, and that Kellogg breached that promise. The jury was absolutely entitled to believe Ryan's testimony and disbelieve Butler's testimony concerning whether the agreement was made and breached.

Similarly, I find that, viewed in the light most favorable to Kellogg, the jury had a rational basis for concluding that Kellogg's failure to pay Ryan the bonus was not willful, that is, not motivated by bad faith, bad motive, spite or ill will toward Ryan. Viewed as a whole, the jury was entitled to determine that Kellogg's refusal to pay Ryan the bonus was based on Kellogg's belief that no bonus was due, and was not based on malice or ill will toward Ryan.

Kellogg also argues that the jury could not have found that Ryan had an enforceable oral agreement to pay him wages because he acknowledged, through his acceptance of the Kellogg employee handbook and knowledge of the course of dealing in the industry, that he was an employee at will whose salary and benefits were discretionary. At trial, the parties sharply disputed a general course of dealing in the industry and also disputed the date when Ryan was given an employee handbook. Kellogg's witness testified that the course of dealing in the industry was to make all bonuses discretionary. Kellogg's witness also testified that Ryan was given the employee handbook in mid 2003. As the Kellogg employee handbook makes clear that all employees are at will, Ryan should have understood that any bonus he received was discretionary.

In contrast, Ryan testified that in the industry it was not at all unusual to be promised a fixed, non-discretionary bonus, particularly when a broker was leaving behind a bonus at a previous place of employment. Ryan further testified that he did not remember getting an employee handbook until February, 2004, well after the 2003 and 2004 oral agreements to

pay him a non-discretionary bonus were reached. The only written evidence admitted at trial showed that Ryan received an employee handbook in February, 2004. There was no testimony at all concerning either party's reliance upon the employee handbook in their course of dealing.

Based upon the foregoing, the jury could have accepted Ryan's testimony and rationally concluded that brokers did receive non-discretionary bonuses, particularly when they left behind a bonus from a former employer. Further, the jury was entitled to find that the Kellogg employee handbook had no relevance, because it was not given to Ryan until after the non-discretionary bonus agreement was made, and there was no showing that either party relied upon the handbook's provisions.

Accordingly, I deny Kellogg's motion to set aside the portion of the jury's verdict against Kellogg as against the weight of the evidence, and I deny Ryan's cross-motion to set aside the portion of the jury's verdict against Ryan as against the weight of the evidence.

C. Trial Court Rulings

Kellogg argues that my exclusion of questions to Ryan concerning his mortgage and child support obligations permitted Ryan to convey to the jury a false impression that Ryan is the "poster boy of financial health." Kellogg also takes issue with my failure to charge the jury with the Statute of Frauds and other GOL provisions. Kellogg claims that either and/or both of these errors require that Kellogg be afforded a new trial.

"A new trial should be granted in the interests of justice only if there is evidence that substantial justice has not been done . . .as would occur, for example, where the trial court erred in ruling on the admissibility of evidence, there is newly-discovered evidence, or there has been misconduct on the part of the attorneys or jurors." *Gomez v. Park Donuts, Inc.*, 249 A.D.2d 266, 267 (2d Dep't 1998)(citation omitted); *see also Schafrann v. N.V. Famka, Inc.*, 14 A.D.3d 363, 364 (1st Dep't 2005) ("A new trial in the interest of justice is warranted only if there is evidence that substantial justice has not been done.").

My Evidentiary Ruling Allegedly Permitting Ryan to Present Himself to the Jury as the "Poster Boy of Financial Health"

In its motion in limine, Kellogg sought to prohibit Ryan from testifying as to the compensation package of a co-worker, James Dresch, who was also allegedly promised salary and a non-discretionary bonus. Unlike Ryan, however, Dresch was allegedly promised his non-discretionary bonus upfront, not at year-end. The upfront bonus promise was allegedly due to Dresch's poor finances. At trial, I excluded testimony concerning Dresch's compensation on relevancy grounds. I did, however, permit Ryan to testify to a conversation with Butler which concerned *both Dresch's and Ryan's* compensation.

Thereafter, Kellogg sought to introduce evidence showing that, like Dresch, Ryan was in poor financial shape, because he was going through a divorce and had to pay "alimony" and child support. At trial I held that the issue of whether Kellogg had agreed to pay Ryan a non-discretionary bonus and whether that agreement was breached was not related to Ryan's child support and maintenance obligations. I further found that testimony concerning

Ryan's divorce, maintenance and child support obligations was remote from the fact issues at trial, was of tangential value, and was very personal. I therefore excluded testimony on Ryan's maintenance, child support and mortgage obligations on relevancy grounds.

The trial court has the discretion to limit the scope and content of trial testimony on the grounds of relevancy and materiality. *Price v. New York City Housing Authority,* 92 N.Y.2d 553 (1998); *Coopersmith v. Gold*, 89 N.Y.2d 957 (1997); *Feliciano v. Ford Motor Credit Co.*, 28 A.D.3d 221 (1st Dep't 2006). Here, the particulars of Ryan's divorce, including his child support and maintenance obligations to his former spouse and children, were collateral to the issue of whether Kellogg agreed to pay Ryan a non-discretionary bonus and whether Kellogg breached that agreement. On this post-trial motion I adhere to my decision to exercise my discretion and exclude that evidence. Further, I find that my exclusion of that evidence, even if erroneous, would not have affected the outcome of the trial.[6]

My Decision Not to Charge the Jury on the General Obligations Law

Kellogg also claims that I should have, but did not, charged the jury on GOL §§ 5-1103 (oral modification of contracts) GOL § 5-1105 (contracts supported by past consideration) and GOL § 5-701 (Statute of Frauds). In opposition, Ryan once again argues

---

[6] Kellogg's claim that I permitted Ryan to present himself as the "Poster Boy of Financial Health" to the jury is undermined by the trial testimony showing that Ryan had taken a $50,000 loan against his 401(k) account after not being paid his bonus. That testimony vividly showed the jury Ryan's financial difficulties, without involving personal matters of his family.

that because Kellogg never asserted either of these defenses in its pleadings, Kellogg was not entitled to the charges. Further, Ryan argues that because Kellogg never acknowledged that an agreement to pay Ryan a non-discretionary bonus even existed, there was no factual dispute as to whether the Statute of Frauds or other GOL defenses would apply.

As stated above, Kellogg did not assert any GOL defenses in its answer, and therefore could not rely upon these defenses at trial. Moreover, because Kellogg denied the existence of any bonus agreement with Ryan, the jury was not faced with a factual dispute over the terms of the agreement with which it would be required to apply the Statute of Frauds or other GOL defenses.

To support its argument that I should have charged with jury with the Statute of Frauds, Kellogg cites to *J.R. Loftus, Inc. v. White*, 85 N.Y.2d 874 (1995). In *J.R. Loftus, Inc.* the parties at trial did not dispute the existence of an oral agreement to construct a house, but disputed some of the precise terms of that agreement. In particular, the parties disputed whether the contractor agreed to a warranty provision that would have made the contract incapable of completion within a year. If the jury found that the warranty provision had been part of the agreement, the jury would have been required to find that the contract violated the Statute of Frauds.

In *J.R. Loftus, Inc.* the Court of Appeals held that, because it was impossible to tell from the jury's verdict whether it found that the warranty provision was a part of the

agreement, and the jury had not been charged on the Statute of Frauds, a new trial was warranted. *J.R. Loftus, Inc., 85 N.Y.2d* at 876.

Here, there jury was not required to sift through two differing versions of an agreement to pay Ryan a non-discretionary bonus, one which would violate the Statute of Frauds and one which would not. Kellogg denied the existence of any agreement with Ryan to pay him a non-discretionary bonus. As a consequence, the jury was required to either accept Ryan's testimony as to the terms of the non-discretionary bonus agreement or accept Kellogg's witness's testimony and find that there was no agreement. In other words, if the jury accepted that an agreement to pay Ryan a non-discretionary bonus existed, there was only one version of that agreement put before the jury - - as set forth in Ryan's testimony.

As shown by its verdict, the jury accepted Ryan's testimony of the existence and terms of the agreement between Ryan and Kellogg to pay Ryan a non-discretionary bonus. There was no need to charge the jury with the Statute of Frauds or other GOL defenses because there was no factual dispute that would require jury action on these defenses. Instead, on this post-verdict motion I have reviewed Kellogg's agreement to pay Ryan a non-discretionary bonus, as testified to by Ryan, and determined that agreement did not violate the Statute of Frauds or other GOL provisions as a matter of law.

D. Ryan's Entitlement to Attorneys Fees

Ryan argues that, as the jury has found that Kellogg failed to pay him wages, under New York Labor Law § 198(1)(a) he is entitled to an award of attorneys fees.

New York Labor Law § 198(1)(a) provides, in part that in any action initiated by an employee for unpaid wages in which the employee prevails, the "court shall allow such employee reasonable attorney's fees." Bonus payments have been held to be wages for purposes of the New York Labor Law. *See Giuntoli v. Garvin Guybutler Corp.*, 726 F.Supp 494 (S.D.N.Y. 1989); *Evans v. Ocwen Financial Corp.*, 89 Civ. 7884, 1993 U.S.Dist. LEXIS 11558 (S.D.N.Y. 1993). With the jury's verdict, Ryan has prevailed on his unpaid wages claim, and is therefore entitled to an award of reasonable attorneys fees. I therefore grant Ryan's motion to that extent. Ryan is directed to submit to the Court and Kellogg, within fifteen days, a statement of attorneys fees with supporting documentation. Kellogg is to review the statement and, within fifteen days thereafter, inform the Court whether it objects to the amount of attorneys fees requested by Ryan. In the event the parties can not agree, I will schedule a hearing and will award a separate judgment for attorneys fees.

Finally, within fifteen days Ryan shall also send a letter to the Court and to Kellogg a proposal for accomplishing the "name clearing" hearing to which Ryan is entitled with respect to his "U5" form. The Court will thereafter schedule a conference to discuss this proposal. In the event that Ryan no longer wishes to pursue the hearing, he is to so inform the Court.

In accordance with the foregoing, it is

ORDERED that the motion of defendant Kellogg Partners Institutional Services for judgment notwithstanding the jury's verdict or for a new trial is denied in its entirety; and it is further

ORDERED that the cross-motion of plaintiff Daniel Ryan is granted only to the extent that Ryan may enter judgment on the jury's verdict for $175,000 plus interest from the date of his termination, Ryan must submit a statement of his attorneys fees and a proposal for the "name-clearing" hearing, all as set forth above, and the motion is otherwise denied.

This constitutes the decision and order of the Court.

Dated: January 4, 2010

ENTER

Hon. Saliann Scarpulla, J.S.C.