SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER, Justice PART 45

MARK GROBER and EVAN SOLOMON

-v-

EDWARD BRONSON, et al

INDEX NO. 651184/12

MOTION DATE ______

MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion ~~is~~ by defendants Lawrence Bronson and Fairhills Capital Mgt to dismiss the complaint, or in the alternative, to strike paragraphs from it is GRANTED per the attached Decision and Order.

The complaint is severed and dismissed as to these defendants.

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

Dated: February 4, 2013

Melvin L. Schweitzer, J.S.C.
MELVIN L. SCHWEITZER

1. CHECK ONE: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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MARK GROBER & EVAN SOLOMON, :

Plaintiffs, : Index No. 651184/12

- against - : DECISION AND ORDER

EDWARD BRONSON, FAIRHILLS CAPITAL MANAGEMENT LLC, E-LIONHEART ASSOCIATES LLC & LAWRENCE BRONSON, : Motion Sequences Nos. 002, 003

Defendants. :

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MELVIN L. SCHWEITZER, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

In Motion 002, defendants Lawrence Bronson (Lawrence) and Fairhills Capital Management LLC (FCM) move, pursuant to CPLR 3211 (a) (1) and (a) (7) and 3016 (b), for dismissal of the complaint, or, in the alternative, to strike paragraphs from the complaint.

In Motion 003, Edward Bronson (Edward) and E-Lionheart Associates LLC (E-Lionheart) move, pursuant to CPLR 3211 (a) (1) and (a) (7) for dismissal of the complaint as to Edward, and for dismissal of the complaint, in part, as to E-Lionheart.

Background

The complaint alleges as follows: Edward is engaged in a business that involves the solicitation of investment funds, and the investment of those funds and his own funds in securities-related transactions. From May 2009 through the present, Edward has operated his business under various names, including Fairhills Group and Fairhills Capital Management (together, Fairhills Business). The Fairhills Business engages primarily in the acquisition and sale of stock. From May 2010 through at least March 2011, Edward's father, Lawrence, also participated in and directed the Fairhills Business and received profits from it.

The Fairhills Business consists of a continuous stream of financing transactions, including acquiring convertible debt and providing financing to public companies. Edward's employees locate publicly trading companies that are interested in obtaining financing in exchange for a quantity or block of their stock. If a suitable prospect is found (based on trading volume or company stock liquidity), the parties negotiate financing terms, and, most importantly, the quantity of stock that the company is willing to transfer in exchange for financing. Upon reaching an agreement, Edward receives the stock, and the issuer obtains financing from the Fairhills Business or from Edward's related entity, E-Lionheart. Edward then sells the unrestricted or free-trading stock, thereby generating enormous profits.

In February 2009, Edward hired plaintiff Mark Grober as portfolio manager for the Fairhills Business. Initially, Edward agreed to pay Grober $15,000 per month as compensation. In May of 2009, Edward directed his employees, including Grober, to locate prospective companies, investigate those companies, and discuss with them the terms of financing. Beginning in June 2009, when the Fairhills Business began to generate profits, and because Grober was handling much of the paperwork and logistics of the transactions, Edward agreed to pay Grober 10% of the profits that the Fairhills Business generated, and permitted him to "co-invest" with Edward in financing transactions in which Grober was to receive 50% of the profits. Edward repeatedly represented to Grober that these investments of compensation were permissible, that Grober would earn substantial profits, and that Grober would be able to withdraw both his earned compensation and the resulting investment profits.

[* 4]

During the period July 2009 through April 2011, in reliance on Edward's representations, Grober took out of the business only a small portion of his earnings, and reinvested the rest. As of April 2011, the amount Grober earned and reinvested exceeded $400,000, and he was owed more than $2 million.

Plaintiff Evan Solomon began working for Edward in March 2009, with an agreement that he would be compensated at the rate of $400 per week. Solomon was working primarily as a cold caller, contacting publicly traded companies that were interested in receiving financing in exchange for some quantity of their stock. In August 2009, after Solomon had demonstrated his ability to identify prospective borrowers, Edward agreed to pay him 4% of profits from the resulting financing transactions. Edward also offered to "allow" Solomon to "roll" his compensation (then $1,000 per week) back into the investment activities. Solomon was promised a percentage of the returns from the financing transactions in which he invested, dependent on the amount of his investment.

As of year end 2009, Solomon's earnings exceeded $127,000. In February 2010, Edward agreed that Solomon would earn 5% of all profits from all of the Fairhills Business, and would continue to earn a percentage of profits from transactions in which he invested. Based on that agreement, Solomon continued to work for Edward. As of May 2011, the amount owed to Solomon as compensation and returns on investments totaled more than $400,000.

Edward's statements to plaintiffs were deliberately false when made, Edward had no intention of ever allowing plaintiffs to recover the earned compensation or their returns on investment, and he made those statements with the intent of inducing plaintiffs to continue to perform services while taking little or no salary.

In May 2010, Edward's father, Lawrence, was released from federal prison after serving 16 months in a case involving charges of racketeering conspiracy, witness tampering, obstruction of justice, and contempt of court. Almost immediately upon his release from prison, Lawrence became actively involved in the Fairhills Business, and he began to receive a portion of the Fairhills Business profits.

In November 2010, Edward directed plaintiffs to "meet with Larry" regarding their employment agreements. Edward and Lawrence told Solomon that they would not honor the agreement to pay him his compensation and his investment returns. Edward told Solomon that he would pay him $15,000 per month for nine months, instead of the more than $500,000 that he was owed. Solomon could accept those amounts, or, according to Edward, leave via the office window. Solomon took Edward's threats seriously. In early 2011, Solomon again raised compensation issues with Edward. Edward directed him to Lawrence, who again said they would not pay him the amount owed. Defendants failed to pay to Solomon even the lesser amounts, or the $500,000. Since then, Solomon reiterated his demand for payment, but to no avail.

Edward has engaged in a pattern of obtaining money, including investment amounts, by claiming that the investor would obtain substantial returns, and that the investor would receive the returns on those investments, while, in fact, he fails to actually invest those funds, and refuses to return either the principal or the investment returns unless and until the commencement of legal action.

The complaint contains seven causes of action.

The first cause of action, for breach of contract, is against Edward, FCM, and E-Lionheart. Allegedly, plaintiffs entered into agreements with Edward, pursuant to which they worked for Edward regarding the FCM Business, in exchange for a percentage of the profits, which exceeded $20 million. Plaintiffs' losses exceed $1 million.

The second cause of action, for breach of contract, is against Edward, FCM, and E-Lionheart. Allegedly, plaintiffs entered into agreements with Edward, pursuant to which they reinvested their earned compensation so as to receive a percentage of the profits generated by the financing transactions in which those funds were invested. Those transactions generated substantial profits, received by E-Lionheart, and entitle plaintiffs to $1.3 million.

The third cause of action, for common-law fraud, is against Edward. Allegedly, to induce Grober and Solomon to work for him, Edward made misrepresentations of material facts, including claiming that plaintiffs' investments were permissible under all applicable rules and regulations, that plaintiffs would be paid the compensation that they invested, and that plaintiffs would be paid substantial returns on those investments. Plaintiffs justifiably relied on the false representations to their detriment.

The fourth cause of action, for violation of Labor Law §§ 190 and 193, is against Edward, FCM, and E-Lionheart. Allegedly, through the services that they performed, Grober and Solomon are owed more than $900,000 and $400,000, respectively, in wages. Defendants violated Article 6 of the Labor Law, and are liable to the plaintiffs pursuant to Labor Law §§ 191, 193, and 198 for the unpaid wages, liquidated damages on earned commissions, and reasonable attorney's fees, costs and disbursements, in an amount in excess of $3 million.

The fifth cause of action, for unjust enrichment, is against Edward and E-Lionheart. Allegedly, defendants have been unjustly enriched by retaining amounts that they derived from the efforts of the plaintiffs, including the amounts of compensation that these plaintiffs invested, and the profits that the investment of those amounts generated.

The sixth cause of action, for promissory estoppel, is against Edward. Allegedly, plaintiffs reasonably relied on Edward's promises to their detriment by continuing to perform services that generated substantial profits, and by not seeking other employment.

The seventh cause of action, for aiding and abetting common-law fraud, is against Lawrence. Allegedly, Lawrence engaged in conduct to induce plaintiffs to perform services for him, and to "reinvest" their compensation with him. Plaintiffs justifiably relied on the representations. Beginning in November 2011, plaintiffs sought to obtain the amounts that they had earned as compensation and the returns on those investments. Lawrence knew that plaintiffs had been promised both the percentage compensation and the returns on investments, and that Edward made those promises and representations without any intent to honor them. To aid the fraud, Lawrence communicated to Solomon, and through him to Grober, that defendants were unwilling to pay those amounts, and that they would only pay some lesser amount, and even used express or implied threats of physical repercussions if the plaintiffs refused to accept those substantially lower amounts.

Lawrence and FCM argue that (1) plaintiffs fail to state an aiding and abetting claim against Lawrence because (a) there was no underlying fraud, (b) plaintiffs fail to allege adequately Lawrence's actual knowledge of the underlying fraud, and (c) plaintiffs fail to allege that Lawrence provided substantial assistance to the alleged fraud, and (2) plaintiffs fail to state a claim against FCM, because it was not a party to any of the agreements. In the alternative, Lawrence seeks to have the court strike the allegations about his being released from prison, in that they are inflammatory and without relevance.

Edward and E-Lionheart argue that the court should (1) dismiss the fraud, unjust enrichment, and promissory estoppel claims, because they are duplicative of the breach of contract claims, (2) dismiss the breach of contract claims, because (a) documentary evidence establishes that Edward did not individually contract with plaintiffs, and (b) plaintiffs' own allegations establish that they were paid all compensation owed to them, and (3) dismiss the Labor Law claims because (a) Edward was not plaintiffs' "employer" pursuant to the Labor Law, (b) plaintiffs were paid their full compensation, (c) plaintiffs' alleged compensation does not qualify as "wages" under Article 6 of the Labor Law, and (d) their job positions preclude them from relying on section 191 of the Labor Law.

Discussion

Motion 002 is granted in its entirety, and the complaint is dismissed as against Lawrence and FCM. Motion 003 is granted to the extent of dismissing the third, fifth, and sixth causes of action as against Edward, and dismissing the complaint as against E-Lionheart.

Motion 002

1. Lawrence.

Lawrence is named only in the seventh cause of action for aiding and abetting common law fraud. However, the complaint does not actually allege that he participated in any fraud against plaintiffs.

To establish liability for aiding and abetting fraud, plaintiffs must prove: "(1) the existence of a fraud; (2) a defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission" (*JP Morgan Chase v Winnick*, 406 F Supp 2d 247, 252 [SD NY 2005] [internal quotation marks and citation omitted). The elements of fraud are a false representation concerning a material fact, scienter, reliance, and damages (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]). The complaint does not satisfy this pleading requirement.

According to the complaint, Lawrence's role was not to make misrepresentations, but, rather, to intimidate plaintiffs. The complaint alleges that Lawrence told plaintiffs that they would be paid less than the amounts owed. It alleges that he used express or implied threats of physical repercussions if the plaintiffs refused to accept substantially lower amounts. His alleged conduct may constitute some sort of actionable wrongdoing, but it is not fraud.

The complaint is also dismissed as against FCM, which is named in the first cause of action (breach of the employment agreements), second cause of action (breach of the investment agreements), and fourth cause of action (violation of Labor Law §§ 190 and 193). The complaint fails to allege that plaintiffs had an employment relationship with this entity. Rather, it alleges that Edward hired plaintiffs, and that it was Edward who entered into the investment agreements with plaintiffs. In their opposition papers, plaintiffs argue that the court should reverse-pierce the corporate veil to hold FCM liable for the wrongdoing of its shareholder, Edward (citing paragraphs 10-12, 15 of the complaint). However, the complaint does not contain allegations supporting this theory of recovery. Conclusory allegations in a complaint are insufficient to state a veil-piercing claim (*Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407, 407

[1st Dept 2007] ["Other than conclusory statements that the Rouse defendants dominated and controlled their subsidiaries (SSSLP and Marketplace), plaintiffs failed to allege particularized facts to warrant piercing the corporate veil"]).

Motion 003

1. Edward.

The first two causes of action are for breach of contract. The first alleges that plaintiffs entered into agreements with Edward, pursuant to which they worked for Edward regarding the FCM Business, in exchange for a percentage of the profits. The second alleges that plaintiffs entered into agreements with Edward, pursuant to which they reinvested their earned compensation so as to receive a percentage of the profits generated by the financing transactions in which those funds were invested.

Edward first argues that the breach of contract claims against him should be dismissed, because documentary evidence shows that E-Lionheart, not Edward, employed plaintiffs. The documentary evidence consists of a Form 1099 tax return that shows that, between 2009 and 2011, plaintiffs were paid more than $1 million by E-Lionheart, not Edward. In addition, paragraph 82 of the complaint alleges: "Those transactions in which the plaintiffs invested generated substantial profits, which profits were received by E-Lionheart, from which plaintiffs were entitled to receive $1.3 million."

Edward "failed to submit documentary evidence to resolve all factual issues as a matter of law and conclusively dispose of [plaintiffs'] claim" (*Cohen v OrthoNet N.Y. IPA, Inc.*, 19 AD3d 261, 261 [1st Dept 2005]). That a Form 1099 tax return shows that, between 2009 and 2011, plaintiffs were paid more than $1 million by E-Lionheart, not Edward, does not conclusively show that E-Lionheart employed plaintiffs.

Moreover, the court must accept the facts as alleged in the complaint as true and afford plaintiffs the benefit of every reasonable inference (*Delos Ins. Co. v Smith & Laquercia,* LLP, 84 AD3d 668 [1st Dept 2011]). If, indeed, Edward employed plaintiffs, as alleged, then a reasonable inference is that he had one of his entities render payments to them. All that the documentary evidence establishes is that Edward caused E-Lionheart to remit payment to plaintiffs.

Edward next argues that plaintiffs' own allegations establish that they were paid all the compensation owed to them. He reasons as follows: The complaint alleges that plaintiffs voluntarily elected to reinvest a portion of their payments in the company's investments. It also alleges that plaintiffs decided for themselves the amount of compensation to withdraw and the amount to invest with the company. Paragraph 40 states that Grober "decided to take out of the business only a small portion of his earnings, and reinvest the rest." Therefore, after plaintiffs decided the amount of compensation to withdraw and the amount to reinvest, the reinvested money ceased to be compensation owed under an employment agreement. Instead, it became capital contributed to an investment.

This argument is without merit. The breach of contract claims are based on the allegations that Edward failed to pay plaintiffs the amounts owed under the agreements, whether such amounts are deemed compensation or investment returns. Representative allegations included the following:

> "Mr. Solomon was told by Edward Bronson and Lawrence Bronson that they were refusing to honor the agreement with Mr. Solomon to pay to him his

compensation and the returns on the compensation that he had invested. Instead of the more than $500,000 that was owed to Mr. Solomon under his agreement, Mr. Bronson told Mr. Solomon that he would pay him a total of $15,000 per month for 9 months" (complaint, ¶ 59).

"In early 2011, Mr. Solomon again raised with Ed Bronson the issues relating to his compensation. Ed Bronson directed Mr. Solomon to speak with Lawrence Bronson about that issue. Mr. Solomon, who was fully aware of Mr. Bronson's federal conviction and prison sentence, did speak with Lawrence Bronson but was again told that they would not pay him the actual amount that he was owed. The defendants failed even to pay to Mr. Solomon the lesser amounts that they said they intended to pay, much less the actual amounts of approximately $500,000 that were owed to Mr. Solomon. Since then, Mr. Solomon reiterated his demand for payments of the amount to which he was entitled, and the defendants refused that demand" (*id.*, ¶¶ 60-65).

"Given the Bronson's repudiation of the compensation agreement with Mr. Solomon, Mr. Grober also made demand for both his compensation, and the returns on his investment. Defendants failed and refused to pay to Mr. Grober the amounts that he is owed" (*id.*, ¶¶ 66-67).

The third cause of action alleges that Edward, to induce Grober and Solomon to perform services for him, made a series of misrepresentations of material facts, including claiming that the investment by the plaintiffs was permissible under all applicable rules and regulations, that plaintiffs would actually be paid the compensation that they invested, and that plaintiffs would receive and be paid substantial returns on those investments. It alleges further that Edward's statements were deliberately false when made, and he had no intention of allowing them to ever recover the earned compensation or their returns on investment. Allegedly, he made those statements for the purpose and with the intent of inducing plaintiffs to continue to perform services while taking little or no salary. The claim fails because a "fraud-based cause of action is duplicative of a breach of contract claim when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract" (*Mañas v VMS Assoc., LLC*, 53 AD3d 451, 453 [1st Dept 2008] [internal quotation marks and citation omitted]).

Fraud may be actionable where a misrepresentation of present facts, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty (*GoSmile Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]). Here, however, the misrepresentation that the investments were permissible, if indeed it were a misrepresentation, is not alleged to have cause damages. The essence of the complaint is that plaintiffs were damaged because Edward failed to pay the compensation to which they were entitled to under their employment agreements.

The fourth cause of action for violation of Labor Law § § 190 and 193 alleges that, through the services that they performed, Grober earned and is owed a total of more than $900,000 in wages, and Solomon earned and is owed more than $400,000 in wages. In failing to pay the wages that were promised to plaintiffs, defendants violated Article 6 of the Labor Law, and are liable to plaintiffs pursuant to Labor Law for the unpaid wages, liquidated damages on earned commissions, and reasonable attorney's fees, costs and disbursements, in an amount in excess of $3 million.

These allegations, as to the failure to pay the agreed-upon amount, constitute a claim based on a "deduction of wages" under section 193 of the Labor Law (*see Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 223 [2000]; *see also Wachter v Kim*, 82 AD3d 658 [1st Dept 2011]). The primary dispute here is whether the amount withheld constitutes "wages" for purposes of Article 6 of the Labor law.

As a preliminary matter, even if plaintiffs are deemed "executives," they are encompassed by the term "employees" under Article 6, section 190. "Article 6 of the Labor Law sets forth a comprehensive set of statutory provisions enacted to strengthen and clarify the rights of employees to the payment of wages" (*Truelove v Northeast Capital & Advisory*, 95 NY2d at 223). "Section 190 (2) defines an 'employee' as 'any person employed for hire by an employer in any employment' – a description that plainly embraces executives" (*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 614, *rearg denied* 11 NY3d 751 [2008]).

Defendants' first argument – that plaintiffs were already paid their compensation in full – has been addressed above.

Defendants next argue that what plaintiffs seek to recover – a profit-driven remuneration (a percentage of the businesses' profits) into which they invested their earnings – cannot be recovered under Article 6. They contend that the agreement to be compensated through a percentage of the profits generated by the firm is in the nature of a profit sharing plan, contingent upon the company's success (akin to a bonus), and, as such, does not qualify as "wages."

In so arguing, Edward seeks to bring the facts within the holding of *Truelove v Northeast Capital & Advisory* (95 NY2d 220). In *Truelove v Northeast Capital & Advisory*, the chief executive officer of the plaintiff's former company had allocated a $160,000 bonus to the plaintiff to be paid in four installments. The plaintiff resigned after the payment of the first installment, and then sued to recover the remaining $120,000. The Court of Appeals held that the bonus was not "wages" under Article 6 of the Labor Law, because it was not based on the employees' own productivity, was entirely discretionary, and subject to the non-reviewable determination of the employer.

Here, plaintiffs are not seeking to recover discretionary bonuses. Rather, they are seeking to recover wages that they earned and are encompassed by Article 6 of the Labor Law. In *Ryan v*

Kellogg Partners Inst. Servs. (19 NY3d 1 [2012]), the plaintiff "testified that he left his well-paying job at another securities firm to join Kellogg in reliance upon the managing partner's promise that his compensation package for 2003 would consist of a base salary of $175,000 and a guaranteed, non-discretionary bonus of $175,000 to be paid to him in late 2003 or early 2004" (*id.*, at 9). The jury found that the plaintiff's job offer included a guarantee to pay a non-discretionary bonus of $175,000 to attract him from his then employer, and that the new employer asked for and received the plaintiff's consent to delay this bonus payment for a year. After the plaintiff was fired, he sued to recover the $175,000 deferred payment.

The Court of Appeals held that, unlike the situation in *Truelove v Northeast Capital & Advisory, supra,* the plaintiff's "bonus was expressly linked to his labor or services personally rendered, . . . [the] bonus had been earned and was vested before he left his job at Kellogg, [and] its payment was guaranteed and non-discretionary as a term and condition of his employment" (*id.* at 11, citing *Giuntoli v Garvin Guybutler Corp.*, 726 F Supp 494, 509 [SD NY 1989] ["bonus payments, already due and vested . . . fall within the definition of wages in § 190"] [internal quotation marks and citation omitted]).

Here, according to a fair reading of the complaint, the "percentage of the profits" of the firm was merely a means of measuring the amount of plaintiffs' compensation, which was tied to their services, and was not meant to reward them with a bonus based on the success of the firm's business. As alleged in the complaint, it was a means of measuring the compensation that they would receive in consideration for their labor and services. Hence, the allegations in the complaint bring the claims here closer to those in *Ryan v Kellogg Partners Inst. Servs.* than those in *Truelove v Northeast Capital & Advisory.*

Defendants are correct in that, to the extent that plaintiffs bring their claims under Section 191 ("Frequency of payments"), they are not actionable. The statute states that employees serving in an "executive, managerial or administrative capacity" are not employees, and an exclusion pertains to claims under section 191 (*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d at 616). However, the reference to section 191 appears inadvertent, and plaintiffs are not bringing a claim under that section of the Labor Law.

The fifth cause of action against Edward for unjust enrichment alleges that defendants have been unjustly enriched by retaining amounts that they derived from the efforts of the plaintiffs, including the amounts of compensation that these plaintiffs invested, and the profits that the investment of those amounts generated.

The unjust enrichment cause of action is dismissed, because the "existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter" (*Parrott v Logos Capital Mgt., LLC*, 91 AD3d 488, 489 [1st Dept 2012] [internal quotation marks and citation omitted]; *American Curtainwall, Inc. v NTD Constr. Corp.*, 83 AD3d 597, 598 [1st Dept 2011]). Additionally, the claim is duplicative of the breach of contract causes of action because plaintiffs allege no duty that defendants owed to them independent of the agreements (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 61 AD3d 614 [1st Dept 2009]).

The sixth cause of action against Edward for promissory estoppel alleges that plaintiffs reasonably relied on Edward's promises to their detriment by continuing to perform services that generated substantial profits for the business, and by not seeking other employment. Allegedly, Edward breached those promises by failing to pay plaintiffs the promised compensation. As with the unjust enrichment claim, the promissory estoppel claim fails because "a simple breach of contract claim may not be considered a tort unless a legal duty independent of the contract— i.e., one arising out of circumstances extraneous to, and not constituting elements of, the contract itself—has been violated"(*Brown v Brown*, 12 AD3d 176, 176 [1st Dept 2004], citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). "In the absence of a duty independent of the agreement, the promissory estoppel claim was duplicative of the breach of contract claim" (*Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 302 [1st Dept 2008]). No such independent duty is alleged here.

2. E-Lionheart.

As for E-Lionheart, it is named in the first (breach of contract), second (breach of contract), fourth (Labor Law), and fifth (unjust enrichment) causes of action. These causes of action are dismissed for the same reasons as for FCM, discussed above, namely, the complaint does not allege that plaintiffs entered into any agreements with this entity. The unjust enrichment claim is not viable because, as discussed above, the complaint does not allege that plaintiffs performed services for that entity for which they expected compensation; the services were performed for Edward.

Accordingly, it is

ORDERED that the motion (002) by Lawrence Bronson and Fairhills Capital Management LLC for dismissal of the complaint is granted and, as against them, the complaint is severed and dismissed with costs and disbursements to these defendants upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion (003) by Edward Bronson and E-Lionheart Associates LLC for dismissal of the complaint is granted to the extent that the third, fifth, and sixth causes of action are dismissed as against Edward Bronson, and the complaint is severed and dismissed as against E-Lionheart Associates LLC with costs and disbursements to E-Lionheart Associates LLC upon submission of an appropriate bill of costs.

Dated: February 4, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.