SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

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INDEX NO. 154754/2017

CARLA CABRERA,

Plaintiff,

MOTION SEQ. NO. 001

- v -

ANJUNA LLC,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is ordered that the motion is **granted in part and denied in part.**

Defendant Anjuna, LLC ("Anjuna") moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint of plaintiff Carla Cabrera ("Cabrera") in its entirety. Cabrera, a former employee of Anjuna, claims that the said company breached her employment contract as well as the duty of good faith and fair dealing, insofar as it violated various sections of New York Labor Law by failing to pay plaintiff her earned wages, and that Anjuna unlawfully retaliated against her by terminating her employment. Defendant argues that plaintiff is unable to state a viable cause of action on any of those claims and that Anjuna also has defenses which are founded upon the documentary evidence. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is **granted in part and denied in part.**

FACTUAL AND PROCEDURAL BACKGROUND:

Anjuna is a California-based corporation with an office in Manhattan. (Doc. 9 at 6.) The company operates as a general sales and marketing agent for international airlines. (*Id.*) By servicing areas that an airline might not operate to or from, Anjuna allows airlines to have a sales presence in a country at a relatively lower cost than if those airlines had opened their own offices. (*Id.*)

On July 12, 2016, plaintiff Cabrera, a New York State resident, was hired by Anjuna to act as a new sales director. (*Id.*) In its offer of employment letter to plaintiff, Anjuna made clear that the term of employment was to be on an at-will basis. (*Id.* at 21.) Besides specifying various employment benefits, such as Cabrera's vacation time and medical insurance, the offer letter also referenced an attached incentive plan. (*Id.*) Together, the offer of employment letter and incentive plan form the heart of the present action.

The incentive plan offered to pay Cabrera two $10,000 bonuses at the end of 2016 if certain key performance indicators were met. (*Id.* at 22–23.) With respect to each bonus, the plan provided as follows:

> The following KPIs [key performance indicators] have a combined $20K bonus attached to be paid at year end (2016). 2017 KPI's to be renegotiated in December 2016.
>
> 1. US$10K
>   By year end (2016) successful setup of APG North America's (US & Canada) sales and marketing organisation including having
>   a. year end 360-degree performance and satisfaction review by manager, peers and direct reports
>   b. developed a strong working relationship within Anjuna and APG globally as well as Anjuna's customers and partners
>   c. hire staff according to organizational setup

d. complete organization trained in APG products relevant to role

2. US$10K
By year end (2016) successful delivery of APG NAs business objectives
   a. Agile and prioritized sales and marketing strategy and implementation plan in place for 2017
   b. 5% growth on overall Anjuna portfolio of GSA and APG product contracts
   c. Successful transition of sales support (customer review) of XL Airways
   d. Secure at least one major additional GSA contract, e.g. ThaiSmile, WestJet, etc.
   e. Secure at least one of the 3 major US airlines — AA, UA, DL — for the APG GET program.

The components of this incentive deal are to be completed by 31st December 2016. Each component must be fully completed to receive each $10K tranche and each component is independent of the other.

(*Id.*) Cabrera understood the terms of both the offer of employment letter and incentive plan, and, on September 3, 2016, she signed the offer letter and became an Anjuna employee. (*Id.* at 7.) According to Cabrera, Anjuna's revenue increased by more than five percent from the time she started work to the end of 2016. (*Id.* at 7–8.)

On December 16, 2016, just as the year was about to end, Cabrera approached her supervisor, Patrick Stepanek ("Stepanek"), to discuss the $20,000 bonus to which she believed she was entitled. (*Id.*) When she asked Stepanek about when he expected Anjuna to pay her the bonuses, he responded that he was unsure and that Anjuna was disappointed with the revenue results for 2016. (*Id.*) Cabrera was apparently stunned at this response, as she thought she had successfully accomplished every key performance indicator for both bonuses by that point. (*Id.*) Thereafter, on December 28, 2016, Cabrera reminded Stepanek that, pursuant to the terms of the incentive plan, Anjuna was obligated to pay her the bonuses by the end of the year. (*Id.* at 8.)

Cabrera's reminders to Stepanek about the combined $20,000 bonus continued into 2017. For example, on January 5, 2017, she again approached Stepanek, who informed her that Anjuna would have to wait until it received revenue data from Thai Airways before the company could make a decision. (*Id.*) On January 13 and 16, she made further visits to Stepanek to inquire about the bonus payments. (*Id.* at 9.) Shortly after these visits, on January 24, Cabrera signed a statement acknowledging receipt of Anjuna's employee handbook. (*Id.* at 25.) She also acknowledged that her employment was on an at-will basis. (*Id.*) Then, on February 1, 2017, after having reached an agreement with Flydubai, plaintiff sent an e-mail to Stepanek stating that she was still expecting Anjuna to pay her both bonuses. (*Id.* at 9) In the message, Cabrera "jokingly" said that she would hold the Flydubai contract hostage until Anjuna paid her the $20,000. (*Id.*)

A few days later, on February 7, 2017, Cabrera was requested to attend a Skype session with Stepanek and James Vaille ("Vaille"), Anjuna's owner. (*Id.* at 10.) During the session, Stepanek and Vaille, without warning, terminated her employment on the ground that she violated company policy by upgrading her seat on a flight from Cairo to New York, even though Cabrera had reassured Stepanek that she was going to reimburse Anjuna for the expense. (*Id.*) As a result, Cabrera responded that she believed she was actually being terminated because of her continued inquiries about the bonuses. (*Id.*)

That same day, she received a notice of termination statement from Anjuna. (*Id.* at 11.) The notice stated:

> Unfortunately, you failed to satisfy many key performance components/indicators tied to both the General and the Business sections.
>
> Specifically, with regard to the General section, you failed to:

> 1) develop a strong working relationship within Anjuna and APG globally as well as Anjuna's customers and partners in full; and
> 2) hire staff according to organizational setup in full.
>
> With regard to the Business section, you've failed to:
> 1) accomplish 5% growth on overall Anjuna portfolio of GSA and APG product contracts; and
> 2) sign at least one major additional GSA contract.
>
> Because you failed to accomplish performance objectives within the stated time frame above, you are not entitled to either bonus.

(*Id.*) It is Cabrera's belief that Anjuna manufactured these reasons as a way to justify the company's nonpayment of the $20,000 bonus. (*Id.*)

Thereafter, on May 23, 2017, Cabrera instituted the instant action against Anjuna, alleging that Anjuna breached her employment contract as well as the duty of good faith and fair dealing, that Anjuna violated New York Labor Law by failing to pay her earned wages, and that Anjuna unlawfully retaliated against her by terminating her employment. (*Id.* at 5–17.) On September 1, 2017, Anjuna filed a motion to dismiss the complaint in its entirety. (*Id.* at 1–2.)

POSITIONS OF THE PARTIES:

Anjuna asserts that plaintiff has failed to state a claim that it breached her employment contract or the covenant of good faith and fair dealing. Specifically, Anjuna asserts that Cabrera was an at-will employee during her relationship with defendant. Anjuna further argues that, even if there were a contractual limitation as to the manner in which Anjuna could terminate plaintiff's employment, it was Cabrera who in fact failed to perform under the contract and that, consequently, she was not entitled to receive the two bonuses. In opposition, Cabrera maintains

that her first cause of action should not be dismissed because she sufficiently pleaded in her complaint all of the elements of a breach of contract claim.

With respect to the allegation that defendant violated various Labor Law sections by failing to pay Cabrera her earned wages, Anjuna asserts that the bonuses are not "wages" within the meaning of New York Labor Law and that she has therefore failed to state a viable cause of action. Anjuna further argues that New York Labor Law §§ 193 and 198 are inapplicable in this matter because those sections govern wage deductions, not unpaid wages. In response, Cabrera maintains that the bonuses were earned wages because their payment was conditioned on her productivity. In her view, Labor Law §§ 193 and 198 govern here because those sections apply whenever an employer wrongfully withholds an employee's wages, whether it be through a salary reduction or simple nonpayment.

With respect to the final allegation that defendant unlawfully retaliated against Cabrera by terminating her employment, Anjuna contends that dismissal is warranted pursuant to Labor Law § 215(2)(b) because Cabrera failed to take the necessary step of giving the New York State Attorney General notice of the possible Labor Law violation before commencing this action. Cabrera responds that § 215(2)(b)'s notice requirement should not be construed as a condition precedent to her cause of action.

LEGAL CONCLUSIONS:

In moving to dismiss, Anjuna relies on CPLR 3211(a)(1) and (a)(7). CPLR 3211(a)(1) provides for dismissal based on documentary evidence. Should the reviewing court find that the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law, then the motion will be granted. (*See 150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 A.D.3d

1, 5 [1st Dept. 2004]; *see also Leon v. Martinez*, 84 N.Y.2d 83, 88 [1994].) If the "allegations are contradicted by documentary evidence, they are not presumed to be true or granted every favorable inference . . . ." (*Sterling Fifth Assocs. v. Carpentille Corp., Inc.*, 9 A.D.3d 261, 261–62 [1st Dept. 2004].)

Under CPLR 3211(a)(7), however, "where the task is to determine whether the pleadings state a cause of action, the complaint must be liberally construed, the allegations must be taken as true, and all reasonable inferences must be resolved in favor of the plaintiff." (*Sterling Fifth Assocs.*, 9 A.D.3d at 261.) "[A] complaint should not be dismissed on a pleading motion so long as, when the plaintiff is given the benefit of every possible favorable inference, a cause of action exists." (*Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 634 [1976].) Thus, the chief inquiry under CPLR 3211(a)(7) is "whether plaintiff['s] pleadings state a cause of action." (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151–52 [2002].) In carrying out this task, courts have clarified that "the nature of the inquiry is whether a cause of action exists and not whether it has been properly stated." (*Marini v. D'Apolito*, 162 A.D.2d 391, 392 [1st Dept. 1990].)

a. Anjuna's Motion to Dismiss Cabrera's First Cause of Action, for Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing, Must Be Denied.

Anjuna maintains that it did not breach the contractual relationship when it terminated Cabrera's employment, while Cabrera asserts that Anjuna became the breaching party when it refused to pay her the $20,000 bonus.

It is a longstanding principle that four elements must be established in a breach of contract action: (1) the existence of a contract; (2) performance of the contract by one party; (3)

breach by the other party; and (4) damages. (*See Noise In Attic Prods., Inc. v. London Records*, 10 A.D.3d 303, 307 [1st Dept. 2004].) In addressing the third element with respect to wrongful termination claims, the Court of Appeals has repeatedly stated that at-will employment relationships may be terminated at any time by either party without cause or notice. (*See Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 304 [1983]; *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 333 [1987]; *Horn v. New York Times*, 100 N.Y.2d 85, 90–91 [2003].) Therefore, a termination of employment that is premised on an at-will relationship will not give rise to a breach by the other party. (*See Gomariz v. Foote, Cone & Belding Communications, Inc.*, 228 A.D.2d 316, 317 [1st Dept. 1996] (no breach of contract where employee was terminated from at-will relationship).)

In this case, the offer of employment letter expressly stated that Cabrera's employment was to be at-will: "The term of employment will be on an at-will basis, meaning that no time period for the duration of your employment is specifically set, made, or guaranteed." (Doc. 9 at 21.) The employee handbook, which plaintiff acknowledged receiving, also provided that "[n]othing in this employee handbook or in any document or statement, written or oral, shall limit the right to terminate employment at-will." (*Id.* at 25.) "[C]ourts should not infer a contractual limitation on the employer's right to terminate an at-will employment absent an express agreement to that effect which is relied upon by the employee." (*Sullivan v. Harnisch*, 81 A.D.3d 117, 122 [1st Dept. 2010]) (citations omitted). Thus, based on the documentary evidence, this Court agrees with Anjuna's argument that no cause of action based on breach of contract arose when Cabrera was terminated from her employment.

However, Cabrera's complaint states a cause of action for breach of contract arising from Anjuna's refusal to pay her the two $10,000 bonuses. Because the incentive plan conditioned

payment of the bonuses on Cabrera's satisfying certain key performance indicators, the next point of inquiry is whether she performed these duties in accordance with the contract. As stated earlier, in determining whether the pleadings state a cause of action, it is a court's duty to construe the complaint liberally and to resolve all reasonable inferences in favor of the plaintiff. (*See* CPLR 3211[a][7]; *see also 1199 Hous. Corp. v. Intl. Fid. Ins. Co.*, 14 A.D.3d 383, 384 [1st Dept. 2005] ("On a motion to dismiss directed at the sufficiency of the complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings.").)

Here, with respect to the nonpayment of the bonuses, Cabrera's pleadings sufficiently set forth a cause of action for breach of contract. Anjuna argues that, instead of alleging only that she satisfied all the conditions requisite for payment of the bonuses, Cabrera was required to plead facts establishing how each individual condition was met. Under the generous standard set forth in CPLR 3211(a)(7), however, this Court must view the pleadings in a light that is favorable to Cabrera. Here, she has alleged in her complaint that she "had successfully accomplished each component and met the KPI's [key performance indicators] of the Non-Discretionary Bonus." (Doc. 9 at 8.) Cabrera further represents that, in accordance with the key performance indicators, she developed strong working relationships with APG partners and that she hired staff according to Anjuna's organizational needs. (*Id.* at 11–12.) Thus, she has sufficiently alleged a claim for breach of contract based on the nonpayment of the two bonuses. (*Cf. Kramer v. Carl M. Loeb, Rhoades & Co.*, 20 A.D.2d 634, 634 [1st Dept. 1964] (dismissing complaint based on paucity of specific allegations regarding alleged transactions).)

Because this Court finds that Cabrera's complaint adequately states a claim for breach of contract based on the nonpayment of the $20,000 bonuses, plaintiff's claim for breach of the covenant of good faith and fair dealing should similarly be allowed to proceed. "In New York,

all contracts imply a covenant of good faith and fair dealing in the course of performance." (*511 W. 232nd Owners Corp.*, 98 N.Y.2d at 153; *see also Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 [1995].) Cabrera's claim that defendant breached the covenant of good faith and fair dealing is thus potentially meritorious and Anjuna's motion to dismiss Cabrera's first cause of action pursuant to CPLR 3211(a)(7) must be denied.

b. Anjuna's Motion to Dismiss Cabrera's Second Cause of Action, for Failure to Pay Wages Pursuant to New York Labor Law §§ 193 and 198, Must Be Granted.

New York Labor Law defines "wages" as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." (Labor Law § 190[1].) In construing this statutory definition, New York courts have excluded "certain forms of incentive compensation that are . . . both contingent and dependent, at least in part, on the financial success of the business enterprise." (*Truelove v. N.E. Capital & Advisory*, 95 N.Y.2d 220, 224 [2000] (internal quotations omitted); *see also Beach v. Touradji Capital Mgt., LP*, 128 A.D.3d 501, 502 [1st Dept. 2015] (dismissing plaintiffs' Labor Law claim on the ground that unpaid extra compensation did not constitute "wages" because its payment depended on factors other than plaintiffs' personal productivity).) In other words, if the compensation served as an incentive, then courts will be reluctant to view such compensation as "wages" within the meaning of Labor Law § 190(1). (*See Ryan v. Kellogg Partners Inst. Servs.*, 19 N.Y.3d 1, 16 [2012] (the term "wages" contemplates a more direct relationship between an employee's own performance and the compensation to which that employee is entitled); *Guiry v. Goldman, Sachs & Co.*, 31 A.D. 3d 70, 74 [1st Dept. 2006] (compensation which acted as an incentive to an employee did not constitute "wages").)

Here, the documentary evidence establishes that the two $10,000 bonuses to which Cabrera believes she is entitled do not fall within the meaning of "wages" under Labor Law § 190(1). Cabrera correctly points out that some of the conditions for the bonuses were contingent on her work productivity. This is supported by the notice of termination statement, which provided: "[*Y*]*ou* failed to satisfy many key performance components/indicators." (Doc. 9 at 11 (emphasis added).) The end of the termination statement read: "Because *you* failed to accomplish performance objectives within the stated time frame above, you are not entitled to either bonus." (*Id.* (emphasis added).) Although this certainly suggests that the bonuses were contingent on Cabrera's quality of work, the other operative document in regard to the bonuses—namely, the *incentive* plan itself—indicates otherwise. For example, with respect to the first $10,000 bonus, one condition in the incentive plan provided that a "year end 360-degree performance and satisfaction review by manager, peers and direct reports" (*Id.* at 22) must have been completed by the end of 2016 before Anjuna would have been required to pay the bonus. With respect to the second $10,000 bonus, another condition in the incentive plan stipulated that its payment was contingent on the "successful transition of sales support (customer review) of XL Airways." (*Id.*) Thus, this Court concludes that these conditions were not dependent solely on Cabrera's productivity, but were instead contingent on the efforts of other employees and on the overall success of the business and other businesses, such as XL Airways. The two bonuses in dispute therefore do not constitute "wages" under the New York Labor Law.

Even if the two $10,000 bonuses constituted "wages" under Labor Law § 190(1), dismissal of plaintiff's second cause of action is still warranted because the two sections which she relies on, §§ 193 and 198, are inapplicable in this matter. Labor Law § 193 provides, in part, that "[n]o employer shall make any deduction from the wages of an employee . . . ." This

provision would not be controlling herein because "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 [1st Dept. 2017].) In an attempt to save her Labor Law claim, plaintiff asks this Court to permit her to amend her complaint and change the § 193 claim with one pursuant to Labor Law § 191. (Doc. 14 at 12–13.) That section, however, protects only certain categories of workers, including manual workers, railroad workers, commission salespersons, and clerical and other workers. (*See* Labor Law § 191.) New York courts have held that this section "does not apply to persons serving in an executive, managerial or administrative capacity." (*Cuervo v. Opera Solutions LLC*, 87 A.D.3d 426, 428 [1st Dept. 2011].) Given plaintiff's position within Anjuna as a sales director, as well as her power to "hire staff according to organizational setup" (Doc. 9 at 22–23), this Court cannot conclude that she could prevail under § 191. Further, § 198 does not apply in the present action, as that section applies only in "action[s] instituted upon a wage claim by an employee . . . in which the employee prevails." (Labor Law § 198.) Because this Court concludes that plaintiff has failed to state a cause of action on her Labor Law claims, Anjuna's motion to dismiss plaintiff's second cause of action must be granted.

c. Anjuna's Motion to Dismiss Cabrera's Third Cause of Action, for Retaliation in Violation of New York Labor Law § 215, Must Be Granted.

Defendant argues that Labor Law § 215(2)(b) bars plaintiff's third cause of action because the documentary evidence shows that plaintiff did not give the Attorney General notice of the potential Labor Law violations before instituting this action. (Doc. 17.) That section provides that "[a]t or before the commencement of any action under this section, notice thereof shall be served upon the attorney general by the employee." (Labor Law § 215[2][b].)

This Court recognizes that decisions interpreting the notice requirement set forth in § 215(2)(b) are inconsistent. (*See Aurelien v. Albert Augustine Ltd.*, 2012 WL 6221085, *1 [Sup Ct, NY County 2012] (§ 215[2][b] does not bar a plaintiff's Labor Law action for failure to apprise the Attorney General with notice beforehand). *But see Antolino v. Distrib. Mgt. Consolidators Worldwide, LLC*, 2011 WL 6148826 [Sup Ct, NY County 2011] (dismissing Labor Law action where plaintiff did not comply with § 215[2][b]).)

Absent a ruling from a higher court on this precise issue, this Court hereby applies the rationale of the Court of Appeals in interpreting a similar statutory provision. In *Columbia Gas of New York, Inc. v. New York State Elec. & Gas Corp.*, the Court of Appeals addressed Business Law § 340(5), which provides that "[a]t or before the commencement of any civil [antitrust] action . . . notice thereof shall be served upon the attorney-general." (28 N.Y.2d 117, 129 [1971].) In *Columbia Gas*, the Court of Appeals held that Business Law § 340(5)'s notice requirement to the Attorney General was not a condition precedent to the cause of action. (*Id.*) According to the Court, the requirement that notice be given was "designed solely to apprise the Attorney-General that such an action was commenced so that he would be aware of the circumstances." (*Id.* (internal quotations omitted).)

Labor Law § 215(2)(b)'s notice requirement is substantially identical to the one addressed by the Court of Appeals in *Columbia Gas*. Applying the same reasoning that the Court of Appeals used in interpreting Business Law § 340(5) to Labor Law § 215(2)(b), this Court concludes that Cabrera's failure to comply with the notice requirement should not result in a dismissal of her retaliation claim. This Court not only finds the Court of Appeals' interpretation of a similar provision persuasive, but also finds that Anjuna has not suffered any prejudice as a result of plaintiff's failure to give the New York Attorney General notice. (*See Aurelien*, 2012

WL 6221085, *1 (denying a motion to dismiss a plaintiff's retaliation claim on the ground that defendant suffered no prejudice from plaintiff's failure to comply with § 215[2][b]'s notice requirement).)

Although this Court determines that § 215(2)(b)'s notice "requirement" to the Attorney General is not a condition precedent to a cause of action predicated on retaliation, defendant's contention that plaintiff did not comply with the provision is actually a moot point. Plaintiff's basis for her retaliation claim is that Anjuna dismissed her for complaining about practices that allegedly violated New York's Labor Law, but this Court, as explained above, has dismissed plaintiff's Labor Law claims. Therefore, this Court grants Anjuna's motion to dismiss plaintiff's third cause of action.

In accordance with the foregoing, it is hereby:

ORDERED that the defendant's motion to dismiss is granted as to plaintiff's second and third causes of action and is denied as to plaintiff's first cause of action; and it is further

ORDERED that, within 20 days of the uploading of this order to NYSCEF, defendant is directed to serve a copy of this order with notice of entry on plaintiff's counsel and on the Clerk of the Court, who is directed to enter judgment accordingly; and it is further

ORDERED that the defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order and with notice of entry; and it is further

ORERED that the parties are to appear for a preliminary conference on November 27, 2018, at 80 Centre Street, Room 280, at 2:15 PM; and it is further

ORDERED that this constitutes the decision and order of this Court.

7/13/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE