SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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SALUS CAPITAL PARTNERS, LLC,

Plaintiff,

-against-

ANDREW MOSER,

Defendant.

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DECISION AND ORDER
Index No.: 655069/2017

Motion Sequence No.: 002

O. PETER SHERWOOD, J.:

Plaintiff Salus Capital Partners, LLC (Salus) moves to dismiss defendant Andrew Moser's (Moser) counterclaims, pursuant to CPLR 3211 (a) (1), (5), and (7), and CPLR 3016 (b).

This action between Salus and its former CEO, Moser, arises over Moser's alleged breach of confidentiality and non-disparagement provisions of his employment agreement, which Salus asserts stem from his revenge campaign against the company after it obtained an arbitration award against him for fraud, misappropriation, and breaches of fiduciary duty while he worked at Salus. Moser asserts nine counterclaims based on Salus's actions before and during the arbitration, including breach of contract, defamation, tortious interference with contract, and New York Labor Law claims. The motion to dismiss the counterclaims is granted.

BACKGROUND

Salus is a limited liability company engaged in asset-based lending (NYSCEF Doc. No. 2, ["Doc. No. ___"], complaint, ¶ 4). From November 2011 through mid-April 2015, Moser served as Salus's president and chief executive officer (*id.*, ¶¶ 6,10). He entered into a written employment agreement with Salus, dated August 26, 2014 (Employment Agreement) which, *inter alia*, set forth the terms of Moser's salary, bonus, and other benefits, and contained an arbitration provision (Doc. No. 3, Employment Agreement §§ 3, 17). In the agreement, Moser agreed not to disparage Salus, and not to disclose confidential information, trade secrets, or the terms of loans, personnel information or legal affairs. The non-disparagement and non-disclosure obligations survived termination of the agreement (Doc. No. 2, complaint, ¶ 8).

On April 24, 2015, Salus terminated Moser's employment, at the time deemed not for cause. Following the termination, Salus conducted a routine due diligence of Moser's emails, and allegedly uncovered evidence that Moser had concealed unauthorized personal charges on his corporate credit card. It hired a law firm to conduct an internal investigation, and discovered substantial evidence that Moser misappropriated corporate funds for his personal use (*id.*, ¶¶ 11-15). On July 7, 2015, after Moser failed to meet with Salus and address the issues raised, Salus re-characterized the termination as one for "Cause" for having engaged in fraud, willful misconduct, misappropriation of corporate funds, and breaches of fiduciary duties and so notified him (*id.*, ¶ 16).

On September 11, 2015, pursuant to section 17 (b) of the Employment Agreement, Salus filed a Demand for Arbitration with the American Arbitration Association, alleging fraud, conversion, breach of fiduciary duties, indemnification, and New York's faithless servant doctrine (*id.*, ¶ 19). Moser counterclaimed for severance and vested but unpaid bonus for 2014. In March 2016, Salus sought to take Moser's deposition in, claiming the arbitration, but Moser sought and obtained various postponements of that deposition due to various health conditions (exhibit 2 to notice of motion, answer, ¶¶ 93-104). Moser also sought adjournments of the arbitration hearings due to ill health, and lack of financial resources. On June 17, 2016, the arbitrator dismissed the counterclaim without prejudice (Doc. No. 4, at 1).

On August 31, 2016, Salus sent a letter to Monroe Capital, Moser's then-employer, detailing Salus's allegations in the arbitration proceeding, and stating that Moser had made claims about his ailing health and financial difficulties in the arbitration (Doc. No. 27, Letter to Monroe). Salus indicated that it intended to ask Monroe Capital about Moser's "work-related activities and compensation since starting at Monroe Capital," through a subpoena duces tecum, but offered that "if you agree to speak with us" and produce certain documents in advance of the hearing, "we would consider in good-faith whether we could proceed against Mr. Moser without seeking to take your deposition" (*id.*). Soon after receiving this letter, Monroe Capital terminated Moser's employment (Doc. No. 22, answer, ¶ 108).

The arbitration hearing was held on October 5-6, 2016. On December 29, 2016, the arbitrator issued a Partial Final Award (Doc. No. 2, complaint, ¶¶ 25-26; and Doc. No. 4). He found, in part, that Moser engaged in a "premeditated and focused plan to falsify invoices and deceive Salus as to

the true nature of the expenses incurred, directly involving a vendor in his scheme. That was fraud . . ." (Doc. No. 4, at 14). He also found that Moser charged substantial personal expenses to his Salus credit card, and failed re-pay them, despite repeatedly promising to do so (*id.*). The arbitrator concluded that "ample evidence demonstrates, and I find, that Moser fraudulently misappropriated Salus funds and converted Salus funds for his own benefit and violated his fiduciary duty to Salus," and that Moser's "fraud and misappropriation of funds clearly constituted Cause under the terms of the Employment Agreement" (*id.* at 20). The arbitrator also noted that Moser's counterclaim for unpaid bonus and severance pay "was dismissed without prejudice by Order dated June 17, 2016," before the arbitration hearings or award (*id.* at 1). The arbitrator held that Salus carried its burden of demonstrating fraud, conversion, breach of fiduciary duty, indemnification, and faithless servant (*id.* at 26). With regard to the finding that of faithless servant, the arbitrator ordered that Moser "must forfeit all compensation earned for services performed during that period [from June 2014 through his termination], including his salary, bonus, and payments for taxes" (*id.* at 24; *see* exhibit 4 to notice of motion, affidavit of Brendan Doyle, dated Jan 10, 2017 [Doyle aff], ¶¶ 2,4 and exhibit A annexed thereto). During that period, Moser was paid a salary totaling $481,234.02, a bonus payment of $300,000.00, and tax payments totaling $98,280.00, for a total compensation of $879,514.02 (Doyle aff,¶ 4). In the Final Award, dated April 17, 2017, the arbitrator reiterated his finding that Salus established its claims, and, on the faithless servant claim, awarded Salus damages in the amount of $879,514.02, which included return of the amount that had been paid to Moser as his 2014 bonus (in the amount of $300,000) (exhibit C to complaint, Final Award at 8-9). On January 26, 2018, the United States District Court for the Southern District of New York granted Salus' motion to confirm the Final Award, and denied Moser's motion to vacate (*see* NYSCEF Doc. No. 55, *Salus Capital Partners, LLC v Moser*, 289 F Supp 3d 468 [SD NY 2018]).

Salus alleges that in July 2017, one of its former borrowers, Kitson Stores (Kitson), commenced an action against Salus in California. The complaint in that action referenced statements Moser made to Kitson's counsel, purportedly regarding Salus's failure to act in a commercially reasonable manner with respect to Kitson's loans, and that Salus was making loans in California without a required commercial lending license (complaint, ¶ 32; answer, ¶¶ 122-128).

Salus commenced this action on July 27, 2017, asserting that Moser breached the confidentiality and non-disparagement provisions in the Employment Agreement by the statements he allegedly made to Kitson. It seeks a declaratory judgment.

On September 11, 2017, Moser answered the complaint, and asserted nine counterclaims. The first counterclaim asserts that Salus breached the Employment Agreement by failing to make required bonus and severance payments due to Moser. He seeks $200,000 as the balance owed of a $500,000 bonus for 2014 and $250,000 in severance. The second counterclaim also asserts breach of the Employment Agreement for disclosure of information in the Salus Letter to Monroe regarding the arbitration, which Moser alleges Salus was obligated to keep confidential (answer, ¶¶ 136-142). The third, fourth, and fifth counterclaims allege tortious interference with existing and prospective contracts, and with business relations. The sixth and seventh counterclaims arise out of Moser's allegations that Salus failed to pay his wages allegedly in violation of the United States Fair Labor Standards Act (29 USC §§ 201-219), and New York Labor Law §§ 190-199. The eighth counterclaim alleges defamation based on the Letter to Monroe. The ninth counterclaim seeks a permanent injunction enjoining Salus from publication of false, misleading, and defamatory statements.

Salus moves to dismiss all nine counterclaims on various grounds. Regarding the first counterclaim Salus asserts res judicata and collateral estoppel. It argues that the arbitrator expressly found that Moser was terminated for "Cause," which bars payment of severance and bonus under the terms of the Employment Agreement. Salus argues that the second counterclaim is insufficient, because the Employment Agreement does not bar either party from communicating with potential non-party witnesses in connection with the arbitration. The tortious interference counterclaims fail because they do not 1) allege the existence or terms of any existing contracts or breach of contract; 2) identify any business relationship with a third party, or wrongful conduct amounting to a crime or independent tort; and 3) allege but for causation. The New York Labor Law (NYLL) counterclaim is insufficient because Moser had no contractual right to severance and bonus payments, was a highly paid executive who is not covered under NYLL§ 191, and the bonus he seeks does not constitute "wages" as defined therein. The FLSA counterclaim is insufficient, because the statute does not apply. Moser's defamation claim must be dismissed because he fails to plead it with

the required particularity, and to allege falsity. Further, the statements were absolutely privileged as statements made in the course of judicial proceedings. Finally, Salus seeks dismissal of Moser's injunctive relief counterclaim, because there are no facts alleged to support his prediction of future libel.

DISCUSSION

I. Legal Standard

For reasons discussed below, the motion shall be granted, and the counterclaims dismissed. On a motion to dismiss, the pleading is liberally construed and court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*EBCI v Goldman, Sachs & Co.*, 5 NY 3d 9, 11 [2005]; *Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]; *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). The court will assume the truth of the factual allegations, draw any reasonable inferences, and determine only whether plaintiff has a legally cognizable claim (*id.*). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*id.*, [internal citation omitted]). Where the defendant seeks dismissal based upon documentary evidence (CPLR 3211 [a] [1]), it must establish that "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002] [internal citation omitted]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

II. First Counterclaim, Breach of Employment Agreement

Moser's first counterclaim for breach of the Employment Agreement is dismissed on the ground that it is barred by the arbitration award, which precludes his assertion of a right to any severance or 2014 bonus. Moser contends that because the arbitrator dismissed his counterclaim for bonus and severance without prejudice, he can still pursue it. While that dismissal, which occurred before the arbitration hearing, bars the application of res judicata or claim preclusion (*see Parker v*

Blauvelt Volunteer Fire Co., 93 NY2d 343, 349 [1999]), it does not bar the application of the doctrine of collateral estoppel or issue preclusion.

Under the doctrine of collateral estoppel, Moser cannot raise any of the issues he unsuccessfully litigated in the now confirmed arbitration. "Collateral estoppel, or issue preclusion, 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . ., whether or not the tribunals or causes of action are the same'" (*id.*, quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). "The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the [party opposing preclusion] had a full and fair opportunity to litigate the issue in the earlier action" (*id.*). "[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding" (*Ryan,* 62 NY2d at 501). These rules apply to arbitration awards (*see Feinberg v Boros*, 99 AD3d 219, 226 [1st Dept 2012]; *see also Casey v Country-Wide Ins. Co.*, 240 AD2d 232, 233 [1st Dept 1997]). The rules preserve party and judicial resources, and "prevent[] inconsistent results" (*id.*).

Here, Salus has met its burden of demonstrating identicality and decisiveness of the issue as to whether Moser was entitled to the bonus and severance he is seeking. In the arbitration, Salus proved, as we required to establish fraud and faithless servant, that Moser "fraudulently misappropriated Salus funds, converted them for his own benefit and violated his fiduciary duty to Salus" (exhibit B to complaint, Partial Final Award at 20). The arbitrator concluded that the fraud and misappropriation "clearly constituted Cause under the terms of the Employment Agreement," (*id.*). Under the Employment Agreement, section 8 (d), an employee terminated for "Cause" would only be entitled to be paid "Accrued Obligations," which are defined to mean earned but unpaid "Salary." "Salary" is defined as base salary (not bonus), unused vacation time, and any benefits under an employee benefit plan (exhibit 1 to notice of motion, Employment Agreement § 8[d][i], [d][v]). Moser would be entitled to severance only if his termination was "without Cause" (*id.* Employment Agreement § 8 [d] [ii]).

Moreover, in the arbitration, Salus demonstrated that Moser, submitted fraudulent invoices to transfer personal charges to Salus, deceived Salus as to his intent, and involved a third party vendor in the scheme, and, thus, was a faithless servant (Doc. No. 4, Partial Final Award, at 23). The arbitrator held that Moser "must forfeit all compensation earned for services performed during [the period of disloyalty, running from June 2014 until his last compensation payment], including salary, bonus, and any payments for taxes" (*id.* at 24). Thus, the arbitrator's factual findings and conclusions doom Moser's counterclaim seeking bonus and severance compensation. While Moser's first counterclaim seeks to compel Salus to pay the $200,000 balance of a $500,000 bonus that had purportedly vested for 2014, the amount he is required to disgorge due to the faithless servant award ($879,514.02) included the first $300,000 of that bonus already paid Moser before he was terminated (Doc. No. 5, Final Award; Doc. No. 44, Doyle aff, ¶¶ 2, 4 and exhibit A annexed thereto). Thus, the issue of whether Moser was entitled to the balance of that same bonus and any severance pay earned during the period of disloyalty, is identical to the issue necessarily determined by the arbitrator in the Final Award. If Moser was allowed to pursue his counterclaim here, and if the court were to find that he was entitled to such payments, the finding would conflict with the arbitrator's determination and award, a result the collateral estoppel doctrine is intended to prevent (*see Feinberg v Boros*, 99 AD3d at 226). Moser has already challenged the award and lost in federal court (Doc. No. 55). He has not shown that he was denied a full and fair opportunity to litigate that issue in the arbitration and in the subsequent confirmation proceeding. The first counterclaim is dismissed.

III. Second Counterclaim- Breach of Non-disclosure Obligation

The second counterclaim, seeking damages for breach of the arbitration provision in the Employment Agreement, also is dismissed. The Employment Agreement provides in section 17 (b), regarding arbitration, that any claim subject to arbitration under section 17 (a), "shall be fully and finally resolved in confidential, binding arbitration to the fullest extent permitted by law" (Employment Agreement § 17). It also provides that the arbitration proceedings shall take place in accordance with the rules regarding employment disputes of the American Arbitration Association (*id.*).

Moser asserts that, because section 17 (b) contains the phrase "confidential, binding arbitration," Salus was barred from contacting potential non-party witnesses, such as Monroe Capital, and its Letter to Monroe breached that confidentiality provision. Moser's reading of section 17 (b), is taken out of context and is not supported by either the language or intent of section 17.

In interpreting a contract, the court must look to the language used, for "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 559-560 [2014] [internal quotation marks and citations omitted]; *accord Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). "Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The court must construe the contract to give meaning and effect to the material provisions and should not render any provision meaningless (*id.*). The agreement "should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" (*id.* at 324-325 [internal quotation marks and citation omitted]).

Here, the term "confidential" in section 17 (b) does not impose a non-disclosure obligation on the parties as Moser urges. Section 17, captioned "Arbitration," addresses only the procedure agreed on by the parties for resolution of disputes covered by the Employment Agreement. It states that "[a]ny controversy [arising out of the Agreement] shall be . . . resolved in a confidential binding arbitration" (Doc. 3, § 17[b]). The provision does not restrict any party from seeking out and presenting relevant evidence in the arbitration. Further, the reference to "confidential, binding arbitration" must be read in the context of the AAA Employment Arbitration rules (Doc. No. 48, American Arbitration Association [AAA] Employment Arbitration Rules), pursuant to which the arbitration was required to be conducted, and to which the parties directly refer in the very next sentence of section 17. Those Employment Arbitration Rules contemplate that the arbitration hearing may involve evidence given by non-party witnesses. For instance, under Employment Arbitration Rule 22, the arbitrator has the authority "to exclude witnesses, other than a party, from the hearing during the testimony of any other witness" *(id.)*. Since the rule refers to the use of non-party witnesses, it follows that Salus (and any party to the arbitration) may contact a potential non-

party witness, such as Monroe Capital, before the arbitration hearing to obtain information regarding Moser's claims of ill health, and lack of financial resources, which Moser alleged prevented him from defending the arbitration. Moser, himself, concedes that while those rules "call for privacy," they do not impose a confidentiality requirement on the parties themselves (defendant's memorandum in opposition [def's opp] at 6 ; *see* also Doc. No. 48, AAA Rule 23 [arbitrator shall maintain the confidentiality of the arbitration]).

The confidentiality provision of the Employment Agreement appears in section 5 and is appropriately captioned "Confidential Information Covenants" (Doc. No. 3, section 5). Nothing in section 5 limits the ability of either party to gather proof from a third party for use in an arbitration proceeding. Indeed it would be difficult to imagine how due process would be served if procedures for resolution of disputes through arbitration barred parties from calling non-party witness. The second counterclaim is dismissed.

IV. Eighth Counterclaim-Defamation

Moser's defamation claim (the eighth counterclaim) is insufficient as a matter of law. "Defamation is 'the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society'" (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014], quoting *Foster v Churchill*, 87 NY2d 744, 751 [1996]). To state a claim for defamation, a plaintiff must allege a "false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Martino v HV News, LLC*, 114 AD3d 913, 913-914 [2d Dept 2014] [quotation marks and citations omitted]). Statements are libelous per se if they, inter alia, accuse the plaintiff of a serious crime (*Liberman v Gelstein*, 80 NY2d 429, 435 [1992]; *Harris v Hirsh*, 228 AD2d 206, 208 [1st Dept 1996]). Because falsity is an element of the claim, substantial truth is an absolute defense (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d at 34). In addition, to satisfy the requirements of CPLR 3016 (b), "the particular words complained of [must] be set forth in the complaint," along with "time, place and manner of the false statement and specify to whom it was made" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]).

The only particularized allegations of defamatory statements Moser makes are those contained in the Letter to Monroe (Doc. No. 27). The only allegedly false statement in that letter is that the arbitration was brought "as a direct result of Mr. Moser's embezzlement of a substantial sum from Salus through repeated acts of fraud, willful misconduct, willful misapplication and willful misappropriation of Salus funds solely for his personal benefit and breaches of fiduciary duty" (*id.*, at 1). Moser contends that while the arbitrator found that he misappropriated corporate resources for personal use, he never characterized Moser's actions as "embezzlement," which denotes that he took part in a crime. The findings of the arbitrator, however, establish that these statements are substantially true. The arbitrator found that Moser engaged in fraud, and that he intended to, and did, not only misappropriate Salus funds, but schemed with a vendor, and created false invoices intended to hide the personal nature of the expenses he incurred on his corporate credit card account, and, specifically, to deceive Salus. The court finds that such conduct may fairly be characterized as "embezzlement," defined in Black's Law Dictionary 561 (8th ed. 2004) as "[t]he fraudulent taking of personal property with which one has ben entrusted". The defamation counterclaim is dismissed.

V. Counterclaims 3, 4 and 5-Tortious Interference

The third through fifth counterclaims for tortious interference with contract and with prospective business relations are insufficient. To plead a counterclaim for tortious interference with an existing contract (the third counterclaim), the defendant must allege (1) the existence and terms of a valid contract with a third party; (2) about which the plaintiff had knowledge; (3) the plaintiff's intentional procurement of the third party's breach of that contract, without justification; (4) breach, and (5) damages (*see NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 620-621 [1996]; *MVB Collision, Inc. v Allstate Ins. Co.*, 129 AD3d 1041, 1043 [2d Dept 2015]). All elements must be pleaded in nonconclusory language to avoid dismissal (*Algomod Tech. Corp. v Price*, 65 AD3d 974, 975 [1st Dept 2009]; *Bonanni v Straight Arrow Publs.*, 133 AD2d 585, 587 [1st Dept 1987]).

The third counterclaim is dismissed, because Moser fails to allege that, by firing him, Monroe Capital breached its employment agreement with him (*see AQ Asset Mgt., LLC v Levine*, 119 AD3d 457, 462 [1st Dept 2014]). Moreover, Moser fails to set forth the terms of his agreement with Monroe Capital (*see J&L Am. Enters., Ltd. v DSA Direct, LLC*, 10 Misc 3d 1076 [A] at *3-4, 2006 NY Slip Op 50101 [U] [Sup Ct, NY County 2006]), or that Salus knew of the terms of that agreement (*id.*).

The fourth and fifth counterclaims, alleging tortious interference with prospective contracts and with business relations, similarly are dismissed. A claim for tortious interference with a prospective business relationship (i.e., an economic advantage) requires the plaintiff to allege: "(1) the defendant's knowledge of a business relationship between the plaintiff and a third party; (2) the defendant's intentional interference with the relationship; (3) that the defendant acted by the use of wrongful means or with the sole purpose of malice; and (4) resulting injury to the business relationship" (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 542 [1st Dept 2011]; *see NBT Bancorp v Fleet/Torstar Fin. Group*, 87 NY2d at 621). The conduct must be directed not at the plaintiff, but at the party with whom plaintiff seeks to have a relationship (*Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]). "Wrongful means include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract" (*Carvel Corp. v Noonan*, 3 NY3d at 191 [internal quotation marks and citation omitted]; *Arnon Ltd. (IOM) v Beierwaltes*, 125 AD3d 453, 453 [1st Dept 2015]).

Moser's pleading fails to identify any particular business relationship with a third party, or any prospective contract, and simply makes bald conclusory allegations that Salus knew of such relationships or potential contracts. His assertions about relations with "other potential business partners" are too vague to support such a claim (*see New York Tire Wholesale Corp. v Thomas Fatato Realty Corp.*, 153 AD3d 1351, 1354 [2d Dept 2017]). To the extent that Moser relies on his relationship with Monroe Capital, the counterclaims still are insufficient. He fails to plead wrongful means. His reliance upon his defamation claim is also unavailing since that claim, as discussed above, is insufficient (*see Amaranth LLC v J.P. Morgan Chase & Co.*, 32 Misc 3d 1235 [A] at *6, 2011 NY Slip Op 51589 [U] [Sup Ct, NY County 2011], *affd* 100 AD3d 573, 574 [1st Dept 2012] [tortious interference claim based on alleged defamatory statement that was, in fact, substantially true, dismissed]). Moser's contention that, by sending the Letter to Monroe Capital, Salus acted for the sole purpose of harming him, also is unavailing. Salus sought discovery from Monroe Capital in a legitimate effort to meet Moser's assertions in the arbitration that he was too ill to participate and lacked financial resources (*cf. Manhattan Sports Rests. of Am., LLC v Lieu*, 137 AD3d 504, 504 [1st Dept 2016] [defendant landlord solely acting to sabotage plaintiff subtenant's restaurant

business so that plaintiff subtenant would and did terminate sublease]; *Knopf v Sanford*, 123 AD3d 521, 522 [1st Dept 2014] [plaintiff lender made statements to defendant's prospective lenders solely in an effort to thwart defendants' attempts to obtain financing]). Defendant's tortious interference counterclaims are insufficient.

VI. Sixth Counterclaim- FLSA Claim

In the sixth counterclaim, Moser alleges that Salus's failure to pay him severance and a 2014 bonus violated the federal Fair Labor Standards Act (FLSA) (29 USC §§ 201 et seq). FLSA, however, addresses minimum wage standards, child labor restrictions, and overtime pay requirements, and is not applicable here. Moser fails to address, and, thus, abandons his FLSA counterclaim. This counterclaim is dismissed.

VII. Seventh Counterclaim- New York Labor Law

The seventh counterclaim asserts that Salus's failure to pay Moser the bonus and severance violated New York Labor Law (NYLL) §§ 190, 191, 193, and 198 (article 6 of NYLL). Section 190 is simply a definitional section, and does not provide any substantive rights. Section 198 similarly creates no rights. Instead, it provides remedies for violation of other NYLL provisions. Section 191 addresses the frequency of payments of wages, and does not apply to Moser, an executive who earned more than the $900 per week ceiling provided in the law (*see Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 616 [2008] [executive does not fall under section 191 of NYLL]). Section 193 prohibits employers from making "any deduction from the wages of an employee" unless permitted by law, or authorized by the employee, for various items such as insurance premiums, pension, health or welfare benefits, or other enumerated items not at issue here.

The purpose of Article 6 of NYLL is to "strengthen and clarify the rights of employees to the payment of wages" (*Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 223 [2000]). Section 190 of the statute 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." NYLL § 198-c (3) states that § 198-c "shall not apply to any person in a bona fide executive, administrative, or professional capacity whose earnings are in excess of nine hundred dollars a week" (NYLL § 198-c). In *Truelove*, the Court of Appeals concluded that the statute's definition excluded "certain forms of incentive compensation that are more in the nature of a profit-sharing arrangement

and are both contingent and dependent, at least in part, on the financial success of the business enterprise" (*id.* at 223-224 [internal quotation marks and citations omitted]). The Court in *Truelove* explained that " in expressly linking earnings to an employee's labor or services personally rendered," the statute "contemplates a . . . direct relationship between an employee's own performance and the compensation to which that employee is entitled" (*id.* at 224). Thus, post-termination payments, to which an employee is contractually entitled, do not constitute "wages," if they are contingent upon any factors other than the "labor or services rendered" by the employee (*see id.* [bonus not "wages" because not predicated solely on plaintiff's personal productivity, but also on employer's financial success]; *see also Beach v Touradji Capital Mgt., LP*, 128 AD3d 501, 502 [1st Dept 2015] [unpaid extra compensation not "wages," because it depended on factors other than plaintiffs' personal productivity]). The term "wages," as defined in this section, "was not intended to include every type of benefit derived by an employee from a master-servant relationship and which might fall within the general category of wages" (*People v Vetri*, 309 NY 401, 408 [1955]).

To the extent this counterclaim seeks recovery of unpaid severance under NYLL, it is dismissed. It is undisputed that Moser was an executive, who earned a salary of more than $900 per week (*see* Employment Agreement § 3 [a]). Thus, pursuant to NYLL § 198-c (3), he has no claim under the Labor Law to compel the payment of a severance package (*see Fraiberg v 4Kids Entertainment, Inc.*, 75 AD3d 580, 583 [2d Dept 2010]; *see also Romanello v Intesa Sanpaolo S.p.A.*, 97 AD3d 449, 455-456 [1st Dept 2012], *affd as modified on other grounds* 22 NY3d 881 [2013]).

With respect to the claim for a 2014 bonus, pursuant to section 3 (b) of the Employment Agreement, Moser's bonus was not predicated solely on his personal productivity. Rather, the company created a bonus pool each year in the amount equal to 50% of the company's net income, and the pool was subject to the approval of the compensation committee of the Board of Directors, which retained the ultimate authority to approve or modify the bonus program in its sole discretion (Employment Agreement § 3 [b]). Since Moser's bonus was discretionary and tied to "factors falling outside the scope of [his] actual work," these amounts do not constitute wages under NYLL (*Truelove*, 95 NY2d at 224; *cf. Ryan v Kellogg Partners Inst. Servs.*, 19 NY3d 1, 16 [2012] [where bonus was expressly linked to services, earned, guaranteed, and non-discretionary as a term and

condition of employment, it constituted wages]). Accordingly, the NYLL counterclaims are dismissed.

VIII. Ninth Counterclaim- Injunction

Finally, the ninth counterclaim which seeks a permanent injunction is dismissed. Moser alleges that based on Salus's wrongful and retaliatory conduct, including the alleged defamatory statements, he will suffer irreparable harm. He fails to address, and, thus, abandons this claim. In addition, as Salus argues, this counterclaim lacks factual support, and granting such relief would constitute a prior restraint on Salus' right to free speech (*see LoPresti v Florio*, 71 AD3d 574, 575 [1st Dept 2010]; *Rosenberg Diamond Dev. Corp. v Appel*, 290 AD2d 239, 239 [1st Dept 2002]). Therefore, it is dismissed.

Accordingly, it is

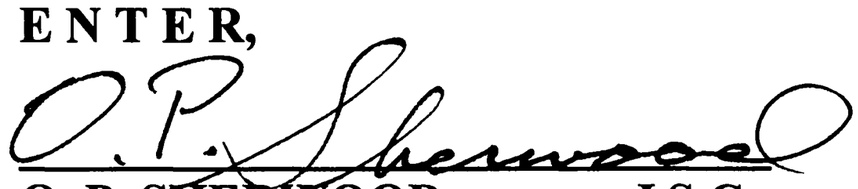
ORDERED that the plaintiff's motion to dismiss the counterclaims is granted and all counterclaims are dismissed; and it is further

ORDERED that counsel are directed to appear for a preliminary conference on Tuesday, September 11, 2018 at 9:30 AM, in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

Dated: August 15, 2018

E N T E R,



O. P. SHERWOOD J.S.C.