SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

ROBERT STEC,

Plaintiff,

Index No.: 152069/2014

– against –

PASSPORT BRANDS, INC. and ERNEST JACQUET,

DECISION/ORDER

Defendants.

Plaintiff Robert Stec, a former executive of defendant Passport Brands, Inc. (Passport), brings this action to recover unpaid wages and other amounts from defendant company and from defendant Ernest Jacquet, Passport's majority shareholder and the chairman of its board of directors. The complaint pleads one cause of action for violation of the New York Labor Law and two causes of action for breach of contract. Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety.

BACKGROUND

The following facts are not in dispute: On or about November 13, 2007, Stec began his employment as the President and Chief Executive Officer (CEO) of Passport, then known as I.C. Isaacs & Company, Inc. (Joint Statement [JS], ¶ 2.) Pursuant to an Employment Agreement between Passport and Stec, dated as of February 10, 2011, the company extended Stec's employment term and agreed, among other things, that Stec would be paid "a base salary . . . at the annual rate of $410,000 through December 31, 2013." (2011 Employment Agreement, § 3 [a] [Jacquet Aff. In Supp., Exh. B].) Defendant Jacquet signed the agreement on behalf of Passport. (Id., Signature Page.)

Beginning in or about November 2011, Passport began to experience financial difficulties. (Jacquet Aff. In Supp., ¶ 53.) It is undisputed that, during this period, Stec was not paid $158,076.92 of the base salary provided for in the 2011 Employment Agreement. Passport also failed to fully repay a $100,000 loan made by Stec to Passport in May 2010 (the 2010 loan).

On July 17, 2012, Stec and Passport entered into a "Consultancy Agreement." (JS, ¶ 5; Jacquet Aff. In Supp., Exh. I.) Like the 2011 Employment Agreement, the Consultancy Agreement was executed by Jacquet, on behalf of Passport, and by Stec. In the Whereas Clause of the Consultancy Agreement, the parties stated that Passport "desires to further reduce its operating costs due to lower sales volume . . . ," and that Stec "desires to reduce his dedicated time to the Passport business and assist Passport in its cost reduction and business strategy execution . . . ." Stec accordingly agreed to "resign[] his full time position as President and CEO of Passport, maintain his position as a director of the Company at the discretion of the Company and accept the position as a strategic independent consultant to the company reporting to the Chairman." (Consultancy Agreement, § 1.) As to the amounts then owed to Stec, the Agreement provided:

> "4) Past due Compensation: The Company [Passport] acknowledges and agrees to repay the past due wages due Stec in the amount of $158,076.92 that are currently recorded in the company accounts payable system. These wages will be paid each month in the amount of not less than $5000 per month provided the company generates the cash flow projected in the 6 months Cash Flow Projection dated July 2, 2012. If and when the Company receives funding from Uniglobal or Silver Pipe LTD in an amount of $3.0mm or more, the payment schedule will accelerate automatically and all past due balances will be paid in full within 30 days of funding going into the Company. The Company, at its discretion, may accelerate the payment schedule but under no circumstance, may they reduce the payments.
>
> "5) Outstanding loan to company: As of July 6, 2012, the company still owes Mr. Stec $30,464.36 from a personal note in the original amount of $100,000 executed in May, 2010. This amount will remain outstanding

> and will accrue monthly interest at an annual rate of 10% until paid in full. At the time that funding comes into the company from any source in the amount of $3.0 mm or more, the company will pay this note off in full (principal and interest)."

The Consultancy Agreement further provided, with exceptions not here relevant, that once certain past due expenses (separate from the past due compensation and outstanding loan amounts described in sections 4 and 5 above) were paid, "Stec will render his Employment Agreement dated February 10, 2011 . . . currently scheduled to run through 2014, null and void in its entirety . . . ."[1] (Id., § 6.) In section 13, a "Default clause," the parties agreed that "[i]n the event that the company fails to completely satisfy the terms of this agreement or obtain agreement from Mr. Stec to modify this agreement, Mr. Stec will return to a compensation package equal to the base pay currently in his [2011] employment agreement."

On or about June 24, 2013, Passport entered into a new agreement with Stec (the June 2013 Agreement) which provided, in pertinent part, as follows:

> "As per our discussion of last Friday regarding the balance of the loan and the back pay owed to you we have agreed to the following:
>
> - Loan balance of $31K: company will pay $5,000.00 per moths [sic] starting in July and the loan will be repaid fully by the end of December 2013. . . .
>
> - Back payroll of $158K: we will have a final discussion of how this amount will be paid to you no later than September 30, 2013 or earlier if the financial circumstances of Passport Brands allow it."

(Jacquet Aff. In Supp., Exh. K.) The June 2013 Agreement was signed by Liviu Goldenberg, as Senior Vice President of Passport.[2]

[1] It is unclear from the record on this motion whether and, if so, when these past due expenses were paid.

[2] Although the June 2013 Agreement is not signed by Stec, defendants do not challenge its enforceability on that ground.

To date, Passport has not paid Stec either the $158,076.92 in unpaid wages or the full balance of the 2010 loan. Stec commenced this action by filing a summons and complaint on March 7, 2014. The complaint pleads a first cause of action against both defendants for violation of New York Labor Law §§ 193, 198, and 663 (Compl., ¶¶ 33-40); a second cause of action against Passport for breach of the Consultancy Agreement (id., ¶¶ 41-46); and a third cause of action against Passport for breach of the June 2013 Agreement (id., ¶¶ 47-52).

DISCUSSION

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212 [b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.) "[I]ssue-finding, rather than issue-determination, is key. Issues of credibility in particular are to be resolved at trial, not by summary judgment." (Shapiro v Boulevard Hous. Corp., 70 AD3d 474, 475 [1st Dept 2010], citing S.J. Capelin Assoc., Inc. v Globe Mfg. Corp., 34 NY2d 338, 341 [1974] [other internal citations omitted].)

New York Labor Law

With respect to the Labor Law cause of action, defendants first contend that Stec "knowingly acquiesced to a reduced salary," creating an "implied agreement between the parties" to a "revised downward salary payment" or to "conditional repayment," which they contend does not violate the Labor Law. (Defs.' Memo. In Supp., at 7.) In the alternative,

defendants contend that no claim exists under any of the three sections of the Labor Law cited in Stec's complaint. According to defendants, there is no claim under Labor Law § 193 because "payments which were withheld by Passport were not unlawful deductions [within the meaning of § 193], but rather a mere failure to pay wages," which they claim is not covered by that section. (Id., at 8 [emphasis in original].) Defendants further contend that no claim exists under Labor Law § 663 because that section "provides for recovery in the event an employee is paid less than the minimum wage established by the law," which is not alleged here. (Id., at 10-11.) Finally, Defendants contend that no claim exists under Labor Law § 198 because the remedies provided in that section are limited to claims based upon substantive violations of article 6 of the Labor Law. (Id., at 11.)[3]

In opposition, Stec denies that he ever agreed to accept a reduced salary, and contends that defendants' assertion of such an agreement is contradicted by the evidence in the record, including Passport's written acknowledgment of its debts to Stec in both the Consultancy Agreement and the June 2013 Agreement. (See id., at 11-14.) Stec further contends that his claim for unpaid wages falls within the types of claims covered by Labor Law § 193 (id., at 14-18), and that he is entitled to liquidated damages and attorneys' fees under Labor Law §§ 198 (1-a) and 663 (1). (Id., at 21.)

Defendants fail to make a prima facie showing that Stec either expressly or impliedly agreed to accept a reduction of his salary. At most, the record shows that Stec agreed to temporarily defer payment of his salary as an accommodation to defendants, in acknowledgment of Passport's financial problems. (See Email from Stec to Jacquet, dated April 3, 2012 [4/3/12

[3] Defendants also contend that Jacquet cannot be individually liable to Stec under the Labor Law, because Jacquet was not Stec's "employer" for purposes of that law. (Id., at 12-13.) As the court holds, for the reasons stated in the text, that defendants are entitled to summary judgment dismissing the Labor Law claim, the court need not decide this issue.

Email] [Jacquet Aff. In Supp., Exh. F].) Defendants also claim that Stec agreed to "condition" his entitlement to the approximately $158,000 in unpaid wages on the company's thereafter meeting certain funding or revenue targets. (See Defs.' Memo. In Supp., at 1-2, 7.) This argument is more fully developed by defendants in support of the branch of their motion seeking dismissal of Stec's breach of contract causes of action. As held below, defendants fail to demonstrate on this record that these causes of action should be dismissed. The court therefore assumes, for purposes of its analysis of the Labor Law cause of action, that Stec has a viable underlying claim for unpaid wages.

The court nevertheless holds that the Labor Law does not provide a remedy for defendants' nonpayment of these wages. Labor Law § 193, on which Stec relies, provides, in pertinent part, that "[n]o employer shall make any deduction from the wages of an employee," except those which, as relevant to this case, "are expressly authorized in writing by the employee and are for the benefit of the employee. . . ." (Labor Law § 193 [1-b].) The statute sets forth a non-exclusive list of potential "authorized deductions," which include payments for, among other things, insurance premiums; pension or health and welfare benefits; dues or assessments to a labor organization; fitness center, health club, and/or gym membership dues; day care expenses; and "similar payments for the benefit of the employee." (Id., § 193 [1-b] [i]-[xiv].)

Here, the issue is whether defendants' withholding of and continuing failure to pay Stec his base salary constitutes an unauthorized "deduction" from wages within the meaning of section 193. In arguing that the withholding of wages is not a "deduction," defendants principally rely on two recent federal decisions in a related Labor Law case, Goldberg v Jacquet (2015 WL 5172939 [SD NY, Aug. 31, 2015, No. 14 Civ 1581, Crotty, J.], affd 667 Fed Appx 313 [2d Cir, June 30, 2016].) There, Goldberg, another Passport executive, sued Jacquet in

federal court for, among other things, violation of the Labor Law after Passport "began withholding a portion of Goldberg's salary to cover general business and operating expenses." (2015 WL 5172939, at * 1.) Jacquet moved for summary judgment dismissing the complaint, including Goldberg's Labor Law § 193 claim. He argued, as he does here, that withheld salary payments "do not constitute deductions and are instead a failure to pay wages not addressed by § 193." (Id., at * 2.) The District Court agreed, holding that "[t]he majority, and more persuasive, interpretation of § 193 is that it has nothing to do with failure to pay wages or severance benefits, governing instead the specific subject of making deductions from wages." (Id. [internal quotation marks and citations omitted].) As explained by the Court: "'[A] 'deduction' is more targeted and direct than the wholesale withholding at issue here, and New York courts recognize that the purpose of section 193 is to 'place the risk of loss for such things as damaged or spoiled merchandise on the employer rather than the employee.'" (Id., quoting Gold v American Med. Alert Corp., 2015 WL 4887525, * 5 [SD NY, Aug. 17, 2015, No. 14 Civ 5485, Keenan, J.].) The Court thus rejected "Goldberg's attempt to portray the withholding of his wages as a deduction, as this would sanction a skewed interpretation of § 193," which "'requires something more [than the total withholding of wages]; a specific instance of docking the employee's pay.'" (Id. [brackets and emphasis in original], quoting Gold, 2015 WL 4887525, at * 2.)

The Second Circuit affirmed, expressly adopting the District Court's holding that "[i]n order to state a claim for a violation of NYLL § 193, a plaintiff must allege a specific deduction from wages and not merely a failure to pay wages." (667 Fed Appx at 314.) According to the Court, "[t]he district court correctly ruled that although Goldberg did not receive wages to which he was entitled, his wages were not reduced in the manner prohibited by NYLL § 193." (Id.) The Second Circuit also noted that "[w]holesale withholding of wages is covered by NYLL §

191, which the parties agree does not apply to the plaintiff because he was an executive and therefore exempt from this provision." (Id., at 314 n 1.)

Although the Goldberg decisions are not binding on this court, their reasoning was expressly adopted by the First Department in Perella Weinberg Partners LLC v Kramer (153 AD3d 443, 449-450 [1st Dept 2017], affg 2016 WL 3906073, * 16-17 [Sup Ct, NY County, July 19, 2016, No. 653488/2015, Kornreich, J.]), a decision issued shortly after the briefing of this motion. Citing Goldberg, numerous prior federal district court cases, and several New York cases, the Court held that "a wholesale withholding of payment is not a 'deduction' within the meaning of Labor Law § 193." (153 AD3d at 449.) The Court expressly stated that "[t]his issue was not addressed by the Court of Appeals in Ryan v Kellogg Partners Inst. Servs. (19 NY3d 1, 16 [2012]) or by this Court in Wachter v Kim (82 AD3d 658, 663 [1st Dept 2011])." (153 AD3d at 449-450.)[4]

The Perella Court's characterization of Ryan and Wachter is significant because these, and other, cases have permitted recovery, under Labor Law § 193, of unpaid compensation, where the compensation was vested as opposed to discretionary. In Ryan, after holding that the employee's bonus payment was due and vested, the Court of Appeals reasoned: "Since [the employee's] bonus therefore constitutes 'wages' within the meaning of Labor Law § 190 (1), [the employer's] neglect to pay him the bonus violated Labor Law § 193, and entitles [the employee] to an award of attorney's fees under Labor Law § 198 (1-a)." (19 NY3d at 16 [internal citation omitted].) In Wachter, which was decided before Ryan, an employee claimed "aggregate cash

[4] It is noted that, although the Perella Court appears to have sided with the weight of authority, a number of pre-Perella cases decided in this Court relied on Ryan and Wachter in holding that Labor Law § 193 covered claims for total withholding of wages. (See e.g. Tortorella v Postworks N.Y. LLC, 2011 WL 3020860 [Sup Ct, NY County, July 13, 2011, Index No. 112686/2010, Madden, J.]; Mestrovic v Serum Versus Venom, LLC, 2015 WL 6508311, * 4-5 [Sup Ct, NY County, Oct. 16, 2015, Index No. 155204/2012, Bannon, J.]; Di Bari v Morellato & Sector USA, Inc., 2012 WL 3527213 [Sup Ct, NY County, Aug. 9, 2012, Index No. 0109387/2008, Oing, J.].)

compensation," which was comprised of a number of elements, including an annualized draw and a bonus. The Court held that to the extent such compensation was non-discretionary, it constituted "'wages' that are protected by Labor Law §193 (1) and § 198." (82 AD3d at 663.)

At least two federal courts have noted the broad reading to which Ryan and other similar cases are susceptible, and distinguished them on the ground that there was no indication in the cases "that the parties disputed whether the withholding was specific enough to be considered a 'deduction.' Indeed, those cases explicitly frame their analysis as interpreting the definition of 'wages,' not deduction." (Gold, 2015 WL 488725, at * 3; accord Komlossy v Faruqi & Faruqi, LLP, 2017 WL 722033, * 14, n 8 [SD NY, Feb. 23, 2017, No. 15 Civ 9316, Polk Failla, J.], affd without discussion of the Labor Law cause of action 714 Fed Appx 11 [2d Cir].) Decisions of this Court have similarly distinguished these cases. (Perella, 2016 WL 3906073, at * 17 [the Court (Kornreich, J.), in the underlying decision, explaining that Ryan "merely addressed the meaning of wages (and that a bonus can be considered wages), not whether all wholesale failures to pay bonuses are § 193 violations"]; Wachter v Kim, 2013 WL 144760, * 1 [Sup Ct, NY County, Jan. 11, 2013, No. 650532/2008] [this Court (Ramos, J.) explaining that in its 2011 decision in Wachter, "the First Department did not address whether the non-payment of Wachter's wages qualifies as a 'deduction from wages,' within the meaning of section 193 of the Labor Law"], appeal withdrawn 109 AD3d 705.)

Notably, in Kolchins v Evolution Markets, Inc. (31 NY3d 100 [2018]), a recent decision upholding the denial of a motion to dismiss a claim for a production bonus, the Court of Appeals reasoned that "[t]o the extent the production bonus was not discretionary . . . [it] could constitute nonforfeitable 'wages.'" (Id. at 110.) In support of this holding, the Kolchins Court, citing Ryan (19 NY3d at 16), explained that nothing in its prior precedent "suggests that the parties may

agree, in violation of the public policy reflected in the Labor Law, that wages earned and vested before an employee leaves a job will be forfeited if the employee is no longer working for the employer when the employer is obligated to remit payment." (Kolchins, 31 NY3d at 110, n 6.)

As in Ryan, it does not appear that the parties in Kolchins were disputing whether the Labor Law provided a remedy for wholesale withholding of wages (there, the bonus), as opposed to deductions from wages. Moreover, review of the electronically maintained court file in the Kolchins case shows that the complaint, which was the subject of the determination of the motion to dismiss that ultimately made its way to the Court of Appeals, pleaded a breach of contract cause of action for nonpayment of the bonus, but not a Labor Law cause of action. (See NYSCEF Doc. Nos. 1, 23; see also Kolchins v Evolution Markets Inc., 2015 WL 6437579, * 2 [Sup Ct, NY County, Oct. 22, 2015, Index No. 653536/2012, Bransten, J.] [noting that "Plaintiff had not pled a Labor Law claim in his original complaint" that was the subject of the decision appealed to the Court of Appeals].)

This court accordingly concludes that the issue of whether Labor Law § 193 permits a cause of action to be maintained for wholesale withholding of wages must await further clarification by the appellate courts, but that Perella remains viable and convincing law. Compelling reasons exist for rejecting a reading of Labor Law § 193 that would permit a cause of action to be maintained for wholesale withholding of, as opposed to specific deductions from, wages. As noted in recent federal court decisions, the total withholding of wages is the essence of a breach of contract claim. (See Gold, 2015 WL 4887525, at * 2; accord Komlossy, 2017 WL 722033, at * 14; see also Kletter v Fleming, 32 AD3d 566, 567 [3d Dept 2006][5].) Moreover, a

[5] In Kletter, the Third Department held that the defendant-counterclaimant's "claim for unpaid work was a 'common-law contractual remuneration claim.'" (32 AD3d at 567 [internal citation omitted].) The Court also dismissed the counterclaim, reasoning that it did not "allege any specific deduction in violation of section 193." (Id.) Kletter was cited in Perella for this latter holding. (Perella, 153 AD3d at 449.)

"'deduction' is more targeted and direct than the wholesale withholding' of wages." (Goldberg, 667 Fed Appx at 314 [quoting Gold, 2015 WL 4887525, at * 5]; Komlossy, 2017 WL 722033, at * 14.)[6] The extensive itemization of authorized deductions in section 193 supports the conclusion that a deduction is more targeted than a wholesale withholding.

In the instant action, Stec's Labor Law § 193 claim is based on defendants' wholesale withholding of his past due wages. Stec does not, either in his pleading or in opposition to this motion, identify any specific unauthorized deduction taken from his wages. Rather, the evidence in the record shows that defendants withheld Stec's wages due to Passport's financial problems and, arguably also, due to disagreements as to the terms of payment agreed to by the parties. This withholding is not the type of "deduction" Labor Law § 193 was designed to prevent.

In addition, it is undisputed that Labor Law § 191 authorizes a cause of action to be brought for nonpayment of wages by employees identified in that section (manual workers, railroad workers, commission salespersons, and clerical and other workers). It is settled that this section does not apply to executives. (See Pachter v Bernard Hodes Group, Inc., 10 NY3d 609, 615, 616 [2008] [explaining that, under prior precedent, "employees serving in an executive, managerial or administrative capacity do not fall under section 191 of the Labor Law and, as a result, those individuals are not entitled to statutory attorney's fees under section 198 (1-a) if they assert a successful common-law claim for unpaid wages"], rearg denied 11 NY3d 751; Goldberg, 667 Fed Appx at 314, n 1.) To permit Stec, a former executive of Passport, to recover

[6] In support of this holding that a deduction is more targeted than wholesale withholding of wages, the federal courts have relied on Matter of Hudacs (v Frito-Lay, Inc.) (90 NY2d 342, 349 [1997].) The issue there was whether the Labor Law § 193 prohibition on unauthorized deductions from wages was violated by the employer's requirement that salespeople remit to the employer funds collected from customers upon the delivery of inventory. In holding that it was not violated, the Court cited the legislative history of section 193, stating that this section "was intended to place the risk of loss for such things as damaged or spoiled merchandise on the employer rather than the employee." (See Goldberg, 667 Fed Appx at 314 [quoting Gold, 2015 WL 4887525, at * 5, quoting Hudacs].)

unpaid wages under section 193 would create an exception that would effectively swallow the limitation in section 191 as to the categories of workers authorized to sue for unpaid wages. (See Goldberg, 667 Fed Appx at 314, n 1.)

As no cause of action exists under Labor Law § 193, Stec cannot avail himself of the remedies provided for under Labor Law § 198, which are reserved for claims based upon substantive violations of article 6. (See Gottlieb v Kenneth D. Laub & Co., 82 NY2d 457, 463 [1993], rearg denied 83 NY2d 801 [1994].) Nor can Stec maintain a claim for attorney's fees pursuant to Labor Law § 663, which covers violations of article 19, the Minimum Wage Act. (Recovery Racing, LLC v Abate, 2007 WL 2302451, * 3 [Sup Ct, Nassau County, Aug. 10, 2007, Index No. 017764/2005, Warshawsky, J.]; see also 52 NY Jur2d Employment Relations, § 187.)

The first cause of action, for violation of the New York Labor Law, will accordingly be dismissed in its entirety.

Breach of Contract

Stec's second and third causes of action are for breach of the Consultancy Agreement and for breach of the June 2013 Agreement, respectively. For the reasons discussed above in connection with Stec's Labor Law cause of action (supra at 5-6), the court holds that defendants fail to show that Stec agreed to reduce his salary by the amount of the unpaid wages.

Stec's breach of contract claim for the $158,000 in unpaid wages is pleaded in the third cause of action for breach of the June 2013 Agreement, which is asserted only against defendant Passport. (Compl., ¶ 49.) The parties disagree as to the enforceability of the provision in this Agreement regarding payment of Stec's withheld wages, which states: "Back payroll of $158K: we will have a final discussion of how this amount will be paid to you no later than September

30, 2013 or earlier if the financial circumstances of Passport Brands allow it." Defendants interpret this provision as requiring the parties to have a final discussion no later than September 30, 2013 as to how the withheld wages were to be paid to Stec. (Defs.' Reply Memo., at 7.) Stec interprets the provision as requiring the parties to have a final discussion thereafter as to how Passport was to pay the wages no later than September 30, 2013. (Pl.'s Memo. In Opp., at 23.)

It is well settled that the determination of whether a contract is ambiguous is one of law to be resolved by the court. (Matter of Wallace v 600 Partners Co., 86 NY2d 543, 548 [1995]; W.W.W. Assocs., Inc., 77 NY2d at 162.) The court should determine from contractual language, without regard to extrinsic evidence, whether there is any ambiguity. (Chimart Assocs. v Paul, 66 NY2d 570, 573 [1986].) In determining whether a contract is ambiguous the "initial question . . . is whether the agreement on its face is reasonably susceptible of more than one interpretation." (Id.; Nausch v Aon Corp., 283 AD2d 353, 353 [1st Dept 2001].)

Applying these precepts, the court holds that the provision in the June 2013 Agreement regarding payment of wages is reasonably susceptible to both parties' interpretations and is therefore ambiguous. Moreover, if the provision did not require full payment by September 30, 2013, and a discussion was required as to a payment schedule, defendants may be correct that the parties failed to agree on a material term, because the discussion never occurred. (See Defs.' Reply Memo., at 7-8.) Determination of this issue cannot be made, however, prior to the receipt of parole evidence as to the proper construction of the provision.

The third cause of action also pleads a claim against defendant Passport for failure to pay the outstanding balance of the 2010 loan by December 31, 2013. (Compl.,¶ 49.) It is undisputed that full repayment of the loan did not occur by that date. (See Pl.'s Memo. In Opp., at 10

[alleging a balance due on the loan of $5,778 in principal as of November 2013].) A triable issue of fact also exists on the amount of principal and interest due on the loan.

The second cause of action pleads a claim for breach of the Consultancy Agreement and is also asserted only against defendant Passport. This cause of action alleges that Passport breached the Consultancy Agreement by failing to pay the balance of the 2010 loan and "by failing to return Plaintiff 'to a compensation package equal to the base pay [in the February 2011 Employment Agreement]....'" (Compl., ¶ 43 [brackets and ellipsis in original].)

Defendants do not claim, let alone make a prima facie showing, that they complied with section 5 of this Agreement, which required Passport to repay the 2010 loan in full "[a]t the time that funding comes into the company from any source in the amount of $3.0 mm or more." (Consultancy Agreement, § 5.) Defendants further fail to address Stec's evidence that Jacquet himself injected more than $3 million in funds into Passport after the execution of the Consultancy Agreement. (See Pl.'s Memo. In Opp., at 22 [citing deposition transcript and financial summaries].) If defendants breached section 5 of the Consultancy Agreement, they may also have breached section 13, the "Default clause," which provided that "[i]n the event that the company fails to completely satisfy the terms of this agreement or obtain agreement from Mr. Stec to modify this agreement, Mr. Stec will return to a compensation package equal to the base pay currently in his employment agreement." It is undisputed that Passport never "return[ed]" Stec to his prior base salary.[7]

Defendants' arguments with respect to the second cause of action primarily concern

[7] Questions of fact exist concerning the interplay between the Consultancy Agreement and the June 2013 Agreement with respect to repayment of the 2010 loan. The parties do not address, among other issues, the extent to which the June 2013 Agreement constituted a modification of the Consultancy Agreement, and whether this modification occurred before or after Passport received the $3 million in funding referenced in section 5 of the Consultancy Agreement and purportedly defaulted on that agreement. Nor do they address the effect of the possible unenforceability of the June 2013 Agreement on the loan repayment and default provisions of the Consultancy Agreement.

section 4 of the Consultancy Agreement, which addressed Stec's withheld wages.[8] As held in connection with Stec's Labor Law claim, defendants fail to show that Stec agreed to a reduced salary. (See supra, at 5-7.) In addition, defendants argue that Stec agreed to a condition to repayment of the wages that was not met. (Defs.' Memo. In Supp., at 13-14.) More particularly, defendants argue that Passport's achievement of the revenue targets set forth in the "6 months Cash Flow Projection dated July 2, 2012," referenced in section 4 of the Consultancy Agreement, was a "condition precedent" to Passport's obligation to pay Stec's past due wages under that agreement. (Id., at 14.) In claiming that the projected cash flow was not met, defendants rely on the conclusory assertion of Mr. Jacquet. (Jacquet Aff. In Supp., ¶ 72.)

Even assuming that Passport failed to meet the specified revenue targets, the court does not find, on the record as briefed, that this failure discharged or released the company from its liability to Stec for his "past due wages." Section 4 of the Consultancy Agreement unequivocally stated that "[t]he Company acknowledges and agrees to repay the past due wages due Stec in the amount of $158,076.92 . . . ." (Consultancy Agreement, § 4.) The sentence that follows stated that "[t]hese wages will be paid each month in the amount of not less than $5000 per month provided the company generates the cash flow projected in the 6 months Cash Flow Projection dated July 2, 2012." Section 4 thus, by its terms, provided that the new payment schedule to which the parties agreed was conditioned on the company's achievement of the projected cash flows, not that Passport's pre-existing contractual liability to Stec for unpaid wages would be conditioned on, released, or waived if the company did not achieve the specified

[8] The second cause of action alleges Passport's breach of the Consultancy Agreement by failing to pay the loan and to return Stec to the base pay in the 2011 employment agreement. (Compl., ¶ 43.) This cause of action, however, incorporates allegations regarding past due wages. (Id., ¶ 43, incorporating ¶ 23.) Defendants assume that the pleading of the second cause of action includes a claim for unpaid wages. (See Defs.' Memo. In Supp., at 14 ["Additionally, the breach of contract claims, Counts 2 and 3, fail because the conditions precedent to repayment under the 'Agreements' did not occur, thus no repayment was required"].) The court will do so as well.

revenues. The parties have not submitted authority on the legal effect on the wage claim of the company's failure to meet projected revenues. Nor have they addressed the interplay between the provisions of the Consultancy Agreement and the June 2013 Agreement as to the unpaid wage claim.

The branch of the motion to dismiss the second and third causes of action will accordingly be denied.

It is accordingly hereby ORDERED that the motion of defendants Passport Brands, Inc. and Ernest Jacquet for summary judgment dismissing the complaint is granted solely to the extent of dismissing the first cause of action (for violation of the New York Labor Law) in its entirety with prejudice.

This constitutes the decision and order of the court.

Dated: New York, New York
August 22, 2018

MARCY FRIEDMAN, J.S.C.