SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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ROBERT HARRIS,

Plaintiff,

-against-

INTIMO, INC., NATHAN NATHAN individually, TOMMY NATHAN, individually, MORIS ZILKHA, individually, and JOHN DOES 1-10, and ABC CORPS. 1-10, fictitious names for persons or entities whose present roles and identities are unknown,

Defendants.

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Index No.: 650175/2017
MOT SEQ: 001

DECISION AND ORDER

NANCY M. BANNON, J.:

This action arises out of plaintiff Robert Harris's claims, *inter alia*, that his former employer, respondent Intimo, Inc. (Intimo), as well as individual defendants Nathan Nathan (Nathan), Tommy Nathan (Tommy), and Moris Zilkha (Zilkha) (collectively, defendants), discriminated against him, by wrongfully terminating him as a result of his age, in violation of the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL). Among other claims, plaintiff also alleges that defendants breached their employment agreement with him and violated the New York Labor Law (NYLL or Labor Law) when they failed to pay him for his earned commissions and wages. Defendants move, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to state a cause of action. As set forth below, under the relaxed pleading standard applied to discrimination cases, in addition to the standard applied in considering a motion to dismiss, the complaint adequately sets forth causes

of action for age discrimination in violation of the NYSHRL and NYCHRL, as well as causes of action grounded in breach of contract and violations of the Labor Law.

BACKGROUND AND FACTUAL ALLEGATIONS

Prior to being terminated in February 2016, plaintiff had been employed at Intimo, a "fashion and apparel manufacturing" company located in New York, New York. Plaintiff commenced his employment in 2010, as Vice President of Sales, and was ultimately promoted to Senior Vice President of Sales and Licensing. Plaintiff was 65 years old at the time he was terminated.

Nathan is the founder and owner of Intimo, Tommy is the Vice President and Zilkha' s current title is General Manager, although he previously held the role of Chief Financial Officer. Plaintiff claims that these defendants are some of the ten largest shareholders of Intimo and that they acted as employers within the meaning of the Labor Law. In addition, plaintiff believes that these defendants are "alter egos" of Intimo.

Plaintiff's complaint states that he was improperly terminated because of his age and that, upon termination, the company still owed him unpaid wages and commissions.

Prior to starting his employment with Intimo, plaintiff and Nathan, on behalf of company, discussed plaintiff's salary and compensation. Nathan memorialized the discussion in an email dated December 30, 2009. In pertinent part, the email stated,

> "Robert,
> We discussed and agreed to the following salary thresholds and compensation earlier today:
>
> Year 1, $100K + 3% of sales in excess of $1m
> Year 2, $125K + 3% of sales in excess of $1.5
> Year 3, $150K + 3% of sales in excess of $3m

> Also, any additional business that you bring, such as licensing from your connections etc. will be compensation in addition to the above. We will discuss those on a case by case basis, and most likely we will compensate you by a year end bonus.
>
> I look forward to having you on our team.
> Nathan Nathan."

Plaintiff's exhibit D at 1.

Plaintiff claims that, pursuant to the agreement between Intimo and plaintiff, he was owed commissions in the amount of $267,380.00 at the time of his termination. The complaint sets out the amounts owed for 2010, 2011 and 2012, and maintains that an additional "as-yet uncalculated commission is owed" to him for 2016.

In addition to being owed commissions, plaintiff alleges that Intimo failed to pay him his full promised salary for the years 2010 through 2015. Plaintiff provides the calculations for each year, for an amount totaling $88,863.00 in unpaid wages. In addition, plaintiff alleges that, after he performed the work but did not receive his promised salary, Nathan "justified the shortfall by claiming to retroactively reduce [plaintiff's] salary." Complaint, ¶ 70. Nathan also "demanded that Plaintiff return $5,000.00 of salary that had already been paid. After Plaintiff protested this, Company management ultimately only took back approximately $2,200.00." *Id.*, ¶ 72.

According to plaintiff, in the fall of 2015, management deliberately started to take away his responsibilities and give them to a younger employee. Plaintiff alleges that he was excluded from meetings and that his business accounts were reassigned to the younger employee. Plaintiff states that he "complained, in or about November 2015 and December 2015, about the mistreatment that the Company was directing toward him." *Id.*, ¶ 80. He continues that he advised Nathan that "it was wrong for [plaintiff's] wages to be reduced retroactively." *Id.*, ¶ 80.

When plaintiff was terminated on February 24, 2016, Nathan advised plaintiff that "things were not working out." *Id.*, ¶ 85. Nathan did not provide plaintiff with any deficiencies

in his performance. Plaintiff alleges that "Mr. Nathan claimed that he would consider allowing [plaintiff] to work on a commission only basis and said that they should sleep on it and discuss it on Monday." *Id.*, ¶ 90. However, plaintiff alleges that proposal was "not truthful," as the company "already had two younger people ready and in place to assume [his] job duties." *Id.*, ¶ 91.

Plaintiff alleges that he was qualified for the position that he held and that he excelled at his job while at Intimo. For example, plaintiff claims that he "started a children's division for the Company . . . salvaged Walmart private label business . . . [and] grew the Jockey business to become one of the most profitable parts . . . ." *Id.*, ¶ 48.

After he was terminated, plaintiff filed this complaint seeking, among other things, compensatory damages, unpaid compensation and liquidated damages pursuant to the Labor Law, attorneys' fees and costs, and punitive damages, due to the willful disregard of plaintiff's rights.[1] Defendants are seeking to dismiss all claims for failure to state a cause of action.

DISCUSSION

A. Dismissal

On a motion to dismiss pursuant to CPLR 3211, "the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." *Mendelovitz v Cohen*, 37 AD3d 670, 671 (2d Dept 2007). However,

[1] Shortly after plaintiff was terminated, he initiated an action in the United States District Court for the Southern District of New York (District Court), including a federal claim of age discrimination under the ADEA. After filing the lawsuit, plaintiff became aware that, because Intimo had less than 20 employees, plaintiff could not pursue an ADEA claim. On January 10, 2017, plaintiff then filed a notice of voluntary dismissal with the District Court and filed in the instant complaint in Supreme Court, New York County.

"bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted). "In assessing a motion under 3211 (a) (7), . . . the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v Martinez*, 84 NY2d 83, 88 (1994) (internal quotation marks and citations omitted). Moreover, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 (2005).

B. Labor Law Unpaid Wages – First Cause of Action

The first cause of action, alleging unpaid wages under the Labor Law, states that defendants violated Labor Law §§ 191 (1) (c), 191-b and 191-c [2] when they failed to pay him commissions owed. As set forth above, plaintiff explains that he was not paid commissions owed to him over the course of several years. According to plaintiff, defendants were required to pay him the commissions owed within five days after he earned the commissions. In addition, plaintiff alleges that defendants violated Labor Law § 193 when they retroactively reduced pay that was previously promised to Plaintiff at a set rate.

Labor Law § 191:

The plaintiff states that he is considered a "commissioned salesperson" employee who is entitled to recover commissions and salary under Labor Law §§ 191 (1) (c), 191-b and 191-c. Labor Law § 191-b states, in relevant part, that "[a] sales representative during the course of the contract, shall be paid the earned commission and all other monies earned or payable in accordance with the agreed terms of the contract, but not later than five business days after the

[2] Plaintiff inaccurately set forth the provisions as "NYLL §§ 191 (c), 191-B and 191-C." Complaint, ¶ 96.

commission has become earned." Labor Law § 191-b (3). Labor Law § 191-c indicates, in pertinent part, that "[A] principal who fails to comply with the provisions of this section concerning timely payment of all earned commissions shall be liable to the sales representative in a civil action for double damages." Labor Law § 191-c (3).

Pursuant to Labor Law § 191-a (d), a "sales representative" is defined as an independent contractor, in contrast to commission salespersons, who are classified as employees under Labor Law §1 90 (6) and Labor Law § 191 (1) (c). *See AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 A.D.3d 6, 15 (2d Dept 2008) (internal quotation marks and citations omitted). Plaintiff has conceded that he is a salaried employee working as a "commissioned salesperson." As a result, plaintiff cannot recover under either Labor Law §§ 191-b or 191-c because they are only applicable to sales representatives, defined as independent contractors, rather than to salaried employees. *See Deutschmann v First Mfg.* Co., 7 AD3d 363, 364 (1st Dept 2004).

Pursuant to Labor Law § 190 (6), commission salesman is defined as the following: "any employee whose principal activity is the selling of any goods . . . and whose earnings are based in whole or in part on commissions. The term "commission salesman" does not include an employee whose principal activity is of a supervisory, managerial, executive or administrative nature." Defendants argue that plaintiff's job titles, listed as Vice President of Sales and Senior Vice President of Sales and Licensing, demonstrate that plaintiff was an executive and is thus precluded from recovering his commissions under the Labor Law § 191 (1) (c). *See Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 616 (2008).

In opposition, plaintiff avers that, despite his job title, he was primarily engaged in sales functions. "[S]alaried employees who receive commissions are protected under § 191 (1) (c) ...." *Derven v PH Consulting, Inc.*, 427 F Supp 2d 360, 369 (SDNY 2006). For purposes of the

motion to dismiss, plaintiff has adequately pled that he was a commission salesman and that defendants violated Labor Law § 191 (1) (c) when they timely failed to pay him the commissions he was contractually entitled to. "[O]n a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (7), we accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff's claim." *Davis v Boeheim*, 24 NY3d 262, 268 (2014) (internal quotation marks and citations omitted).

Labor Law 193:

Pursuant to Labor Law § 193 (1) (a) and (b), "[n]o employer shall make any deduction from the wages of an employee, except deductions which . . . are made in accordance with the provisions of any law . . . or . . . are for the benefit of the employee." Plaintiff alleged in the first cause of action that, in violation of Labor Law § 193, defendants "retro-actively reduced pay that was previously promised to Plaintiff at a set rate." Complaint, ¶ 97. Defendants do not address the section of the first cause of action alleging a violation of Labor Law § 193.

In any event, regardless of whether plaintiff is ultimately considered an executive, courts have found that executives are "not categorically excluded from the definition of 'employee' under Labor Law §190 (2) and may be entitled to protection under Labor Law § 193." *Farricker v Penson Dev., Inc.*, 2009 WL 860239, *7, 2009 US Dist LEXIS 27484, *20, (SD NY 2009).

Accordingly, only plaintiff's claims brought pursuant to Labor Law §§ 191-b and 191-c may be dismissed at this stage.

C. Wage Theft Prevention Act - Second Cause of Action

In the second cause of action, plaintiff states that defendants violated Labor Law § 195 when they failed to provide him with employee wage statements for the years 2010 through 2016, as required by the New York Wage Theft Prevention Act (WTPA). Defendants argue that

the WTPA became effective on April 9, 2011 and cannot be applied retroactively to plaintiff's claims. Plaintiff maintains that he is entitled to recover under Labor Law § 195 (1) because he worked for defendants both prior to and after the WTPA went into effect. According to plaintiff, he did not receive any required wage notices. If he cannot recover under Labor Law § 195 (1), plaintiff alleges that he can still plead a viable claim under Labor Law § 195 (3) because he did not receive required wage notices with every salary payment.

Pursuant to Labor Law § 195(1) (a), at the time of hire and also annually, employers are required to provide, "among other things, the rate of pay, allowances, the regular pay day, the name of the employer, the physical address of the employer's main office, and a mailing address and telephone number for the employer." *Salomon v Adderley Indus., Inc.*, 960 F Supp 2d 502, 511 (SDNY 2013) (internal quotation marks and citations omitted). Pursuant to Labor Law § 195(3), employers are further required to provide certain information on every wage statement, such as rate of pay and deductions. Courts have found that the WTPA does not apply retroactively, and that an employee who began working before the legislation took effect may not bring a claim for an employer's failure to provide wage notices. *Trujillo v Transperfect Global, Inc.*, 164 AD3d 1161, 1162 (1st Dept 2018); *see also Canelas v A'Mangiare Inc.*, 2015 WL 2330476, *5, 2015 US Dist LEXIS 66316, *12 (SDNY 2015). Since plaintiff was hired in 2010, he cannot sustain a claim pursuant to Labor Law § 195.

Furthermore, in the complaint, plaintiff broadly alleges only that defendants "failed to provide notices as required by the New York Wage Theft Prevention Act. This violates NYLL § 195." Complaint, ¶ 100. Plaintiff's claims are conclusory and do not put defendants on notice that they failed to provide him with written notice of his rates of pay at any specified time during his employment. Plaintiff states in his opposition that defendants violated Labor Law § 195 (1)

and (3), but he does not submit any of his wage statements demonstrating any purported deficiencies. Although courts have found that the "recitation of the statutory language is sufficient to state a claim," plaintiff's claims as alleged here do not track the language of the statute at issue, nor do they set forth with sufficient specificity the types of information allegedly withheld. *Kone v Joy Constr. Corp.*, 2016 WL 866349, *6, 2016 US Dist Lexis 26981, *19 (SDNY 2016).

Accordingly, the second cause of action is dismissed.

D. Age Discrimination in Violation of the NYSHRL and NYCHRL – Third and Fourth Causes of Action

Pursuant to the NYSHRL and the NYCHRL, it is an unlawful discriminatory practice for an employer to refuse to hire or employ, or to fire or to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's age. *See* Executive Law § 296 (1) (a); Administrative Code of the City of NY (Administrative Code) § 8-107 (1) (a).

Under both the NYSHRL and the NYCHRL, the court applies the burden shifting analysis developed in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), where the plaintiff has the initial burden of establishing a prima facie case of discrimination. *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 (2004). Plaintiff must show that "[he] is a member of a protected class, was qualified for the position, and was terminated or suffered some other adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009). In addition, on a motion to dismiss, employment discrimination cases are "generally reviewed under notice pleading standards . . . [I]t has been held that a plaintiff alleging employment discrimination 'need not plead [specific facts

establishing] a prima facie case of discrimination' but need only give 'fair notice' of the nature of the claim and its grounds." *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 (1st Dept 2009) (internal citation omitted).

Here, plaintiff alleges that he was 65 years old and qualified for his position. According to plaintiff, just prior to his termination, defendants started to take away his responsibilities and give them to a younger employee. Further, defendants started to exclude plaintiff from meetings and other important company discussions. Defendants then terminated plaintiff shortly afterwards and allegedly replaced him with two younger employees. Defendants purportedly did not provide an explanation for their actions except to state that they needed to make a change. They also did not identify any deficiencies in plaintiff's performance.

For purposes of a motion to dismiss, plaintiff has "made allegations, that, if true, would carry [his] 'de minimis burden.'" *Brathwaite v Frankel*, 98 AD3d 444, 445 (1st Dept 2012). Plaintiff has alleged that he was a member of a protected class due to his age, that he was terminated despite being qualified to hold the position, and that the termination occurred under circumstances giving rise to an inference of age discrimination. Accordingly, plaintiff has sufficiently pled a claim against all defendants for age discrimination in violation of the NYSHRL.

It is well settled that the provisions of the NYCHRL are to be construed more liberally than its state or federal counterparts. *Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 599 (1st Dept 2016). Courts have found that, if a plaintiff's allegations state claims under the NYSHRL, then, "[a] fortiori, they state a claim under the [NYCHRL], which is more liberal than either its state or federal counterpart." *Brightman v Prison Health Servs., Inc.*, 62 AD3d 472, 472 (1st Dept 2009). As defendants' motion to dismiss is denied with respect to plaintiff's age-based

disparate treatment claims under the NYSHRL, the motion to dismiss is also denied with respect to the same claims made under the NYCHRL.

E. Retaliation in Violation of the NYSHRL and NYCHRL – Fifth and Sixth Causes of Action

Under both the NYSHRL and the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. Executive Law § 296 (7); Administrative Code § 8-107 (7). When analyzing claims for retaliation, courts apply the burden shifting test as set forth in *McDonnell Douglas Corp. v Green* (411 US at 802), which places the "initial burden" for establishing a prima facie case of retaliation on the plaintiff. For a plaintiff to successfully make out a prima facie claim of retaliation under the NYSHRL, he must demonstrate that: "(1) [he] has engaged in a protected activity, (2) [his] employer was aware of such activity, (3) [he] suffered an adverse employment action based upon the activity, and (4) a causal connection exists between the protected activity and the adverse action." *Harrington v City of New York*, 157 AD3d 582, 585 (1st Dept 2018). Under the NYCHRL, instead of demonstrating that he suffered from an adverse action, plaintiff need only "show only that the defendant took an action that disadvantaged [him]." *Id.* (internal quotation marks and citations omitted).

"The term protected activity refers to action taken to protest or oppose statutorily prohibited discrimination." *Sharpe v MCI Communications Servs.*, 684 F Supp 2d 394, 406 (SD NY 2010) (internal quotation marks and citations omitted); *see also Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 (1st Dept 2010) (internal citation omitted). Here, plaintiff cannot establish the first element in a prima facie case of retaliation under either the NYSHRL or the NYCHRL because he did not engage in protected activity. *Breitstein v Michael C. Fina, Co.,*

156 AD3d 536, 537 (1st Dept 2017). Plaintiff alleges that he was retaliated against after he complained about the mistreatment that the Company was directing towards him; namely, that it was wrong for his wages to be retroactively reduced. However, plaintiff's complaints did not "constitute protected activity," as plaintiff never asserted or even insinuated to anyone that he was mistreated or terminated as a result of his age. *Fruchtman v City of New York*, 129 AD3d 500, 501 (1st Dept 2015); *see also International Healthcare Exch., Inc. v Global Healthcare Exch., LLC*, 470 F Supp 2d 345 (SDNY 2007) (internal quotation marks and citations omitted). Accordingly, plaintiff's employer was not on notice that discrimination was occurring. *International Healthcare Exch., Inc. v Global Healthcare Exch., LLC*, *supra* at 357.

Accordingly, the fifth and sixth causes of action are dismissed.

F. Fraud - Seventh Cause of Action

Plaintiff alleged that defendants promised to pay plaintiff certain compensation with the knowledge that they never intended to pay plaintiff. In his breach of contract cause of action, plaintiff is seeking damages stemming from the alleged breach of defendants' agreement with plaintiff to pay him certain wages and commissions. Plaintiff cannot sustain a cause of action for fraud "where, as here, the only fraud claimed relates to an alleged breach of contract." *Hylan Elec. Contr., Inc. v MasTec N. Am., Inc.*, 74 AD3d 1148, 1149 (2d Dept 2010); *see also Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 (1st Dept 1988). Moreover, even if the fraud claim set forth conduct unrelated to the parties' employment agreement, it would still be dismissed as duplicative of the breach of contract claim for the additional reason that "the damages sought are duplicative of the damages sought for breach of contract." *Financial Guar. Ins. Co. v Morgan Stanley ABS Capital I Inc.*, 164 AD3d 1126, 1127 (1st Dept 2018); *see also*

Manas v VMS Assoc., LLC, 53 AD3d 451, 545 (1st Dept 2008. Therefore, the seventh cause of action is dismissed.

G. Breach of Contract - Eighth Cause of Action

In support of this cause of action, plaintiff provides an email that he received from Nathan prior to the start of his employment with Intimo. As indicated above, the email sets forth the terms of the agreed-upon compensation plaintiff would be entitled to, including both the salary and commissions schedule. Defendants claim that this email cannot satisfy the statute of frauds, that it did not set forth the terms and conditions of a purported agreement and that it did not contain all of the essential terms of an employment contract. However, defendants' arguments are unavailing. It is well settled that emails sent between the parties can satisfy the statute of frauds and constitute a contract. *Newmark & Co. Real Estate Inc. v 2615 E. 17 Realty LLC*, 80 AD3d 476, 477 (1st Dept 2011). "Defendant does not dispute its authorship of the e-mails, nor that they were sent by its agent, . . . The e-mail agreement set forth all relevant terms of the agreement, including the particular commission charged by plaintiff, and thus, constituted a meeting of the minds." *Id.* at 477-478. Accepting plaintiff's allegations as true for the purposes of the motion to dismiss, plaintiff has alleged a viable claim for breach of contract.

H. Breach of the Covenant of Good Faith and Fair Dealing - Ninth Cause of Action

Plaintiff alleges that "in each contract and in all employment relationships [there is] an implied duty of good faith and fair dealing" and that defendants breached that duty. Here, the alleged breach of the covenant of good faith and fair dealing is premised on the same set of facts that defendants breached their obligations to pay commissions and salary under the employment agreement. As a result, this cause of action, is "based on the same allegations and seek[s] the same damages as the breach of contract . . . claim[] [and should be] dismissed as duplicative."

Ullmann-Schneider v Lacher & Lovell-Taylor, P.C., 121 AD3d 415, 416 (1st Dept 2014). Accordingly, the ninth cause of action is dismissed.

I. Quantum Meruit -Tenth Cause of Action

"To state a cause of action to recover in quantum meruit, the plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services allegedly rendered." *Tesser v Allboro Equip. Co.*, 302 AD2d 589, 590 (2d Dept 2003). Plaintiff has sufficiently alleged a claim for quantum meruit, as he claims that, despite providing services to defendants in good faith, he was not compensated. Defendants dispute that the emails constituted an employment agreement between the parties. Where, as here, "there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract." *Scarola Ellis LLP v Padeh*, 116 AD3d 609, 611 (1st Dept 2014) (internal quotation marks and citation omitted).

J. Respondeat Superior - Eleventh Cause of Action

Plaintiff broadly asserts that, pursuant to the doctrine of respondeat superior, Intimo is liable for all damages incurred as a result of actions and/or omissions of the individual defendants who engaged in unlawful conduct. While Intimo may be held liable for defendants' actions if plaintiff is ultimately successful on some of his claims, plaintiff has not adequately pled how the doctrine of respondeat superior is applicable to the causes of action herein.

Accordingly, the cause of action alleging respondeat superior is dismissed.

K. Individual Liability - Twelfth Cause of Action

In the twelfth cause of action, plaintiff seeks to hold defendants individually liable under the Labor Law and the NYSHRL and NYCHRL.

BCL § 630:

The complaint indicates that, pursuant to BCL § 630, plaintiff seeks to impose individual liability based on defendants' status as one of the ten largest shareholders of Intimo. BCL § 630 (a) states, in relevant part, that the ten largest shareholders of every domestic corporation, "shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its . . . employees . . . , for services performed by them for such corporation." However, the claim as pled under BCL § 630 is dismissed at this time as "plaintiff[] failed to comply with a condition precedent to such action, in that [he] did not allege that judgment had been entered against any of the defendant corporations and returned unsatisfied." *Garcia v Tamir*, 269 AD2d 423, 423 (2d Dept 2000).

Labor Law:

Plaintiff seeks to impose liability on the individual defendants based on their status as employers under the Labor Law.[3] *See e.g. Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 625-626 (1st Dept 2013) (internal citations omitted). According to plaintiff, the individual defendants had exercised control over the managerial operations of Intimo, namely the polices related to hiring and firing employees and determining the rate and method of payment. The court finds that plaintiff has sufficiently pled the "employer theory" of liability in the complaint. *Cohen v Finz & Finz, P.C.*, 131 AD3d 666, 667 (2d Dept 2015). "Plaintiff alleged adequate facts to state a cause of action against each of the individual defendants in his . . . capacity as the plaintiff's

[3] Defendants did not address this theory of liability based on individual defendants' role as an employer under the Labor Law.

employer within the meaning of the Labor Law." *Id*; *see also Bonito v Avalon Partners, Inc.*, 106 AD3d at 626.

NYSHRL and NYCHRL:

Individual liability can be established under the NYSHRL and NYCHRL under certain circumstances. Under the NYSHRL, pursuant to Executive Law § 296 (1) and (6), "an individual may be subject to liability if he or she is an 'employer' (i.e., has an ownership interest or the power to do more than carry out personnel decisions made by others) or if the individual has aided and abetted in the discriminatory conduct." *Graaf v North Shore Univ. Hospital,* 1 F Supp 2d 318, 324 (SDNY 1998).

Under the NYCHRL, pursuant to Administrative Code § 8-107 (1) (a), individual employees may be held liable when they "act with or on behalf of the employer in hiring, firing, paying, or in administering the 'terms, conditions or privileges of employment.'" *Priore v New York Yankees*, 307 AD2d 67, 74 (1st Dept 2003). Similarly, Administrative Code § 8-107 (6) provides that an individual employee may be held liable for aiding and abetting discriminatory conduct under the NYCHRL. Plaintiff has broadly alleged that all the individual defendants were employers. Plaintiff further alleges that the individual defendants also aided and abetted discrimination. Even if the defendants lacked the authority to fire plaintiff, their alleged participation may give rise to aider and abettor liability in lieu of employer liability, if the termination is found to constitute a violation under the NYSHRL or NYCHRL. Accordingly, taking all the allegations in the complaint as true and resolving all inferences in favor of plaintiff, the complaint sufficiently states a claim under the NYSHRL and NYCHRL against the individual defendants.

In sum, plaintiff's claims against the individual defendants grounded in BCL § 630 are dismissed, but the remaining claims against the individual defendants as employers under the Labor Law and NYSHRL and NYCHRL, and plaintiff's claims against the individual defendants for aiding and abetting with respect to age discrimination, are not dismissed.

L. Fictitious Party Allegations -Thirteenth Cause of Action

Plaintiff's thirteenth cause of action seeking to hold fictitious parties individually liable for violations as alleged in the complaint, is dismissed. This is not a separate substantive cause of action and merely repeats the allegations set forth in the complaint.

M. Additional Requested Relief

The plaintiff seeks punitive damages. Pursuant to Administrative Code § 8-502 (a), a plaintiff can recover punitive damages under the NYCHRL. However, punitive damages are unavailable under the NYSHRL. *See e.g. Greenbaum v Svenska Handelsbanken, NY*, 67 F Supp 2d 228, 262 (SDNY 1999). Similarly, punitive damages are not available in a breach of contract action based on remedying a private wrong. *Rocanova v Equitable Life Assur. Soc'y*, 83 NY2d 603, 613 (1994). Therefore, except for the claim for punitive damages under the NYCHRL, the remaining claims seeking punitive damages, are dismissed.

The court notes that, in plaintiff's memorandum of law, he informally requests that he be allowed to re-plead his claims, pursuant to CPLR 3025 and 3026, if the court finds any of the claims to be insufficiently pled. Plaintiff did not move or cross-move for this relief, nor did he attach a proposed amended complaint pursuant to CPLR 3025 (b). Accordingly, the plaintiff's request is premature.

CONCLUSION

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted to the extent that (1) so much of the first cause of action as alleges violations of Labor Law §§ 191-b and 191-c, (2) the second, fifth, sixth, seventh, ninth, eleventh and thirteenth causes of action, (3) so much of the twelfth cause of action as seeks to impose liability under BCL § 630, and (4) the plaintiff's claims for punitive damages except as relates to the plaintiff's employment discrimination claim under the New York City Human Rights Law, are dismissed individually as against each defendant, and the motion is otherwise denied; and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that the parties shall appear for a compliance conference on February 14, 2019, at 9:30 a.m., as previously scheduled.

Dated: December 12, 2018

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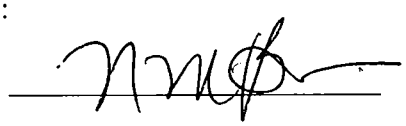

J.S.C.
HON. NANCY M. BANNON