Gelmann v Trustees of Columbia Univ. in the City of N.Y.
2019 NY Slip Op 31004(U)
April 16, 2019
Supreme Court, New York County
Docket Number: 651841/2018
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA **PART** IAS MOTION 39EFM

Justice

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EDWARD GELMANN

Plaintiff,

- v -

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Defendant.

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INDEX NO. 651841/2018

MOTION DATE 11/09/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for DISMISS.

Plaintiff Edward Gelmann M.D. ("Gelmann"), a professor of medicine, pathology and cell biology at Columbia University, brings this action to recover unpaid wages from defendant Trustees of Columbia University in the City of New York ("Columbia"). The complaint pleads two causes of action for violations of the New York Labor Law, a cause of action for breach of contract and a cause of action for unjust enrichment and quantum meruit. Columbia now moves, pursuant to CPLR 3211 (a) (1), (a) (5) and (a) (7), to dismiss the two Labor Law claims.

Background

The complaint alleges the following facts: On or about February 1, 2007, Gelmann joined the faculty at Columbia as the Chief of the Division of Hematology/Oncology and as Deputy Director of the Herbert Irving Comprehensive Cancer Center (the "CCC"), located at Columbia's Medical Center. Gelmann was also named the Clyde Wu Professor of Oncology.

Pursuant to an employment agreement between Gelmann and Columbia, dated September 15, 2006 (the "2006 Employment Agreement"), Columbia agreed to pay Gelmann a salary of $500,000, which included a $250,000 base salary, supplemented by a $50,000 administrative salary as the Division Chief, a $113,000 salary as Deputy Director of the CCC, and "salary support" in the amount of approximately $87,000 from his position as the Wu Chair.

According to the complaint, Gelmann was also given control over "the unspent interest from the Wu endowment [that] had accrued" prior to his arrival at Columbia to do with as he saw fit (the "Accrued Funds"). Gelmann alleges that the Accrued Funds account contained approximately $650,000. Gelmann claims that he chose to preserve the Accrued Funds so that he could draw upon them at the end of his term as the Wu Chair – *i.e.* when he was no longer receiving the Wu Chair salary support.

Pursuant to an employment agreement between Gelmann and Columbia, dated February 13, 2013 (the "2013 Employment Agreement"), Gelmann's position and compensation were modified. Specifically, Gelmann agreed to step down as the Division Chief (and, therefore, as the Wu Chair), though he was to remain the Deputy Director of the CCC. In light of the changes, the 2013 Employment Agreement stated that Gelmann's salary would consist of $100,000 in "tenure support," $200,000 in "clinical practice and research compensation," $50,000 in "programmatic support," $30,000 for "an administrative stipend," "research grant salary support, including the HICCC P30

(which currently sums to $127K [68% effort])" (the "CCC Grant Funds") and "accrued Wu Professorship funds ($65K/year).

According to the complaint, the "accrued Wu Professorship funds" discussed in the 2013 Employment Agreement refers to the Accrued Funds that Gelmann had not withdrawn during his years as the Wu Chair. In addition, the 2013 Employment Agreement stated that, if the Wu Professorship was conferred on a new professor, "the accrued [Wu Professorship] funds . . . would be allocated to [Gelmann's] salary support."

Gelmann alleges that in July 2015, his total compensation was reduced to $203,000 in part because Columbia improperly deducted the entirety of the $65,000 in Accrued Funds due to him that year (and in the subsequent years) as an expense charge against Gelmann's "prior salary and lab expenses" at the university. In addition, Gelmann alleges that in 2015 and 2017 he received only a fraction of the HICCC Grant Funds that he should have received under the 2013 Employment Agreement.

Gelmann also alleges that in or about July 2015 he formally complained to Columbia about "contractual and Labor Law violations" in respect to his salary. Gelmann was then directed to address his complaint to other departments. In June 2016, Gelmann filed a formal grievance and met with Columbia's grievance committee. The grievance was referred to the Provost's office.

Two months later, in August 2016, Columbia notified Gelmann that it was removing him from his position as the Deputy Director of the CCC. Gelmann further alleges that, around this time, Columbia stopped referring new patients to him, thereby reducing Gelmann's "clinical practice" compensation.

Finally, in April 2017, the Provost's office informed Gelmann that "his complaint was contractual in matter and therefore outside the scope of his Office's jurisdiction. Gelmann then commenced this action, and Columbia moves for partial dismissal of the Labor Law §§ 193 and 215 causes of action for failure to state a claim and based upon documentary evidence.

Discussion

On a motion to dismiss a complaint pursuant to CPLR 3211 all allegations in the complaint are deemed to be true; all reasonable inferences which can be drawn from the complaint and the allegations therein must be resolved in favor of the plaintiff (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration." (*Simkin v Blank*, 19 NY3d 46, 52 [2012] [internal quotation marks omitted]).

In addition, a motion to dismiss based on documentary evidence may be granted only where documentary evidence "utterly refutes" the plaintiff's factual allegations, resolves all factual issues as a matter of law, and conclusively disposes of the claims at issue (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002].

The Labor Law § 193 Cause of Action

Labor Law § 193 provides, in pertinent part, that "[n]o employer shall make any deduction from the wages of an employee" except for deductions "expressly authorized in writing by the employee and [] for the benefit of the employee, provided that such

authorization is voluntary . . .” (Labor Law § 193 [b]). Acceptable deductions include, *inter alia,* insurance premiums, pension and gym memberships.

> “[A]rticle 6 of the Labor Law sets forth a comprehensive set of statutory provisions . . . [that] strengthen and clarify the rights of employees to the payment of wages . . . . Labor Law § 193 prohibits employers from making any deduction from the wages of an employee, and section 190 broadly 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”

(*Kolchins v Evolution Markets, Inc.*, 31 NY3d 100, 109 [2018] [citations and internal quotation marks omitted]).

To allege a claim under Labor Law § 193, a plaintiff “must allege a specific deduction from wages and not merely the failure to pay wages” (*Stec v Passport Brands, Inc.* [2018 NY Slip Op 32052 [U], **7 [Sup Ct, NY County 2018], quoting *Goldberg v Jacquet*, 667 Fed Appx 313, 314 [2d Cir 2016]; *see also Cuervo v Opera Solutions LLC*, 87 AD3d 426, 428 [1st Dept 2011] [Moskowitz, J., concurring in part]).

Columbia, relying primarily on the recent First Department decision in *Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443 (1st Dept 2017) contends that its alleged failure to pay Gelmann portions of his salary are not deductions from Gelmann’s wages as defined by section 193. Rather, it argues, the alleged failure to pay was merely a “withholding” or “non-payment” and, therefore, outside the scope of protection afforded by section 193 (*Perella*, 153 AD3d at 449 [“Defendants . . . Labor Law claims were correctly dismissed because a wholesale withholding of payment is not a ‘deduction’ within the meaning of Labor Law § 193”]).

In opposition, Gelmann argues that his claim falls within the type of claims covered by section 193 because Columbia did not simply withhold or fail to pay his wages. Rather, Columbia "debited" his wages to pay for laboratory and salary expenses attributed to Gelmann, in violation of section 193.

1. The CCC Grant Funds

Gelmann alleges that he was entitled to $127,000 from his work for the CCC contingent upon his devoting "68% of his professional efforts to research grants" (complaint ¶ 54), but that Columbia forced him to certify only a 37% effort, resulting "in a loss of approximately $27,052 from the guaranteed compensation" set forth in the 2013 Employment Agreement (*id.* ¶ 56).

A "dispute as to the calculation of the net amount [of wages] does not reflect a deduction from wages within the meaning of section 193 . . ." (*Miles A. Kletter D.M.D. & Andrew S. Levine, D.D.S., P.C. v Fleming*, 32 AD3d 566, 567 [3d Dept 2006]). Here, the complaint plainly alleges a dispute as to whether Gelmann, in fact, devoted 68% of his professional effort to research grants and, therefore, whether Columbia was contractually required to pay Gelmann that part of his salary contingent upon a 68% devotion of effort, rather than a lesser amount. Gelmann's CCC Grant Fund claim addresses the calculation of that part of Gelmann's salary under the 2013 Employment Agreement. It is not a deduction from wages within the meaning of section 193 (*Kletter*, 32 AD3d at 567). Accordingly, Columbia is entitled to the dismissal of that part of the first cause of action that seeks relief for violations of Labor Law § 193 with respect to the CCC Grant Funds.

2. The Accrued Funds

Columbia argues that its failure to pay Gelmann that part of his salary derived from the Accrued Funds is not a deduction as contemplated in Labor Law § 193, relying on several recent cases, including *Perella* and *Stec.*

In *Perella*, the defendants/crossclaim plaintiffs deferred approximately $10 million in compensation that was allegedly due to them. Before receiving the money, the plaintiff terminated them and failed to remit the deferred compensation. In short, the parties' dispute focused solely on whether the $10 million was contractually owed to defendants under their respective employment contracts. Importantly, the counterclaim complaint alleged that "[b]y withholding and refusing to pay Plaintiffs' wages, Defendants have violated [section 193]" (*Perella Weinberg Partners LLC v Kramer,* Index No. 653488/2015 [Sup Ct, NY County 2015], docket no. 12, ¶ 303). Aside from this allegation of a general withholding of pay, the counterclaim complaint was silent as to allegations of improper deductions.

In granting the dismissal of the section 193 claim, the trial court noted that defendant's "entitlement to all of the disputed compensation turns on whose interpretation of the contracts . . . is true. This is the classic type of dispute [that] is not covered by § 193" (*Perella Weinberg Partners LLC v Kramer*, 2016 NY Slip Op. 31387[U], 34 [Sup Ct, NY County 2016], *aff'd as mod* 153 ADF3d at 443).

The First Department agreed that the claims were properly dismissed because "a wholesale withholding of payment is not a 'deduction' within the meaning of Labor Law § 193" (*Perella Weinberg Partners LLC v Kramer,* 153 AD3d at 449).

In *Stec*, due to financial difficulties, the defendant was unable to pay the plaintiff approximately $150,000 of his salary. The parties agreed that the defendant would repay the past due wages over time, but as of the filing of the action, nothing had been paid. The court explained that "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 . . ." (*Stec v Passport Brands, Inc.*, 2018 NY Slip Op 32052 [U] at **6). The court found that Stec did not "identify any specific unauthorized deduction taken from his wages" (*id.* at **11). Based on this finding, the court, relying on *Perella*, ultimately dismissed Stec's section 193 claim because the claim, as alleged, was "based on defendants' wholesale withholding of his past due wages." (*id.*).[1]

In contrast, Gelmann alleges not only that Columbia failed to pay him $65,000 from the Accrued Funds, but that those funds were "deducted" from his wages and

[1] Similarly, in *Sheehan v Square Mile Capital Partners* (2013 NY Slip Op 34171[U] [Sup Ct, NY County 2013]), the dispute focused solely on an employer's failure to pay plaintiff compensation allegedly due under a contract (*Sheehan,* 2013 NY Slip Op 34171[U], at **6 ["The claim that [the defendants] did not pay Plaintiff the wages allegedly due him pursuant to the Employment Agreement does not state a viable cause of action under this statute"]). The court in *Sheehan* dismissed the section 193 claim because a failure to pay is not a deduction (*see also Kane v Waterfront Media, Inc.,* 2008 NY Slip Op. 34370(U) (Sup Ct, NY County 2008) ("To state a claim for violation of Labor Law 193, a plaintiff must allege a specific deduction from wages and not merely a failure to pay wages").

"debited by the University against prior 'salary and lab expenses' purportedly attributed to [Gelmann]" (complaint, ¶ 51, emphasis supplied). In its motion to dismiss, Columbia submits the following evidence: the 2006 Employment Agreement and the 2013 Employment Agreement. Neither document utterly refutes Gelmann's claim that some of his wages were deducted and debited towards expenses he allegedly accrued during his work for Columbia.

Based on the foregoing, there remains a question as to whether defendant paid the Accrued Fund wages to Gelmann, but then deducted them in full – which would violate section 193 – or whether defendant simply did not pay the Accrued Fund wages *ab initio*, which courts have consistently held does not violate section 193. Columbia's submissions do not utterly refute Gelmann's allegations that his wages were deducted to pay for his purported expenses. Ultimately, whether the Accrued Fund wages were deducted or withheld is a question of fact that cannot be resolved by the evidence provided on this pre-answer, pre-discovery motion.

For the foregoing reasons, Gelmann has sufficiently alleged a claim for improper wage deductions and Columbia is not entitled to the dismissal of that part of the first cause of action that seeks relief for violations of Labor Law § 193 with respect to the Accrued Funds.

Labor Law § 215 Cause of Action

Labor Law § 215, known as the Wage Theft Preemption Act, provides the following, in pertinent part:

> "No employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company, or any other person, shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee (i) because such employee has made a complaint to his or her employer . . . that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of this chapter, or any order issued by the commissioner . . ."

(Labor Law § 215 [1] [a]).

"[R[elief under New York Labor Law § 215 requires that a plaintiff allege that he made a complaint about his or her employer's alleged violation of the statute, and was terminated or subject to adverse employment action as a result" (*Week Publs., Inc. v Hernandez*, 54 Misc 3d 1221(A) [Sup Ct, NY County 2016], citing *Castagna v Luceno*, 2011 WL 1584593, *12 [SDNY 2011], *aff'd* 744 F3d 254 [2d Cir 2014]; *see also Epifani v Johnson*, 65 AD3d 224, 236 [2d Dept, 2009]). "The employee need not be familiar with the specifics of the Labor Law to cite the section of the statute [he or she] relies on. All that is required is that the complaint to the employer be of a colorable violation of the statute" (*Weiss v Kaufman*, 2010 NY Slip Op. 33261[U], *2 [Sup Ct, New York County 2010]).

Here, Gelmann alleges in his complaint that he complained to Columbia about "unlawful deductions from his wages," repeatedly met with Columbia's Provost office about this issue, complained to the Associate Dean for Faculty Affairs, complained "about the University's unlawful deduction from his wages . . . to the Faculty Senate," and met with the grievance committee and filed a formal grievance. Gelmann then

alleges that two months after filing the formal grievance, he was removed from his position as Deputy Director of the CCC. In addition, around this time, Gelmann alleges that the University significantly reduced new patient referrals to him, which negatively impacted both his research and his private practice income.

Given the foregoing allegations, Gelmann has sufficiently alleged that he made a complaint about Columbia's purported violation of the Labor Law, and that, shortly thereafter, Columbia engaged in punitive retaliatory conduct.

Columbia argues that its removal of Gelmann from the Deputy Directorship was not a demotion. Rather, Gelmann's removal was consistent with an agreed-upon reduction of responsibilities set forth in the 2013 Employment Agreement. This argument conflates the Division Chair position with the Deputy Director position which, per the 2006 Employment Agreement, are separate titles with separate responsibilities and lines of salary. In addition, the 2013 Employment Agreement specifically indicates that Gelmann's term as Division Chair was to end on or before September 1, 2013, but that he was to retain his position as Deputy Director of the CCC.

As the 2013 Employment Agreement does not discuss Gelmann's relinquishment of the Deputy Directorship, it does not utterly refute Gelmann's allegations that his removal from that position was retaliatory. Thus, Columbia is not entitled to the dismissal of the second cause of action premised on a violation of Labor Law § 215.

I have reviewed the remaining contentions of the parties and finds them to be unavailing.

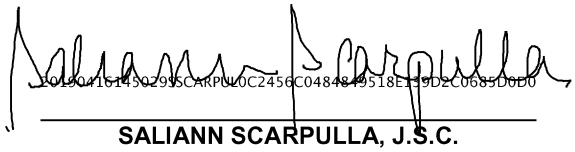
In accordance with the foregoing, it is

ORDERED that the motion of defendant Trustees of Columbia University in the City of New York to dismiss the first and second causes of action of plaintiff Edward Gelmann is granted to the extent that the part of the first cause of action that seeks relief, pursuant to Labor Law § 193, with respect to the P30 HICCC Grant Funds is dismissed, and the motion is otherwise denied; and it is further

ORDERED that defendant Trustees of Columbia University in the City of New York is directed to serve an answer to the complaint within 20 days of the date of this decision and order; and it is further

ORDERED that counsel are directed to appear for a conference in Room 208, 60 Centre Street, New York, New York on June 5, 2019.

This constitutes the decision and order of the Court.



4/16/2019
DATE

SALIANN SCARPULLA, J.S.C.

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