Munroe v Truveris Inc
2019 NY Slip Op 31674(U)
June 7, 2019
Supreme Court, New York County
Docket Number: 650454/2017
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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ANDREW MUNROE,

Plaintiff,

- v -

TRUVERIS INC,

Defendant.

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INDEX NO. 650454/2017

MOTION DATE 12/13/2018, 12/13/2018

MOTION SEQ. NO. 003 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154

were read on this motion to/for SUMMARY JUDGMENT.

Gerald Lebovits, J.:

Plaintiff Andrew A. Munroe commenced this underlying action against his former employer, defendant Truveris, Inc., alleging, among other things, breach of contract regarding unpaid severance pay and unawarded stock options, a violation of the New York Labor Law (NYLL or Labor Law) for unlawfully deducting wages in the form of unused vacation pay and age discrimination in violation of the New York State Human Rights Law (NYSHRL).

In motion sequence 003, Truveris moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint. Truveris is further seeking summary judgment in its favor on its seventeenth affirmative defense of mistake and on its second counterclaim for reformation. In motion sequence 004, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the second, third, fifth and sixth causes of action in the complaint. Plaintiff is also seeking summary judgment dismissing defendant's first and second counterclaims. Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

For the reasons set forth below, the part of defendant's motion for summary judgment dismissing the complaint is granted and the remainder of the motion is denied. The part of plaintiff's motion for partial summary judgment dismissing the first counterclaim is granted and the remainder is denied.

Background

On May 28, 2012, plaintiff commenced his employment with Truveris in the role of Vice President, Legal and Compliance. Truveris "is a health information technology company whose services and applications allow its customers (insurance brokers, large employers, pension funds, and health plans) to navigate the pharmacy benefit contract process . . . ." Tynes affirmation, exhibit C, aff of Michel Facendola (Facendola), Chief Financial Officer of Truveris, ¶ 2. Plaintiff remained employed with Truveris until he was terminated on February 29, 2016.

The terms of plaintiff's employment were set forth in an employment offer letter (employment letter) dated May 17, 2012. Defendant's exhibit H. The employment letter was issued by Bryan Birch (Birch), defendant's former CEO, and Sylvia Wong, HR Generalist, and plaintiff agreed to the terms prior to commencing employment. The employment letter states the following, in relevant part: "Your annual base salary will be $155,000.00 base salary. Your salary is payable (less statutorily required deductions) according to Truveris' standard payroll schedule, presently twice per month on the 15th and last day of the month." *Id.* at 1. Further, plaintiff would be awarded 100,000 in stock options subject to a gradual four-year vesting period. In addition to receiving a $5,000 sign-on bonus and a $5,000 one-time bonus, plaintiff would be eligible to receive an annual cash bonus equal to 25% of plaintiff's earned annual wages. The terms of the annual bonus are set forth as follows:

> "You will be eligible to receive an annual cash bonus at a target amount equal to 25% of your earned wages, which if earned, shall be payable in the first quarter of the following year. The determination of bonus is subject to the Company achieving targets as set by the Board and on individual performance. Should the company exceed targets, the company shall at its discretion pay up to 150% of target bonus. Notwithstanding anything herein to the contrary, you must be employed by the Company on the date that any bonus is paid in order to receive the bonus payment."

Id.

The employment letter also advised plaintiff that he was eligible to receive employee benefits, including health insurance. Plaintiff was entitled to 15 days of paid vacation per calendar year, with no carry over allowed for unused vacation time. Pursuant to the "severance" section of the employment letter, plaintiff was informed that, if he is terminated, he is eligible to receive three months of salary as severance pay, but that it was subject to executing a general release. Further, in order to be eligible for severance pay, plaintiff had to continue to comply with his signed confidentiality agreement and sign a non-compete agreement. The employment letter indicates the following, in relevant part:

> "In the event that (a) your employment with the Company is terminated by the Company without following the conclusion of the Initial Employment Year, you will continue to be paid your then-current Salary, in accordance with the Company's customary payroll practice, for a period of three (3) months. Receipt of the foregoing severance amount shall be (i) in lieu of all other amounts payable by the Company to you and shall be received by you in settlement and complete release of all claims you may have against

> the Company other than those arising pursuant to the payment of the severance amount and (ii) subject to your execution of a release agreement in form and substance reasonable satisfactory to the Company evidencing the foregoing release and your continued compliance with your Employee Confidentiality and Assignment of Works Agreement (the 'Confidentiality Agreement').
>
> "As additional consideration for the foregoing severance amount (and payment thereof shall be subject to), you shall enter into a non-competition agreement pursuant to which you will agree for the period in which you receive the foregoing severance amount to not, directly or indirectly, become financially interested in, be employed by or have any business connection with any other person, corporation, firm, partnership or other entity whatsoever which competes directly with the Company, throughout the world . . . ."

Id. at 2.

Plaintiff received several increases in salary and additional stock options throughout the course of his employment. For instance, pursuant to a stock option/raise letter (stock option letter) dated March 24, 2014, he was advised that he was receiving a raise due to his contributions to the company. Effective April 15, 2014, plaintiff's salary was $175,000. The stock option letter also informed plaintiff that, "in consideration of the importance of your role with Truveris, we will add Double Trigger Language for all your existing stock options with the company. This would protect your stock in the event of Change of Control and/or terms of Material Change in your responsibilities." Defendant's exhibit E at 1.

On October 1, 2015, plaintiff was promoted to Senior Vice President of Legal and Compliance. His salary was increased to $225,000 and he was granted an additional 50,000 stock options. A stock option letter dated September 22, 2015 informed him that his "new annual salary [was] $225,000. This new rate of reflective of a 12.5% increase of your base pay." Defendant's exhibit G at 1. Further, "in consideration of the importance of your role with Truveris, we will add Double Trigger Language for these stock options. This would protect your stock in the event of Change of Control and/or terms of Material Change in your responsibilities." *Id.*

In February 2016, as a way to reduce costs, Truveris eliminated its legal department in favor of outsourcing its legal needs to an independent law firm. Plaintiff was terminated, along with three out of the four other employees in the legal department. He was 54 years old at the time.

Upon termination, plaintiff did not receive the compensation and benefits that he was expecting. As a result, he filed the instant complaint. The first cause of action alleges that defendant discriminated against plaintiff on the basis of age, in violation of the NYSHRL. According to plaintiff, although Truveris alleges that the legal department was eliminated in an effort to reduce costs, this was not the real reason, as outsourcing the company's legal needs would actually only increase costs. Plaintiff continues that his termination was part of an attempt to target older employees for termination. He states that the employees in the legal department

who were terminated were all "part of the New York State age protected class, while the one (1) team member who was retained was not." Complaint, ¶ 29.

The second cause of action alleges that defendant violated Labor Law § 193 when it unlawfully deducted wages from him in the form of 8.3 days of unused vacation time. Plaintiff is seeking damages in the sum of $7,182.69, in addition to reasonable attorneys' fees plus statutory interest.

The third cause of action, grounded in breach of contract, sets forth two alleged breaches upon termination. First, plaintiff alleges that defendant breached the employment letter when it failed to pay him his then-current salary for a period of three months after termination. Second, in breach of the stock option letters, defendant inaccurately asserted that only 179,375 of plaintiff's stock options had fully vested. Plaintiff explains that the stock option letters included "double trigger" language with these stock options, protecting them in the event of change of control "and/or" terms of material change in his responsibilities. According to plaintiff, starting in 2015, he "saw a relinquishment of responsibility," including being "excluded from numerous decision-making meetings that were part of his usual job responsibilities." Complaint, ¶ ¶ 22, 24. Therefore, according to plaintiff, as he experienced a material change in his responsibilities, the "double trigger" clause provision in the stock option letters would be satisfied, causing all of his stock options to vest. By the time plaintiff was terminated, he had been granted a total of 357,500 stock options.

In the fourth cause of action, plaintiff alleges that defendant breached the employee handbook when it failed to offer plaintiff the option to continue with his health care coverage for 18 months following termination.[1]

The fifth cause of action states that defendant breached the implied covenant of good faith and fair dealing when, upon termination, it offered plaintiff only 65% of his annual bonus amount. The complaint indicates that plaintiff was scheduled to receive his annual bonus on March 11, 2016. He was terminated on February 29, 2016. Plaintiff alleges that defendant "improperly accelerated the termination to avoid payment of [plaintiff's] yearly bonus." *Id.*, ¶ 78. The complaint states that other similarly situated executives were offered full bonuses. However, in bad faith, plaintiff was offered $36,563, or 65% of his annual bonus.

In the last cause of action, "Quantum Meruit-Unjust Enrichment," plaintiff alleges that defendant was unjustly enriched when it accepted and used his valuable services without compensating him in accordance with the employment letter.

<u>Counterclaims</u>

In defendant's second verified amended answer, it asserts two counterclaims. The first counterclaim for breach of contract alleges that plaintiff breached the Employee Non-Disclosure and Invention Assignment Agreement (non-disclosure agreement) by disclosing defendant's confidential information. According to defendant, pursuant to the non-disclosure agreement,

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[1] Plaintiff subsequently withdrew this cause of action.

after plaintiff was terminated, he was required to return or destroy defendant's confidential information. It states, "[Plaintiff's] document production in this action reveals that he is in possession of Truveris' Confidential Information." Defendant's exhibit N at 11. As a result, defendant is seeking damages for breach of contract in an amount to be determined at trial.

Reformation, the second counterclaim, seeks to change the double trigger language contained in the stock option letters from "and/or" to "and" in the sentence "This would protect your stock in the event of Change of Control and/or terms of Material Change in your responsibilities." It states that Birch, the former CEO, testified that "it was both his intention, and the [Board's] intention, for the Double Trigger Language to mean a first event must occur in order to trigger the occurrence of a second event. . . . Truveris must first experience a change in control in order for a material change in [plaintiff's] responsibilities to occur." *Id.* at 12. Thus, according to defendant, the "and/or" language is a scrivener's error and does not express the intention and meaning of the parties.

Alternatively, defendant seeks summary judgment on its seventeenth affirmative defense, mutual mistake. It similarly indicates "[b]y mutual mistake of the parties to this action, the 3-24-2014 Stock Option Letter . . . did not and do [sic] not set forth the actual understanding and agreement of the parties . . . ." *Id.* at 10.

<u>The Instant Action</u>

Both parties move for summary judgment in their favor and the relevant arguments for each cause of action and counterclaim are as follows:

Age Discrimination

Defendant argues that plaintiff has failed to meet his burden to establish that his termination occurred under circumstances giving rise to an inference of discrimination. According to defendant, it is undisputed that the entire in-house legal department was eliminated due to its high operating costs. As a result, plaintiff was not targeted on the basis of age as he, along with the three other professionals, was terminated. Defendant argues that, while plaintiff may not agree with its business decision, a reduction in costs is a legitimate, nondiscriminatory justification for termination.

In addition, even if plaintiff could establish a prima facie case of discrimination, defendant asserts that he is still unable to establish that its proffered reason is a pretext for discrimination. In support of plaintiff's claim, he had argued that the only team member retained was 31 years old and not part of a protected class. Defendant states that its decision to retain that one member and transfer him to the finance department does not support a discrimination claim because he and plaintiff had completely different responsibilities and were not similarly situated. While plaintiff was head of the legal department earning $225,000 a year, the retained member was an "administrative employee who tracked the Company's contracts, and was paid $50,000.00 a year as of February 2016." Facendola aff, ¶ 8.

Plaintiff does not address his age discrimination claim in response to defendant's motion for summary judgment or in his own motion.

Labor Law § 193

Plaintiff alleges that defendant improperly deducted wages when it failed to compensate him for 8.3 days of unused vacation time.

According to defendant, plaintiff has improperly pled this claim under Labor Law § 193, as no deduction of wages occurred. Regardless, defendant continues that, even if plaintiff's claim was made pursuant to Labor Law § 191 or Labor Law § 198 as one for failure to pay wages, it would still fail. As plaintiff is an executive who was earning more than $900 a week, he is excluded from the protections of Labor Law § 191 and is also excluded from Labor Law § 198-c (3). Defendant adds that, in any event, in March 2017 it ultimately provided plaintiff with a check in the amount of $7,188.65, representing his unused vacation time.

According to plaintiff, defendant's employee handbook entitles him to the payment of unused vacation days upon termination. As a result, vacation pay constitutes "wages," and this claim is properly pled as an unlawful wage deduction under Labor Law § 193. In his motion for summary judgment, for the first time, plaintiff raises the argument that, not only does vacation pay constitute wages that were improperly withheld, but bonus and severance pay can also constitute wages that were unlawfully deducted in violation of Labor Law § 193 (*see* plaintiff's memo of law at 24). He also raises the argument that defendant failed to make payments in a timely manner, as he was owed wages on the next scheduled payday. Plaintiff provides the definitions for multiple provisions found under Article 6 of the NYLL and maintains, for the first time, that he is entitled to costs and penalties as recoverable under Labor Law § 198.[2]

Breach of Contract/Severance Pay and the Reformation Counterclaim

Defendant argues that summary judgment should be granted dismissing the breach of contract claim because defendant did not breach the terms of the employment letter regarding severance benefits. Defendant cites to the language in the employment letter explaining that plaintiff is required to execute a general release as a condition precedent to receiving severance benefits. As a result, defendant argues that, as plaintiff did not satisfy the conditions precedent to receiving severance benefits, he was not eligible to receive them and they have been forfeited.

Plaintiff notes that salary is not defined in the employee handbook. He continues that "then-current Salary," as defined in the severance section of the employment letter, includes not only his monthly salary, but all accrued benefits and bonuses. Plaintiff alleges that severance is owed to him and that he is not required to sign the improper release. "Indeed, Plaintiff, is owed, without having to provide a release and other considerations to Defendant Truveris, accrued benefits such as vacation pay, non-discretionary bonus payments and vested option awards." Plaintiff's memo of law at 14.

[2] Article 6 of the Labor Law governs the payment of wages and is comprised of Labor Law §§ 190-199 (a).

Evidently, although it is not well articulated, plaintiff believes that defendant should not be allowed to enforce one contract, namely the severance agreement, in its favor, when it was responsible for its breach by not providing him 100% of his fully vested stock options upon termination. He states that defendant "is improperly attempting to enforce a term of a contract that it currently in breach of while also promoting reformation of what it has deemed as ambiguous contracts that materially affect the total consideration offered in exchange for the improper release." *Id.* at 13-14.

In at least three different letters, plaintiff was advised that "Double Trigger Language" would be added to all his existing stock options within the company. This language would protect his stock "in the event of Change of Control and/or terms of Material Change in [his] responsibilities." Plaintiff has conceded that there has been no change of control during the course of his employment. Nonetheless, as set forth below, he argues that, as he has experienced a change in material responsibilities, he is entitled to accelerated vesting of his remaining stock options. According to plaintiff, termination is considered a material change in his responsibilities.

In October 2015, defendant hired James Kean (Kean) "as a consultant and acting Chief Operating Officer to review the Company's various departments and make recommendations for operational, staffing, and process improvements." Facendola aff, ¶ 3. Kean allegedly "appropriated the initiative previously commenced to have the vendor Coal Fire audit Truveris . . . ." Plaintiff's memo of law at 17. Kean also requested that Peter Duran (Duran) create slides for a December 11, 2015 Board meeting and Kean presented these slides at the meeting. Duran was hired by plaintiff as a "compliance expert," and reported to plaintiff throughout the course of plaintiff's employment. Also at the same meeting, without consulting plaintiff, Kean proposed a resolution appointing Bertrand Janin (Janin) as Chief Privacy Officer and Chief Security Officer. Plaintiff testified that Janin, "appropriated compliance matters," that were his responsibility. Adrian affirmation, exhibit T, plaintiff's tr at 221. Plaintiff continued, "[c]ompliance responsibilities were half my title at Truveris." *Id.* at 222.

As previously mentioned, defendant argues that, pursuant to the reformation of the stock option letter, both a change in control and material change had to have occurred. As plaintiff concedes there was no change of control, the additional stock options could not fully vest. Further, plaintiff "incorrectly argues that Truveris's (alleged) prior breach of the contract excused [plaintiff] from having to sign a release." Defendant's memo of law in opposition at 8. Defendant also alleges that the proposed settlement agreement is inadmissible evidence and must be stricken from the record.

Further, according to defendant, the evidence establishes that plaintiff did not experience a material change in his job responsibilities. For example, Duran reported directly to plaintiff on compliance matters throughout plaintiff's employment. Plaintiff continuously supervised the legal department, still attended the board meetings as secretary and also prepared the minutes of the meetings.

In support of its reformation counterclaim, defendant argues that a scrivener's error occurred, as common sense would suggest that double trigger requires two events to occur and not just one. Therefore, a material change alone would not trigger the double trigger protection. In addition, both Birch and Facendola testified that, although defendant intended to write the stock option letter just using the word "and," it was incorrectly recorded and drafted by Sylvia Chen (Chen) after the Board meeting. Birch testified that the "double-trigger language that was discussed and put into the three agreements at Truveris was when a company would buy Truveris, it would trigger then or if there was a material diminutization of the job title after the purchase." Birch tr at 78. Facendola testified that "[d]ouble trigger is exactly what it means, it's both conditions must be met . . . ." Facendola tr at 52.

In response, plaintiff maintains that, as defendant was the party who drafted the contract and created the ambiguity, reformation should be denied. Further, defendant should be estopped from claiming reformation as the routine use of the "and/or" language establishes that defendant was negligent in drafting the stock option letter. Further, plaintiff notes that the "and/or" language is also used in Facendola's stock option letter. *See* plaintiff's exhibit K at 4. Moreover, plaintiff claims that the use of "and/or" is not a mutual mistake but a unilateral one, as plaintiff testified that he did not have any role in preparing the stock option letter. Plaintiff's tr at 174.

Breach of the Covenant of Good Faith and Fair Dealing

Plaintiff argues that defendant breached the covenant of good faith and fair dealing when he was not offered the full amount of annual bonus upon termination.

Defendant provides several arguments for why it should be granted summary judgment dismissing this claim. In relevant part, pursuant to the terms of the employment letter, to be eligible for the bonus, plaintiff must be employed by the company on the date that any bonus is paid. As plaintiff was not employed on the date that his 2015 annual bonus was paid, he was not entitled to receive it. In addition, Facendola testified that, for the 2015 year, the Board only approved a 65% annual target bonus for the executives. *See* Facendola tr at 44.

It continues that, where, like here, claims for breach of good faith and fair dealing are premised on an underlying breach of contract claim, they must fail. Defendant further alleges that its conduct with respect to the bonus cannot amount to a breach of good faith and fair dealing because the payment of a bonus is discretionary. In addition, as an at-will employee, plaintiff has no entitlement to a discretionary bonus.

Finally, defendant argues that plaintiff fails to raise a triable issue of fact regarding an alleged scheme to deprive him of his bonus by accelerating his termination. It maintains that plaintiff was terminated by a certain date not as a way to deprive him of his annual bonus, but as a result of the elimination of the legal department.

According to plaintiff, pursuant to the relevant language in the employment letter, the 25% annual target bonus is not discretionary, but is based on three contingencies. "The three contingencies are based upon individual performance and Company Board targets as well as the

employment status at the time of payment." Plaintiff's memo of law at 10. Plaintiff argues that the "[n]on-discretionary bonus eligibility/payment which was part of the Severance Agreement was based upon set Company and contingent (non-discretionary) individual performance targets." *Id.* at 6.

In addition, plaintiff submits an email exchange from 2013, indicating that defendant's CEO discussed changing the bonus language to include, among other things, the word discretionary. The proposed change is as follows:

> "You will be eligible to be granted an annual, discretionary award at a target value amount equal to 25% of your earned wages, which, if granted, shall be awarded in the first quarter of the following calendar year. . . . The determination of awards will be subject to the Company achieving certain targets as set by the Company's Board of Directors, and also based on individual performance. Notwithstanding anything herein to the contrary, you must be employed by the Company on the date that any award is actually redeemed. Any voluntary or involuntary termination of your employment will void the award and the company will have no obligation to give you this or any other accrued benefit."

Adrian affirmation, exhibit N at 1.

Ultimately, the language was not altered. According to plaintiff, this establishes that defendant intended for plaintiff's bonus to be "contingent," and not discretionary. He also compares the language to the one in the employment letter describing the 150% bonus, which he entitles as "discretionary."[3]

Plaintiff argues that he has earned the full amount of his bonus and that the bonus payment was approved by the Board. Although not employed on the date the bonus was paid, plaintiff believes that he should not be penalized by defendant's timing of his termination. Plaintiff states that defendant "offered full bonuses to all other similarly situated executives, while in bad faith, offered [plaintiff] 65% (36,563) of his full bonus upon termination." Complaint, ¶ 78.

Unjust Enrichment

According to defendant, plaintiff has no viable claim for unjust enrichment or quantum meruit because the parties have a valid written contract; namely, the employment letter, governing the matter in dispute.

Plaintiff does not address his claim for unjust enrichment in opposition to defendant's motion. However, in his motion for summary judgment, he argues that he was relying on both Birch and Chen, as drafters of the stock option letter, "to provide language to protect his options in case of a change in the company. As such Defendant Truveris has been unjustly enriched by

[3] "Should the company exceed targets, the company shall at its discretion pay up to 150% of target bonus."

the erroneous language it itself has drafted, should its interpretation of such language be adopted." Plaintiff's memo of law at 24.

Breach of Contract Counterclaim

Plaintiff does not dispute retaining certain materials such as work product. However, he argues that the non-disclosure agreement excludes this type of material from being confidential. In addition, according to plaintiff, even if he did retain confidential materials, the breach of contract counterclaim should be dismissed for lack of damages. Defendant has not identified any damages that it sustained as a result of plaintiff's alleged breach of the non-disclosure agreement.

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso,* 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

II. Age Discrimination in Violation of the NYSHRL

Pursuant to the NYSHRL 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).

As plaintiff failed to oppose defendant's motion for summary judgment dismissing the cause of action alleging age discrimination, it is deemed abandoned and dismissed. *See e.g. Genovese v Gambino*, 309 AD2d 832, 833 (2d Dept 2003) (where plaintiff "did not oppose that branch" of defendant's motion for summary judgment dismissing the cause of action for wrongful termination, plaintiff abandoned this claim); *see also Mega Group, Inc., v Halton*, 290 AD2d 673, 675 (3d Dept 2002) ("Thus, by not opposing – and thus conceding – defendants' entitlement to summary judgment, plaintiff has failed to raise any triable issue of fact on the subject . . .").

In any event, even if plaintiff was able to establish a prima facie case of age discrimination, defendant has met its burden of providing a legitimate business reason for plaintiff's termination, which was based on eliminating the entire legal department as a way to reduce costs. In response, plaintiff fails to raise a triable issue of fact as to whether the reason proffered by defendant was "merely a pretext for discrimination." *Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 (1st Dept 2016); *see also Uwoghiren v City of New York*, 148 AD3d 457, 457 (1st Dept 2017) ("Plaintiff failed to raise triable issues of fact as to whether defendants' proffered reasons for these decisions were pretextual or incomplete, given the absence of any evidence from which a reasonable jury could infer that his [protected characteristic] played a role in defendants' decision to [terminate him]").

Therefore, defendant is granted summary judgment dismissing the first cause of action alleging age discrimination in violation of the NYSHRL.

III. Labor Law § 193 - Vacation Pay

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." The statute lists examples of authorized deductions, such as for insurance premiums or transit passes. Labor Law § 193 (1) (b) (i), (vii); *see also Gold v American Med. Alert Corp.*, 2015 WL 4887525, *5, 2015 US Dist LEXIS 108122, *11 (SD NY 2015) ("'[D]eductions' are better understood as, and limited to, things like fines, payments, or other forms of pay docking. The list of authorized deductions in section 193 itself offers further support for that reading, as each permissible deduction is for a discrete purpose . . .").

Plaintiff insists that the failure to pay vacation wages under Labor Law § 193 can be interpreted as a deduction as contemplated under the statute. However, plaintiff's arguments are unavailing as "[a] wholesale withholding of payment is not a deduction within the meaning of Labor Law § 193." *Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449 (1st Dept 2017) (internal quotation marks and citations omitted).[4]

Even assuming that the wholesale withholding of vacation pay could be construed as making an impermissible deduction under Labor Law § 193, as set forth below, plaintiff still fails to raise a triable issue of fact that his vacation pay may be excluded from the protections of Labor Law § 198-c. Labor Law § 198-c (1) requires "any employer who is party to an agreement to pay or provide benefits or wage supplements to employees . . . to provide such benefits or furnish such supplements within thirty days after such payments are required to be made." Wages or benefits are defined as "reimbursement for expenses; health, welfare, and

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[4] A year after plaintiff was terminated, defendant ultimately sent plaintiff a check for the amount of unused vacation time. Nonetheless, as an executive, plaintiff is precluded from making a claim that defendant failed to pay him in a timely manner in violation of Labor Law § 191. *See e.g. Eden v St. Luke's-Roosevelt Hosp. Ctr.*, 96 AD3d 614, 616 (1st Dept 2012) ("As a professional earning more than $900 a week (Labor Law § 190 [7]), plaintiff is 'expressly excluded' from the protections of Labor Law § 191").

retirement benefits; and vacation, separation or holiday pay." Labor Law § 198-c (2). However, "[t]his section 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." Labor Law § 198-c (3). Thus, as stated in Labor Law § 198-c (3), "professionals like plaintiff who earn more than $900 a week are not entitled to paid time off, or any other benefit or wage supplement, under the Labor Law." *Naderi v North Shore-Long Is. Jewish Health Sys.*, 135 AD3d 619, 620 (1st Dept 2016) (citations omitted).

In the complaint, plaintiff is seeking statutory interest and attorneys' fees for defendant's alleged violation of Labor Law § 193. However, in his memorandum of law, plaintiff argues that, for all wages he is owed, including the vacation pay, bonus and severance, he is entitled to costs and penalties as recoverable under Labor Law § 198 (1-a).[5] Labor Law § 198 "is not a substantive provision, but [rather] provides for remedies available to a prevailing employee." *Salahuddin v Craver*, 163 AD3d 1508, 1510 (4th Dept 2018) (internal quotation marks and citations omitted); *see also Slotnick v RBL Agency Ltd.*, 271 AD2d 365, 365 (1st Dept 2000) (Labor Law 198 (1-a) "provides only a damage remedy for substantive violations of article 6 of the Labor Law and depends upon pleading and proof of such substantive violation"). As plaintiff has failed to allege a substantive violation of article 6 of the Labor Law, he cannot recover the additional damages and attorneys' fees available under Labor Law § 198 (1-a).

Accordingly, as plaintiff fails to raise a triable issue of fact as to the applicability of Labor Law § 193 to his unused vacation time, defendant is granted summary judgment dismissing the second cause of action.[6]

IV. Breach of Contract - Severance Payment and Vested Stock Options and Reformation

The elements of a breach of contract claim are: (1) the existence of a valid contract (2) performance of the contract by the injured party; (3) breach by the other party; and (4) resulting damages. *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 (1st Dept 2007).

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[5] Labor Law § 198 provides the remedies available for successful wage claims made pursuant to Article 6, including the availability of attorney's fees and liquidated damages. Labor Law §198 (1-a) states the following, in relevant part:

> "In any action instituted in the courts upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due."

[6] In plaintiff's memorandum of law, he raises the argument, for the first time, that defendant violated Labor Law § 193 by failing to compensate plaintiff with his bonus and/or severance payment. Plaintiff did not give defendant notice of these alleged Labor Law violations in his complaint, and the court will not address them at this time.

In support of plaintiff's contention that he is entitled to be paid for an additional three months, he cites the severance section of the employment letter, which states that, upon termination, he is entitled to be paid his salary for three months. However, in the same paragraph, plaintiff is also advised that his receipt of severance is, among other things, subject to executing a release agreement in favor of defendant. The employment letter, like any other contract, "should be read as a whole, and every part will be interpreted with reference to the whole." *Global Reins. Corp. of Am. v Century Indem. Co.*, 30 NY3d 508, 518 (2017) (internal quotation marks and citations omitted).

Courts have found that "[a] corporate officer forfeits his right to severance pay by not executing a release required by his employment agreement." *Cloke-Browne v Bank of Tokyo-Mitsubishi UFJ, Ltd.*, 2011 WL 666187, *3, 2011 US Dist LEXIS 14116, *9 (SD NY 2011); *see also Ruiz v Lenox Hill Hosp.*, 146 AD3d 605, 606 (1st Dept 2017) ("The motion court correctly determined the plaintiff is not entitled to a severance payment under his employment contract or severance agreement unless he executes the general release provided in the severance agreement"). It is undisputed that plaintiff did not execute a release in favor of defendant. Accordingly, plaintiff fails to raise a triable issue of fact regarding the entitlement to severance payments in his breach of contract claim because he did not "perform[] the condition precedent that would obligate [defendant] to tender the disputed payments to him." *Cloke-Browne v Bank of Tokyo-Mitsubishi UFJ, Ltd.*, 2011 WL 666187 at *3, 2011 US Dist LEXIS 14116 at *9.

Plaintiff's argument that "then-current Salary," as indicated in the employment letter, would include all accrued benefits, bonuses and stock options, is without merit. It is well settled that "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). Here, it is clear that the "plain meaning" of salary as set forth in the severance section of the employment letter refers to the usual monthly salary received in his paycheck.[7] Regardless of whether his salary included other compensation, plaintiff did not satisfy the requirements to be eligible for severance benefits and they have been forfeited. *See e.g. Cloke-Browne v Bank of Tokyo-Mitsubishi UFJ, Ltd.*, 2011 WL 666187 at *4, 2011 US Dist LEXIS at *10 ("The letter agreement essentially gives Plaintiff a choice — to accept the post-termination bonus payments while waiving claims against the company, or to forgo the payments and preserve whatever claims he may have. No public policy precludes such a contractual condition").

Plaintiff argues that defendant breached the terms of the stock option letter by claiming that only 179,375, and not 357,500, of plaintiff's stock options have fully vested. Pursuant to the terms of the stock option letter, the stock options would fully vest "in the event of Change of Control and/or terms of Material Change in [his] responsibilities." It is undisputed that no change of control occurred during the course of plaintiff's employment. Plaintiff believes that,

[7] The court does not agree with plaintiff's alternative interpretations of the term salary. For example, plaintiff surmises that it was not the intent of the parties to include only salary in the term "salary." However, Facendola testified that the three other employees in the legal department did not receive any equity as payment as part of a severance package. Adrian affirmation, exhibit E, Facendola tr at 51-52.

starting in the fall of 2015, he experienced a material change in his responsibilities, thereby triggering the accelerated vesting of his stock options. As set forth in the facts, plaintiff claims that he was not included in certain meetings and that another employee took over part of his compliance responsibilities.

To begin, in this situation, the court declines to adopt plaintiff's interpretation that a material change in his responsibilities as written in the stock option letter, could be equated with having no more responsibilities, or termination. The plain language refers to protecting plaintiff's stock options in case of a material change in responsibilities while plaintiff is still employed by defendant. *See e.g. Vesta Capital Mgt. LLC v Chatterjee Group*, 78 AD3d 411, 411 (1st Dept 2010) (internal quotation marks and citation omitted) ("Mere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact").

Further, as set forth below, plaintiff fails to raise a triable issue of fact that he experienced a "significant change in [his] duties constitut[ing] a material breach of his employment agreement." *Fewer v GFI Group Inc.,* 124 AD3d 457, 458 (1st Dept 2015). Around the same time plaintiff believes that he experienced a material change in employment, he received a salary increase and was promoted to Senior Vice President of Legal and Compliance. Further, throughout the course of employment, the compliance expert hired by plaintiff continued to report to him, plaintiff still supervised the entire legal department and plaintiff attended the Board meetings in his executive capacity. Thus, at no point was plaintiff's "rank and role" diminished nor did he have to report to his replacement. *Id.* As a result, based on the record, plaintiff failed to raise a triable issue of fact that a material change in responsibilities occurred shortly prior to his termination.

Accordingly, as plaintiff did not satisfy a condition precedent for accelerated vesting, defendant did not breach the terms of the stock option letter.

The court notes that, plaintiff alleges in the third cause of action that he "fully performed under the [employment letter] and [stock option letter]. Truveris breached the contracts by failing to compensate [plaintiff] as contractually required to." Complaint, ¶ ¶ 67, 68. However, in his memorandum of law, plaintiff argues that he was forced to sign an improper release prior to the receipt of his severance payment and he attaches the proposed release.[8] Defendant alleges that the release has been improperly presented as evidence. *See e.g. CIGNA Corp. v Lincoln Natl. Corp.,* 6 AD3d 298, 299 (1st Dept 2004) ("documents prepared and exchanged for purposes of settlement, which are inadmissible to prove either liability or the value of the claims"). Here, the court agrees with plaintiff that the severance agreement was not presented in an effort to prove defendant's liability but to allegedly establish that defendant "improperly demanded" a release.

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[8] For example plaintiff alleges that defendant improperly withheld this non-discretionary bonus payment in order to force him to sign the "February 2016 Separation Agreement which improperly demanded a release of claims in exchange for payment of, among other things accrued benefits, severance and bonus." Plaintiff's memo of law at 10.

Nonetheless, for purposes of the third cause of action, it is not necessary to examine the severance agreement, whose terms were, in any event, not included in the complaint. Plaintiff's possible entitlement to severance pay and stock options are set forth in separate, respective contracts. As plaintiff did not execute a release in accordance with the employment letter, he is not entitled to three months' severance pay. After his termination, plaintiff exercised 179,375 stock options. Pursuant to the terms of the stock option letter, he is not entitled to accelerated vesting of the remaining stock options.

V. Reformation Counterclaim

Both parties seek summary judgment on the reformation counterclaim, which states that a scrivener's error occurred. "A scrivener's error constitutes a mistake solely in the reduction of an agreement to writing ." *Rosalie Estates, Inc. v Colonia Ins. Co.,* 227 AD2d 335, 337 (1st Dept 1996). Defendant proposes to change "and/or" to "and," in the stock option letter, thereby requiring both a change in control and a material change in responsibility to occur prior to plaintiff's stock options fully vesting.

Viewing the evidence in the light most favorable to the non-moving party, both sides raise issues of fact as to whether reformation should be granted as the result of a scrivener's error.

Plaintiff argues that, as defendant was the party who drafted the contract and created the ambiguity, reformation should be denied. The court finds "there is nothing ambiguous or self-contradictory about the policy. . . . However, while the policy itself is not ambiguous . . . further discovery is warranted as to whether the failure to include . . . [and/or] was a scrivener's error." *Rosalie Estates, Inc. v Colonia Ins. Co.,* 227 AD2d at 336.

"Reformation based upon a scrivener's error requires proof of a prior agreement between parties, which when subsequently reduced to writing fails to accurately reflect the prior agreement." *US Bank Natl. Assn. v Lieberman*, 98 AD3d 422, 424 (1st Dept 2012). Here, Birch testified that, at a Board meeting, he discussed the stock option letter and intended for the language to be "and." However, Chen inaccurately took notes at the meeting and then mistakenly drafted the letter. Therefore, in opposition to plaintiff's motion, defendant raises a triable issue of fact as to whether there was a mistake in the "reduction of [the stock option letter] to writing." *Rosalie Estates, Inc. v Colonia Ins. Co.,* 227 AD2d at 337.

Plaintiff also raises a triable issue of fact in opposition to defendant's motion for summary judgment. It is well settled that, "[p]articularly where an agreement is negotiated between sophisticated, counseled business people negotiating at arms length, ... courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." *Global Reins. Corp. of Am. v Century Indem. Co.*, 30 NY3d at 518-519 (internal quotation marks and citation omitted). Here, despite re-negotiating a salary increase and increase in stock options for an employee on several occasions, defendant

failed to add the language it now seeks to enforce. Although Facendola also testified that the "and/or" was not intended, this exact language is also used in his stock option letter.[9]

"Reformation on grounds of mutual mistake requires proof, by clear and convincing evidence, that an agreement does not express the intentions of either party." *US Bank Natl. Assn. v Lieberman*, 98 AD3d at 424. In opposition to defendant's motion, plaintiff raises a triable issue of fact as to whether both parties intended what was written in the agreement. Plaintiff received and signed off on several stock option letters using the "and/or" language. He testified that he was not involved in drafting the stock option letter and does not challenge the way it is presently drafted. Accordingly, the part of defendant's motion seeking summary judgment on its affirmative defense of mutual mistake, is denied.

VI. Breach of the Implied Covenant of Good Faith and Fair Dealing

"[A] covenant of good faith and fair dealing is implicit in all contracts. This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." *Gettinger Assoc., L.P. v Abraham Kamber Co. LLC*, 83 AD3d 412, 414 (1st Dept 2011) (internal quotation marks and citations omitted). This cause of action appears to be presented for the court to determine whether plaintiff is entitled to 100% of his bonus, not, whether he is even entitled to 65% of the bonus as presented to him as part of the severance agreement. Plaintiff argues that his bonus had been earned prior to termination and that the timing contingency in the employment letter should not be enforced. He alleges that the language is "non-discretionary, subject to contingencies rather than discretion. The bonus payment was approved by the Board and Compensation Committee but was not paid before [plaintiff] was terminated." Plaintiff's memo of law at 11-12.

As set forth below, plaintiff has failed to raise a triable issue of fact as to whether the entire amount of his bonus was vested at the time of his termination. "The issue before us is one of simple contract interpretation." *Marin v Constitution Realty, LLC*, 128 AD3d 505, 507 (1st Dept 2015). "It is well settled that [t]he best evidence of the parties' intent is what they say in their writing. When parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *Id.* (internal quotation marks and citations omitted).

The unambiguous language in the employment letter clearly indicates that the bonus is discretionary, subject to, and dependent on, both the company's and the individual's performance, and that if the bonus is earned, it will be paid in the first quarter of the following year. In addition, plaintiff was required to be employed by defendant at the time the bonus was payable to qualify for it. Here, the Board did not approve and offer plaintiff a 100% target bonus prior to his termination. In any event, courts have held that even an "'approval' of the bonus by defendant's special committee [would not] create some obligation on defendant to make the wholly discretionary payment." *UBS Sec. LLC v RAE Sys. Inc.*, 101 AD3d 510, 510 (1st Dept 2012).

[9] The court notes that, as a result of this decision, even if the double trigger language remained as "and/or," plaintiff did not satisfy either condition allowing his stock options to fully vest.

Plaintiff's alternative interpretation of the bonus language is strained and inconsistent, and the court will not "construe the language in such a way as would distort the contract's apparent meaning." *Fleming v Fleming*, 137 AD3d 1206, 1207 (2d Dept 2016) (internal quotation marks and citations omitted). In addition, the 2013 proposed, but not adopted, changes to the bonus language also fail to raise a triable issue of fact. *See e.g. L.E.K. Consulting LLC v Menlo Capital Group, LLC,* 148 AD3d 527, 528 (1st Dept 2017) ("Because the letter agreement is not ambiguous, there is no need to look to extrinsic evidence").[10]

It is well settled that "[a]n employee has no enforceable right to compensation under a discretionary compensation or bonus plan and, accordingly, a forfeiture of such compensation does not occasion a cause of action for breach of implied covenant of good faith and fair dealing." *Nikitovich v O'Neal*, 40 AD3d 300, 300 (1st Dept 2007). Further, plaintiff is an at-will employee and "could have been terminated for any lawful reason, and this Court may not substitute its business judgment for that of the employer." *Id.* (internal citations omitted). Accordingly, as the bonus plan is discretionary, plaintiff fails to raise a triable issue of fact that defendant breached the covenant of good faith and fair dealing by not compensating plaintiff with 100% of his target annual bonus.

In the complaint, plaintiff alleges that defendant improperly accelerated the termination to avoid the bonus payment and that other similarly situated executives were offered full bonuses while plaintiff was offered only 65% of his annual bonus. As noted, defendant maintains that the legal department was eliminated on a certain date as a way to reduce costs. Defendant alleges that, "while [plaintiff] contends that he is entitled to 100% of his bonus for 2016, Company executives who received bonus payments in 2016 received only 65% of the target bonus as a result of the metrics actually achieved by the Company." Defendant's memo of law at 22, n 8; *see also* Facendola tr at 44. Plaintiff does not address any of these initial arguments in opposition to defendant's motion for summary judgment.

Accordingly, defendant's motion for summary judgment dismissing the cause of action for breach of the covenant of good faith and fair dealing is granted.[11]

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[10] The court notes that both the 2013 proposed changes and the current employment letter also reiterated the conditions that the bonuses are subject to the company achieving targets as set by the Board and that plaintiff must be employed by defendant on the date that the bonus is paid in order to receive it.

[11] It is well settled that "claims for breach of the implied covenant of good faith and fair dealing . . . which are based on the same allegations and seek the same damages as the breach of contract [claims] . . . should [be] dismissed as duplicative." *Ullmann-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415, 416 (1st Dept 2014). The court notes that, to the extent that the alleged breach of the covenant of good faith and fair dealing is premised on the same set of facts that defendant breached its obligations to compensate plaintiff the amounts owed pursuant to the employment letter, the claim should be alternatively dismissed as duplicative. *See e.g.* complaint, ¶ 38: Defendant failed to meet its contractual obligation as it "failed to compensate [plaintiff] for amounts owed: specifically; for amounts owed regarding unused vacation days, his Stock Options, his bonus and continued health care."

VII. Unjust Enrichment

Unjust enrichment is classified as a "quasi-contract claim" and invokes "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties." *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 (2012) (internal quotation marks and citations omitted). It is well settled that "a party may not recover in . . . unjust enrichment where the parties have entered into a contract that governs the subject matter." *Pappas v Tzolis*, 20 NY3d 228, 234 (2012) (internal quotation marks and citation omitted).

The complaint states that defendant was unjustly enriched when it accepted plaintiff's valuable services but failed to compensate him, as promised, in accordance with the employment letter. Accordingly, here, the employment letter is the contract that "governs the subject matter" for which plaintiff seeks to recover damages. *Pappas v Tzolis*, 20 NY3d at 234.

Similarly, the employment letter precludes a quantum meruit claim. *See e.g. L.E.K. Consulting LLC v Menlo Capital Group, LLC*, 148 AD3d at 528 ("plaintiff's recovery on [the quantum meruit] claim is precluded by the fact that the letter agreement is a valid contract"). Accordingly, defendant has established its prima facie case dismissing the quantum meruit or unjust enrichment claim.

Furthermore, the court is not persuaded by plaintiff's alternative theory that he relied on the drafters of the stock option letter to protect his interests. Although not expressed clearly, plaintiff believes that the contractual language allowed defendant to obtain the benefit of the stock options, of which in "equity and good conscience" should be provided to plaintiff. *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 (2011) (internal quotation marks and citation omitted). However, "unjust enrichment is not a catchall cause of action to be used when others fail." *Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 (2012). It is well settled that "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Id.* Here, there is a valid contract governing the terms of the stock options. Furthermore, even construing the stock option letter in plaintiff's favor, he was unable to satisfy either condition allowing all his options to fully vest.

Accordingly, as contracts existed between the parties, defendant is granted summary judgment dismissing the sixth cause of action for quantum meruit-unjust enrichment.

VIII. Breach of Contract Counterclaim

Plaintiff is granted summary judgment dismissing the first counterclaim as defendant fails to address it in opposition to plaintiff's motion for summary judgment.

Accordingly, in conclusion, defendant's motion for summary judgment dismissing the complaint is granted and plaintiff's motion for partial summary judgment on the second, third, fifth and sixth causes of action is denied. Both parties are denied summary judgment on the reformation counterclaim and plaintiff is granted summary judgment dismissing the breach of contract counterclaim.

Accordingly, it is

ORDERED that the motion of defendant Truveris, Inc. (motion sequence 003) for an order granting summary judgment dismissing the complaint is granted, and the complaint is dismissed as against said defendant; defendant's motion for summary judgment on its seventeenth affirmative defense and its second counterclaim is denied; and it is further

ORDERED that the motion of plaintiff Andrew Munroe (motion sequence 004) for an order granting partial summary judgment is granted only to the extent that the first counterclaim is dismissed, it is otherwise denied in its entirety; and it is further

ORDERED that defendant's remaining counterclaim shall continue; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 7 of this court, Room 345, 60 Centre Street, on July 31, 2019, at 10 a.m.

6/7/2019
DATE

GERALD LEBOVITS, J.S.C.

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