Chase v Tax Lien Mgr. LLC
2021 NY Slip Op 32802(U)
December 9, 2021
Supreme Court, New York County
Docket Number: Index No. 654256/2018
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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WILLIAM CHASE,

Plaintiff,

Index No.: 654256/2018

-against- Motion No. 002

TAX LIEN MANAGER LLC and LOWEN HANKIN, DECISION and ORDER

Defendants.

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NANCY BANNON, J.:

INTRODUCTION

In this employment dispute, plaintiff seeks payment of severance as well as unpaid wages under the parties' employment contract based on breach of contract and New York Labor Law violations. Defendants Tax Lien Manager LLC (TLM) and Lowen Hankin (Hankin) move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint. Defendants contend that plaintiff was not terminated but voluntarily resigned and as such was not entitled to severance. They also urge that the labor law claims are insufficient as a matter of law. Plaintiff opposes the motion. The motion is granted in part.

BACKGROUND

TLM creates private investment funds, named the "Empire Tax Funds," and acquires and manages real property tax lien portfolios for those funds (NYSCEF Doc. No. 36, affidavit of Lowen Hankin, dated November 4, 2020 [Hankin aff], ¶ 2). Defendant Hankin is the head of TLM and one of its largest shareholders (NYSCEF Doc. No. 38, complaint, ¶¶ 4-5).

On April 21, 2010, plaintiff was hired by TLM as a portfolio analyst pursuant to an employment agreement (the Employment Agreement) (*id.*, ¶¶ 7-8). The Employment Agreement provided, in relevant part, that plaintiff's employment was at-will and his starting salary was $90,000 per year with the potential for an annual discretionary bonus. It further provided that if TLM terminated plaintiff without cause, he "shall be entitled to severance pay equal to four (4) weeks' base pay for each full year you have been employed hereunder" (NYSCEF Doc. No. 40). From April 2010 to May 2018, plaintiff's salary increased from $90,000 to $220,000 (NYSCEF Doc. No. 38, compl, ¶ 10). During that time, he was promoted to senior analyst and then to principal (NYSCEF Doc. No. 47, affidavit of William Chase, dated December 29, 2020 [Chase aff], ¶¶ 3-4). In October 2013, plaintiff was offered a 10% carried interest in a select number of funds (*id.*, ¶ 5).

In the second half of 2017, TLM's business began declining (NYSCEF Doc. No. 36, Hankin aff, ¶¶ 6-7). TLM began cost cutting, including decreasing defendant Hankin's own salary from $230,000 to $130,000 effective January 1, 2018 (*id.*, ¶ 7).

Defendants notified plaintiff sometime in May 2018 that his salary would also be reduced 30% from $220,000 to between $150,000 to $160,000 (*id.*, ¶ 9). Plaintiff asserts that defendant Hankin indicated that he would remain a full-time employee with added flexibility to look for a new job through October 2018, when his employment with TLM would end (NYSCEF Doc. No. 47, Chase aff, ¶ 7). On June 15, 2018, when plaintiff was paid his bi-monthly salary, TLM reduced his salary to $150,000 (*id.*, ¶ 10).

On June 15, 2018, plaintiff submitted a letter of resignation to TLM and Hankin, stating that he was leaving because he was constructively discharged (NYSCEF Doc. No. 52). He states that he gave Hankin passwords to websites that he had control over, and informed Hankin of what he was working on and what was left to be done on that work (NYSCEF Doc. No. 47, Chase aff, ¶ 21).

On August 27, 2018, plaintiff commenced this action, asserting four causes of action. The *first* claim is for breach of the Employment Agreement, seeking the severance payment of $135,384.61 plus interest (NYSCEF Doc. No. 38, compl, ¶¶ 30-37). The *second* cause of action alleges violation of New York Labor Law (NYLL) § 191(3), based on TLM's alleged failure to pay plaintiff's wages on the regular payday for the pay period during which his termination occurred, seeking the same $135,384.61, plus 100% liquidated damages, interest and attorney's fees (*id.*, compl, ¶¶ 38-42). The *third* cause of action alleges violation of NYLL § 195, for TLM's failure to notify plaintiff in writing at least seven calendar days prior to the change in his salary (*id.*, compl, ¶¶ 43-47). The *fourth* cause of action alleges defendant Hankin's violation of

New York Business Corporation Law § 630, asserting that Hankin is jointly and personally liable for debts and wages due to plaintiff (*id.*, compl, ¶¶ 48-53).

Defendants answered the complaint, denying the material allegations and asserting affirmative defenses including failure to state a claim, no privity of contract with defendant Hankin, setoff, waiver, failure to meet conditions precedent, complete and timely payment, good faith belief in its appropriate payment of wages, and good faith belief that it was not required to provide plaintiff with statements pursuant to NYLL § 195.

Defendants now move pursuant to CPLR 3212 for summary judgment dismissing the complaint, urging that plaintiff's voluntary resignation forecloses his claim for severance under the Employment Agreement. They argue that plaintiff's theory of constructive discharge fails as a matter of law because he cannot show that his working conditions were so intolerable that he felt compelled to resign. They contend that plaintiff's reduced salary was reasonably expected and fair under the circumstances and compared favorably with earnings commanded by persons with his level of experience. Defendants submit Hankin's affidavit in which he states that his own and plaintiff's salaries were linked to the dollar amount of TLM's assets under management (AUM), and that beginning in July 2017, AUM declined 41% from that date through June 15, 2018 (NYSCEF Doc. No. 36, Hankin aff, ¶¶ 2-6). As a result, Hankin's own salary was cut from $230,000 to $130,000 effective January 1, 2018, and despite that decrease plus other cost cutting measures, TLM was no longer able to maintain plaintiff's full annual

compensation (*id.*, ¶¶ 7-9). Hankin attests that he informed plaintiff of TLM's need to reduce his salary after May 2018, and in the first pay period of June, TLM reduced plaintiff's salary to $150,000, at which point plaintiff immediately resigned (*id.*, ¶ 10).

Defendants also urge that plaintiff's labor law claims fail because plaintiff has no claim for unpaid wages or severance. They urge that the second cause of action for unpaid wages under NYLL § 191(3) is insufficient because plaintiff was serving in an executive, managerial or administrative position. Further, no claim lies under NYLL § 193 because plaintiff is not seeking to recover for any specific deduction from wages. Finally, defendants argue that NYLL § 198-c(3) bars plaintiff, as a person serving in an executive, administrative or professional capacity whose earnings are more than $900 per week, from seeking recovery for unpaid contractual severance.

With respect to the fourth cause of action against defendant Hankin individually, defendants contend that no judgment has been recovered against TLM and so no execution has been returned unsatisfied against it that would permit plaintiff to pursue a direct claim against defendant Hankin, as a principal of the limited liability corporation (New York Limited Liability Corporation Law [NY LLC Law] § 609 [c]). Defendants further urge that, in any event, cause existed for plaintiff's termination. They submit Hankin's affidavit in which he attests that TLM discovered examples of plaintiff's neglect and non-performance of his job responsibilities during the months before May 2018 (NYSCEF Doc. No. 36, Hankin aff, ¶¶ 13-14). Hankin also asserts that plaintiff resigned, during TLM's tax and audit season, without leaving an exit memo, open critical

issues list, or instructions for access to websites or his office computer passwords (*id.*, ¶ 11).

In opposition, plaintiff asserts that defendants constructively discharged him. He contends that defendants wanted to terminate his employment but they had no cause so they threatened drastic cuts to his salary, told him he would be terminated by October and to look for another job, and threatened transfer of TLM's assets and filing for bankruptcy rather than pay him severance. In his affidavit, plaintiff recounts that on May 14, 2018, Hankin indicated that plaintiff's salary would be reduced by 30%, his employment would be terminated in October 2018, and he should look for another job (NYSCEF Doc. No. 38, compl, ¶¶ 11-13; NYSCEF Doc. No. 47, Chase aff, ¶ 7). On May 21, 2018, Hankin told him his salary would be reduced from $220,000 to $160,000, and he would become a part-time employee with no health insurance (NYSCEF Doc. No. 47, Chase aff, ¶ 8). On May 22, 2018, Hankin offered plaintiff an independent contractor agreement, without severance, lower hours and salary, and no health insurance, which plaintiff refused to sign (*id.*, ¶¶ 9-11). On May 23-25, 2018, plaintiff recounted that he and Hankin continued to negotiate his termination, and on May 25, 2018, Hankin indicated that rather than pay plaintiff severance he would transfer TLM's assets and file for bankruptcy (*id.*, ¶¶ 12-15). On June 7, 2018, Hankin informed plaintiff of the salary reduction to $150,000 effective June 1, 2018, and told him to find a new job as soon as possible (*id.*, ¶ 16). Based on this, plaintiff contends that, at the least, there is a triable issue of fact as to his constructive discharge.

On his NYLL claims, plaintiff argues that under NYLL § 191(3), an employer is required to pay wages no later than the regular pay day for the pay period during which the termination occurred, he was constructively discharged on June 15, 2018, defendants failed to pay his severance pay, and severance pay constitutes wages under NYLL § 198-c. He urges that there is no exception in NYLL § 191(3) for a "principal," only for an employee who acts in an executive, administrative or professional capacity whose earnings are over $900 per week. Plaintiff argues that if defendants are seeking to assert this exemption, they needed to raise it as an affirmative defense, which they did not, and thus it was waived. Moreover, he asserts that it does not apply because there were no benefits associated with his title of principal, he had no authority to hire or fire, and the prior offer of a 10% share of carried interest in a select number of funds never resulted in any money for plaintiff (*id.*, ¶¶ 4-5). He further states that he was not a co-principal with Hankin because he had to ask Hankin to approve his vacation, but the reverse was not true (*id.*, ¶ 19). On defendants' challenge to his NYLL § 193 claim, he asserts that when TLM reduced his wages effective June 1, 2018, his bi-weekly paycheck should have been $9,166.67 but was reduced to $6,250.00, an unauthorized reduction of $2,916.67 (NYSCEF Doc. No. 47, Chase aff, ¶¶ 24-46). Finally, plaintiff contends that defendants fail to offer any evidence that he was terminated for cause and that their alleged proof consists of after-acquired evidence, which fails to provide a basis for summary judgment relief. Further, plaintiff denies engaging in any form of misconduct or failure to meet his job responsibilities (*id.*, ¶¶ 21-23).

DISCUSSION

The motion for summary judgment is granted only to the extent that the portion of the second cause of action seeking severance pay under New York Labor Law §§ 191(3) and 198-c, and the entire fourth cause of action, are dismissed and the motion is otherwise denied.

The movant on a motion for summary judgment is required to make a *prima facie* showing that it is entitled to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Upon such a showing the burden shifts, and the opposing party must then demonstrate the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). When deciding a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-movant (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]).

Constructive Discharge

The first cause of action seeks recovery for breach of the Employment Agreement based on the theory of constructive discharge. When the parties entered into the Employment Agreement, they explicitly agreed that plaintiff was an at-will employee (NYSCEF Doc. No.48, employment agreement, ¶ 1). Thus, TLM was generally free to change the terms of plaintiff's employment, within the confines of that agreement. Where, as here, an employment agreement specifies particular benefits payable on discharge or termination, the employee is entitled to these benefits if the termination

amounts to a constructive discharge (*Robinson v Kingston Hosp.*, 55 AD3d 1121, 1122 [3d Dept 2008] [change in employment terms for at-will employee could entitle her to contractual severance if the change constituted constructive discharge]; *Scott v Harris Interactive, Inc.*, 512 Fed Appx 25, 27 [2d Cir 2013]; *Hoffman v Nutmeg Music Inc.*, 2018 WL 4471708, * 8 [D Conn 2018] [constructive discharge test can be used to determine entitlement to severance in employment contract cases]). Constructive discharge occurs when the employer, "rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntarily resignation" (*Pena v Brattleboro Retreat*, 702 F2d 322, 325 [2d Cir 1983] [internal quotation marks and citation omitted]; *see Morris v Schroder Capital Mgt. Intl.*, 7 NY3d 616, 621 [2006]; *see also Zaborowski v Roman Catholic Diocese of Brooklyn*, 195 AD3d 884, 885 [2d Dept 2021]). The employer's actions "must be deliberate and intentional" (*Morris v Schroder Capital Mgt. Intl.*, 7 NY3d at 622). The working conditions must be so difficult or unpleasant that a reasonable employee would have felt compelled to resign (*Pena v Brattleboro Retreat*, 702 F2d at 325; *Morris v Schroder Capital Mgt. Intl.*, 7 NY3d at 622). In that regard, on summary judgment,

> "If any relevant facts are in dispute or subject to competing inferences as to their effects, or if there is admissible evidence from which a rational juror could infer that a reasonable employee would have felt so compelled, rejection of the constructive-discharge theory as a matter of law is impermissible"

(*Green v Town of East Haven*, 952 F3d 394, 405 [2d Cir 2020]; *see also Hoffman v Nutmeg Music Inc.*, 2018 WL 4471708, * 8, 2018 US Dist LEXIS 158505, * 25 [issue of whether constructive discharge occurred is "heavily fact-intensive inquiry"]).

The constructive discharge test may be used to determine an employee's entitlement to severance under an employment contract (*see Scott v Harris Interactive, Inc.*, 512 Fed Appx at 27-28; *Robinson v Kingston Hosp.*, 55 AD3d at 1123 [plaintiff may pursue constructive discharge claim where employment agreement obligated employer to pay severance if plaintiff was terminated]). An extreme reduction in pay may constitute a constructive discharge (*see Pennsylvania State Police v Suders*, 542 US 129, 134 [2004] [extreme pay cut is an example of adverse action]; *Scott v Harris Interactive, Inc.*, 512 Fed Appx at 28 [30% reduction in pay, from $220,000 to $150,000, could be deemed to have made continued employment untenable]; *Kirsch v Fleet St., Ltd.*, 148 F3d 149, 161–62 [2d Cir 1998] [where 55% reduction in pay, employer took account away basically ending employee's prospects for additional earnings, and supervisor "nodded in response to [the plaintiff']s statement that the company was trying to force him to leave," conduct amounted to constructive discharge] [emphasis omitted]; *Stokes v City of Mount Vernon, N.Y.*, 2012 WL 3536461, at *7, 2012 US Dist LEXIS 118386, * 19-20 [SD NY 2012] ["A severe reduction in pay may constitute a constructive discharge"], *on later motion* 2015 WL 4710259, * 8, 2015 US Dist LEXIS 106276, * 19-20 [SD NY 2015] [percentage of salary reduction and reasonable expectations of parties are relevant to fact determination of whether involuntary resignation; summary judgment denied]; *Hogan v Metromail*, 107 F Supp 2d 459, 469 [SD NY 2000] [reduction in pay along with elimination of substantial benefits and evidence of deliberate intent establishes constructive discharge]; *cf. Romain v Great Expressions Dental of New York LLP*, 2018 WL 3542858, *8, 2018 US Dist LEXIS 122454, * 22 [SD NY 2018] [$10,000 pay reduction insufficient]).

In *Scott v Harris Interactive, Inc.* (512 Fed Appx 25), the plaintiff employee had an offer letter for at-will employment, which provided for a starting salary of $220,000, with possible salary increases upon annual review. This letter also stated that if he were terminated for any reason other than cause, the defendant employer would provide certain severance benefits and continued health care benefits (or their cash equivalent) (*id.* at 27). Plaintiff accepted the offer letter, which became the parties' employment agreement, and began working for defendant. It was undisputed that in the first year of employment, the plaintiff's job responsibilities were reduced, and later that same year his salary was reduced to $150,000. The plaintiff refused to accept these changes and told the employer defendant that he deemed himself constructively discharged (*id.*). In considering plaintiff's constructive discharge claim, the Second Circuit found that the "percentage of a reduction and the reasonable expectations of the parties" are relevant to the factual determination of whether the employee was forced into an involuntary resignation (*id.* at 28). The court denied summary judgment to defendant on the claim, finding triable issues of fact (*id.*).

Here, while defendants present *prima facie* proof that plaintiff was an at-will employee, and he resigned, disqualifying him from collecting severance under the Employment Agreement, plaintiff has raised a triable issue of fact on his constructive discharge theory. He presents undisputed proof of a significant 30% reduction in his salary along with threats of termination by October or even sooner as the parties discussed, in May 2018, his severance and salary. In addition, defendants were

purportedly threatening cancelation of plaintiff's health insurance benefits and repeatedly told him to find a new job as soon as possible. This evidence is sufficient to raise a genuine issue as to whether he was being forced into an involuntary resignation (*see Scott v Harris Interactive, Inc.*, 512 Fed Appx at 27; *Kirsch v Fleet St., Ltd.*, 148 F3d at 161–62; *Stokes v City of Mount Vernon, N.Y.*, 2012 WL 3536461, at *7, 2012 US Dist LEXIS 118386; *Hogan v Metromail*, 107 F Supp 2d at 469). A rational juror could infer that plaintiff was reasonable in feeling compelled to resign. Defendants' arguments that plaintiff was terminated for cause further demonstrate that there are triable issues. They submit only defendant Hankin's affidavit with conclusory statements and no documentary support (NYSCEF Doc. No. 36), which is refuted by plaintiff's opposition affidavit (NYSCEF Doc. No. 47, Chase aff at ¶¶ 21-23). Therefore, summary judgment is denied on the first cause of action.

New York Labor Law Claims

In the second cause of action, plaintiff seeks recovery for unpaid wages, including severance pay, plus liquidated damages and attorney's fees, citing New York Labor Law (NYLL) § 191(3). To establish a NYLL Article 6 claim, plaintiff must allege that his wages and severance are being withheld in violation of a substantive provision of this article (*see Leschak v Raiseworks, LLC*, 2016 WL 11695068, * 7, 2016 US Dist LEXIS 31785 [SD NY 2016]). While plaintiff cites NYLL § 191(3) (section 191(3) or § 191[3]) in his claim for unpaid wages, that section relates to the timing and frequency of wage payments. Subsection 3 provides, in relevant part, that "[i]f employment is terminated, the employer shall pay the wages not later than the regular pay day for the pay period

during which the termination occurred" (NYLL § 191[3]). The gravamen of plaintiff's claim here is that defendants failed to pay him the severance payment upon his termination without cause and decreased his wages for the last two weeks leading up to his termination.

The first part of this claim most naturally falls under § 198-c of the NYLL (section 198-c or § 198-c). That section relates to withheld "benefits or wage supplements," including separation or severance (NYLL § 198-c[2]). Subsection c(3) of that section, however, provides that it "shall not apply to any person in a *bona fide* executive, administrative, or professional capacity whose earnings are in excess of nine hundred dollars a week" (NYLL § 198-c[3]). Thus, courts applying Article 6 of the Labor Law hold that executives or professionals who earn more than $900 per week are not permitted to assert a claim for severance under section 198-c (*Romanello v Intesa Sanpaolo S.p.A.*, 97 AD3d 449, 455-456 [1st Dept 2012], *affd as modified on other grounds* 22 NY3d 881 [2013]; *Fraiberg v 4Kids Entertainment, Inc.*, 75 AD3d 580, 583 [2d Dept 2010] [claim for the failure to pay severance arises under § 198-c and barred by that section's exemption for employees working in executive, administrative or professional capacity earning more than $900 per week]; *Corbett v Bristol Dev. Corp.*, 67 Misc 3d 1224[A], 2020 NY Slip Op 50631[U], * 4 [Sup Ct, NY County June 2, 2020] [Lebovits][same], *affd* 195 AD3d 564 [1st Dept 2021]; *Kolchins v Evolution Mkts. Inc.*, 2015 NY Slip Op 32847[U] at * 4 [Sup Ct, NY County 2015] [while severance payments

are recoverable under § 198-c, plaintiff was excluded as an executive earning more than $900 per week]).

While severance payments are arguably recoverable under section 198-c, plaintiff here cannot proceed under that section because the executive employee exclusion in section 198-c(3) applies. It is undisputed that plaintiff was employed in a professional capacity, was promoted to "principal," eligible for a 10% share of carried interest in select funds, and his annual base salary was $220,000, which clearly exceeds the $900 per week ceiling (*see Naderi v North Shore-Long Is. Jewish Health Sys.*, 135 AD3d 619, 620 [1st Dept 2016]; *see also Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 615 [2008]). Defendants submit proof of plaintiff's resumes, showing that as a principal, he "managed operations for eight specialized investment funds, performed property, credit and legal due diligence for acquisitions of over $175 million in real estate tax liens, advised on real estate disposition strategies, and obtained equity financing" (NYSCEF Doc. No. 61). He has a BA from the University of Virginia, an MBA from NYU, and describes himself as "a results-oriented real estate professional with experience in real estate finance, market research, alternative investments, investor relations, and property valuation" (NYSCEF Doc. Nos. 62, 63). This clearly demonstrates that he was employed in a professional capacity.

Plaintiff does not contest these facts in his opposition. Plaintiff's contention that he was not an executive because his responsibilities were not executive functions -- he could not hire or fire and needed defendant Hankin's approval to take a vacation -- are of

no moment (*see McDonald v McBain*, 99 AD3d 436, 438 [1st Dept 2012]; *see also Zito v Fischbein, Badillo, Wagner* & Harding, 35 AD3d 306, 307 [1st Dept 2006] [plaintiff "as a highly compensated professional, ha[d] no cognizable claim under Labor Law § 198"]; *Taylor v Blaylock & Partners*, 240 AD2d 289, 292 [1st Dept 1997]).

Plaintiff's contention that defendants may not assert executive exclusion because it was not raised as an affirmative defense in their answer is unavailing. There is no express or implied requirement to plead this defense (see CPLR 3018[b]). Whether the sections of the NYLL under which plaintiff's claims are asserted can be applied to him are clearly part of his *prima facie* burden to establish. Additionally, plaintiff has not demonstrated any prejudice or surprise regarding this defense (*see Rogoff v San Juan Racing Assn.*, 54 NY2d 883, 885 [1981]; *Korff v Corbett*, 155 AD3d 405, 409 [1st Dept 2017] [failure to have expressly pleaded defense of past consideration did not mandate denial of defendant's summary judgment motion on that defense]; *Sullivan v American Airlines, Inc.*, 80 AD3d 600, 602 [2d Dept 2011] [an unpleaded defense may be the basis for granting summary judgment where no prejudice or surprise to opposing party]; *Sheils v County of Fulton*, 14 AD3d 919, 921 [3d Dept 2005] [same]). Plaintiff has had a full opportunity to respond to this defense in his opposition to this motion. Therefore, the portion of the second cause of action seeking severance pay plus liquidated damages and attorney's fees under NYLL §§ 191(3) and 198-c is dismissed.

With respect to the part of plaintiff's claim seeking "unpaid wages" under section 191(3) for the two weeks of decreased salary, plus attorney's fees,

> "employees serving in an executive, managerial or administrative capacity do not fall under section 191 of the Labor Law and, as a result, those individuals are not entitled to statutory attorney's fees under section 198(1-a) if they assert a successful common-law claim for unpaid wages"

(*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 616 [2008]).

The "unpaid wages" which plaintiff asserts defendants deducted from his promised salary from June 1, 2018 through June 15, 2018 more appropriately fall under NYLL § 193 (section 193 or § 193). § 193 provides, in relevant part, that "[n]o employer shall make any deduction from the wages of an employee, except deductions which" are made in accordance with certain laws, rules and regulations, or "are expressly authorized in writing by the employee and are for the benefit of the employee," and limits such deductions to payments for specific items such as insurance premiums, pension and health benefits, and union dues (*id.*, §1[a],[b]). This provision was intended to "prohibit deductions from an employee's wages whereby the risk of loss is placed on the employee instead of the employer" (*Cooperman v Criterion 360, Inc.*, 2021 WL 3772705, * 4 [Sup Ct, NY County Aug 25, 2021], citing *inter alia Hudacs v Frito-Lay, Inc.*, 90 NY2d 342, 349 [1997]). It only applies to deductions, not to a complete withholding of wages (*Amon v Drohan*, 188 AD3d 404, 404 [1st Dept 2020]; *Kolchins v Evolution Mkts., Inc.*, 182 AD3d 408, 408 [1st Dept 2020]).

Here, plaintiff alleges in his second cause of action that on June 7, 2018, defendants informed him that they were reducing his salary from $220,000 to $150,000 retroactively effective a week earlier (i.e., as of June 1, 2018) (see NYSCEF Doc. No. 38,

complaint, ¶ 26; see also NYSCEF Doc. No. 46, Chase aff, ¶¶ 24-26). Plaintiff's bi-weekly pay before that date was $9,166.67, and, on June 15, 2018, he was only paid $6,250, resulting in a deduction of $2,916.67 (NYSCEF Doc. No. 46, Chase aff, ¶¶ 25-26). Contrary to defendants' contention, plaintiff has asserted a specific unauthorized deduction from his earned wages for the first two weeks of June (*see Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449-45- [1st Dept 2017]). Unlike sections 191 and 198-c, section 193 applies to employees notwithstanding their roles as professionals, managers or executives (*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609). Therefore, the portion of the second cause of action seeking unpaid wages in the amount of $2,916.67 pursuant to NYLL § 193 survives.

With regard to the third cause of action seeking to recover under NYLL § 195 (the New York Wage Theft Prevention Act) for defendants' failure to provide timely written notice of the salary reduction, defendants fail to make any arguments, much less a *prima facie* case, for such claim's dismissal. Therefore, this branch of their motion is denied.

Personal Liability of Defendant Hankin

The fourth claim seeks recovery of unpaid wages from defendant Lowen Hankin, individually, as the alleged largest shareholder of defendant TLM, under Business Corporation Law § 630, which addresses the liability of shareholders for wages due employees. Because TLM is a limited liability corporation, however, New York Limited Liability Company Law (NY LLC) § 609 (c) instead applies. Under NY LLC § 609, members and managers of a limited liability corporation, like TLM, are expressly exempt

from personal liability for the company's obligations for any wages or salaries due an employee, unless the member is given notice in writing that the employee intends to hold the member liable under this section within 180 days after termination of such services. Moreover, any action to enforce the liability must be commenced within 90 days after the return of an execution unsatisfied against the limited liability company upon a judgment recovered against it by the employee. This provision precludes an employee's claims for wages unless such conditions are met, particularly where there are no allegations to support piercing the corporate veil (*see Moshan v PMB, LLC*, 141 AD3d 496, 497 [1st Dept 2016]; *Collins v E-Magine*, 291 AD2d 350, 351 [1st Dept 2002]).

Here, plaintiff fails to plead or show that any execution, based on the recovery of a judgment, has been returned unsatisfied against TLM. Further, there are no allegations that he was employed directly by Hankin, nor has he alleged any facts to support piercing the corporate veil (*see Moshan v PMB, LLC*, 141 AD3d at 497). Therefore, the fourth cause of action is dismissed as a matter of law.

CONCLUSION

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted to the extent that the portion of the second cause of action seeking severance pay, liquidated damages and attorney's fees under New York Labor Law Article 6, and the fourth cause of action against Defendant Lowen Hankin, individually, are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the complaint is dismissed as against defendant Lowen Hankin, with costs and disbursements to defendant Hankin as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant, and it is further

ORDERED that the remaining parties are encouraged to explore settlement.

This constitutes the Decision and Order of the court.

Dated: December 9, 2021

ENTER:

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