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

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DANIEL NIAMEHR,

Plaintiff,

- v -

LAW OFFICES OF MICHAEL S. LAMONSOFF, PLLC, MICHAEL S. LAMONSOFF, and BETH KIRSCHNER,

Defendants.

INDEX NO. 653682/2020

MOTION DATE 06/15/2021, 06/15/2021

MOTION SEQ. NO. 001 003

DECISION + ORDER ON MOTION

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HON. NANCY M. BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 162, 163, 164, 165, 178, 180

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 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, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 171, 172, 173, 174, 175, 179, 181

were read on this motion to/for DISMISSAL.

I. INTRODUCTION

In this action arising from events that allegedly transpired during and after the plaintiff attorney's brief period of employment as an associate with the defendant law firm, the Law Offices of Michael S. Lamonsoff, PLLC (the Law Firm), the defendants move pursuant to CPLR 3211(a)(7) to dismiss the amended complaint in its entirety (SEQ 001). The plaintiff opposes the motion and separately moves pursuant to CPLR 3016(b), CPLR 3211(a)(1), (5), and (7), and CPLR 3211(b) to dismiss the defendants' second, third, fourth, fifth, seventh, and eighth counterclaims and the defendants' second, fourth, thirteenth, and fourteenth affirmative defenses

(SEQ 003). The defendants oppose the plaintiff's motion. For the following reasons, the defendants' motion is granted in part and the plaintiff's motion is granted in part.

II. BACKGROUND

The following allegations are drawn from the plaintiff's amended complaint and the defendants' answer with counterclaims, as applicable and unless otherwise noted, and are assumed to be true solely for purposes of this motion. See, e.g., Grassi & Co. v Honka, 180 AD3d 564 (1st Dept. 2020).

The plaintiff is a personal injury attorney who worked for the Law Firm between May 6, 2019, and August 3, 2020. Defendant Michael S. Lamonsoff (Lamonsoff) is the owner and founding partner of the Law Firm. Defendant Beth M. Kirschner (Kirschner) is the managing attorney of the Law Firm. By stipulation dated February 10, 2022, the plaintiff discontinued this action, with prejudice and without costs, as against Kirschner. Accordingly, the defendants' motion is deemed withdrawn insofar as asserted on behalf of Kirschner and the term "defendants," as used hereinafter, shall exclude Kirschner.

The plaintiff avers that in April 2019, he met with Lamonsoff and Kirschner with regard to his interest in an open position for a personal injury trial attorney at the Law Firm. On April 19, 2019, the defendants offered him the position with the following terms: (a) $130,000 base salary; (b) 5% commission on settlements; (c) 10% commission on verdicts; and (d) 40% commission on cases the plaintiff referred to the Law Firm. The 5% commission on settlements was to be earned upon Lamonsoff's approval of settlement offers negotiated by the plaintiff. The plaintiff accepted the defendants' offer and commenced employment with the Law Firm on May 6, 2019.

On July 30, 2019, the plaintiff received an employment offer from a competing New York law firm (the competing firm) with terms "substantially more favorable" than the terms of the plaintiff's employment with the Law Firm. The plaintiff accepted the competing firm's offer and gave notice to Lamonsoff that he was departing in two weeks. On August 4, 2019, Lamonsoff offered the plaintiff, in addition to the preexisting terms of his employment with the Law Firm, payment of a $30,000.00 bonus upon the plaintiff's completion of his first year there. The plaintiff accepted Lamonsoff's offer and revoked his acceptance of the competing firm's offer.

The plaintiff alleges that during his period of employment with the Law Firm he was a "top performer," had in excess of $4,000,000.00 in settlement offers accepted by Lamonsoff, and referred seven clients to the Law Firm. The plaintiff was paid 5% commission on a number of cases he settled, earning a total of $24,129.33. However, the defendants limited payments of settlement commission compensation to four matters per pay period, reduced payments of commission compensation by the amount of any settlement offers already on file prior to the plaintiff's involvement, and failed to pay the plaintiff 40% commission on a matter he referred to the Law Firm. Further, the defendants ceased paying commission compensation at the outset of the COVID-19 pandemic on March 17, 2020. The defendants also failed to pay the plaintiff the $30,000.00 bonus upon his completion of a year with the Law Firm.

On August 3, 2020, the plaintiff submitted his resignation, purportedly due to "ethical dilemmas" in connection with client matters that he avers the defendants' conduct created. On August 7, 2020, the plaintiff commenced this lawsuit. The amended complaint seeks to recover for the defendants' alleged breach of the compensation terms of the parties' April 19, 2019, employment agreement (the April 2019 agreement) (first cause of action), and the August 4,

2019, oral agreement (the August 2019 agreement) (second cause of action). The plaintiff further states claims for fraudulent inducement with respect to both agreements (third and fourth causes of action), unjust enrichment and promissory estoppel (fifth and sixth causes of action), and violation of section 193 of the New York Labor Law (NYLL) (seventh cause of action).

On September 2, 2020, the defendants filed their answer with counterclaims. As alleged in the defendants' pleading, during his meeting with Kirschner prior to being hired, in April 2019, the plaintiff misrepresented and exaggerated the nature and extent of his prior legal experience. On April 21, 2019, the plaintiff signed and dated an offer letter (the offer letter) wherein the defendants offered him at-will employment in the position of Associate Attorney at the law firm with a starting salary of $130,000.00 per year, commencing on May 6, 2019. The offer letter was devoid of any terms concerning commission or bonus payments.

The defendants aver that during the course of his employment, the plaintiff was "abusive to subordinates" and "deeply disrespectful and hostile to women," including Kirschner. They further contend that the plaintiff used the Law Firm's inability to track communications between firm personnel and anyone outside the office during the mandatory shutdown necessitated by the COVID-19 pandemic to steal clients of the Law Firm. Specifically, the defendants state that the plaintiff used his personal phone to communicate with clients, disparage the Law Firm, and "groom" clients for anticipated solicitation upon his departure. The plaintiff also used the Law Firm's computer system to seek out clients for solicitation. The plaintiff then spent his final days of employment with the Law Firm contacting and soliciting Law Firm clients and drafting substitution letters and Consent to Change Attorney forms for them to sign. On July 31, 2020, four Law Firm clients signed forms agreeing to substitute the plaintiff. After his departure from the Law Firm, the plaintiff purportedly continued to solicit the Law Firm's clients. As a result,

an additional four Law Firm clients have agreed to discharge the Law Firm and substitute the plaintiff. On August 10, 2020, Kirschner, on behalf of the Law Firm, sent the plaintiff a cease-and-desist letter demanding that he cease soliciting Law Firm clients and disparaging the Law Firm to current clients.

The defendants assert counterclaims sounding in breach of fiduciary duty (first counterclaim), tortious interference with contracts (second counterclaim), fraud (third counterclaim), unjust enrichment (fourth counterclaim), disgorgement of compensation and attorneys' fees (fifth and sixth counterclaims), and declaratory judgment (seventh counterclaim). The defendants also seek an accounting (eighth counterclaim).

III. LEGAL STANDARDS

A. CPLR 3211(a)(1)

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). A particular paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable." See VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (1st Dept. 2019) (quoting Fontanetta v John Doe 1, supra).

B. CPLR 3211(a)(5)

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground

that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired." Benn v Benn, 82 AD3d 548, 548 (1st Dept. 2011) (quoting Island ADC, Inc. v Baldassano Architectural Group, P.C., 49 AD3d 815, 816 [2nd Dept. 2008]); see also Gravel v Cicola, 297 AD2d 620 (2nd Dept. 2002). "The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled or was otherwise inapplicable, or whether the action was actually commenced within the period propounded by the defendant." QK Healthcare, Inc. v InSource, Inc., 108 AD3d 56, 65 (2nd Dept. 2013); see MTGLQ Investor, LP v Wozencraft, 172 AD3d 644 (1st Dept. 2019); Epiphany Community Nursery School v Levey, 171 AD3d 1 (1st Dept. 2019); J.A. Lee Elec., Inc. v City of New York, 119 AD3d 652 (2nd Dept. 2014). The plaintiff's submissions in response to the motion "must be given their most favorable intendment." Benn v Benn, supra at 548 (quoting *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

C. CPLR 3211(a)(7)

On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

D. DISCUSSION

A. The Defendants' Motion to Dismiss

The defendants move to dismiss the amended complaint in its entirety pursuant to CPLR 3211(a)(7). The defendants contend, *inter alia*, that the plaintiff does not adequately allege the

formation of an enforceable contract between the parties, that the plaintiff's fraud claims are not particularized and, along with his equitable claims, are duplicative of his contractual claims, and that the plaintiff fails to allege any deduction from his wages within the meaning of the NYLL. The court addresses each claim in turn.

i. First and Second Causes of Action

The elements of a cause of action for breach of contract are "(1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). As to the first element, it is well-settled that "[t]o form a binding contract there must be a 'meeting of the minds,' such that there is a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." Stonehill Capital Management, LLC v Bank of the West, 28 NY3d 439, 448 (2016) (internal citations omitted). Moreover, if it is to be enforceable, a contract must be supported by consideration. "Consideration sufficient to create a contract 'consists of either a benefit to the promisor or a detriment to the promisee.'" Vista Food Exchange, Inc. v BenefitMall, 138 AD3d 535, 536 (1st Dept. 2016) (quoting Weiner v McGraw-Hill, Inc., 57 NY2d 458, 464 [1982]).

Under New York law, an oral agreement for at-will employment providing for the payment of commissions during the course of employment can suffice to create a binding contract. See Murphy v CNY Fire Emergency Services, Inc., 225 AD2d 1034, 1035 (1st Dept. 1996); see also Kieper v Fusco Group Partners, Inc., 152 AD3d 1030, 1031 (3rd Dept. 2017); Caruso v Malang, 250 AD2d 800, 800-01 (2nd Dept. 1998). However, where an employment contract is reduced to a writing that is "complete, clear and unambiguous on its face," the contract "must be enforced according to the plain meaning of its terms," without recourse to

extrinsic, or parol, evidence of what may have been agreed orally between the parties prior to execution of the written instrument. Schron v Troutman Sanders LLP, 20 NY3d 430, 436 (2013) (internal quotation marks and citations omitted); see Braten v Bankers Trust Co., 60 NY2d 155 (1983). Moreover, "[w]here there is a conflict between an express provision in a written contract and an alleged oral agreement, the oral agreement is unenforceable." Shah v Micro Connections, Inc., 286 AD2d 433, 433 (2nd Dept. 2001); see Braten v Bankers Trust Co., supra; Ferrari v Iona College, 95 AD3d 576 (1st Dept. 2012). Notwithstanding the foregoing, evidence of a prior oral agreement may be admissible if the subsequent writing does not constitute a complete and integrated instrument. See Jeremias v Toms Capital LLC, 204 AD3d 498, 499 (1st Dept. 2022); Saxon Capital Corp. v Wilvin Assoc., 195 AD2d 429, 430 (1st Dept. 1993).

Initially, the court notes that the plaintiff does not allege that he had any contractual relationship with Lamonsoff in his personal capacity. Accordingly, the first and second causes of action are dismissed insofar as asserted against that defendant.

As to the plaintiff's claims against the Law Firm, the amended complaint alleges that on April 19, 2019, in exchange for his acceptance of employment with the Law Firm, the defendants orally agreed to pay the plaintiff (a) $130,000 base salary; (b) 5% commission on settlements; (c) 10% commission on verdicts; and (d) 40% commission on cases the plaintiff referred to the Law Firm. On the same day, the plaintiff accepted the offer of employment. On April 21, 2019, after the plaintiff had accepted the job but before he started working at the Law Firm, the plaintiff signed the one-page offer letter. The offer letter stated the position to which the plaintiff was being hired and the starting annual salary to which the plaintiff would be entitled on a bi-weekly basis. The offer letter further advised the plaintiff that employment was on an at-will basis and that the plaintiff would be eligible for participation in the Law Firm's benefits program after

completing 90 days of employment. The offer letter was silent as to commission payments and bonuses.

The plaintiff's allegations are sufficient to state a claim for breach of the April 2019 oral agreement to pay commission. The April 2019 agreement, according to the plaintiff, resulted from the mutual assent of the plaintiff and Lamonsoff, on behalf of the Law Firm, and was supported by consideration insofar as the plaintiff agreed to perform as the Law Firm's employee in exchange for the compensation, including commission payments, promised to him. While the April 2019 agreement was followed by the execution of the offer letter, the pleadings raise doubt as to whether the offer letter was an integrated contract embodying all terms of the parties' agreement. To start, the offer letter contained no merger clause or no-oral modifications clause. See Jeremias v Toms Capital LLC, supra at 499; Stern v Ardachev, 133 AD3d 502, 502 (1st Dept. 2015); Saxon Capital Corp. v Wilvin Assoc., supra at 430. Further, the offer letter consists of only a few short paragraphs, references vague terms of employment, such as the benefits program, that it states are more fully explained in other documents, and contains no provision excluding the possibility of additional compensation terms or conflicting with the oral promise of commission payments in any manner. See Saxon Capital Corp. v Wilvin Assoc., supra at 430; Cf. Ferrari v Iona College, supra at 577; Shah v Micro Connections, Inc., supra at 433. Finally, the plaintiff pleads extrinsic circumstances to support his contention that the offer letter was not fully integrated, including representations in the Law Firm's job posting and throughout the recruitment process from Lamonsoff, Kirchner, and other agents of the Law Firm that commission incentives would be a condition of the employment the plaintiff sought.

The plaintiff has also stated a claim for breach of the August 2019 agreement, pursuant to which the plaintiff contends he was to receive a $30,000.00 bonus upon his completion of his

first year of employment with the Law Firm. Contrary to the defendants' assertions, the plaintiff's revoking his tendered acceptance of an offer of employment from another law firm was valid consideration for the Law Firm's promise of additional payment. See Ryan v Kellogg Partners Inst. Servs., 19 NY3d 1, 9 (2012); Gruber v J.W.E. Silk, Inc., 52 AD3d 339, 340 (1st Dept. 2008). The parties' at-will employment agreement was not an existing legal obligation for the plaintiff to remain employed by the Law Firm no matter what. Indeed, the plaintiff was free to depart from the Law Firm and was prepared to do so but-for the Law Firm's promise of a bonus in exchange for his agreement to stay.

For the foregoing reasons, the first and second causes of action survive as against the Law Firm.

ii. Third and Fourth Causes of Action

"It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." Dormitory Authority v Samson Construction Co., 30 NY3d 704 (2018) (citation omitted). However, the Court of Appeals has also recognized that "a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract." North Shore Bottling Co. v Schmidt & Sons, 22 NY2d 171 (1968); see also Sommer v Federal Signal Corp., 79 NY2d 540 (1992). Thus, in actions involving parties to a contract, a plaintiff states a cause of action sounding in fraudulent inducement where he pleads that the defendant misrepresented a present fact extraneous to the contract with knowledge of its falsity, the plaintiff justifiably relied on the misrepresentation, and the plaintiff suffered damages. See The Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320 (1st Dept. 2004); First Bank of

Americas v Motor Car Funding, Inc., 257 AD2d 287 (1st Dept. 1999); see generally Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553 (2009).

Here, the plaintiff contends in his third cause of action that the defendants made fraudulent representations, including that he would receive commissions and performance bonuses, that the plaintiff would have the opportunity to try "multi-million dollar cases" and make "vast amounts of money," and that the Law Firm was "thriving" in order to induce him to accept an offer of employment with the Law Firm.

The defendants' promises of commission compensation and bonuses to the plaintiff are plainly promissory statements of future performance and do not amount to a misrepresentation of a present fact extraneous to the contract, as required to state a separate cause of action based on a fraud in the inducement. See Glanzer v Kelin & Bloom, 281 AD2d 371, 371-72 (1st Dept. 2001). The plaintiff's attempt to bolster his fraud claims with the novel theory that he is entitled to damages other than commission compensation, for the "personal and family time he forwent" in reliance of the defendants' promise that they would pay him a performance-based commission, does not alter this conclusion.

The defendants' statement that the Law Firm was "thriving" is mere opinion and puffery that does not support an action for fraud. See Sidamonidze v Kay, 304 AD2d 415, 416 (1st Dept. 2003); Jacobs v Lewis, 261 AD2d 127, 127-128 (1st Dept. 1999); see also DH Cattle Holdings v Smith, 195 AD2d 202, 208 (1st Dept. 1994). Likewise, the defendants' statements that the plaintiff would have the opportunity to try high-stakes cases and make "vast amounts of money" are too indefinite and akin to opinion-based puffery to be actionable. See Glanzer v Keilin & Bloom, 281 AD2d 371, 372 (1st Dept. 2001). Moreover, with respect to this last set of statements, the plaintiff contends the defendants promised him opportunities. They did not,

however, promise additional terms of employment. That the opportunities allegedly did not materialize in the course of the plaintiff's one year of employment does not give rise to a fraud claim.

In the fourth cause of action, the plaintiff contends that the defendants falsely represented to him that they would pay him a retention bonus in order to induce him to remain at the Law Firm. Again, this is a clear promissory statement of future performance that cannot give rise to a fraud claim. That the plaintiff claims damages arising from lost opportunities is not unusual in a breach of contract action and certainly does not transform the plaintiff's simple breach of contract claim into a tort, as he contends. See Glanzer v Keilin & Bloom, supra.

Accordingly, the third and fourth causes of action of the amended complaint are dismissed.

The plaintiff's demand for punitive damages is likewise stricken as without merit. Punitive damages may be awarded only "where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, and others who might otherwise be so prompted, from indulging in similar conduct in the future." Walker v Sheldon, 10 NY2d 401, 404 (1961); see Marinaccio v Town of Clarence, 20 NY3d 506 (2013). For that reason, "punitive damages are not recoverable for an ordinary breach of contract." Rocanova v Equitable Life Assur. Soc. of U.S., 83 NY2d 603, 613 (1994).

iii. Fifth and Sixth Causes of Action

As a general rule, where a plaintiff seeks to recover under an express agreement, no cause of action lies to recover in quasi contract. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012). However, where the validity or scope of the contract is in dispute, a plaintiff may plead a claim under a quasi contract theory, such as unjust enrichment or promissory estoppel, in the alternative. See Clark-

Fitzpatrick, Inc. v Long Is. R.R. Co., supra; Henry Loheac, P.C. v Children's Corner Learning Center, 51 AD3d 476 (1st Dept. 2008); ME Corp. S.A. v Cohen Brothers LLC, 292 AD2d 183 (1st Dept. 2002). That is, "where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, plaintiff may proceed upon a theory of [quasi contract] and will not be required to elect his or her remedies (Joseph Sternberg, Inc. v Wolber 36th St. Assocs., 187 AD2d 225)." American Telephone & Utility Consultants, Inc. v Beth Israel Med. Ctr., 307 AD2d 834, 835 (1st Dept. 2003).

Here, the plaintiff sues upon alleged oral employment agreements he entered into with the Law Firm, through Lamonsoff, wherein he avers the Law Firm promised to pay him commissions and a bonus payment. The defendants contend that neither the April 2019 agreement nor the August 2019 agreement are enforceable contracts. Under these circumstances, the plaintiff's quasi-contract claims are not subject to dismissal as duplicative of the plaintiff's breach of contract claims.

A cognizable claim for unjust enrichment requires a plaintiff to demonstrate that (i) the other party was enriched, (ii) at that party's expense, and (iii) "it is against equity and good conscience to permit the [other party] to retain what is sought to be recovered." Paramount Film Distrib. Corp. v State, 30 NY2d 415, 421 (1972) (citations omitted).

The plaintiff states a claim for unjust enrichment inasmuch as he pleads that the Law Firm was enriched by accepting services he rendered without paying him what they promised. Contrary to the defendants' assertions, the plaintiff's alleged performance, including his negotiation of settlements, obtaining verdicts for Law Firm clients, referring new clients to the Law Firm, and agreeing to continue his employment with the Law Firm may have conferred a benefit to the Law Firm that would permit recovery under an unjust enrichment theory. See

Waldman v Englishtown Sportswear, Ltd, 92 AD 833, 836 (1st Dept. 1983) ("Where the express contract has been rescinded, is unenforceable or abrogated, a recovery may be had on an implied promise to pay for benefits conferred thereunder."); Silipo v Wiley, 138 AD3d 1178, 1181 (3rd Dept. 2016) (factual dispute as to whether plaintiff employee was promised more than her salary to perform certain work rendered dismissal of unjust enrichment claim inappropriate); Colton v Sperry Associates Federal Credit Union, 50 Misc 3d 129(A) (App. Term 2nd Dept. 2015).

"To establish a viable cause of action sounding in promissory estoppel, a plaintiff must allege (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise." Rogers v Town of Islip, 230 AD2d 727, 727 (2nd Dept. 1996); see Castellotti v Free, 138 AD3d 198, 2014 (1st Dept. 2016). Additionally, "as a general matter, an oral promise will not be enforced on this ground unless it would be unconscionable to deny it." Steele v Delverde S.R.L., 242 AD2d 414, 415 (1st Dept. 1997); see Porthault Co., Inc. v Jeddah Madison Corp., 43 AD3d 340, 341 (1st Dept. 2007). However, an employee's allegation that he refused other employment opportunities in order to work for his employer, even if done in reliance on purported promises of a certain salary and other benefits, does not create a cause of action for promissory estoppel. Dalton v Union Bank of Switzerland, 134 AD2d 174, 176 (1st Dept. 1987); see Chung v Williams Schwitzer & Associates, P.C., 200 AD3d 514, 516 (1st Dept. 2021); Hart v Windjammer Barefoot Cruises Ltd., 220 AD2d 252, 252 (1st Dept. 1995); Cunnison v Richardson, 107 AD2d 50, 530-54 (1st Dept. 1985).

Here, the plaintiff alleges only that he refused other opportunities of employment in reliance on the Law Firm's promises of commissions and a bonus, and that he was thereby injured. As stated above, this cannot form the basis of an estoppel claim. Moreover, the plaintiff

does not plead an unconscionable injury. See Laurel Hill Advisory Group, LLC v American Stock Transfer & Trust Co., LLC, 112 AD3d 486, 486-87 (1st Dept. 2013). Thus, the fifth and sixth causes of action must be dismissed to the extent they are premised on a promissory estoppel theory.

The plaintiff does not state any quasi contract claim against Lamonsoff in his personal capacity. The amended complaint fails to allege any facts, such as facts establishing that Lamonsoff stood to gain personally from the plaintiff's services or that he acted in other than his corporate capacity, that would support personal liability. See Ishin v QRT Management, LLC, 133 AD3d 449, 450 (1st Dept. 2015); Mackie v La Salle Industries, Inc., 92 AD2d 821, 822-23 (1st Dept. 1983). Accordingly, the fifth and sixth causes of action are dismissed in their entirety as against Lamonsoff.

iv. Seventh Cause of Action

Under Section 193 of the NYLL, "[n]o employer shall make any deduction from the wages of an employee," except under certain conditions not relevant here. N.Y. Lab. Law § 193. Section 190 of the NYLL 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." Id. § 190(1). To state a claim for violation of Section 193, a plaintiff must allege a specific deduction from wages and not merely a failure to pay wages. See Vergara v Mission Capital Advisors, LLC, 200 AD3d 484, 485 (1st Dept. 2021); Stec v Passport Brands, Inc., 182 AD3d 434, 434 (1st Dept. 2020); Perella Weinberg Partners LLC v Kramer, 153 AD3d 443, 449 (1st Dept. 2017) (collecting state and federal cases).

Here, the plaintiff's allegations that the defendants withheld commission and bonus payments from him do not suffice to state a Section 193 claim because they do not involve any

specific deduction from his earned wages. The plaintiff's insistence to the contrary based on his assertion that he received *some* commission and bonus payments is misplaced. The distinction between a specific deduction and a wholesale withholding of payment is not merely whether the amount the plaintiff claims is a percentage versus all of his total wages. Rather, a deduction within the meaning of Section 193 must be something more targeted and direct than a simple failure to pay. To be sure, as one federal court in the Southern District of New York observed, in a decision cited with approval by the Appellate Division, First Department, (Perella Weinberg Partners LLC v Kramer, supra at 449), "New York courts recognize that the purpose of [S]ection 193 is to 'place the risk of loss for such things as damaged or spoiled merchandise on the employer rather than the employee.'" Gold v American Medical Alert Corp., 2015 WL 4887525, *5 (S.D.N.Y. Aug. 17, 2015) (quoting Hudacs v Frito-Lay, Inc., 90 NY2d 342, 349 [1997]). The caselaw, and the statute itself, which includes a list of permissible "deductions" for such discrete purposes as payment for insurance premiums, gym membership dues, tuition, and day care (N.Y. Lab. Law § 193[b][i]-[xiv]), demonstrate that deductions "are better understood as, and limited to, things like fines, payments, or other forms of pay docking." Gold v American Medical Alert Corp., supra at *5. No occurrence of that nature has been alleged.

Accordingly, the seventh cause of action is dismissed in its entirety.

B. The Plaintiff's Motion to Dismiss

The plaintiff moves to dismiss the defendants' second, third, fourth, fifth, seventh, and eighth counterclaims and the defendants' second, fourth, thirteenth, and fourteenth affirmative defenses pursuant to CPLR 3016(b), 3211(a)(1), (5), and (7), and 3211(b). The plaintiff also seeks in his moving papers partial dismissal of the first counterclaim. The plaintiff asserts that each of the foregoing counterclaims is barred in whole or in part by certain agreements between

the plaintiff and the Law Firm at the time of the plaintiff's departure, or, at minimum, premature; that they are duplicative of the first counterclaim sounding in breach of fiduciary duty; and that they fail to state claims.

The plaintiff submits in support of his motion, *inter alia*, stipulations between the plaintiff's firm, Niamehr Law Firm, and the Law Firm (the substitution agreements), each executed in August 2020 by the plaintiff on behalf of his firm and Kirschner on behalf of the Law Firm. The substitution agreements each bear a different caption and index number attributable to an action commenced by a former client of the Law Firm and in which the Law Firm was counsel of record for such client. The substitution agreements each provide (1) that the Niamehr Law Firm is substituted for the Law Firm as counsel of record for the plaintiff in the relevant matter, (2) that the Niamehr Law Firm is to immediately remit disbursements in a fixed sum to the Law Firm in exchange for the Law Firm's turning over the file in the relevant matter, (3) that the Law Firm retains a lien on the net attorneys' fees upon the disposition of the relevant matter, (4) that the attorneys are to agree to the amount of said lien or participate in a fee hearing to be scheduled before the court in the relevant matter for the determination of said lien, and (5) that, upon the receipt of any settlement check, the Niamehr Law Firm shall notify the Law Firm in writing and hold all attorneys' fees in escrow until the Law Firm's lien is resolved.

The court addresses each counterclaim and affirmative defense that is the subject of the plaintiff's motion in turn.

i. First Counterclaim

To plead a cause of action for breach of fiduciary duty, the defendants must allege (1) the existence of a fiduciary relationship, (2) misconduct by the plaintiff, and (3) damages directly caused by the plaintiff's misconduct. See Burry v Madison Park Owner LLC, 84 AD3d 699 (1st

Dept. 2011); Rut v Young Adult Inst., Inc., 74 AD3d 776 (2nd Dept. 2010). "A cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016(b)." Swartz v Swartz, 145 AD3d 818, 823 (2nd Dept. 2016); see also Burry v Madison Park Owner LLC, supra.

An at-will employee can be found to have breached a fiduciary duty to his employer if he has "acted directly against the employer's interests," as in, for example, cases of "embezzlement, improperly competing with the current employer, or usurping business opportunities." Veritas Capital Management, L.L.C. v Campbell, 82 AD3d 529, 530 (1st Dept. 2011); see also Beach v Touradji Capital Management, LP, 144 AD3d 557, 563 (1st Dept. 2016). In such cases, where one who owes a duty of loyalty to a principal is faithless in the performance of his services, New York "mandates the forfeiture of all compensation." Art Capital Group, LLC v Rose, 149 AD3d 447, 449 (1st Dept. 2017) (internal quotation marks omitted) (citing Soam Corp. v Trane Co., 202 AD2d 162, 163-64 [1st Dept. 1994]).

In their first counterclaim, the defendants state that the plaintiff, as an employee of the Law Firm, owed the Law Firm a duty of loyalty. The defendants aver that the plaintiff breached that duty by actively soliciting clients of the Law Firm while he was still employed by the Law Firm and prior to giving notice of his departure, using Law Firm resources inappropriately to solicit clients, and disparaging the Law Firm to its clients. The plaintiff does not move to dismiss the first counterclaim in its entirety. Rather, the plaintiff avers in his moving papers that the first counterclaim should be limited to the plaintiff's alleged solicitation of the only two former Law Firm clients who substituted the plaintiff in the absence of a substitution agreement.

The plaintiff does not explain why the existence of substitution agreements with respect to some former Law Firm clients should bar the defendants' breach of fiduciary duty claim. As

explained above, an employer states a breach of fiduciary duty claim against its employee when it alleges that the employee acted against the employer's interests, including by improperly competing with the employer and/or usurping business opportunities. The defendants have alleged that the plaintiff did precisely that. While the parties may have preliminarily agreed to share attorneys' fees derived from business the plaintiff allegedly "stole" at the close of litigation, they did not enter into any release or other agreement resolving the defendants' claims. Moreover, if the defendants ultimately prevail on their faithless servant claim, they would be entitled to disgorge the plaintiff's compensation as an employee of the Law Firm, separate and apart from the attorneys' fees that are addressed in the substitution agreements.

For the foregoing reasons, the first counterclaim survives in its entirety.

ii. Second Counterclaim

"A [counter]claim of tortious interference requires proof of (1) the existence of a valid contract between [the defendants] and a third party; (2) the [plaintiff's] knowledge of that contract; (3) the [plaintiff's] intentional procuring of the breach, and (4) damages." Foster v Churchill, 87 NY2d 744, 749–50 (1996) (citation omitted); Macy's Inc. v Martha Stewart Living Omnimedia, Inc., 127 AD3d 48 (1st Dept. 2015); see also 330 Acquisition Co., LLC v Regency Sav. Bank, F.S.B., 293 AD2d 314, 315 (1st Dept. 2002); Mayo, Lynch & Assocs., Inc. v Fine, 148 AD2d 424 (2nd Dept. 1989). In the context of terminable-at-will retainer agreements between an attorney and a client, the underlying conduct must constitute a crime or an independent tort, the same heightened showing required in a claim for tortious interference with business relations. Steinberg v Schnapp, 73 AD3d 171, 176 (1st Dept. 2010); see also Ginarte Gallardo Gonzalez & Winograd v Schwitzer, 193 AD3d 614, 615 (1st Dept. 2021). "Allegations

of mere self-interest or economic motivations will not suffice." Steinberg v Schnapp, supra at 176 (citing Phillips v Carter, 58 AD3d 528 [1st Dept. 2009]).

Contrary to the plaintiff's assertions, courts in this state have held that it is possible to premise a tortious interference claim on the solicitation of a client with an at-will retainer agreement, provided sufficient wrongful conduct is also alleged. See, e.g., Lurie v New Amsterdam Cas. Co., 270 NY 379, 381 (1936); Ginarte Gallardo Gonzalez & Winograd v Schwitzer, supra; Dilimetin & Dilimetin v Stein, 297 AD2d 601, 602 (1st Dept. 2002); Lowenbraun v Garvey, 60 AD3d 916, 917 (2nd Dept. 2009); Koeppel v Schroder, 122 AD2d 780, 783 (2nd Dept. 1986). Here, the defendants have alleged that the plaintiff improperly solicited clients of the Law Firm while he was employed by the Law Firm and before he announced his departure, in violation of the plaintiff's fiduciary duty to the Law Firm. If the plaintiff's alleged conduct is, in fact, proven to amount to a breach of fiduciary duty, it constitutes an independent tort that qualifies as wrongful conduct for purposes of a tortious interference claim. See Guard-Life Corp. v S. Parker Hardware Mfg. Corp., 50 NY2d 183, 194 (1980); A.S. Rampell, Inc. v Hyster Co., 3 NY2d 369, 379 (1957); Out of Box Promotions, LLC v Koschitzki, 55 AD3d 575. 578 (2nd Dept. 2008); Zimmer-Masiello, Inc. v Zimmer, Inc., 159 AD2d 363, 366-67 (1st Dept. 1990). Thus, the defendants state a claim for tortious interference.

The substitution agreements present no basis for dismissing the second counterclaim. The conduct underlying such counterclaim is alleged to have occurred prior to the execution of the substitution agreements and is not addressed in the agreements in any manner. As the court has observed, the substitution agreements contain no release of any claims and no indication that they are intended to resolve any controversies between the parties. Cf. Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V., 17 NY 3d 269, 276 (2011) ("clear and

unambiguous" release bars claims). At most, the substitution agreements provide that the Law Firm has a claim to some undetermined percentage of the attorneys' fees that may be recovered in the underlying actions. They do not preclude the Law Firm from recovering upon the tort theories pleaded in this action.

Finally, the plaintiff presents no legal support for his argument that the defendants cannot plead a claim for tortious interference in addition to their claim for breach of fiduciary duty, even though premised on the same underlying conduct. While conduct actionable as legal malpractice or defamation may not be the subject of other independent tort claims, as the cases cited by the plaintiff explain, no such conduct or claim has been alleged here.

The second counterclaim survives in its entirety.

iii. Third Counterclaim

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.'" Epiphany Community Nursery Sch. v Levey, 171 AD3d 1, 8 (1st Dept. 2019) (quoting Eurycleia Partners, LP v Seward & Kissel, LLP, supra at 559). Fraud must be pleaded with particularity under CPLR 3016(b).

The defendants allege that, when he was interviewed for his position at the Law Firm, the plaintiff "misrepresented and exaggerated his experience as a trial attorney" and "claimed that he had significant trial experience." Clearly, this is insufficient to state a fraud claim. First, the defendants' allegation is insufficiently particularized inasmuch as it fails to identify such basic information as what trial experience the plaintiff represented having and how that was false. Moreover, the plaintiff's purported representation that he had "significant" experience is mere puffery that does not support an action for fraud. See Sidamonidze v Kay, supra at 416; Jacobs v

Lewis, supra at 127-128; DH Cattle Holdings v Smith, supra at 208; Glanzer v Keilin & Bloom, supra at 372.

The defendants further allege in their third counterclaim that the plaintiff, *inter alia*, falsely called in sick in his final days of employment with the Law Firm as part of a scheme to contact Law Firm clients and solicit them to leave the Law Firm and become clients of the plaintiff's new firm. While the plaintiff's notice of motion seeks to dismiss the third counterclaim in its entirety, the plaintiff clarifies on reply that he "has only sought to dismiss [the third counterclaim] based on the allegation that he misrepresented his trial experience."

Accordingly, the third counterclaim is dismissed to the limited extent that it is based on the plaintiff's alleged misrepresentations during the Law Firm's hiring process, and the third counterclaim otherwise survives.

iv. Fourth Counterclaim

As the court has explained above, a claim for unjust enrichment requires a party to establish that the other party was enriched at that party's expense, such that an equitable obligation should arise in order to prevent injustice. Paramount Film Distrib. Corp. v State, supra at 421. Here, the defendants claim that the plaintiff exploited Law Firm resources, including the Law Firm's infrastructure, client base, and good will, to "start[] a new practice behind [the Law Firm's] back…for the benefit of himself at the expense of [the Law Firm]."

To the extent the defendants assert that the plaintiff may be held liable on the bare fact that he gained experience and expertise while working for the Law Firm and subsequently started his own practice in the same field, the defendants fail to state a cognizable unjust enrichment claim. Indeed, it would be perverse to permit an employer to state an equitable claim against an ex-employee simply because such ex-employee learned on the job and later became a competitor

of the employer. The only reason the defendants might be entitled to recover for the conduct alleged in the fourth counterclaim is that such conduct amounts to one of the torts alleged in the first through third counterclaims. Thus, the defendants' unjust enrichment claim is duplicative of such counterclaims and could not stand in the absence of those counterclaims. See Corsello v Verizon N.Y., Inc., 18 NY3d 777, 790-91 (2012).

The fourth counterclaim is dismissed.

v. Fifth Counterclaim

The fifth counterclaim seeks disgorgement of all attorneys' fees earned on the cases wherein the plaintiff has been substituted for the Law Firm as a former Law Firm client's counsel of record. Disgorgement is not an independent claim, notwithstanding that the defendants have styled it as such. Rather, it is a remedy that the defendants may claim if they prevail on any of their first through third counterclaims. In any event, the plaintiff fails to establish that the defendants should be precluded from seeking disgorgement of attorneys' fees as a remedy. While the substitution agreements establish that the defendant has a lien on fees in some of the actions in which the plaintiff was substituted, they award no fees to the defendant. Moreover, as the court has stated, they contain no release or other resolution with respect to the defendants' tort claims.

The plaintiff's argument that any attempt to disgorge attorneys' fees is premature is likewise unavailing. Contrary to the plaintiff's assertions, the defendants adequately allege that the plaintiff is being compensated for his work on the underlying cases, which has been ongoing since August 2020. Notably, the plaintiff does not deny that he has recovered fees for his work. Rather, the plaintiff claims that the substitution agreements "provide the exclusive procedure for resolution of the apportionment of fees" on the cases they govern. But the substitution

agreements contain no such exclusivity provisions and, once again, no release of any of the claims in this matter.

Accordingly, the defendants' demand for disgorgement of attorneys' fees, though improperly styled as an independent cause of action, survives as a demand for relief pursuant to the defendants' first through third counterclaims. Of course, in the event the Law Firm recovers a percentage of fees in the underlying actions prior to the resolution of the defendants' counterclaims, any disgorgement awarded in this action would be limited to fees not already recovered.

vi. Seventh Counterclaim

Pursuant to CPLR 3001, the court may "render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed," (CPLR 3001), for the "primary purpose" of "stabiliz[ing] an uncertain or disputed jural relationship with respect to present or prospective obligations" (Chanos v MADAC, LLC, 74 AD3d 1007, 1008 [2nd Dept. 2010] [citing Goodman v Reisch, 220 AD2d 383 (2nd Dept. 1995)]; see Touro Coll. v Novus Univ. Corp., 146 AD3d 679 [1st Dept. 2017]).

The seventh counterclaim seeks a judicial declaration of the amount or percentage of attorneys' fees to which the plaintiff and the Law Firm are entitled for each former Law Firm client matter on which the plaintiff has been substituted for the Law Firm as counsel. In essence, the defendants ask the court to determine the parties' relative rights to legal fees the plaintiff may earn on former Law Firm client matters in the future.

The plaintiff avers that any declaratory judgment as to apportionment of fees is premature because "the facts necessary to apportion fees have not yet occurred because work on these cases

is ongoing." In fact, if the work was completed and it could be ascertained what the plaintiff's total earnings on the cases were, declaratory judgment would be inappropriate because the court could simply apportion damages. Since the parties agree that work on the cases has not been completed, the defendants, at this juncture, sufficiently state a claim for a declaration of the parties' rights with respect to the plaintiff's future earnings on such cases.

vii. Eighth Counterclaim

The plaintiff argues that the defendants' equitable cause of action for an accounting of attorneys' fees earned on the cases in which the plaintiff substituted for the Law Firm, like the defendants' demand for disgorgement of attorneys' fees, is duplicative and premature. For the reasons the court has discussed, those arguments are rejected and the eighth counterclaim survives.

viii. Affirmative Defenses

The defendants' second affirmative defense states, "Plaintiff's damages, if any, were not caused by Mr. Lamonsoff or by [the Law Firm]." The defendants' fourth affirmative defense sounds in waiver, acquiescence, laches, and/or estoppel. At this stage in the proceeding, based on the defendants' denials and assertions in the answer and prior to any discovery taking place, the defendants' second and fourth affirmative defenses survive. The burden remains on the defendants to ultimately establish the validity of such affirmative defenses.

However, the defendants fail to rebut the plaintiff's arguments with respect to, or demonstrate any potential merit as to, the thirteenth affirmative defense, founded upon the statute of frauds, and the fourteenth affirmative defense, invoking statute of limitations. Accordingly, those affirmative defenses are dismissed.

IV. CONCLUSION

Accordingly, it is

ORDERED that the motion of the defendants Law Offices of Michael S. Lamonsoff, PLLC, Michael Lamonsoff, and Beth Kirschner (SEQ 001) to dismiss the amended complaint is deemed withdrawn as moot insofar as asserted on behalf of Beth Kirschner only, pursuant to the stipulation of discontinuance filed by the parties on February 10, 2022, and the amended complaint is dismissed as against Beth Kirschner, with prejudice and without costs, pursuant to the same stipulation; and it is further

ORDERED that the balance of the defendants' motion to dismiss the amended complaint is granted to the extent that the third, fourth, and seventh causes of action of the amended complaint are dismissed in their entirety, the fifth and sixth causes of action of the amended complaint are dismissed to the extent they are premised on a theory of promissory estoppel, all causes of action in the amended complaint are dismissed in their entirety as against defendant Michael Lamonsoff, and the plaintiff's demand for punitive damages is stricken, and the motion is otherwise denied; and it is further

ORDERED that the plaintiff's motion to dismiss the defendants' second, third, fourth, fifth, seventh, and eighth counterclaims and the defendants' second, fourth, thirteenth, and fourteenth affirmative defenses, is granted to the extent that the third counterclaim is dismissed to the extent it is based on the plaintiff's alleged misrepresentations during the defendants' hiring process, the fourth counterclaim is dismissed in its entirety, and the thirteenth and fourteenth affirmative defenses are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the plaintiff shall reply to the defendants' surviving counterclaims within 21 days of entry of this decision and order; and it is further

ORDERED that the parties shall appear for a preliminary conference, to be conducted via Microsoft Teams, on December 15, 2022, at 12:30 p.m.

This constitutes the Decision and Order of the court.

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

DATED: September 30, 2022