SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

Emic Corp.

INDEX NO. 153977-2016

MOT. DATE

- v -

MOT. SEQ. NO. 7-9

Richard Barenblatt et al

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

There are three motions for summary judgment pending in this action. In motion sequence 7, defendant GuardHill Financial Corp ("GuardHill") moves for summary judgment dismissing plaintiff Emic Corp. formerly known as Apple Mortgage Corp.'s ("Emic") fifth cause of action against it. Emic opposes that motion.

In motion sequence 8, Emic and third-party defendant Eric Appelbaum (collectively the "Emic Parties") move: [1] to strike the answers asserted by defendants Richard Barrenblatt, David Breitstein and GuardHill based upon spoliation of evidence; [2] awarding Emic summary judgment on liability on its first cause of action for breach of fiduciary duty; and [3] dismissing the counterclaims asserted by defendants Barrenblatt, Breitstein, Keith Furer and Kevin Ungar (collectively the "individual defendants") for unpaid commissions and alleged improper deductions. Defendants oppose that motion.

Finally, in motion sequence 9, the individual defendants move for summary judgment dismissing Emic's claims against them and for summary judgment on their counterclaims and third-party claims for minimum wage, overtime, failure to provide wage statements, and failure to pay commissions. The individual defendants further seek attorneys fees and expenses. The Emic Parties oppose the individual defendants' motion as well.

Issue has been joined and note of issue was filed May 26, 2022. All three motions were brought within 120 days after note of issue was filed, as per the preliminary conference order dated February 11, 2020. Therefore, the motions are timely and will be considered by the court.

The relevant facts are as follows. Emic, which was owned by Appelbaum at all relevant times, formerly employed the individual defendants as Mortgage Loan Originators ("MLOs") until the latter resigned on September 3, 2013 and began working at GuardHill, one of Emic's competitors according to

Dated: 4/12/23

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☒ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

the complaint. The complaint further asserts that the individual defendants "copied and removed from [Emic] information concerning [Emic's] customers and potential customers which constituted confidential information belonging to [Emic] and, in many cases, personal financial information of borrowers and potential borrowers who had entrusted such information to [Emic]." Emic claims that the individual defendants then deleted portions of the information they improperly took from Emic's computer network "in an obvious attempt to avoid detection." Emic has asserted claims for breach of fiduciary duty, unfair competition, unjust enrichment and conspiracy against the individual defendants and aiding and abetting breach of fiduciary duty against GuardHill.

GuardHill's Employment Agreements with the Former Employees included a provision, Section 15, which expressly provided that "Employee agrees not to disclose proprietary information belonging to a former employer or other entity without its written permission." Section 6 of said agreement, entitled "Employment Announcement", further provided:

> Employee understands and agrees that, as an Employee for the Company, he/she is required by Company policy to send email announcements to his database of clients and referral sources within the first fourteen days of his/her employment with the Company. The Company shall provide the support of the Company's Marketing Specialist to assist Employee with organizing his database to assist Employee in completing this requirement.

According to a sworn affidavit by Alan Rosenbaum, former CEO of GuardHill, such email announcements were standard and customary for MLOs. Rosenbaum further states:

> GuardHill did not want and never asked the Former Employees to provide GuardHill with any confidential information belonging to Apple Mortgage Corp. or any of its customers. To the best of GuardHill's knowledge, the Former Employees never provided GuardHill with confidential information belonging to Apple Mortgage Corp. or their customers.

Meanwhile, the individual defendants generally admit that they took client contact information with them when they departed Emic but deny that such acts were improper. The individual defendants further claim that this lawsuit was commenced because Appelbaum was "enraged" when the individual defendants left Emic to work for GuardHill and that "for years, Appelbaum and Apple failed pay minimum wage and overtime as required by law, made unlawful deductions from commissions due and owing to the Individual Defendants, and otherwise violated fundamental requirements of the New York State Labor Law. When the Individual Defendants resigned, Appelbaum and Apple illegally withheld commissions from closed and pending deals that had been procured by the Individual Defendants, further violating the law."

There was prior litigation between the parties in the United States District Court for the Southern District of New York, entitled Apple Mortgage Corp. v. Richard Barenblatt et al., No. 13-cv-9233 (the "Federal Action"). In the Federal Action, Emic pursued largely identical claims against the individual defendants for alleged misconduct when they left Emic's employ. In an Opinion and Order dated February 15, 2016 (the "2/15/16 Order"), Judge John G. Koeltl, *inter alia*, dismissed Apple's claims for lack of standing. As Judge Koeltl explained, Emic entered into a purchase agreement with Sterling National Bank ("Sterling") on February 4, 2014, after the Federal Action was commenced, pursuant to which Emic sold to Sterling its right to prosecute the Federal Action against the individual defendants. Judge Koeltl stated in pertinent part as follows:

> The purchase agreement between Sterling and Apple is clear: "[Sterling] will acquire all of the business, assets, and rights" of Apple. [] Sterling thus acquired Apple's right to pursue the claims against the defendants and thus, Apple lost its standing to bring its claims. ...

> Apple does not argue that the contract is ambiguous. Apple instead argues that Sterling and Apple did not intend for Apple's claims to be included in the asset sale. [] To the extent that the purchase agreement appears to sell Apple's rights to Sterling, Apple argues that there was a mutual mistake by the parties. Under New York law, however, "a mutual mistake must be as to a fact, and not as to the legal consequences of the contract into which the parties are entering." []
>
> To the extent the agreement conveyed Apple's rights in this lawsuit to Sterling, Apple requests that this Court reform the contract to give effect to the parties' intent. But the court cannot reform a contract between Apple and Sterling because Sterling is not a party to this action and the reformation would affect Sterling's rights under the purchase agreement.

Thus, Judge Koeltl dismissed Emic's claims without prejudice for lack of jurisdiction.

Applicable law

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Motion sequence 7

The court will first consider GuardHill's motion. GuardHill argues that Emic lacks standing to pursue its claims against it. In opposition, Emic maintains that it has standing because, on May 4, 2016, Apple and Sterling executed an Amendment to Purchase Agreement and Amendment to Bill of Sale Agreement (the "Amendment"), pursuant to which they amended the original transaction documents to reflect the parties' original intent that Apple's claims against the Individual Defendants and GuardHill were not among the assets sold to Sterling. The Amendment provides in pertinent part as follows:

> WHEREAS, Apple Mortgage Corp., a New York Corporation ("APPLE"), Eric Appelbaum ("Appelbaum"), Sterling National Bank, a national banking association ("SNB") and Sterling Bancorp., a financial holding company ("Bancorp") entered into a Purchase Agreement dated as of February 4, 2014 (the "Purchase Agremeent");
>
> WHEREAS, APPLE changed its name to Emic Corp. ("EMIC") on July 2, 2014; and
>
> WHEREAS, EMIC, Appelbaum and SNB wish to amend the Purchase Agreement solely to confirm that pursuant thereto, SNB did not acuiqre from APPLE: (i) any of its rights and claims, and interests therein, against David Breitstein, Richard Barrenblatt, Keith Furer and Kevin Ungar including but not limited to those claims asserted by APPLE against Mssrs. Breitstein, Barenblatt, Furer and/or Ungar in the litigation filed by APPLE against them and pending in the United States District Court for the Southern District of New York.... ; and/or (ii) any of APPLE's rights and claims, and interests therein, against GuardHill Financial Corporation

("GuardHill"), including but not limited to any claims related to GuardHill's employment of Mssrs. Breitstein, Barenblatt, Furer and/or Ungar and/or the claims asserted against them by APPLE in the Action.

NOW, THEREFORE, in consideration of the mutual representations, warranties and covenants contained in the Purchase Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree that the Purchase Agreement is amended solely as follows, and otherwise remains in full force and effect:

Paragraph 1(a): the text set forth in Paragraph 1(a) of the Purchase Agreement is hereby replaced and superseded by the following:

"SNB will acquire the business, assets and rights of APPLE set forth on Exhibit A (collectively, the "Assets")."

EXHIBIT A: Exhiibt A of the Purchase Agreement is hereby replaced and superseded by the amended Exhibit A attached hereto.

GuardHill argues that the Amendment was a "sham and did not alter the transaction in any way" because "Sterling received no new consideration for the [A]mendment." In turn, Emic asserts that the Amendment did in fact alter the purchase agreement because it "ma[d]e clear that not all of Apple's assets were being sold to Sterling..." In an echo of arguments made before Judge Koeltl, Emic next argues that the Amendment was not a sham because neither Apple nor Sterling "intended that Sterling would be purchase Apple's claims against the [i]ndividual [d]efendants or GuardHill as part of the transaction, and that the [p]urcahse [a]greement ... incorrectly memorialized the agreement between the parties. This is a textbook 'mutual mistake' warranting reformation of the agreements." Finally, Emic claims that the Amendment was supported by consideration because Sterling avoided litigation to reform the purchase agreement based on the parties' mutual mistake." To support this claim, plaintiff's counsel points to a letter from David J. Minder, Senior Counsel for Sterling, dated September 16, 2014, who states:

Dear Mr. Appelbaum:

This is to confirm that in connection with the Purchase Agreement between Apple Mortgage Corp and Eric Appelbaum and Sterling National Bank and Sterling Bancorp [] dated February 4, 2014, the referenced lawsuit was not included in the assets purchased by Sterling.

Emic also points to the testimony of Michael Bizenov, then President of Consumer Banking at Sterling, taken in January 2015 during the course of the Federal Action. Bizenov stated that it was not Sterling's intent to acquire Apple's claims against the Individual Defendants and GuardHill as part of the foregoing purchase.

The Court disagrees with GuardHill that the Amendment is not enforceable. "All contracts must be supported by consideration, consisting of a benefit to the promisor or a detriment to the promisee (*Beitner v. Becker*, 34 AD3d 406 [2d Dept 2006]). However, a contract will be given effect if the past consideration is fully expressed in the challenged contract (*see i.e. Mast Property Investors, Inc. v. Gaines Service Leasing Corp.*, 194 AD2d 412 [1st Dept 1993]). The court finds that the statement ", in consideration of the mutual representations, warranties and covenants contained in the Purchase Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged" is sufficiently specific to take this past consideration out of the general rule. Since the Amendment is supported by sufficient consideration, it is enforceable. Meanwhile, Judge Koeltl's order, which is law of the case, does not require a different result. Judge Koeltl ruled that the purchase agreement transferred the rights to prosecute the underlying claims in this action to Sterling, and the Amendment

clearly states that those rights belong to Emic. Thus, Emic has standing to prosecute the claims it has brought in this action against the defendants.

In light of this result, the court declines to consider the parties' remaining arguments on the issue of standing. To the extent that GuardHill argues Emic also sold its customer lists and related information which forms the basis of its claims in this action, that argument merely goes towards the measure of Emic's damages in this action, since there is no dispute that there was an approximate six-month gap between the individual defendants' departure from Emic and execution of the purchase agreement.

GuardHill next argues that Emic's aiding and abetting breach of fiduciary duty claim cannot be sustained against it. Specifically, GuardHill maintains that Emic cannot show that GuardHill induced or participated in the breach. Emic asserts that triable issues of fact preclude summary judgment. On this issue, the court sides with Emic.

A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach (*Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003]). "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so . . ." (*id.* at 126). Here, there is an issue of fact as to whether GuardHill assisted the individual defendants' purported breaches of fiduciary duty based on GuardHill's undisputed requirement that new employees were required to send emails to their contacts obtained and/or maintained during the course of their former employment, as described above and below. While the employee agreement obligated the individual defendants "not to disclose proprietary information belonging to a former employer or other entity without [GuardHill's] written permission", the fact does not mandate judgment as a matter of law in favor of GuardHill. Moreover, Emic has raised triable issues of fact by highlighting evidence and testimony that GuardHill employees assisted Barenblatt in extracting information from Emic's computer system and assisted Furer in inputting client loan application forms into GuardHill's system. For at least these reasons, the balance of GuardHill's motion must be denied.

Motion sequences 8 and 9

The remaining motions are interrelated and are herein considered in tandem. The Emic Parties first move for spoliation sanctions in the form of an order striking defendants' answers because GuardHill never inspected Barenblatt or Breitstein's computers for Apple files, nor did GuardHill instruct the individual defendants to preserve their original computers. The Emic Parties further complain that "Breitstein's computer apparently was replaced in 2015 without him having experienced any problems, while the federal action was pending and likely after GuardHill was on notice to preserve same." Defendants argue the request for spoliation sanctions is untimely and moot since it has been raised after years of litigation and after note of issue was filed. Otherwise, defendants assert that there is no basis for the relief, claiming that Barenblatt and Breitstein have preserved discovery and that plaintiff only demanded that GuardHill produce the computers six years after the individual defendants began working for it.

Spoliation of a key piece of evidence, whether negligent or intentional, may warrant dismissal of an action or the striking of responsive pleadings (*Standard Fire Ins. Co. v. Federal Pac. Elec. Co., 14 AD3d 213* [1st Dept 2004]). Dismissal or striking a responsive pleading is warranted only where the spoliated evidence is the sole means by which a party can establish a claim or defense, where a claim or defense is otherwise "fatally compromised" or a party is "left 'prejudicially bereft' of its ability to defend as a result of the spoliation (*Arbor Realty Funding, LLC v. Herrick, Feinstein LLP*, 140 AD3d 607 [1st Dept 2016]).

The Emic Parties have failed to establish that the missing computers are the only way to prove their claims or defenses. Therefore, the drastic relief they seek is unwarranted. To the extent that the Emic Parties may be entitled to an adverse inference at trial, they may make an appropriate application to the trial judge.

As for the balance of the Emic Parties' motion, which seeks partial summary judgment on the first cause of action for breach of fiduciary duty against the individual defendants and dismissing the individual defendants' counterclaims, it is also denied. At-will employees owe a limited duty of loyalty to their employees which is only breached "where the employee has acted directly against the employer's interests – as in embezzlement, improperly competing with the current employer, or usurping business opportunities" (*Veritas Capital Mgt., L.L.C. v Campbell*, 82 AD3d 529 [1st Dept 2011]). While the Emic Parties maintain that they have established the individual defendants took confidential information including client contact information from Emic without Emic's permission, the individual defendants hotly contest the circumstances surrounding Emic's claims and whether this act was improper. The court cannot resolve these issues of fact on this record, which remain for a factfinder to determine. Therefore, the motion sequence 8 as to plaintiff's first cause of action is denied.

Relatedly, the individual defendants are not entitled to dismissal of Emic's claims against them. Triable issues of fact preclude summary judgment as to Emic's first cause of action for the reasons already stated. Further, to the extent that the individual defendants argue the Federal Action resolved the issue of whether the information they took from Emic was confidential, the court disagrees. For example, Judge Koeltl stated: "... the defendants testified that they agreed that the customer's lists were confidential and could not be posted or sent outside of Apple." Accordingly, motion sequence 9 is denied as to Emic's first cause of action.

Emic's remaining claims against the individual defendants are for: unfair competition [2nd COA]; unjust enrichment [3rd COA]; and conspiracy against Breitstein, Furer and Ungar [4th COA]. As Emic's counsel points out, an unfair competition claim "may be based on misappropriation of client lists . . . if wrongful . . . tactics [are] employed" (*Barbagallo v. Marcum, LLP*, 820 FSupp2d 429, 447 [EDNY 2014]). Here, the court agrees that there is sufficient evidence of a "physical taking" and "wrongful tactics" so as to survive defendants' motion for summary judgment. Accordingly, motion sequence 9 is denied as to Emic's second cause of action.

Motion sequence 9 is also denied as to Emic's third cause of action. An unjust enrichment claim is a quasi-contract arising when a defendant was enriched at plaintiff's expense and it is against equity and good conscience that defendant retain what is sought to be recovered (*Travelsavers Enterprises, Inc. v. Analog Analystics, Inc.*, 149 AD3d 1003 [2d Dept 2017]). In terms of damages, Emic's seeks the commissions received by the individual defendants at GuardHill for certain borrowers whose loans closed at GuardHill after Apple ceased doing business. Contrary to defense counsel's contention, a claim for unjust enrichment may arise from misappropriation of confidential client information (*see i.e. SRM Beauty Corp. v. Sook Yin Loh*, 30 Misc3d 1222[A] [Sup Ct Queens Co 2011]).

Finally, the individual defendants' motion is denied as to Emic's fourth cause of action. While New York does not recognize an independent tort of conspiracy, plaintiff has alleged sufficient tortious conduct to support a separate claim for conspiracy against the subject defendants. Contrary to defense counsel's contention, plaintiff has alleged more than that Breitstein, Furer and Ungar jointly decided to resign. Accordingly, motion sequence 9 is denied as to Emic's complaint.

The court now turns the balance of motion sequences 8 and 9 as to the individual defendants' counterclaims and third-party claims. The individual defendants have asserted the following claims, which the court will refer to as counterclaims for the sake of brevity: against Emic for breach of contract [1st counterclaim]; against Emic and Appelbaum for illegal deductions from wages [2nd counterclaim]; against Emic and Appelbaum for unpaid commissions [3rd counterclaim]; against Emic and Appelbaum for failure to pay minimum wage and overtime [4th counterclaim]; against Emic and Appelbaum for failure to provide wage statements [5th counterclaim]; and against Emic and Appelbaum for fraud [6th counterclaim].

Emic does not dispute that the individual defendants were entitled to be paid a minimum wage and overtime, if they worked overtime. Further, it is undisputed that the individual defendants only received commissions and did not receive compensation for work weeks at a time. Thus, the individual defend-

ants have established that they were not paid a minimum wage in violation of Labor Law § 652 to the extent that they worked and did not receive minimum wages. However, there material questions of fact as to what days and how many hours the defendants worked, as well as whether the individual defendants worked overtime, thus precluding summary judgment on the individual defendants fourth counterclaim for failure to pay overtime. Contrary to defense counsel's contention, a factfinder could discredit the individual defendants' claims about the number of hours they worked and credit Appelbuam's observations and testimony about same. Thus, both motions are denied as to the individual defendants' overtime claims.

As for their calculation of damages, the individual defendants have lumped their minimum wage and overtime calculations together in charts entitled scenarios with no contemporaneous proof that they actually worked the weeks or hours they claim to have worked. Further, the individual defendants claim to "have calculated the amounts owed to them in minimum wage and/or overtime for the period from May 11, 2010 (six years before the Complaint was filed in this action) through August 30, 2013 (the date of their last paychecks from Apple). They are owed the following back wages: Barenblatt - $748,327.05; Breitstein - $192,626.12; Furer - $871,850.69; and Ungar - $334,279.49." The individual defendants have failed to demonstrate through competent proof their measure of damages on this motion. Accordingly, they are only entitled to conditional summary judgment on liability on their fourth counterclaim for failure to pay minimum wages to the extent that the individual defendants can prove that they worked the days/weeks that they did not receive adequate compensation.

N.Y. Labor Law § 198(1-a) provides 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 ....

Since the individual defendants have failed to demonstrate a wage violation under the Labor Law, the court declines to address as premature the parties' arguments as to whether the Emic Parties had a good faith basis to believe that its underpayment of wages was in compliance with the law.

The Emic Parties do not oppose the individual defendants' motion on their claim for failure to provide wage statements as required by the then-effective version of Labor Law § 198[1-d]. Accordingly, the individual defendants' motion is granted on the fifth counterclaim and each individual defendant is granted a money judgment in their favor against Emic for $2,500, along with costs and reasonable attorney's fees to be determined after trial.

The individual defendants seek to hold Appelbaum personally liable for all sums due from Emic on the grounds that he is an employer as that term is defined under Labor Law § 190[1]. Appelbaum does not dispute that he qualifies as an employer, but argues that his liability is limited to unpaid wages beginning March 26, 2013, which the individual defendants do not dispute on reply. Accordingly, the court finds that Appelbaum is liable for unpaid wages from March 26, 2013 through the date of their resignation on September 3, 2013.

The court next considers the parties' arguments as to allegedly unpaid commissions which implicates their first and third counterclaims. "[A] sales representative, hired at will, is not entitled to commissions after the termination of employment" (*Devane v. Garg*, 171 AD3d 605 [1st Dept 2019] quoting *Mackie v. La Salle Indus.*, 92 AD2d 821 [1st Dept. 1983]). The individual defendants' employment agreements, which have been provided to the court, are substantially similar. With respect to compensation, these agreements state in pertinent part as follows:

> Your compensation will be based on [50-56]% of the loan amount and cannot vary from one transaction to another. First $[250-400] will reduced (sic) from 1% of the loan amount. Then your compensation will be [50-56]% of the remainder.
>
> If your loan applications pass our initial quality check and achieve an approved/committed status without first being suspended for conditions other than collateral approval then you are eligible for an additional 4% of the loan amount to be paid quarterly.
>
> If you originate the same or more loans in the preceding quarter than you originated in the prior year's same quarter then you are eligible for an addition (sic) 3% to be paid quarterly.
> ...
>
> If you originate a loan through a new referral source versus through any Apple [] website inquiries then you are eligible for an additional 3% on that transaction to be paid quarterly.
>
> If you close more than 90% of all loans submitted (excluding transactions where the property doesn't appraise to the necessary LTV) then you are eligible for an additional 3% to be paid quarterly.
>
> If you close a new transaction for a. past customer you are eligible for an additional 3% to be paid quarterly.

The subject employment agreements do not provide for post-employment commissions. While the individual defendants rely on cases such as *Arbeeny v Kennedy Exec. Search, Inc.* (71 AD3d 177 [1st Dept 2010]) and *Yudell v. Israel & Assoc.* (248 AD2d 189 [1st Dept 1998]), these cases are distinguishable because the employment agreements at issue do not entitle the individual defendants to commissions for all loans arranged or originated by the defendants. The individual defendants' reliance on Judge Koeltl's decision is also misplaced. Judge Koeltl declined to dismiss the individual defendants' counterclaim for unpaid commissions "on loans that closed before the defendants left [Emic]" because "[t]here is at least a question of fact as to whether these commissions should be classified as 'post-termination' or pre-termination. It is unclear whether the Compensation Agreements contemplated that the employees should receive their commissions in the event that they left Apple before submitting their final commissions sheets and whether the Compensation Agreements preclude paying the employees commissions because the employees were no longer employed at the time the final paychecks were issued."

To the extent that there is nothing on this record which would resolve the issue of fact previously identified by Judge Koeltl, the motions as to the first and third counterclaims for unpaid commissions are denied as to loans closed prior to the individual defendants' resignation. As for the remainder of the first and third counterclaims, the Emic Parties' motion for summary judgment dismissing this portion of the individual defendants' claims is granted and the individual defendants' respective request for relief is denied.

Finally, the court considers the individual defendants' first and second counterclaims based on improper deductions. The individual defendants allege that the Emic Parties took the following improper deductions: "(a) deductions to commissions where the initial leads were supposedly generated by Apple; (b) deductions to commissions for medical insurance payments; and (c) deductions to commissions designated, falsely, as for "FICA," a known acronym for a United States mandatory tax pursuant to the Federal Insurance Contributions Act."

In the Federal Action, the individual defendants only asserted an improper deduction claim with respect to the "FICA" deduction of $276. On this point, Judge Koeltl's decision is on point. Relying on

Pachter v. Bernard Hodes Group, Inc. (891 NE2d 279 [2008]), Judge Koeltl held that the parties' course of conduct prior to the individual defendants' execution of the employment agreements (*supra*) in July 2012 bars the individual defendants' claim that the deductions were improper. After July 2012, only Breitstein continued to be charged the deduction until his resignation. Therefore, Judge Koeltl dismissed Barenblatt, Furer and Ungar's improper deduction claims and Breitstein's improper deduction claim survived.

While the parties argue and whether or not the improper deduction claims should be dismissed, there is no dispute that for all pay periods for which the individual defendants claim improper deductions were taken, they each prepared and submitted to Apple a worksheet calculating the amount of commissions to which they believed they were entitled. It was this course of conduct which Judge Koeltl based his decision on that *Pachter* was dispositive on the individual defendant's pre-July 2012 improper deduction claims. Thus, to the extent that the individual defendants have asserted improper deduction claims which arose prior to July 2012, these claims must be dismissed.

With respect to alleged improper deductions post-July 2012, neither side has specified what improper deductions were taken. Judge Koeltl already found that Breitstein had FICA deductions taken post-July 2012 which were not permitted under the applicable employment agreement. Since the movant on a motion for summary judgment bears the burden of demonstrating entitlement to the relief sought, and neither side has demonstrated entitlement to judgment as a matter of law as to post-July 2012 deductions, the motions as to these claims is also denied.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED GuardHill's motion for summary judgment (sequence 7) is denied; and it is further

ORDERED that the Emic Parties' motion for summary judgment (sequence 8) is granted to the following extent:

> [1] the individual defendants' first and third counterclaims for unpaid commissions on loans that closed after the individual defendants resigned on September 3, 2013 are severed and dismissed; and
>
> [2] to individual defendants' first and second counterclaims for improper deductions which arose prior to July 2012 are severed and dismissed.

And it is further **ORDERED** that the individual defendants' motion for summary judgment (sequence 9) is granted to the following extent:

> [1] the individual defendants are entitled to conditional summary judgment on liability on their fourth counterclaim for failure to pay minimum wages to the extent that the individual defendants can prove that they worked the days/weeks that they did not receive adequate compensation;
>
> [2] the individual defendants are awarded summary judgment on their fifth counterclaim for failure to provide wage statements and each individual defendant is granted a money judgment in their favor against Emic and Appelbuam, joint and severally, for $2,500, along with costs and reasonable attorney's fees to be determined after trial;
>
> [3] the court finds that Appelbaum is liable for unpaid wages from March 26, 2013 through the date of their resignation on September 3, 2013.

And it is further **ORDERED** that motion sequence numbers 8 and 9 are otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 4/12/23
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.