SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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JOSHUA M. BERMAN,

Plaintiff,

-against-

Index No.
604049/2007

TYCO INTERNATIONAL LTD. and TYCO INTERNATIONAL (US) INC.,

Defendants.

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Madden, J.:

Defendants Tyco International Ltd. and Tyco International (US) Inc. (collectively Tyco) move for partial summary judgment dismissing the first, fourth, and sixth causes of action in the complaint.

Plaintiff Joshua M. Berman, a former vice president and director for Tyco, brought this action against Tyco seeking damages for unpaid salary for a five-month period in 2002, and severance pay under the company's severance plan, under theories of breach of contract, violation of the New York Labor Law, promissory estoppel, unjust enrichment, quantum merit, and under ERISA (29 USC §§ 1001 et seq.). The action had initially been brought here, then removed to federal district court, and then returned to this court upon dismissal of the ERISA claim. Tyco now moves for partial summary judgment on plaintiff's claims for severance pay, and for relief under the Labor Law section 198 (1-a). It argues that, in a July 31, 2002 letter agreement, plaintiff expressly waived participation in any Tyco benefit plans, which would include its severance plan, and that, even if he did not, he was not eligible for such pay, because his

termination was not part of a reduction in force. Plaintiff counters that he did not waive severance pay, and neither party intended that he waive such right. He further argues that the plan did not require that his termination be a reduction in force, and even if it did, it was, in fact, such a reduction.

BACKGROUND

Plaintiff is an attorney, and worked as outside counsel for Tyco beginning in 1965 (defendants' statement of material facts in support of motion, dated February 24, 2014 [Tyco statement of material facts], ¶ 1; plaintiff's counter-statement of material facts in opposition, dated May 8, 2014 [plaintiff's counter-statement], ¶ 1). In 1966, he was elected as an officer of Tyco; in 1967, he was elected to the board of directors; in 1970, he was elected as Chairman and Chief Executive Officer, and served as the chairman until 1973 (Tyco's statement of material facts, ¶ 2; plaintiff's counter-statement, ¶ 2). In 1997, Berman became a vice president of Tyco, though he was still employed at the law firm of Kramer Levin Naftalis & Frankel LLP, working as Tyco's outside counsel (Tyco's statement of material facts, ¶ 3). He continued as outside counsel during this time through 1999.

In October 1999, Berman agreed to an offer by Tyco's then-CEO Dennis Kozlowski to become a Tyco employee, providing legal and business advice, and began working for Tyco directly on March 1, 2000 (*id.*, ¶ 4; plaintiff's counter-statement, ¶ 32).

The Letter Agreement

In June 2002, Berman learned that he was not documented as an employee with Tyco, but rather as a consultant, and that his health benefits were being provided under a personal plan covering Kozlowski, rather than the Tyco corporate employee plan (Tyco's statement of material

facts, ¶ 5). Tyco then arranged to have Berman employed as an officer (*id.*, ¶ 6). By memorandum dated June 25, 2002, the Compensation Committee of Tyco's Board of Directors "unanimously recommend[ed] [that] . . . [t]he Compensation of Joshua M. Berman, Esquire, shall be set at $30,000 per month in his function as Vice President of the Corporation. He shall be entitled to Health Benefits (but not other fringe benefits) as an employee" (exhibit D to affirmation of John H. Kazanjian, dated February 24, 2014 [Kazanjian affirm]).

By letter dated July 31, 2002, the parties set forth their agreement (the Letter Agreement) regarding Berman's employment. The Letter Agreement provided:

> "This is to confirm my understanding that effective July 31, 2002, I will receive $30,000 a month in compensation from Tyco International Ltd. (The 'Company') as an employee . . . . As an employee, I will be eligible to participate in the Company's medical and dental plan (including medical reimbursement) after the customary 30 day waiting period, and I can pay for my share of the premiums . . . with pre-tax dollars. I understand that you will endeavor to have me covered in the Exec-U-Care Medical Reimbursement Plan or similar plan. I will also be automatically enrolled in the Company's business travel accident plan, the basic life insurance plan and the accidental death and dismemberment plan.
>
> I further understand that as an employee, I will be eligible for a variety of other Company-sponsored benefit plans, including the Company's Retirement Savings and Investment Plan (401 (k) plan), the Deferred Compensation Plan, the Supplemental Executive Retirement Plan, the Employee Stock Purchase Plan, the long-term disability plan, the supplemental life insurance plan, the personal family accident plan, the adoption assistance program, the education and opportunity programs, voluntary programs available under You.Decide.com, and the employee assistance plan (the 'Benefit Plans'). Most of these Benefit Plans require employee contributions. I hereby elect not to participate in any of the Benefit Plans, and I hereby agree on behalf of myself, my estate and heirs to hold harmless the Company, its directors, officers and employees for failure to provide to me any of the benefits available

under the Benefit Plans"

(exhibit F to Kazanjian affirm). This Letter Agreement was signed by Berman, and by Steven W. Foss, the Chairman of Tyco's Board of Directors' Compensation Committee. Berman saw a draft of the letter before he signed it, and had the opportunity to consult a lawyer other than himself (Tyco's statement of material facts, ¶ 10). At his deposition, Berman testified that, at the time he signed the Letter Agreement, he was generally aware that Tyco had a generous severance plan, but he did not discuss with Tyco representatives whether the plan would apply to him (exhibit C to Kazanjian affirm, deposition of Joshua M. Berman [Berman dep] at 175-181).

In Tyco's Form 10Q filed with the SEC on August 14, 2002, Berman's employment was described in the following manner:

> "On June 25, 2002, the Compensation Committee recommended and the Board of Directors approved a resolution that [Berman's] compensation be continued at the same level as he has received since 1 March 2000, namely that his compensation be set at $30,000 per month; that the compensation be paid to him as an employee and Vice President of the Company; that he be entitled to health benefits but not other fringe benefits; and that he receive normal and customary expenses and have the use of a secretary"

(exhibit G to Kazanjian affirm). Tyco's Form 8-K, filed with the SEC in September 2002, stated that, from March 1, 2000 to July 31, 2002, Berman was employed directly by Tyco, and that his "compensation was at a rate of $360,000 per year, without benefits (other than health benefits), and was in addition to normal director's fees" (exhibit H to Kazanjian affirm).

The Severance Plan

On August 6, 2002, the Compensation Committee adopted a severance plan (the Severance Plan), which was retroactively effective as of July 1, 2001 (exhibit P to affirmation of

Barry Friedberg in opposition, dated May 8, 2014 [Friedberg affirm]). The Severance Plan provided, in relevant part:

> "This Severance Plan has been established in order to give Tyco corporate employees who remain at the Company after the current restructuring of the corporate offices reassurance about their severance benefits should there be any further reductions in force within the next 12 months. The Plan became effective as of July 1, 2002, and will remain in effect for at least 12 months in the sole discretion of Tyco management. All Tyco Corporate employees who are full time as of the effective date of the Plan will automatically be considered participants in the Plan as of that date.
>
> Employees will receive a severance pay benefit under the Plan of one full month of pay for each $10,000 of salary to a maximum of one year or two weeks of pay for each completed year of service to a maximum of one year, whichever is greater . . . . The severance pay benefit for employees holding the position of Vice President and above will be one month of payment for every $10,000 of salary to a maximum of 24 months.
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> * * * *
>
> An employee will not be eligible for severance benefits if the employee is terminated for any of these following reasons: resignation or other voluntary termination of employment; or termination for cause, including, without limitation, termination due to poor performance, misconduct or violation of the Company's rules or policies"

(exhibit P to Friedberg affirm at JMB000445-447).

Berman's Departure from Tyco

In June 2002, spurred by its suspicions of then-CEO Kozlowski's improper transactions, Tyco's board retained the law firm of Boies, Chiller & Flexner (Boies) to independently review and investigate all transactions between Tyco and its officers and directors (Tyco's statement of material facts, ¶ 16). The Manhattan District Attorney's Office also was investigating all such

transactions beginning in January 2002 (*id.*, ¶ 17).

In July 2002, Tyco's board elected Edward Breen as the new Chairman and CEO of Tyco (plaintiff's counter-statement, ¶ 58; complaint, ¶ 27). Berman testified at his deposition that, on August 12, 2002, Paul Verkuil, an attorney with Boies, called him and told him that Breen was concerned about public disclosure of the Letter Agreement, and about how it would look if Tyco reported this agreement, and then the Manhattan DA's investigation discovered a problematic issue with him (Tyco statement of material facts, ¶¶ 18-19; exhibit C to Kazanjian affirm, Berman dep at 197-200). Berman attested that Verkuil suggested that the Letter Agreement be terminated "until matters were clarified," and Berman agreed to do so (Tyco statement of material facts, ¶ 19; exhibit C to Kazanjian affirm, Berman dep at 198-200).

Two weeks later, by the end of August 2002, the Manhattan DA's office indicated that questions in its investigation involving Berman had been answered satisfactorily (Tyco statement of material facts, ¶ 20; plaintiff's counter-statement, ¶ 61). According to Berman, he then returned to his duties at Tyco (Tyco statement of material facts, ¶ 20).

In September 2002, Berman claims that he approached Breen and John A. Krol, then lead director, and suggested that he could stay on at Tyco and work on "legacy matters," legal and regulatory matters from the Kozlowski-era that required some institutional knowlege (*id.*, ¶ 21; plaintiff's counter-statement, ¶ 62). Berman testified that Breen and Krol were noncommittal in response, and it was clear that Breen did not want Berman to have any continuing role at Tyco as a Vice President or an employee (Tyco statement of material facts, ¶ 21; plaintiff's counter-statement, ¶ 66). Berman raised the issue of severance pay, but Krol was noncommittal, and he did not raise the issue again until February 2003 (Tyco statement of material facts, ¶ 22; exhibit

A to Kazanjian affirm, complaint, ¶ 41).

On December 5, 2002, Berman resigned as a director and officer of Tyco, and considered that he had been terminated as an employee (Tyco statement of material facts, ¶ 21; exhibit B to Friedberg affirm, Berman dep at 259, 266).

Berman's Claims

In this action, Berman seeks a lump sum payment of his salary for the five-month period from July through November 2002 in the total amount of $150,000, severance pay of $720,000 pursuant to the Severance Plan, and sanctions pursuant to the New York Labor Law § 198 (1-a) (exhibit B to Friedberg affirm, complaint, ¶ 49). He asserts claims for breach of express or implied contracts (first cause of action); in quantum merit (second cause of action); unjust enrichment (third cause of action); promissory estoppel (fourth cause of action); ERISA violation (fifth cause of action); and violation of New York Labor Law § 198 (1-a) for willfully withholding Berman's non-discretionary minimum guaranteed compensation (sixth cause of action).

Procedural History

This action was originally brought in this court in December 2007 (Kazanjian affirm, ¶ 12). In January 2008, Tyco removed the action to the United States District Court for the Southern District of New York on the bases of federal question jurisdiction for the ERISA claim, and diversity jurisdiction (*id.*).

After discovery, Tyco moved for partial summary judgment. On March 30, 2011, the Southern District dismissed Berman's claims for severance pay, and under ERISA. On May 11, 2011, the Southern District concluded there was no basis for diversity jurisdiction, and remanded

the action back to this court (*id.*, ¶¶ 13-14). On July, 20, 2011, Berman filed a note of issue in this court (*id.*, ¶ 14).

On July 16, 2012, on Berman's appeal of the district court's grant of summary judgment, the United States Court of Appeals for the Second Circuit reversed and vacated the district court's summary judgment order (*id.*, ¶ 15; *see Berman v Tyco Intl. Ltd.*, 492 Fed Appx 152 [2d Cir 2012]). It found that the record was sufficient to support a jury finding that Berman's termination from Tyco was actual and involuntary, and left for the district court to determine on remand whether the Severance Plan was an ERISA plan, and whether Berman waived his participation therein by executing the Letter Agreement (exhibit N to Kazanjian affirm at 6-8). On December 7, 2012, Tyco renewed its motion for partial summary judgment on the issue of severance pay in the Southern District, arguing in part that ERISA did not apply (Kazanjian affirm, ¶ 17). On September 20, 2013, the Southern District partially granted Tyco's motion, dismissing Berman's ERISA claim (fifth cause of action), and denied the remainder of the motion, declining to exercise supplemental jurisdiction over the state law claims, and remanded the action back to this court (exhibit Q to Kazanjian affirm).

This Motion

In moving for partial summary judgment, Tyco argues that the motion is timely, because the note of issue filed by Berman in July 2011 was nullified when the action was removed from this court's trial calendar, and restored in the Southern District, upon the Second Circuit's July 16, 2012 order. On the merits, Tyco asserts that Berman waived any right to severance pay by signing the Letter Agreement. It argues that the "Benefit Plans" included in Berman's waiver are not limited to the plans listed in the second paragraph of the Letter Agreement, as made plain by

the agreement's use of the word "including," which is a term of enlargement that recognizes the existence of plans, other than the named plans, to which Berman waived eligibility. Tyco argues that Berman agreed that he would only participate in the plans stated in the first paragraph of the Letter Agreement, and, if the parties intended for him to be eligible for severance, they would have included it in the first paragraph, particularly since Berman was aware that Tyco had a generous severance plan in place at the time. Tyco further contends that the extrinsic evidence demonstrates that Berman had no expectation of receiving severance benefits. Even if he did not waive such benefits, Tyco asserts that Berman is not entitled to them under the language of the Severance Plan, because his departure from Tyco was not part of a "'reduction in force,'" and he cannot show that he relied on Tyco's practice of providing severance pay. On the promissory estoppel claim, Tyco argues that Berman cannot demonstrate that anyone at Tyco promised him severance benefits. Finally, Tyco contends that the New York Labor Law claim must be dismissed because it does not provide a remedy to employees, such as Berman, who served in an executive capacity.

In opposition, Berman first contends that the motion is untimely, because it was made more than 120 days after the note of issue was filed on July 20, 2011. On the merits, Berman contends that the Letter Agreement does not mention severance pay, and the first paragraph, setting forth some benefit plans in which he was going to participate, does not purport to be exhaustive. In the second paragraph, Berman contends that he only waived his right to participate in "Benefit Plans," a defined term, meaning the 11 employee benefit plans enumerated immediately preceding the term. With respect to the term "including," Berman urges that the court must consider the context to determine whether it was to be expansive, as Tyco contends,

or is all inclusive, as he contends. In addition, he argues that waivers, such as the Letter Agreement, are strictly and narrowly construed. He points to various documents, email and interoffice correspondence as proof that Tyco did not intend that the term "including" in the second paragraph be expansive. Berman notes that nowhere in all the documentary evidence is there any mention of severance pay, or any indication that Tyco was intending to have Berman waive his right to such pay. Moreover, Berman points to the fact that, when this was taking place, the Compensation Committee was discussing a severance plan for corporate employees, and yet failed to include it in the waived "Benefit Plans."

With regard to the Severance Plan, Berman asserts that he is eligible under the plan, as there was no requirement that his termination be part of the reduction in force. Even if the plan did make such a requirement, Berman contends that his termination was part of a broad-based reduction in force of the Tyco corporate offices after Breen took over in July 2002 (*see* exhibits V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, and HH to Friedberg affirm). He further contends that he relied upon Tyco's severance pay policy in accepting and continuing employment at Tyco. He also asserts that he was promised by Kozlowski all of the benefits and privileges of a senior employee, including its severance pay policy. Finally, Berman contends that his claim under Labor Law § 198 (1-a) is sufficient, notwithstanding that he was an executive, based on his allegations that Tyco violated section 193 of Article 6 therein by unlawfully withholding his wages in failing to pay him after June 30, 2002.

In reply, Tyco argues that the only reasonable interpretation of the Letter Agreement is that Berman waived any rights to severance pay, and the extrinsic evidence confirms that the parties did not intend him to receive severance benefits. It contends a promissory estoppel is not

viable here. Finally, Tyco challenges Berman's assertion of a violation of Labor Law § 193, contending that severance benefits do not fall within the Labor Law's definition of "wages."

DISCUSSION

The motion for partial summary judgment is granted to the extent that the fourth and sixth causes of action are dismissed as a matter of law, and is otherwise denied.

On the issue of the timeliness of Tyco's motion, the court finds that it is timely (*see* CPLR 3212 [a]). Berman's original note of issue, which was filed on July 20, 2011, was filed during this action's initial period of remand in this court following the Southern District's May 10, 2011 remand order. At the same time, Berman was perfecting his appeal to the Second Circuit of the Southern District's summary judgment order. On July 16, 2012, when the Second Circuit vacated the Southern District's remand order, the action was removed from this court's trial calendar and restored in the Southern District. This, in effect, nullified the original note of issue (*see Lance Intl., Inc. v First Natl. City Bank*, 86 AD3d 479, 480 [1st Dept 2011]; *Negron v Helmsley Spear, Inc.*, 280 AD2d 305, 305 [1st Dept 2001]). Berman has not filed another note of issue. As a result, Tyco's motion, which has been made after issue was joined, and no other time frame has been established by this court, is timely.

The fourth claim seeking severance pay under a promissory estoppel theory is dismissed. To establish a promissory estoppel claim, the plaintiff must demonstrate a clear and unambiguous promise, reasonable and foreseeable reliance on that promise, and injury sustained based on that reliance (*see AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 20-21 [2d Dept 2008]; *New York City Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 491 [1st Dept 2004]).

Here, Berman contends that, when he left his firm, Kramer Levin, in 1999, Kozlowski, as the CEO of Tyco, promised that Berman would be paid a salary of $360,000 per year, that he and his wife would be under the company's medical insurance plans; that he would continue to receive fees and stock options as a director, but not grants under stock option plans or restricted share plans or other such employee fringe benefits; and that he "would have all the other privileges of an employee of the company," but there was no specific discussion of severance pay (exhibit B to Friedberg affirm, Berman dep at 49-50, *see also* 66-68). Berman also testified that he was aware that Tyco had a severance plan and that it was a generous one (*id.* at 175), and that there were discussions about it at the board level in 2002 as it related to all employees (*id.* at 176). He asserts that, pursuant to Tyco's promises, he withdrew from his law firm, and went to work in-house as a senior employee for Tyco, and continued his employment by Tyco.

Although the theory of promissory estoppel allows the enforcement of a promise even in the absence of an enforceable contract, promissory estoppel is not valid in this employment context under *Dalton v Union Bank of Switzerland* (134 AD2d 174, 176 [1st Dept 1987]; *see also Laurel Hill Advisory Group, LLC v American Stock Transfer & Trust Co., LLC*, 112 AD3d 486, 486-487 [1st Dept 2013]; *Mayer v Publishers Clearing House*, 205 AD2d 506, 507 [2d Dept 1994]). *Dalton* dismissed a claim for promissory estoppel based on allegations that the employer promised the plaintiff employment at a certain salary with other benefits, the plaintiff was induced to leave his former job forgoing other employment opportunities, and then his employment was terminated. The Appellate Division stated "a change of job, even with increased emoluments and advanced status, is not sufficient to call promissory estoppel into play" (*id.* at 177 [quotation marks and citations omitted]). *Dalton's* factual situation is very

similar to Berman's claim that, based on vague promises by Kozlowski of severance pay, he remained with Tyco, left his former firm and did not pursue other opportunities for employment (*see De Madariaga v Union Banciare Privee*, 2012 WL 8466699, 2012 NY Slip Op 33183 [U] [Sup Ct, NY County June 25, 2012] [Feinman, J], *affd as modified on other grounds* 103 AD3d 591 [1st Dept 2013]). Thus, the promissory estoppel claim is dismissed.

To the extent that Berman's allegations in the fourth claim can be construed as a claim of breach of an implied contract for severance pay based on Tyco's severance pay policy, it is part of the first cause of action for breach of express and implied contracts, and is discussed with that claim below.

Tyco also is granted partial summary judgment dismissing the sixth claim for violation of New York Labor Law § 198 (1-a). In that claim, Berman alleges that Tyco continues to willfully withhold his "'non-discretionary' minimum guaranteed compensation" (exhibit A to Kazanjian affirm, complaint, ¶ 64). New York Labor Law § 198 (1-a), however, does not provide remedies for employees serving in executive, administrative, or managerial capacities unless the employee alleges a substantive violation of Article 6 of the Labor Law (*Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457, 463 [1993] [section 198 (1-a) not applicable to executive's common-law contractual claim for unpaid wages]; *see also Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 616-617 [2008] [section 198 (1-a) is applicable where employer made deductions from executive's commission wages that violated Labor Law §193]). In *Gottlieb v Kenneth D. Laub & Co.* (82 NY2d 457), the Court of Appeals determined that executive, managerial or administrative employees do not fall under section 191 of the Labor Law, and, thus, cannot recover liquidated damages and statutory attorneys' fees under Labor Law § 198 (1-a) if they

assert a successful common-law claim for failure to pay wages (*id.*; *see Pachter v Bernard Hodes Group, Inc.*, 10 NY3d at 616). After *Gottlieb,* in June 2008, the Court of Appeals decided *Pachter v Bernard Hodes Group, Inc.* (10 NY3d at 616) in which the plaintiff, an executive of the defendant company, brought a claim for violation of Labor Law § 193, for defendant's actions in making adjustments to the commissions she was receiving, which amounted to deductions from her wages. Labor Law § 193 (1) provides, in relevant part:

> "No employer shall make any deduction from the wages of an employee, except deductions which: (a) are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency . . . ; or (b) are expressly authorized in writing by the employee and are for the benefit of the employee, provided that such authorization is voluntary and only given following receipt by the employee of written notice of all terms and conditions of the payment and/or its benefits and the details of the manner in which deductions will be made . . ."

(New York Labor Law § 193 [1]). The *Pachter* Court held that the plaintiff had the right to bring such a claim for the deductions made to her commission wages (*id.*).

Here, while Berman did not allege any Labor Law Article 6 violation in his complaint, in opposition to this motion he now claims that Tyco violated Labor Law section 193 (plaintiff's memorandum of law in opposition at 32), by making an impermissible deduction from his wages. He argues that this section applies to both his unpaid wages and to his claim for severance pay. First, this alleged statutory violation never appears in Berman's complaint, and is now being asserted for the first time after the action has been pending since 2007, and after discovery is complete. Permitting an amendment, which Berman never even seeks leave for, could be prejudicial to Tyco. In any event, as to his failure to pay wages claim, as an executive, Berman is expressly excluded from the protections of section 191, which governs the failure to pay wages

(*Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d at 461; *see also McDonald v McBain*, 99 AD3d 436, 438 [1st Dept 2012]). As to the severance payment, Berman may not bring a claim under section 193, because, even assuming that total withholding, rather than specific deductions, is a violation of that section, he fails to establish any facts to demonstrate that he is not excluded from the protection of wage supplements by virtue of section 198-c (3). Section 198-c (2) defines "wage supplements" as "includ[ing] . . . but . . . not limited to, . . . separation or holiday pay" ((Labor Law § 198-c [2]). Subsection 3 of that section specifically excludes executives "whose earnings are in excess of nine hundred dollars a week" from the protection of wage supplements as wages. Thus, there is no claim under Labor Law Article 6 to compel payment of his severance package (*Fraiberg v 4Kids Entertainment, Inc.*, 75 AD3d 580, 583 [2d Dept 2010]). Berman fails to raise a triable issue of fact as to the applicability of Labor Law Article 6, and, therefore, the sixth cause of action is dismissed.

Dismissal of Berman's first claim for breach of contract, however, is denied. In this cause of action, Berman alleges that Tyco was obligated to pay him severance benefits under its severance plan, and that its failure to pay constitutes breach of express or implied contract. Tyco contends that, in the Letter Agreement, Berman waived any right to severance pay as a matter of law.

A contractual right may be waived if the waiver is voluntary, knowing, and intentional (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]; *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]). A waiver "may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage" (*General Motors Acceptance Corp. v Clifton-Fine Cent.*

School Dist., 85 NY2d 232, 236 [1995], citing *Hadden v Consolidated Edison Co. of N.Y.*, 45 NY2d 466, 469 [1978]). An employee may waive his or her rights to benefits under an employment plan (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d at 104; *General Motors Acceptance Corp. v Clifton-Fine Cent. School Dist.*, 85 NY2d at 236). However, a waiver must be based on "a clear manifestation of intent" to relinquish a contractual right, and it "should not be lightly presumed" (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]). In general, the existence of an intent to waive a contractual right is a question of fact (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d at 104 [fact issue as to whether party fully or only partially waived right under contract]; *General Motors Acceptance Corp. v Clifton-Fine Cent. School Dist.*, 85 NY2d at 236 [fact issue as to waiver]; *Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]; *Mahuson v Ventraq, Inc.*, 118 AD3d 1267, 1269 [4th Dept 2014] [same]; *Hannigan v Hannigan*, 104 AD3d 732, 735 [2d Dept 2013] [same]).

Contrary to Tyco's contention, the plain terms of the Letter Agreement do not clearly include severance benefits within the Benefit Plans in which Berman elected not to participate. The Letter Agreement fails to mention severance pay at all. Instead, in the first paragraph, Berman confirmed his monthly compensation amount from Tyco, and stated that he will be eligible to participate in Tyco's medical and dental plan, and that he will be covered under a medical reimbursement plan, the business travel accident plan, the basic life insurance plan, and the accidental death and dismemberment plan (exhibit F to Kazanjian affirm, Letter Agreement). Basically, it confirmed that he was now enrolled as an employee, his health insurance would be under the Tyco plan, and that he was automatically enrolled in three other benefit plans. This

paragraph does not purport to be exhaustive with regard to Berman's employment, as it does not mention directors' fees or compensation, or other employee benefits available to senior Tyco employees (*see* plaintiff's counter-statement ¶ 68).

In the second paragraph, the parties agreed that Berman waived his rights to defined "Benefit Plans." They agreed that he was eligible for:

> "a variety of other Company-sponsored benefit plans, including the Company's Retirement Savings and Investment Plan [401 (k)], the Deferred Compensation Plan, the Supplemental Executive Retirement Plan, the Employee Stock Purchase Plan, the long-term disability plan, the supplemental life insurance plan, the personal family accident plan, the adoption assistance program, the education and opportunity programs, voluntary programs available under You.decide.com, and the employee assistance plan (the 'Benefit Plans')"

(exhibit F to Kazanjian affirm, Letter Agreement). The Letter Agreement stated that "[m]ost of these Benefit Plans require employee contributions." Then, Berman agreed that he "hereby elect[s] not to participate in any of the Benefit Plans" (*id.*). While the term "including," as Tyco argues, often is a term of enlargement, it is "a word of several shades of meaning depending on the context" (*see Red Hook Cold Stor. Co. v Department of Labor of the State of N.Y.*, 295 NY 1, 8 [1945] [quotation marks and citation omitted]). "It may be used in the sense to comprise or embrace; or to contain or to express the idea that a thing in question constitutes a part only of the contents of some other thing . . . [it] may be used to bring into a definition something that would not be there unless specified, or it may be used to show the meaning of the defined word by listing some of the things meant to be referred to" (*id.*). It must be considered in context, and in light of the purpose of the provision (*id.*). The term is not free from ambiguity. "It may be admitted that the term 'includes' may sometimes be taken as synonymous with 'means'"

(*Helvering v Morgan's Inc.*, 293 US 121, 124-125 [1934]).

In considering the context, here, the parties' purpose was to set forth the rights to defined "Benefit Plans" to which Berman was waiving. Again, a waiver must be intentional, voluntary and knowing (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d at 104; *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d at 184). "Benefit Plans" was a defined term, parenthetically put in quotation marks immediately after what that term was meant to define, the 11 enumerated benefit plans, and not, as Tyco would have it read, immediately after the phrase " a variety of other Company-sponsored benefit plans." The court notes that, while Berman is an experienced attorney, Tyco is the party which drafted the Letter Agreement. In addition, there is no mention anywhere in the documentary evidence, such as emails among Patty Prue, the senior vice president of Tyco's human resources department, other Tyco human resources personnel, Steven Foss, chairman of the Compensation Committee, and Marian Tse, outside counsel of Tyco, of severance pay as one of the benefits Tyco was considering when drafting, or Berman was considering when signing, this Letter Agreement (*see* exhibits E, F, G, H, I, and K to Friedberg affirm). This is particularly noteworthy since, while this was being drafted, the compensation committee was considering the Severance Plan (exhibit O to Friedberg affirm; *see* plaintiff's counter-statement, ¶ 55).

Further, if the list of 11 benefit plans was meant only to illustrate, then it would seem that the drafter would have included the severance pay plan, which was of real significance monetarily and of considerable current interest for the compensation committee, rather than, for example, the "voluntary programs available under YOU.decide.com" (exhibit F to Kazanjian affirm). If Tyco intended that "including" be a term of enlargement, it could have included the

terms "but not limited to" or "without limitation" as it did with regard to the Severance Plan (*see* exhibit P tp Friedberg affirm at JMB000447).

Tyco's submissions do not eliminate triable issues of fact as to whether the waiver extended to severance pay. Berman's testimony that he was aware that Tyco had a generous severance pay plan, but that he did not make any changes to the draft letter agreement to explicitly exclude severance pay from the waiver (exhibit B to Friedberg affirm, Berman dep at 172-177), does not resolve this issue. Tyco's Sec public filings which include the phrase "health benefits but not other fringe benefits" which is the same language as used in the compensation committee's meeting minutes (exhibits D, E, G, and H to Kazanjian affirm) does not direct a finding as a matter of law that severance was waived. Therefore, this court finds a triable issue of material fact as to whether Berman knowingly and intentionally waived his right to severance pay in the Letter Agreement.

Tyco's alternative argument, that even if his right was not waived, Berman was not eligible for benefits under the Severance Plan because his termination was not a "reduction in force," is rejected. The Severance Plan was created to provide severance benefits to corporate employees who lost their jobs by further reductions in force through June 30, 2003 (*see* exhibit O to Friedberg affirm). At the time that Berman was terminated, Breen, as the newly appointed CEO in July 2002, was cleaning house, and terminating senior executives, at the vice-presidential level, previously employed under Kozlowski (*see* exhibits V, W, X Y, Z, AA, BB, CC, DD, EE, FF, GG, and HH to Friedberg affirm). These employees were getting severance pay (*see id.*). Berman contends that Breen had publicly stated that he was getting rid of the old board and getting new, highly credible ones, and that Tyco had terminated almost 300 people on the

corporate team (*see* plaintiff's memorandum at 27; *see also* exhibit B to Friedberg affirm, Berman Dep at 255-256, 259, 264-265). Berman's employment was terminated after the Manhattan District Attorney concluded its investigation, clearing him of any wrongdoing, and then Breen and Krol rejected Berman's efforts to have an ongoing role as a Tyco employee, and Tyco ceased to compensate him. A rational juror, viewing this evidence in the light most favorable to Berman, could find that his termination was a reduction in force, and was involuntary.

As an alternative to the express contract claim, Berman also asserts breach of implied contract based on Tyco's severance policy. In order for a severance payment policy to constitute an enforceable obligation, the employee must show that it was a regular practice of the employer to provide severance benefits, and that he or she knew of the practice, and relied on it in accepting and continuing employment (*see Cohen v National Grid USA*, 89 AD3d 1051, 1051-1052 [2d Dept 2011] [plaintiffs must tender sufficient evidence of regular practice, knowledge and reliance]; *Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 125 [1st Dept 2007] [plaintiff must present some proof of practice]; *Hirschfeld v Institutional Investor, Inc.*, 208 AD2d 380, 380-381 [1st Dept 1994] [implied contract claim for severance pay stated claim]; *see also Smith v New York State Elec. & Gas Corp.*, 155 AD2d 850 [3d Dept 1989] [no reliance where plaintiff unaware of policy]). The employee's actions in reliance must be unequivocally referable to the presence of the severance pay policy (*Gallagher v Ashland Oil*, 183 AD2d 1033, 1034 [3d Dept 1992]). Berman testified at his deposition that, when he accepted employment by Tyco in 1999, after he had already worked as its outside counsel for around 35 years, he was very familiar with its pay policies and practices. He stated that he was aware of it "generous"

severance pay policy, though, at the time, he did not discuss with Tyco whether the severance plan would apply to him (exhibit C to Kazanjian affirm, Berman dep at 175-181). He contends that he accepted employment at Tyco, instead of continuing at his firm, Kramer Levin, in reliance on this generous severance pay policy. Berman's proof raises an issue of fact as to whether he relied on the severance policy sufficiently to support this implied contract claim (*see Skelly v Visiting Nurse Assn. of Capital Region Inc.*, 210 AD2d 683, 683 [3d Dept 1994] [factual issue as to implied employment agreement]; *Dicocco v Capital Area Community Health Plan*, 135 AD2d 308, 310 [3d Dept 1988] [same]; *cf. Gallagher v Ashland Oil*, 183 AD2d at 1034 [at trial, where only evidence is that plaintiff continued in employ after defendant instituted severance pay policy, this is insufficient to establish reliance]). Berman's proof that he left his law firm, after practicing for over 30 years, and at approximately 61 years old, to become a Tyco employee based on its offer of compensation and medical benefits and its severance pay policy is enough to warrant a trial on his implied contract claim, Therefore, dismissal is denied.

Accordingly, it is

ORDERED that the motion for partial summary judgment is granted to the extent that the fourth and sixth causes of action are dismissed, and is otherwise denied

Dated: April 13 2015

ENTER:

J.S.C.
HON. JOAN A. MADDEN
J.S.C.