Klein v Henson Group, Inc.
2012 NY Slip Op 33527(U)
October 11, 2012
Supreme Court, New York County
Docket Number: 604266/07
Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD** PART 35
Justice

Klein, Alan J.

-v-

The Henson Group, Inc.

INDEX NO. 604266/07
MOTION DATE 9/11/12
MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for __________

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ________ No(s). ________

Answering Affidavits — Exhibits ________ No(s). ________

Replying Affidavits ________ No(s). ________

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of plaintiff's motion for summary judgment on its complaint is denied; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment dismissing defendants' counterclaims is granted solely to the extent that defendant's second counterclaim is hereby severed and dismissed; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that the parties shall report to Part 40 for trial on November 27, 2012, 9:30 a.m. and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 10/11/12 ________, J.S.C.

HON. CAROL EDMEAD

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

--x

ALAN J. KLEIN,

Index No. 604266/2007
Motion Seq. 002

Plaintiff,

-against-

THE HENSON GROUP, INC.,

Defendant.

--x

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for, *inter alia*, breach of employment agreement,[1] plaintiff Alan J. Klein ("plaintiff") moves for summary judgment against his former employer, The Henson Group, Inc. ("defendant"), to recover monies allegedly due and owing.

Factual Background

According to plaintiff's motion, defendant hired him as "a salesperson on the staff," pursuant to an employment agreement dated September 10, 2004 (the "2004 Agreement" or "Agreement"). Pursuant to this Agreement, defendant agreed to pay, in addition to plaintiff's base salary of $60,000 per year, "a 10% commission based on the revenue of each, manager approved, project you close . . . ." Plaintiff asserts that the Agreement did not allow defendant to cease paying commissions upon the separation of his employment, and defendant was not permitted to modify or withhold commissions based on profitability.

Plaintiff argues that he was entitled to be paid commissions for as long as his projects generated revenue to the defendant. Although defendant increased the commission rate at times,

[1] Plaintiff's complaint seeks damages for (1) breach of contract, (2) promissory estoppel, (3) unjust enrichment, (4) *quantum meruit*, (5) conversion, (6) fraud, and (7) violation of New York State Labor Law §§190-199 (the "Labor Law").

[* 3]

the average rate during plaintiff's employment was at least 10%. Plaintiff's agreed-upon commission was non-discretionary and a guaranteed percentage of the revenues generated by his closed/originated projects, and therefore, are "wages" under the Labor Law. Plaintiff closed numerous projects in 2005, 2006 and 2007 which were manager approved. The documents exchanged during discovery demonstrate that defendant received revenue from these projects, even after plaintiff terminated his position on August 13, 2007, and that defendant failed to pay plaintiff the commissions due thereon. Specifically, defendant either paid plaintiff commissions and improperly deducted them from plaintiff's wages, or failed to pay plaintiff commissions due on approximately 11 accounts. Plaintiff argues that pursuant to Labor Law §§ 191, 191(c), and 198 (1-a), which defendant concedes applies to the matter herein, defendant owes, at this juncture, $55,959.86 in unpaid wages, and $55,959.86 in liquidated damages under the Labor Law. Plaintiff is also entitled to $25,181.94 in lost interest, computed at the rate of 9% on the unpaid wages from September 1, 2007 through August 31, 2012 as the prevailing party pursuant to CPLR §§5001-5004 and the Labor Law.[2]

Plaintiff asserts that he is also entitled to summary judgment on his breach of contract claim, in addition to the remaining common law claims, as all of the elements of such claims have been established. Defendant made a clear promise to pay plaintiff commissions, plaintiff justifiably relied on such promise, equity and good conscience require defendant to make full restitution to plaintiff, plaintiff performed services in good faith expecting to be paid for his services, defendant unlawfully converted plaintiff's commissions by making deductions from

[2] Plaintiff also asserts that as the prevailing party, he is entitled to attorneys' fees under the Labor Law, which will be sought under a separate application.

plaintiff's paychecks, and defendant fraudulently induced plaintiff to join defendant on the promise of payment commissions.

Plaintiff further argues that defendant's defenses based on non-profitability, plaintiff's alleged termination, and a handbook that plaintiff did not sign, lack merit.[3] Defendant acknowledged that the Labor Law applies, and therefore, has no good faith basis to believe that its underpayment of plaintiff's wages was in compliance with the Labor Law.

And, defendant's counterclaims for "recoupment" of commissions paid,[4] and harassment due to plaintiff's frivolous causes of action, are baseless.

In opposition, defendant contends that plaintiff was hired as an at-will, vice-president of sales, and the terms of his employment were established in an offer letter which plaintiff never signed and which did not contain a "no modification" clause. Plaintiff never signed any written agreement regarding his commission. Over the years, the terms of his employment changed.

In 2006, the defendant published a new "Compensation Structure for 2006 for the Henson Group, Inc.'s Sales Department," which stated that any new projects won and started in 2006 would be subject to a new structure. Under this structure, plaintiff could earn 0%, 8%, 10%, or 12% depending on the project he sold. The parties operated under this new system all of 2006, and plaintiff never objected to it when he received a spreadsheet of his commissions with his paycheck every two weeks. Plaintiff accepted both the "benefits (12%) and the burden (8%)" of this new structure and accepted, on three occasions, 0% commissions. Plaintiff received an

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[3] Defendant's Answer contains the following three affirmative defenses: (1) laches (for recoupment), (2) failure to plead fraud with particularity, and (3) that plaintiff's claim pursuant to Labor Law §198 is barred by the explicit terms of this section since plaintiff made more than $600 per week.

[4] This counterclaim is denominated as one for breach of contract.

email in the latter case, explaining that the subject project was not profitable and that no commission would be paid. In such case, defendant then recouped the entire commission which was paid before the profitability analysis, and plaintiff accepted this procedure without complaint.

In 2007, the terms were again modified and a new 2007 Handbook was published, including a subsection for compensation and pay policies, which plaintiff, as an executive and vice-president, approved. Also in 2007, an email was sent with another new commission schedule, effective "immediately for all checks that come in starting 1/1/2007." The email also advised that defendant reserved its right to modify the schedule or rescind the schedule, in whole or in part, with or without notice. For eight months, plaintiff received commission reports and paycheck based on the new schedule without objection.

When plaintiff quit in August 2007, defendant calculated his commissions under the new schedules, and determined that it overpaid plaintiff because of unprofitable projects. As of the end of plaintiff's employment, commissions were not payable on unprofitable projects. And, because commissions were paid before profitability could be determined (as some revenue often came in before a project was completed), commissions were paid when none were due, but then later deducted against future commissions earned. Thus, in the event no commissions are due on unprofitable projects, plaintiff owes defendant commission overpayments. Since this was the position defendant took at the time of plaintiff's demand, defendant refused to pay additional commissions.

Pursuant to the Handbook "Commission Policy" in effect at the time plaintiff left the company, a former employee is only entitled to "commission compensation actually earned through the date of termination." This phrase can only mean that commission is earned and becomes payable at the time the revenue is received, and the salesman must be employed by defendant when the revenue is received. To read this phrase as permitting a commission to be earned upon the signing of a project, or any other way, would render the phrase meaningless. Thus, no commissions are due if the employee is not with the defendant at the time the commission is earned. Indeed, upon further calculations, plaintiff owes defendant money whether or not he is owed commissions on post termination revenue. At the least, a triable issue of fact exists as to the parties' intent.

Defendant argues that under caselaw, a company can make deductions from commissions after a sale is agreed to, based on the costs associated with that project, and the parties' course of conduct, prior to the dispute, of accepting such deductions demonstrates their intentions regarding the deductions. Parties are free to amend their agreements, and the modifications were confirmed in documents, emails, an affidavit of a disinterested former employee, and years of plaintiff's acceptance of commission reports.

Furthermore, issues of fact exist as to whether defendant's version of events create a *bona fide* dispute or constitute a "willful" violation of the Labor Law. Also, liquidated damages of the unpaid commissions is unwarranted. In any event, plaintiff is at most entitled to 25% and not 100% in liquidated damages, since the events at issue and commencement of this action predate the increase in damages under the Labor Law.

The damages plaintiff seeks are also inflated. Plaintiff is not entitled to commissions on new work obtained after his termination. Nor can plaintiff receive commissions for which a client was not billed and did not pay. Plaintiff's calculations are inaccurately based on account receivables, as opposed to revenues of the defendant. And, plaintiff's specific claim for $7,000 is based on an email that does not indicate the project to which it relates and whether plaintiff closed the project.

And, plaintiff's fraud claim should be dismissed as improperly plead and duplicative of his breach of contract claim. Plaintiff also failed to address his fraud claim in his motion.

Discussion

As the proponent of the motion for summary judgment, plaintiff must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR §3212 [b]). This standard requires plaintiff to make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman* at 563; *Prudential Securities Inc. v Rovello*, 262 AD2d 172, 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562).

As relevant to plaintiff's motion herein, Labor Law § 191(c), entitled "Commission salespersons,

> A commission salesperson shall be paid the wages, salary, drawing account, commissions and all other monies earned or payable *in accordance with the agreed terms of employment*. . . . The agreed terms of employment shall be reduced to writing, signed by both the employer and the commission salesperson . . . . Such writing shall include a description of how wages, salary, drawing account, commissions and all other monies earned and payable shall be calculated. Where the writing provides for a recoverable draw, the frequency of reconciliation shall be included. Such writing shall also provide details pertinent to payment of wages, salary, drawing account, commissions and all other monies earned and payable in the case of termination of employment by either party. . . .

Not only is there an issue of fact concerning the terms to which the parties agreed (*see infra* at pp. 11-15), plaintiff failed to submit an employment agreement signed by both defendant and plaintiff. Therefore, plaintiff failed to establish a violation of the Labor Law.

To prevail on a cause of action for breach of contract, plaintiff must establish the making of an agreement, the performance by that party, breach by the other party, and resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court New York County 2006], *citing Furia v Furia,* 116 AD2d 694, 695 [2d Dept 1986]). In addition, plaintiff must set forth the terms of the agreement upon which liability is predicated by making specific reference to the relevant portions of the contract or by supplying a copy of the contract (*Atlantic Veal & Lamb, Inc. v Silliker, Inc.*, 11 Misc 3d 1072, 816 NYS2d 693 [Supreme Court New York County 2006] *citing Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [1987] and *accord Valley Cadillac Corp. v Dick,* 238 AD2d 894, 894 [1987]).

Courts must construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms (*James v Jamie Towers Housing Co., Inc.*, 294 AD2d 268, 743 NYS2d 85 [1st Dept 2002]). The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*see Slatt v Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms *(see, e.g. R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]). Ultimately, the aim is a practical interpretation of the language employed so that there be a realization of the parties' "reasonable expectations" (*see Sutton v East River Sav. Bank*, 55 NY2d 550, 555, 450 NYS2d 460 [1982]).

Here, plaintiff established the existence of an enforceable agreement, *to wit*: the 2004 Agreement wherein defendant agreed to employ him as "the Senior Vice President of Sales on a full-time basis." Under this Agreement, defendant was to pay plaintiff a salary of $60,000 per year which "shall be reviewed quarterly" and, in addition to this salary, a "10% commission based on the revenue of each, manager approved, project you close." The Agreement continued: "Commissions will be paid on the 10th of each month *and will be based upon the actual revenues received by the Company during the previous month from projects you generate*." (Emphasis added). While the 2004 Agreement is not signed by plaintiff, there is no requirement in the document that its enforceability was conditioned upon plaintiff's signature, and it is uncontested that all parties operated under the Agreement (*Kowalchuk v Stroup*, 61 AD3d 118, 873 NYS2d 43 [1st Dept 2009] ("an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound . . . unless, of course, the parties have agreed that their contract will not be binding until executed by both sides")). Plaintiff attests that he agreed to the terms of this Agreement and defendant paid plaintiff in accordance with the 2004 Agreement.

Further, plaintiff submits documentation produced by defendants during discovery, showing that plaintiff was paid at least 10% commissions during 2005-2007, and that he closed many projects during this period.

Plaintiff also established that in December 2006, defendant made certain deductions ($$4,488 and $1,485) from his paycheck, representing commissions that were previously paid to plaintiff on two projects: Golden Tree and Tishman Speyer, respectively (Plaintiff Motion, Exh. 22).[5] Defendant withheld the commissions on the Golden Tree project "until golden pays the remaining invoices." (Plaintiff Motion, Exh. 26). Defendant also found that plaintiff was not

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[5] It is noted that according to the documents plaintiff submitted, plaintiff was paid 11% from October 1, 2006 though December 31, 2006, 1% higher than what plaintiff insists the parties agreed to in the September 10, 2004. Therefore, plaintiff's submissions are unclear as to the percentage plaintiff was entitled to receive on "actual revenues received by the Company." Plaintiff's motion, Exhibit 12, also demonstrates that plaintiff received varying percentages, ranging from 8% yo 12%.

entitled to the commissions previously paid on the Tishman Speyer project because the estimated profit on this project was only $450 and rendered defendant unable to "issue a commission." (Plaintiff Motion, Exh. 23). The record also established that plaintiff's employment with defendant ceased on August 13, 2007,[6] and that his final paycheck did not contain approximately $7,000 in commissions as promised by defendant (Plaintiff EBT, 161-162),[7] since defendant deducted from that amount $3711.25, and claimed that he was no longer entitled to commissions on revenues received after his "resignation." The record also indicates that while defendant continued to receive payments from projects plaintiff closed before he resigned, defendant did not pay plaintiff commissions on these amounts.

"Once the commission is earned, it cannot be forfeited" (*Arbeeny v Kennedy Executive Search, Inc., supra citing Davidson v Regan Fund Mgt. Ltd.*, 13 AD3d 117, 786 NYS2d 47 [2004]). Further, there "is a long-standing policy against the forfeiture of earned wages, and this applies to earned, uncollected commissions as well" (*Arbeeny v Kennedy Executive Search, Inc., supra citing Weiner v Diebold Group, Inc.*, 173 AD2d 166, 166–167, 568 NYS2d 959 [1991]).

As reasoned in *Arbeeny v Kennedy Executive Search, Inc.* (71 AD3d 177, 180-181, 893 NYS2d 39 [1st Dept 2010]):

> Although generally an at-will employee is not entitled to post-termination commissions, the parties are certainly free to provide otherwise in a written agreement. For example, in Yudell v. Israel & Assoc., 248 A.D.2d 189, 669 N.Y.S.2d 580 [1998], the employee

[6] Emails attached in Exhibit 27 to plaintiff's motion indicated that by email dated Monday, August 13, 2007, at 7:13 p.m., defendant "terminated" plaintiff's employment. Thereafter, on Wednesday, August 15th, plaintiff "resigned" his employment.

[7] Plaintiff failed to establish, as a matter of law, his claim for $26,831.12, representing 10% commissions based on the "Account Receivables Report," (Plaintiff's Motion, ¶54), as the 2004 Agreement only permits 10% of "the actual revenues received by the Company."

[* 12]

> earned commissions based on a percentage of all fees actually received that were "originated by" her. She brought an action to recover commissions for her role in securing two placements that were completed post-termination. The employer contended that as a matter of law, the employee could not recover commissions for placements that were finalized after she left. In denying summary judgment, this Court held that the words "placements ... originated by you" did not alone specify when or how the placement must be completed in order to entitle the employee to a commission. *Had the employer meant to foreclose the possibility of the employee earning a post-termination commission on a placement unquestionably originated by her, it could have said so explicitly, such as "placements ... originated and completed by you" or "placements ... originated by you which occur during your employment here "* . . . . (Emphasis added).

Based on the plain reading of the 2004 Agreement, such Agreement does not expressly limit plaintiff's receipt of commissions, to the months during which plaintiff is employed. Instead, defendant agreed that plaintiff's commissions would "be paid" on the 10^{th} of each month based on the "actual revenues [defendant] received" during the previous month from projects plaintiff generated. However, there is an issue of fact as to what the parties intended by "actual revenues received by the Company . . . ."

Further, the remaining submissions raise an issue of fact as to whether the 2004 Agreement was subsequently modified in 2006, as to plaintiff's claims regarding wage deductions in 2006, and later in 2007, as to plaintiff's claims to (1) commissions earned as of August 13, 2007 and (2) commissions "on additional *revenue*" received by defendant in 2007. As such, plaintiff cannot establish, as a matter of law, that defendant breached the 2004 Agreement.

As to the alleged 2006 improper wage deductions, it is noted that the 2004 Agreement contained no express provision permitting defendant to make any adjustments to plaintiff's paycheck based on "estimated profit[s]" (November 20, 2006 email) or outstanding payments owed by clients on "remaining invoices" (November 15, 2006). And, the November 15, 2006 email demonstrates that defendant "actually received" $44,800 from Golden, (the record only shows that Tishman was invoiced). A "Compensation Structure for 2006 for the Henson Group Inc.'s Sales Department" (submitted by defendant) stated that "Any new projects won and started in 2006 will be subject to this new compensation structure. The document also indicates that the percentages reflect "guaranteed commission rates," and fail to mention any right of defendant to recoup commissions. Nor does this document contain any language limiting an employee's (*i.e.*, plaintiff's) ability to receive commissions once no longer employed by defendant, or restricting a former employee's right to a commission to amounts actually received by the defendant prior to termination. "

However, in 2006, plaintiff's commissions were adjusted, and plaintiff received, without objection at the time his commissions were so calculated, commissions according to this new compensation structure. Defendant's President, Gregory Henson ("Henson") states that the November 15 and November 20, 2006 emails sent to plaintiff, advising that plainitff would not receive a commission for the Tishman or Golden projects because they were unprofitable, was "standard practice" (Henson Affidavit, ¶¶18, 25). According to defendant, plaintiff "was absolutely aware that the Company was implementing this policy" and "never objected to the implementation of this policy" until filing his motion (*id.*, ¶¶32, 33, 36). Such statements, coupled with plaintiff's receipt of his commission payments according to this policy, without an any alleged objections thereto, raise an issue of fact as to whether plaintiff agreed to such policy subsequent to the 2004 Agreement.

As to plaintiff's claims for 2007 commissions, plaintiff submitted an email defendant sent him on January 5, 2007 setting forth a new commission policy, in which defendant changed the commission percentages to range from 8% to 14% "for this year" "effective immediately for all checks that come in starting 1/1/2007." This email expressly reserved defendant's "right at anytime to, to create, amend, supplement, modify or rescind, in whole or in part, this commission plan, as it deems appropriate, with or without notice." Further, the 2007 email indicated that the commission policy set forth therein was "not a [guarantee], contract, or agreement . . . ." The record contains no email or other written response from plaintiff objecting to this email or schedule, and it is uncontested that plaintiff was paid commissions in 2007 according to this percentage schedule, without objection.

Further, as cited to in plaintiff's letter dated August 28, 2007 submitted by plaintiff, defendant's 2007 Handbook provides:

> Upon termination of an employee, whether voluntary or involuntary, whose compensation includes commissions based on sales, earnings, performance, or other measure, *such employee shall be entitled to the commission compensation actually earned through the date of termination.* All earned commission compensation shall be paid upon termination or by the next regularly schedule pay date." (Emphasis added).
>
> (Exhibit 32).

In that letter, plaintiff requests "all commissions earned up to the date of my resignation on August 13, 2007."

Therefore, plaintiff's submissions in this regard indicate that defendant modified the prior commission policies such that plaintiff's commissions would be based on what he earned as commissions "through the date of termination." In other words, unlike the 2004 Agreement, which based plaintiff's commissions on amounts defendant received in revenues, the 2007

Handbook limited plaintiff's entitlement to commissions would be based solely on those projects he generated while still employed with defendant, irrespective of whether defendant received revenue. Thus, an issue exists as to whether the 2004 Agreement was modified , in part, by such 2007 Handbook issued by defendant (*O'Neill v New York University*, 97 AD3d 199, 944 NYS2d 503 [1st Dept 2012] (assessing viability of breach of contract claim in light of employer's written policies found in its Code of Ethics, Code of Conduct, Non–Retaliation Policy, and Research Misconduct Policies)).

According to defendant's President, Henson, the 2007 Handbook stated that after an employee is terminated, he or she is only entitled to commissions actually earned prior to his or her departure (Henson Affidavit, ¶39). Henson attests that it was his intent to "avoid paying commissions" where an employee "tries to claim entitlement to a commission *where the revenue is received after they leave*" (¶40), as it is "impossible for a THG salesperson to 'earn' a commission after they were terminated." (¶42). (emphasis added). Therefore, arguably, based on a practical interpretation of the phrase mandating that employees "shall be entitled to the commission compensation actually earned through the date of termination," defendant eliminated its previous, apparent obligation to pay employees earned commissions based on actual revenues received. Thus, plaintiff failed to establish, as a matter of law, that he is entitled to commissions based on defendant's "account receivables," or based on the "actual revenues received by defendant" (Plaintiff's Memorandum of Law, pp. 7-8).

It is also noted that according to terms of the 2007 Handbook, under "COMMISSION COMPENSATION," defendant provided that "Commission based on compensation, if any, shall be paid in accordance with written terms and conditions agreed upon by the Firm and each employee or *in accordance with other established Firm policies*." (Emphasis added). Defendant submitted an affidavit from its former Marketing Director, who states that in 2007, defendant had a policy

> "whereby commissions were only paid on profitable projects, i.e. even if a project had revenue of, say $20,000, no commission would be paid if its costs was also $20,000. . . . Because commissions were paid as the revenue came in, and this was sometimes prior to the completion of a project, the profitability was not always known at the time the commission was paid. In the event that a commission was paid on, what turned out to be, an unprofitable project (where no commission was due), the commission was recouped by the [defendant] as a deduction against future profit." (Craig McGuire Affidavit, ¶¶ 6-7).

These factors raise an issue of fact as to defendant's entitlement to recoup the commissions previously paid to plaintiff based on profitability.

Both the Labor Law cited above and plaintiff's breach of contract claim require, at least, a showing that an agreement to terms exists, and in this regard, an issue of fact exists as to the terms under which defendant agreed to pay plaintiff commissions. Consequently, plaintiff's request for liquidated damages, and lost interest are unwarranted. Therefore, plaintiff's motion for summary judgment is denied.

The remaining branch of plaintiff's motion for summary judgment on his claims for promissory estoppel, unjust enrichment, *quantum meruit*, conversion, and fraud, is denied.

To establish a claim for promissory estoppel, a plaintiff must prove "(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" (*Sabre Intern. Sec., Ltd. v Vulcan Capital Management., Inc.*, 95 AD3d 434, 944 NYS2d 36 [1st Dept 2012]). An issue of fact concerning the alleged promise defendant made concerning commissions, and thus also, as to whether plaintiff's reliance on such promise was reasonable.

To establish a claim for unjust enrichment, a plaintiff must establish that he/she performed services for the defendant which resulted in the defendant being unjustly enriched (*Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc. v Holiday Org., Inc.*, 12 Misc 3d 1182 [2006], *citing Clark v Daby,* 300 AD2d 732, 751 N.Y.S.2d 622 [3d Dept 2002] and *Kagan v K-Tel Entertainment, Inc.*, 172 AD2d 375, 568 NYS2d 756 [1st Dept 1991]). In order to state a claim of unjust enrichment, a plaintiff must allege that he or she "conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor" (*Nakamura v Fuji*, 253 AD2d 387, 390 [1st Dept 1998]). An issue of fact exists as to whether defendant was unjustly enriched from plaintiff's performance of his services.

As to plaintiff's *quantum meruit* claim, it "is hornbook law that in order to establish a claim in *quantum meruit*, a claimant must establish "(1) the performance of services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefor; and (4) the reasonable value of the services" (*Moses v Savedoff*, 96 AD3d 466, 947 NYS2d 419 [1st Dept 2012]). Plaintiff failed to establish, as a matter of law, the reasonable value of the services he performed, and that he was not compensated for such services.

As to plaintiff's conversion claim, a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *State of New York v Seventh Regiment Fund,* 98 NY2d 249, 746 N.Y.S.2d 637, 774 NE2d 702 [2002]). Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiffs rights (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006], internal citations omitted); *Employers' Fire Ins. Co. v Cotten*, 245 NY 102 [1927]; *see also* Restatement [Second] of Torts §§ 8A, 223, 243; Prosser and Keeton, Torts § 15, at 92, 102 [5th ed.]; *Vigilant Ins. Co. of America v Housing Authority of City of El Paso, Tex.*, 87 NY2d 36 [1995]; *Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 590 NYS2d 201 [1st Dept 1992]). As issues of fact exists to whether defendant was entitled to recoup the commissions previously paid to plaintiff, an issue of fact exists as to whether defendant intentionally and without authority, assumed or exercised control over plaintiff's commissions, in derogation of plaintiff's rights.

"In order to recover for fraud, plaintiffs must show a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury" (*Pope v Saget*, 29 AD3d 437, 817 NYS2d 1 [1st Dept 2006]). "CPLR 3016(b) requires that these elements of fraud be pleaded in detail." (*Id.*) Here, plaintiff failed to establish that defendant made fraudulent misrepresentations concerning plaintiff's commissions.

As a result, it cannot be said the defendant's counterclaims for breach of contract based on its alleged right to recoup commissions, lacks merit, and dismissal of this counterclaim is denied. However, defendant did not oppose dismissal of its second counterclaim for damages based on plaintiff's "frivolous" claims and such counterclaim is dismissed.

And, as defendant did not cross move to dismiss plaintiff's fraud claim, on notice, defendant's request in opposition to plaintiff motion to dismiss plaintiff's fraud claim is denied, without prejudice.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion for summary judgment on its complaint is denied; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment dismissing defendants' counterclaims is granted solely to the extent that defendant's second counterclaim is hereby severed and dismissed; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that the parties shall report to Part 40 for trial on November 27, 2012, 9:30 a.m. and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 11, 2012

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD