SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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STAFFTOPIA, INC. D/B/A
ELEVATE RECRUITING GROUP,

Plaintiff,

-against-

PROMETHEUS GLOBAL MEDIA D/B/A
BILLBOARD ONLINE, JANE DOES 1-10,
JOHN DOES 1-10, and DOE BUSINESS
ENTITIES 1-20,

Defendants.

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**DECISION/ORDER**
Index No. 152376/2016
Mot. Seq. No. 001

**KATHRYN E. FREED, J.S.C.:**

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

| PAPERS | NUMBERED[1] |
|---|---|
| NOTICE OF MOTION, ELIASBERG FUCHS AFF. IN SUPP. AND EXHIBITS ANNEXED | 9-12 |
| RUST AFF. IN SUPP. AND EXHIBITS ANNEXED | 13-18 |
| MEMO OF LAW IN SUPP | 19 |
| MEMO OF LAW IN OPP | 21 |
| VITACCO AFF. IN OPP AND EXHIBITS ANNEXED | 22-25 |
| LEAMON AFF. IN OPP. AND EXHIBITS ANNEXED | 26-27 |
| REPLY MEMO OF LAW | 28 |

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action for, among other things, breach of an employee recruitment contract, plaintiff, a recruiter, moves, pursuant to CPLR 3211, to dismiss defendant Prometheus Global

[1] Unless otherwise indicated, the papers are referred to according to the document numbers assigned to them by the New York State Courts Electronic Filing System (NYSCEF).

Media's (hereinafter "defendant") affirmative defenses and counterclaims against it. Defendant submits written opposition. After oral argument, and following a review of the papers submitted and relevant statutes and case law, **the motion is granted.**

**FACTUAL AND PROCEDURAL BACKGROUND**

In August 2012, the parties executed a written agreement pursuant to which plaintiff would find potential employees to fill open positions in defendant's organization. (Doc. No. 13-14) The agreement provided that, in exchange for plaintiff's services, defendant would pay a fee of 17% of each hired candidate's first-year salary, including sign-on bonuses. It is undisputed that the agreement was modified in November 2014 to increase plaintiff's fee to 18%, despite that there was no writing formally memorializing the change. Under the terms of the agreement, defendant had to pay the fee within 45 days after receipt of an invoice. The agreement also contained a "100% Guarantee" provision, under which defendant was entitled to a replacement of any candidate whose employment was terminated within 180 days from his or her first day, free of charge. The provision had two express conditions which, if "not satisfied, [would void] the guarantee:" first, written notification of the candidate's dismissal had to be given within 30 days after his or her last day and, second, the recruitment fee had to have been paid "in full and on time." The agreement also provided that it could "be modified only by a written document signed by both parties."

This action focuses on four referrals. First, in November 2014, plaintiff referred a candidate, and defendant hired the candidate. (Doc. No. 13.) On November 30, 2014, plaintiff submitted invoice No. 1305, requesting payment in the amount of $28,800, which constituted 18% of the November 2014 candidate's first yearly salary. (Doc. No. 15.) On February 10,

2015, defendant paid the referral fee, more than 45 days after the invoice was received.

Second, in February 2015, plaintiff referred another candidate to defendant, and defendant hired the candidate. (Doc. No. 13.) On April 2, 2015, plaintiff submitted invoice No. 312, requesting payment in the amount of $16,200, which constituted 18% of the candidate's first-year salary. (Doc. Nos. 13, 16.) On July 14, 2015, defendant paid the fee, more than 45 days after the invoice was received.

Third, in June 2015, plaintiff referred another candidate, and defendant hired the candidate. (Doc. No. 13.) On June 12, 2015, plaintiff submitted invoice No. 333 to defendant, requesting payment in the amount of $18,900, which constituted 18% of the candidate's first-year salary. (Doc. No. 17.) Despite a demand, defendant never paid this invoice.

Fourth, in July 2015, plaintiff referred another candidate, and defendant hired the candidate. (Doc. No. 13.) On July 15, 2015, plaintiff submitted invoice No. 343 to defendant, requesting payment in the amount of $30,600. (Doc. No. 18.) Despite a demand, defendant never paid this invoice.

In September 2015, defendant informed plaintiff that it had terminated the February 2015 candidate's employment, and requested that the $16,200 fee be applied to a portion of the balances owed on the June and July 2015 candidates' invoices. (Doc. No. 22.) Plaintiff refused, through Brian Shea, its Senior Recruiter for Digital Media, but Shea stated that plaintiff would attempt to replace the February 2015 candidate and waive the fee for that candidate. Indeed, according to defendant, the February 2015 referral was hired and fired within the 180-day 100% guarantee provision of the agreement. Defendant contends that, although the referral fees were paid more than 45 days after the invoices were submitted for that candidate, plaintiff agreed to

honor the guarantee in a conversation between Angela Vitacco, defendant's VP of Human Resources, and Shea. In an email sent by Vitacco to other of defendant's employees, she stated that Shea "offere[ed] to replace [the February 2015 candidate] and waive [the] placement fee." (NYSCEF Doc. No. 25.) Defendant concedes that plaintiff thereafter "submitted candidates as potential replacements for the February 2015 [c]andidate, but none of them were qualified. Prometheus rejected all of them."

In this action, plaintiff seeks to recover commissions totaling $49,500 based on the June 2015 and July 2015 referrals, memorialized in invoice Nos. 333 and 343. Defendant has joined issue and asserted affirmative defenses and counterclaims based, primarily, on the theory that the February 2015 candidate's fees were not earned and should be used to offset the balance owed to plaintiff. Plaintiff now moves to strike those affirmative defenses and dismiss the counterclaims.

**POSITIONS OF THE PARTIES**

Plaintiff asserts that the terms of the written contract control, and that defendant has failed to plead or prove either modification or waiver sufficient to allow it to avoid the effect of failing to pay the invoices within 45 days after they were submitted. Plaintiff maintains the contract provisions bar all of defendant's defenses and counterclaims, and the motion essentially rises and falls on the issue of whether defendant has adequately pleaded a modification, waiver or estoppel that allows it to avoid the effect of the 45-day provision.

Defendant argues, in response, that there is at least a question of fact as to whether there was either a waiver or modification precluding a judgment at this preliminary stage. It further contends that it has adequately pleaded causes of action in breach of contract and the warranty of good faith and fair dealing, as well as for setoff.

**LEGAL CONCLUSIONS**

"On a motion to dismiss affirmative defenses pursuant to CPLR 3211 (b), the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law." *534 E. 11th St. Hous. Dev. Fund. Corp. v Hendrick*, 90 AD3d 541, 541-542 (1st Dept 2011). As for the branch of the motion directed at the counterclaims pursuant to CPLR 3211 (a) (1) and (7), "regardless of which subsection of CPLR 3211 (a) a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the [pleader] the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Ray v Ray*, 108 AD3d 449, 451 (1st Dept 2013); *see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001); *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). "However, factual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and documentary evidence." *Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613 (1st Dept 2015) (internal quotation marks, brackets and citations omitted).

Contract provisions that prohibit oral modifications, such as the one undisputedly present in the agreement at issue here, are enforceable pursuant to statute. *See* General Obligations Law § 15-301 (1); *see generally Israel v Chabra*, 12 NY3d 158, 163-167 (2009). Courts have found valid modifications of contracts containing such provisions, in the absence of a subsequent written amendment, only in two circumstances: where there is an oral modification and partial performance that is unequivocally referable to the modification or, alternatively, where there is estoppel. *See Rose v Spa Realty Assoc.*, 42 NY2d 338, 343-344 (1977); *Castellotti v Free*, 138 AD3d 198, 204 (2015); *Paramount Leasehold, L.P. v 43rd St. Deli, Inc.*, 136 AD3d 563, 569 (1st

Dept 2016), *lv dismissed and denied* 28 NY3d 1024 (2016); *Gansevoort 69 Realty LLC v Laba*, 130 AD3d 521, 521 (1st Dept 2015); *Ball v Brodsky*, 126 AD3d 448, 448 (1st Dept 2015).

Nothing in the papers indicates that the parties ever agreed that the placement fee for the February 2015 candidate could be applied retroactively to cover the fees that plaintiff had earned for previous placements. Even accepting defendant's assertion that there was a modification, the modification merely provided that plaintiff would send candidates to replace the February 2015 candidate – not that defendant could avoid paying plaintiff's prior earned fees. Defendant has not stated a legal basis, either based on the express contract or the parties' subsequent conduct, that would permit a reduction of the fees that plaintiff earned from the June and July 2015 hires, and nothing in the papers casts doubt on plaintiff's entitlement to collect the fees. Thus, the affirmative defenses must be stricken.

As for defendant's counterclaims, they focus on the February 2015 candidate. But, again, even giving defendant the benefit of the doubt, plaintiff merely offered to replace the February 2015 candidate without charging defendant an additional fee for the replacement, despite the fact that defendant had failed to make a timely payment of the February 2015 invoice. Moreover, defendant concedes that plaintiff referred two candidates to replace the February 2015 candidate, but asserts that neither of them were qualified. This bald, conclusory assertion falls far short of what would be required to state a cause of action against plaintiff. Defendant does not allege that it ever requested for plaintiff to continue to send candidates to attempt to replace the February 2015 candidate. Since the 100% guarantee provision did not specify the number candidates plaintiff was required to refer and the timing for those referrals, to establish a breach, defendant was obligated to notify plaintiff that it considered the candidates unqualified and demand that

plaintiff refer additional candidates within a specific, and reasonable, time frame. *See Taylor v Goelet*, 208 NY 253, 258-259 (1913); *GDJS Corp. v 917 Props.*, 99 AD2d 998, 999 (1st Dept 1984), *appeal dismissed* 62 NY2d 942 (1984); *Beechwood Gun Club, Inc. v City of Beacon*, 153 Misc 358, 360 (Sup Ct, Bronx County 1933), *affd* 242 App Div 761 (1st Dept 1934); *see generally Fursmidt v Hotel Abbey Holding Corp.*, 10 AD2d 447, 449 (1st Dept 1960); *compare Blask v Miller*, 189 AD2d 958, 960 (3d Dept 1992). Defendant's failure to do so renders its counterclaims for breach of contract, as well as the alternative theories, fatally flawed.

Accordingly, it is hereby:

ORDERED that the motion to strike affirmative defenses and counterclaims is granted in its entirety, and the affirmative defenses and counterclaims appearing in the answer are stricken in their entirety; and it is further

ORDERED that counsel for plaintiff is directed to serve a copy of this order, with notice of its entry, upon all parties within 20 days after it is entered; and it is further

ORDERED that the parties are directed to appear at a preliminary conference at 80 Centre Street, Room 280, on March 7, 2017, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

DATED: January 5, 2016

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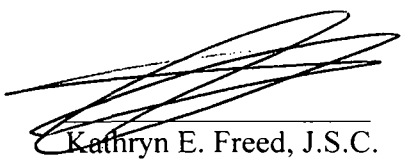

Kathryn E. Freed, J.S.C.