

<b>USPA Accessories LLC v McGhee</b>
2020 NY Slip Op 31845(U)
June 11, 2020
Supreme Court, New York County
Docket Number: 655172/2019
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. GERALD LEBOVITS **PART** **IAS MOTION 7EFM**

*Justice*

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USPA ACCESSORIES LLC d/b/a CONCEPT ONE  
ACCESSORIES,

Plaintiff,

- v -

MICHAEL J. MCGHEE,

Defendant.

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**INDEX NO.** 655172/2019

**MOTION DATE** 05/13/2020

**MOTION SEQ. NO.** 001 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 33, 34, 35, 36

were read on this motion for LEAVE TO AMEND.

*Lazarus & Lazarus, P.C.*, New York, NY (Harlan M. Lazarus and Max I. Ezoory of counsel), for plaintiff.

*Criscione Ravala LLP*, New York, NY (Galen J. Criscione of counsel), for defendant.

Gerald Lebovits, J.:

In this breach-of-contract action, plaintiff, USPA Accessories, LLC, has sued defendant, Michael J. McGhee. USPA claims that under the terms of a sales-consulting agreement between them, McGhee is obligated to repay approximately \$135,000 in advanced but unearned sales commissions. McGhee now moves to dismiss under CPLR 3211 (motion sequence 001). Separately, McGhee moves under CPLR 3025 (b) to amend his reply papers in support of his motion to dismiss (motion sequence 002). McGhee's motion to dismiss is granted; the motion for leave to amend is denied as academic.

**BACKGROUND**

USPA sells accessories across a range of settings and product lines. In January 2017, USPA hired McGhee as a vice president of sales. (*See* NYSCEF No. 19 [signed offer letter].) In that role, USPA agreed to pay McGhee partly on salary and partly on commission. The offer letter provided that McGhee's first paycheck would include \$20,000 as an advance against future commissions. (*See* NYSCEF No. 19 at 2 § 3.) McGhee's commissions would be applied to this

advance as earned. If McGhee were to “resign from the company prior to . . . earning back the commission,” he would be obligated to “reimburse the company for the unearned portion.” (*Id.*)

In early 2018, USPA and McGhee agreed in writing that for the rest of 2018 he would work for USPA as a consultant on an independent-contractor basis, rather than as a vice president of sales. (*See* NYSCEF No. 3 at 6 § 8.1.) This new contract specified that “any and all prior agreements by and between” McGhee and USPA, “including without limitation the January 9, 2017 letter agreement” between them, are “cancelled, void and of no effect.” The contract specified as well that USPA and McGhee each “release[d] the other from any and all claims, obligations and/or liabilities arising out of or relating to any and all prior agreements.” (*Id.* at 1 § 2.1 [a].) The agreement also contained a merger clause, which provided that “[t]his agreement and the exhibits hereto represent and constitute the entire agreement between the parties, and supersede and merge all prior negotiations, agreements, and understandings, oral or written, with respect to any and all matters between” McGhee and USPA. (*Id.* at 10 § 9.7.)

Substantively, the 2018 contract provided that McGhee would be paid principally on a sales-commission basis. (*See id.* at 2-3 art. 3.) In addition to a specified commission on net sales, USPA agreed to pay McGhee \$8,000 a month as an advance against commission. (*Id.* at 2 § 3.1.)

The contract also provided that USPA had the “sole discretion” to “set cash discounts, make allowances and adjustments, provide refunds, and write off as bad debts overdue amounts” as “deem[ed] advisable.” (*Id.* at 3 § 3.5.) “In each such case,” USPA would “charge back to [McGhee’s] account any actual amounts previously paid or credited to [McGhee] with respect to such case discounts, allowances, adjustments, returns, refunds, or bad debts.” If, however, “such accounts are paid at a later time,” McGhee would “be entitled to the applicable commissions on such amounts paid.” (*Id.*)

The contract further provided that USPA would “submit to [McGhee] monthly statements of the Commissions due and payable to [McGhee] under the terms” of the contract—and that McGhee would “be bound to such statements” unless he provided specific written objections to them “within thirty (30) days of [his] receipt of the statement.” (*Id.* at § 3.6.) The contract did not include any language stating that McGhee would be obligated to repay commissions that had been advanced to him but not earned back under USPA’s commission statements.

According to the allegations of the complaint, McGhee worked for USPA for the full duration of the 2018 contract. After the contract’s expiration, McGhee worked for USPA without a written agreement for part of 2019, as well. Over the course of 2018 and 2019, USPA advanced McGhee a total of \$135,790.06 in commissions (which USPA termed “loans”) that were neither earned back nor repaid.

USPA brought this action, seeking the \$135,000 under several related theories (contract, unjust enrichment, account stated, and money had and received). McGhee has moved to dismiss the complaint under CPLR 3211 (a) (1) and (a) (7) (motion sequence 001). After briefing on the motion to dismiss was complete, McGhee sought leave under CPLR 3025 (b) to amend his reply papers in support of dismissal to add new arguments based on information that McGhee had learned after filing the reply (motion sequence 002).

## DISCUSSION

McGhee moves to dismiss under CPLR 3211 (a) (1) and (a) (7). When ruling on a CPLR 3211 (a) (7) motion to dismiss, this court must accept as true the facts as alleged in the pleadings and submissions in opposition to the motion, accord the non-moving party the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. (*See Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Services, Inc.*, 20 NY3d 59, 63 [2012].) In assessing a motion under CPLR 3211 (a) (1), the motion may be granted “only where the documentary evidence utterly refutes [the non-moving party's] factual allegations, conclusively establishing a defense as a matter of law.” (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002].)

The CPLR 3211 motion to dismiss is granted, for the reasons set forth below. Defendant’s separate CPLR 3025 motion for leave to file an amended “pleading”—*i.e.*, an amended reply memorandum of law in support of dismissal—is therefore academic, and denied on that ground.<sup>1</sup>

### **I. USPA’s Contract, Unjust-Enrichment, and Money-Had-and-Received Claims**

USPA’s claims against McGhee for breach of contract and unjust enrichment both rest on the contention that McGhee was obligated under the terms of the 2018 contract to repay unearned commission advances. In moving to dismiss, McGhee argues that the contract does not include that repayment requirement. This court agrees.

It is undisputed that the 2018 contract lacks any express requirement to repay unearned commission advances. USPA’s position is instead based on § 3 of the 2017 offer letter and § 3.5 of the 2018 contract. Neither provision supports USPA’s contract and unjust enrichment claims.

The 2018 contract expressly forecloses USPA’s reliance on § 3 of the 2017 offer letter. Section 2.1 of the 2018 contract provides that the terms of the 2017 offer letter are “cancelled, void and of no effect,” and that USPA releases McGhee from “any and all claims, obligations and/or liabilities” deriving from that earlier agreement. (NYSCEF No. 3 at 1 § 2.1 [a].) Additionally, § 9.7 of the 2018 contract provides that the terms of the contract are “the entire agreement between the parties, and supersede and merge all prior” written understandings “with respect to any and all matters” between the parties. (*Id.* at 10.) USPA’s contractual claims against McGhee may rest only on the terms of the 2018 contract, not any earlier contracts between them.<sup>2</sup>

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<sup>1</sup> This court is skeptical that a second motion under CPLR 3025 is an appropriate vehicle for McGhee to seek to put before the court newly discovered evidence as to the first motion. But the court need not reach that issue here.

<sup>2</sup> In any case, even the 2017 offer letter required McGhee to repay unearned commissions only “should [he] resign from the company prior to . . . earning [them] back.” (NYSCEF No. 19 at 2.)

USPA misplaces its reliance on § 3.5 of the 2018 contract. As an initial matter, a repayment obligation would be a significant contractual provision. One would expect to see it stated expressly (whether in § 3.5 or elsewhere)—not implied between the lines, as USPA would have it.

The substance of § 3.5 is not consistent with reading in an implied repayment obligation, either. That provision (i) affords USPA the “sole discretion” (ii) to make certain specified adjustments to the dollar amounts of sales that have been made or will be made, (iii) provides that USPA will impose chargebacks on McGhee’s account with respect to *those adjustments*, and provides that if adjusted or written-off sales amounts are later paid, McGhee is entitled to commission on those paid amounts. (*See* NYSCEF No. 3 at 3 § 3.5.)

That is, in § 3.5 USPA reserved the right to adjust the amounts of McGhee’s sales as USPA deemed necessary, and to increase or decrease the corresponding amount of commission earned by McGhee on the adjusted sales. Each of these substantive aspects of the provision is inconsistent with USPA’s interpretation, which would instead impose a nondiscretionary obligation on *McGhee* to repay *all* advanced but unearned commissions, and to do so for reasons having nothing to do with any sales adjustments made by USPA.<sup>3</sup>

Indeed, the commission statements that USPA itself attached to the complaint show the distinction between the language of § 3.5 and USPA’s current interpretation of the provision. These commission statements have a column for “Merch Value” as initially sold by USPA, a column for “Chargebacks” that have been deducted from Merch Value, and a column for the post-deduction “Net Sales.” The commission calculated on Net Sales is then compared to an “Advance” column listing the amount of McGhee’s monthly advance on commission. (*See* NYSCEF Nos. 4, 5.) USPA’s claims now are based on the sum of the difference each month between Advance and Net Sales—not the relationship between *Chargebacks* and Advance.<sup>4</sup> In short, USPA’s own commission statements undercut its argument that § 3.5 of the 2018 contract requires repayment of unearned commissions. USPA cannot state a claim for breach of a contractual obligation that does not exist.

USPA’s unjust-enrichment and money-had-and-received claims also rest on the same basic theory: McGhee was (assertedly) obliged under the contract to repay unearned advances but failed to do so, and therefore principles of equity and good conscience require that he not be permitted to retain that money. (*See* NYSCEF No. 23 at 9-10; *see also Georgia Malone & Co. v Rieder*, 19 NY3d 511, 516 [2012] [elements of unjust-enrichment claim]; *Litvinoff v Wright*, 150 AD3d 714, 716 [2d Dept 2017] [elements of money-had-and-received claim].) These claims, too,

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It is undisputed that McGhee did not resign from his role as consultant to USPA before the 2018 contract expired.

<sup>3</sup> USPA’s interpretation also ignores § 3.5’s proviso about commissions on adjusted or written-off sales that USPA later realized.

<sup>4</sup> Indeed, the commission statements reflect a view that McGhee would still owe USPA for any difference between the monthly Advance and monthly Net Sales even if there were no Chargebacks at all.

founder for the same basic reason: the parties' dealings were governed only by the terms of the 2018 contract, which did not require McGhee to repay any unearned advances.

## II. USPA's Account-Styled Claim

USPA also asserts an account-styled claim on the theory that USPA sent, and McGhee retained, commission statements setting forth his obligation to repay unearned commissions. But an account styled "cannot be used to create liability where none otherwise exists." (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 251 [1st Dept 2007].) As discussed above, McGhee did not have a contractual obligation to return to USPA his unearned advance commissions. USPA's account-styled claim fails for the same reason.

Moreover, even if USPA could in theory raise an account-styled claim here—and it cannot—the complaint's allegations in support of that claim are not merely conclusory but self-refuting. The complaint alleges that an account styled exists because "Plaintiff sent to Defendant, and Defendant received and retained without objection, the Commission Statements." (NYSCEF No. 2 at 4 ¶ 24.) The complaint expressly defines "Commission Statements" as comprising the two statements attached as exhibits B and C to the complaint. (*See id.* at 3 n 1.) But exhibits B and C are each dated September 9, 2019—the same day USPA filed the complaint. (*See* NYSCEF Dkt. Entries 1 and 2; NYSCEF No. 2 at 5; NYSCEF Nos, 4, 5.) The Commission Statements thus could not possibly have been sent to, received by, and retained without objection by McGhee before the complaint was filed, as USPA alleges.<sup>5</sup> USPA's account-styled claim is additionally subject to dismissal on this independent ground.

Accordingly, for the foregoing reasons it is

ORDERED that defendant's motion to dismiss under CPLR 3211 (motion sequence 001) is granted, and the complaint is dismissed, with costs and disbursements to be taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that defendant's motion for leave to amend under CPLR 3025 is denied as academic; and it is further

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<sup>5</sup> Indeed, even in opposing McGhee's motion to dismiss, USPA does not contend that it sent commission statements reflecting a repayment obligation that McGhee received and retained without objection—only that while working as a consultant for USPA McGhee had access to USPA computer systems that provided him with regularly updated sales information. (*See* NYSCEF No. 23 at 9.)

ORDERED that defendant shall serve a copy of this order with notice of its entry on plaintiff and on the office of the General Clerk and the office of the County Clerk, who shall enter judgment accordingly.

06/11/20  
DATE

  
**HON. GERALD LEBOVITZ**  
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES  
TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE