

**Mahland v Noor Staffing Group, LLC**

2022 NY Slip Op 30091(U)

January 14, 2022

Supreme Court, New York County

Docket Number: Index No. 657384/2020

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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ROBIN MAHLAND,

Plaintiff,

- v -

NOOR STAFFING GROUP, LLC dba NOOR STAFFING and
PROMPT PERSONNEL, JOHN DOES 1 - 10

Defendants.

-----X

INDEX NO. 657384/2020
MOTION DATE 01/13/2022
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 3-16, 17, 18, 19, 20, 21

were read on this motion to/for VACATE - DECISION

The motion to vacate the Court's decision granting the motion to dismiss (which was granted without opposition) is granted and, upon consideration of that motion, the underlying motion to dismiss is granted in part and denied in part.

Background

As an initial matter, the Court grants the branch of the motion that seeks to vacate the dismissal order. That motion was granted without opposition. Plaintiff initially tried to file opposition after the Court had already granted the motion to dismiss and the parties later tried to stipulate to vacate the decision. The Court declined to consider that request. As counsel for plaintiff's affirmation in support of the instant motion makes clear, the parties had been discussing an adjournment of the motion for weeks prior to the return date but no one told the Court. The motion was submitted, the Court reviewed the file and issued a prompt decision.

Simply put, there was no basis to *sua sponte* vacate that decision because the Court did not make an error; the motion was submitted without opposition.

However, given that the parties subsequently filed both an opposition and reply to the motion, the Court finds that the motion to dismiss should be decided on the merits. Moreover, defendants agreed to vacate the dismissal order (NYSCEF Doc. No. 13) so their opposition to the instant motion is baffling although the Court understands defendants' frustration that it took months for plaintiff to make the instant motion.

### **Motion to Dismiss**

Turning to the merits, this case concerns plaintiff's allegations that defendants refused to pay her certain wages, including commissions she purportedly earned while working as a recruiter for defendants. Defendants run a staffing company and identifies candidates for clients in various industries.

Plaintiff sets forth numerous instances in which she did not receive commissions she is purportedly owed for placing candidates at certain clients, including at Bellevue Hospital and New York University School of Law.

Defendants move to dismiss the complaint on the grounds that an at-will employee is not entitled to post-termination commissions and that the existence of an employment agreement bars plaintiff's claims for unjust enrichment and breach of duty of good faith and fair dealing. They insist that they had no obligation to pay post-termination commissions and so plaintiff's contentions are utterly without merit.

Also included in defendants' moving papers is an affidavit from Mr. Eletto (the chief of staff for defendants) who contends that plaintiff was suspended due to insubordinate statements and disruptive conduct before being terminated following an internal investigation. He claims

that the commissions plaintiff seeks compensation for are from services rendered after she was fired. Mr. Eletto explains that after she was fired, the temporary employees allegedly placed by plaintiff identified in the complaint were managed by another consultant for defendants who then became entitled to receive the commissions that plaintiff now seeks.

In opposition, plaintiff argues that she is seeking compensation for work she performed prior to her termination. She insists that these are disputed facts and that this should compel the Court to deny the motion to dismiss.

In reply, defendants argue that plaintiff abandoned her quasi-contract claims, that plaintiff's alleged commissions were earned post-termination and that the Labor Law claims must be dismissed.

### **Discussion**

“On a motion to dismiss, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery” (*Besen v Farhadian*, 195 AD3d 548, 549, 151 NYS3d 31 [1st Dept 2021] [internal quotations and citations omitted]).

As an initial matter, the Court declines to dismiss the complaint on the ground that plaintiff seeks post-termination commissions. The complaint clearly states that plaintiff made several placements for defendants and that she did not receive those wages (NYSCEF Doc. No. 1, ¶¶ 11-13). That defendants claim that certain of these commissions only accrued after plaintiff was fired is a factual issue and one that this Court cannot determine on a motion to dismiss. The

affidavit of Mr. Eletto does not constitute documentary evidence that irrefutably rebuts the allegations in the complaint. Discovery is clearly required to explore the timeline of when plaintiff allegedly earned commissions (assuming she earned them at all).

However, the Court dismisses plaintiff's fifth cause of action, which seeks damages pursuant to Labor Law § 193. This statute prohibits employers from making certain deductions from an employee's paycheck, such as those for insurance premiums or pension benefits. That is not the case here, where plaintiff claims that she did not receive wages she was owed. In other words, plaintiff's allegations fit squarely under Labor Law § 191, which concerns the payment of wages rather than improper deductions.

The Court also dismisses the third cause of action for unjust enrichment as plaintiff did not address this claim in her opposition and (as defendants argue) abandoned this claim.

Also dismissed is the second cause of action for breach of an implied contract as plaintiff did not state a cognizable cause of action. Plaintiff did not specifically address this claim in her opposition and the allegations for this cause of action (paragraphs 32-35) simply do not adequately state a claim for breach of an implied contract especially where plaintiff's complaint argues that defendants breached its obligations (and contains a breach of contract claim). This is not a case where it is unclear whether the contract at issue contained an implication that plaintiff would receive commissions. Rather, this action concerns whether plaintiff earned those commissions and whether they were earned before she was terminated.

Similarly, the Court dismisses the sixth cause of action for good faith and fair dealing as duplicative of the first cause of action for breach of contract. "The claim that defendants breached the implied covenant of good faith and fair dealing was properly dismissed as duplicative of the breach-of-contract claim, as both claims arise from the same facts and seek the

identical damages for each alleged breach” (*Amcan Holdings, Inc. v Can. Imperial Bank of Commerce*, 70 AD3d 423, 426, 894 NYS2d 47 [1st Dept 2010] [citations omitted]). Here, plaintiff includes a joint demand for damages arising from all the causes of action and the facts are the same. Both the breach of contract and the good faith and fair dealing claims rely on the allegation that defendants did not pay plaintiff what she was owed. That defendants allegedly fired plaintiff to avoid paying her does not save the cause of action for breach of the implied duty of good faith and fair dealing. It merely provides a reason for why plaintiff was terminated.

Accordingly, it is hereby

ORDERED that the motion by plaintiff to vacate this Court’s order dismissing the case is granted; and it is further

ORDERED that upon consideration of defendants’ motion to dismiss the Court grants that motion only to the extent that the second, third, fifth, and sixth causes of action are severed and dismissed and denied as to the remaining relief requested, and defendants are directed to answer pursuant to the CPLR; and it is further

ORDERED that that this action is restored to the active calendar; and it is further

ORDERED that, within 7 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh));] and it is further

ORDERED that upon receipt of the foregoing, the Clerk of the General Clerk's Office shall immediately restore the case to the active calendar.

If plaintiff fails to serve the clerk, then the case will not be restored because the clerk will not know to do it and this motion will be considered abandoned.

Remote Conference: April 26, 2022.

1/14/2022  
DATE

  
ABLENE BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	DENIED
			<input checked="" type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE