SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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DAMIAN NOTO,

Plaintiff,

- v -

PLANCK, LLC,DMEP CORPORATION, HAWKING LLC

Defendant.

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INDEX NO. 155149/2022

MOTION DATE 05/03/2023, 07/11/2023

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 77, 78, 79, 84

were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105

were read on this motion to/for SANCTIONS.

In June 2022, plaintiff Damian Noto commenced this employment action against defendants Planck, LLC (d/b/a Patch Media), DMEP Corporation (d/b/a Hale Global), and Hawking LLC (d/b/a Market News International, or "MNI"). In motion sequence 003, plaintiff moves to reargue the Court's Decision and Order dated March 21, 2023 (hereinafter, the "March 2023 Decision") that granted in part defendants' motion to dismiss. Defendants oppose the motion in its entirety. In motion sequence 004, defendants move for a court order scheduling a sanctions hearing against plaintiff pursuant to CPLR 3126. They allege that, in his opposition to the motion to dismiss, plaintiff perpetrated a fraud on the court by altering two documents and submitting pay stubs that did not belong to him as evidence of his own commission-based employment agreement. Plaintiff opposes the imposition of sanctions. Motion Sequences 003 and 004 are consolidated herein for resolution. For the following reasons, plaintiff's motion for reargument is granted, and upon reargument, the Court adheres to its March 2023 Decision; defendants' motion for an evidentiary hearing is granted.

BACKGROUND

Since both plaintiff's motion to reargue and defendants' motion for sanctions are premised on the Court's conclusions in its March 2023 Decision, the Court summarizes the relevant issues below.

In 2022, plaintiff commenced this litigation, asserting six causes of action—for breach of contract, various violations of New York Labor Law, retaliation, and *quantum meruit*—over three separate agreements between plaintiff and defendants and/or their executives. According to plaintiff's complaint, defendants allegedly promised to (1) provide him with 75 units of equity in Patch, (2) pay a ten-percent commission on gross revenue that Patch received from his "then existing and future sales and revenue partnerships he personally generated," and (3) give a three-percent equity interest in MNI. None of the agreements were reduced to writings.

The Ten-Percent Commission Agreement

In August 2022, defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (5) for failure to satisfy the statute of frauds and CPLR 3211 (a) (7) for failure to state a cause of action. With respect to the statute of frauds and the ten-percent commission plan based on certain performance metrics, defendants argued that the agreement was unenforceable as § 5-701 (a) (1) of New York General Obligation Law requires contracts that "[are] not to be performed within one year from [their] making" to be in writing and this agreement was not. (*See* NYSCEF doc. no. 40 at 3, March 2023 Decision; General Obligation Law § 5-701.)

In opposition, plaintiff submitted a supplemental affidavit (NYSCEF doc. no. 17, Noto Mot. Seq. 001 affidavit), in which he asserted, "Patch's agreement to pay me ten percent commissions as part of my total compensation was reflected in a series of documents." (*Id.* at ¶ 3.) The affidavit attached several exhibits, of which three are particularly relevant here: Exhibit A, Exhibit B, and Exhibit I. Exhibit A (NYSCEF doc. no. 18), which plaintiff describes as "a Patch Commission Plan sent…from the Patch Head of Finance Team" designed to "increase his revenue targets" for 2022, is a Google spreadsheet with three columns. The first column is a list of various companies that Patch has partnerships with and from which plaintiff's commission is determined, the second—labeled "2021"—consists of the total revenue Patch earned from each partnership, and the third column, entitled "cumulative revenue," adds together the revenue received from all partnerships. (*Id.*) These three appear to show that in 2021 plaintiff met his goal of achieving $10 million in revenue. However, the spreadsheet plaintiff received from Patch had a fourth column entitled "cumulative commission," which plaintiff omitted from the exhibit, that contradicts plaintiff's assertion that defendants agreed to a ten-percent commission rate. It instead describes a tiered commission plan beginning at 1% and ending at 9%. (*See* NYSCEF doc. no. 57, Google spreadsheet; NYSCEF doc. no. 53 at ¶ 8-9, Warren St. John affidavit.)

Supplemental Affidavit Exhibit B is from that same Google spreadsheet. Plaintiff describes it as Part 2 of the Patch Commission Plan and as having "memorialized my ten (10%) commission entitlement [sic]." (NYSCEF doc. no. 17 at ¶ 5.) In Exhibit B, Patch uses plaintiff's 2021 revenue as a baseline and structures plaintiff's commission in 2022 around the percentage by which he increased Patch revenue. (NYSCEF doc. no. 19.) The rate at which he would be paid commissions, according to Exhibit B, would be ten percent regardless of whether he increased revenue from 0% to 65% (as described in one row) or 120% to 999% (as described in another). Yet, the Commission Plan that plaintiff received from Patch, the one plaintiff asserted "memorialized" a ten-percent commission, did not describe a uniform ten-percent rate no matter the percent revenue increase. (NYSCEF doc. no. 57.) Instead, the commission plan that Patch sent describes a tiered-rate commission in line with the "cumulative commission" column from

Exhibit A: for example, it describes a 1% commission for a 0% to 65% increase in revenue, a 5% commission for a 65% to 70% increase, etc., up to a 9% commission for a 120% to 999% increase. Plaintiff admits in his opposition that he received the Patch Commission Plan with a tiered-rate commission but asserts that he edited it in line with a call he had with the Patch's Finance Department. (NYSCEF doc. no. 92 at ¶2, Noto Mot. Seq. 004 affidavit ["She invited me to edit the document to include the commission terms that were consistent with my discussions and that I thought were 'fair'…Hence, following our call I did as she asked and edited the document, including changing the commission rate."]) Plaintiff did not provide the Court with this context in the original motion.

In his Mot. Seq. 001 affidavit, plaintiff asserted that Exhibit I are "examples of some of my Patch paystubs reflecting commission payments made to me. Patch did, in part, honor *my* commissions agreement by paying me certain commissions during the course of my Patch employment (emphasis added)." (NYSCEF doc. no. 17 at ¶14.) Defendants allege (and plaintiff does not deny) that these paystubs did not reflect commissions Patch owed him under the ten-percent compensation plan but rather commissions earned by then-CEO Warren St. John. As described in his affidavit, St. John helped form a lucrative business partnership between Patch and another company and then offered plaintiff a point of the resulting commission to smooth over the transition period. (NYSCEF doc. no. 53 at ¶15; *see also* NYSCEF doc. no. 62 at ¶e, CFO Mapili affidavit [explaining plaintiff received no commission payments outside $48,205 in 2020 and $11,795 in 2021 in connection with St. John's partnership agreement].) Contrary to plaintiff's explicit averments, then, defendants allege that the pay stubs that he submitted to the Court had no connection to his commission agreement.

Exhibits A, B, and I were instrumental to plaintiff's argument that the statute of frauds did not render the commission agreement unenforceable. In his memorandum of law, plaintiff asserted that "[he] has clarified in his affidavit [that] his agreement with Patch was confirmed in some writings" and that "Patch partially performed the commissions agreement," thereby "invalidating a statute of frauds defense." (NYSCEF doc. no. 16 at 17-18, plaintiff memo of law.) To support these claims, plaintiff pointed to the three exhibits described above. Further on, he argued, in explicit reference to Exhibit I, that "Mr. Noto was paid certain commissions while employed by Patch *in return for his sales efforts*." (*Id*. at 18.)

The Court's March 2023 Decision recognized that nothing in the motion's procedural posture precluded it from considering plaintiff's supplemental affidavit and exhibits on the motion to dismiss. (*See* NYSCEF doc. no. 40 at 3.) In its discussion of the statute of frauds, the Court determined that the portion of the agreement entitling plaintiff to commissions after his termination needed to be in writing. (*Id*. at 4 [finding that, as asserted in the complaint, plaintiff's agreement constituted a promise to pay commissions indefinitely and solely at the discretion of third parties such that Gen. Oblig. Law § 5-701 (a) (1) required it to be in writing].) As to commissions that accrued during plaintiff's employment, the Court held that this portion of the agreement did not run afoul of §5-701. The Court explained that the agreement to provide compensation "appeared to be coterminous with his [at-will] employment contract," which, by definition, was capable of being performed within one year and thus not subject to the statute of frauds. That the two agreements were "coterminous," the Court found, was because the "pay stubs and emails from Patch executives allegedly reflect both the obligation to pay plaintiff his

salary and a ten-percent commission." (*Id.*) Lastly, the Court rejected plaintiff's two arguments that the pay stubs reflected partial performance, and that emails and other writings "confirmed Patch's agreement to pay commissions."

In this motion sequence, defendants move for an order imposing sanctions after an evidentiary hearing. Defendants suggest that dismissal of the complaint may be warranted. (NYSCEF doc. no. 90 at 13-14.)[1]

Whether the Agreement for 75 Units of Equity in Patch is Supported by Consideration

Plaintiff focuses his motion to reargue solely on the Court's determination in its March 2023 Decision that Patch's promise to grant him an additional 75 units of equity in Patch was unsupported by valid consideration. In doing so, the Court rejected plaintiff's argument that his "additional efforts on behalf of Patch, as well as [his] added responsibilities for MNI" constituted consideration for defendants' promise for the additional units of equity. (NYSCEF doc. no. 40 at 7-8.) The Court noted that, while an at-will employee's decision to "continue employment" or "refrain from leaving" may constitute valid consideration under the right circumstances, in this action, plaintiff never considered leaving (since this promise was made shortly after being hired) and plaintiff's "continued, additional efforts" amounted to obligations plaintiff already committed to performing in his original contract. (*Id.*) Since plaintiff had not pled the existence of a valid contract, the Court granted defendants' motion to dismiss under CPLR 3211 (a) (7).

DISCUSSION

Defendants' Motion for Sanctions

As the Court of Appeals has defined it, fraud on the court involves conduct that is deceitful and obstructionistic, injecting misrepresentations and false information into the judicial process "so serious that it undermines. . . the integrity of the proceeding." (*CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 318 [2014], citing *Baba-Ali v State of New York*, 19 NY3d 627, 634 [2012].) The conduct constituting such fraud must be a knowing attempt to hinder the fact finder's fair adjudication of the case and concern matters central to the issues of the case. (*Id.*, citing *McMunn v Mem'l Sloan-Kettering Cancer Ctr.*, 191 F Supp 2d 440, 445 [SDNY 2002].) Therefore, sanctions are inappropriate where the alleged conduct is insignificant and touches matters collateral to the issue at hand. (*See e.g., Paslogix Inc. v 2FA Tech., LLC*, 708 F Supp 2d 378, 401 [SDNY 2010].) The party moving for sanction must demonstrate fraud on the court by clear and convincing evidence. (*CDR Creances*, 23 NY3d at 318.) Before imposing sanctions, courts in this jurisdiction hold evidentiary hearings to determining if the alleged misconduct can be established by clear and convincing evidence such that the court can order sanctions. (*See Augustin v Augustin*, 79 AD3d 651, 652-653 [1st Dept 2010] ["Given the policy implications of

[1] Although defendants suggest that dismissal may be warranted as a sanction for plaintiff's conduct, it is notable that they have not sought dismissal through a reargument or renewal motion pursuant to CPLR 2221. The Court surmises that this is because either (1) the evidence of plaintiff's deception was discoverable on the previous motion sequence (since the unedited versions of Exhibits A, B, and I were indisputably within their possession), thus precluding the Court from granting such a motion, or (2) the Court's prior determination that the statute of frauds did not apply to the ten-percent commission agreement was correct and would not have changed regardless of whether plaintiff produced Exhibits A, B, and I.

a fraud being perpetrated on the court, we exercise our independent discretion and remand for an evidentiary hearing"]; *Voyiatgis v Lelekakis*, 2018 NY Misc. LEXIS 1838 at *12-13 [Sup. Ct. Queens County 2018].)

The Court grants defendants' motion for an evidentiary hearing to determine whether there is clear and convincing evidence that plaintiff willfully or knowingly misled the Court. It is beyond a serious doubt that plaintiff presented Exhibits A and B as the compensation plan *as Patch sent it*. (*See* NYSCEF doc. no. 17 at ¶3, ["Patch's agreement to pay me ten percent commissions as part of my total compensation was *reflected* in a series of documents"], at ¶ 4 ["Exhibit A is a Patch Commission Plan sent to me from Patch Head of Finance Team… 10% of gross revenues for achieving a target of 12x my salary annually"], and at ¶5 ["Exhibit B is Part 2 of same Patch Commission Plan sent to me from Patch's Head of Finance which *memorializes* my 10 (10%) commission entitlement"].) This, of course, was not true. More to the point, the difference between Exhibits A and B, as represented by plaintiff, and the compensation plan that Patch sent is the difference between an actual agreement that, as plaintiff's put it, "was not solely based on verbal discussions" and evidence of an offer made by Patch to plaintiff. In fact, plaintiff's communications with Patch the day after he received (and edited) the plan suggest that he was still attempting to negotiate a commission plan. (*See* NYSCEF doc. no. 59, email with Rob Cain ["I would like you to consider increasing my plan by 1% in each tier up to my goal and 9% for any additional revenue above it."]) This distinction, as plaintiff implicitly recognized in his memorandum of law, was material to whether the agreement satisfies the statute of frauds.

With respect to Exhibit I, plaintiff claimed that the pay stubs he submitted to the court reflected commission payments made in line with *his* commission agreement and that Patch partially honored it. (NYSCEF doc. no. 17 at ¶ 14.) A review of plaintiff's original memorandum of law reveals this assertion to be plaintiff's singular basis for arguing that defendants partially performed on the contract and, therefore, the statute of frauds did not apply. (NYSCEF doc. no. 16 at 17.) That the pay stubs were instead receipts of commissions earned by St. John—and that plaintiff did not disclose this fact—underscores just how inaccurate it was to suggest that "[plaintiff] was paid certain commissions while employed by Patch in return for his sales effort." (*Id*.) In this motion sequence, plaintiff asserts, "there was nothing misleading about the pay stubs I submitted into evidence or my testimony with respect thereto and I stand by it." (NYSCEF doc. no. 92 at ¶6.) Further, to the extent the Court may find the exhibit misleading, plaintiff merely states "there are plainly material disputes of fact" between the parties, but there is "overwhelming evidence proving that [Patch] previously treated me as a commissionable employee." (*Id*.) From the Court's perspective, plaintiff's attempt to minimize this as a genuine dispute of fact strains credulity: the rather obvious conclusion to be drawn is that Exhibit I was an intentionally misleading attempt to convince the Court that the agreement was not within the statute of frauds. This is especially true since plaintiff was not paid commissions at any other point during his employment. (*See* NYSCEF doc. no. 62, [explaining that Patch's payroll records reflect no commission payment from 2016 through 2021 except for St. John's].) Accordingly, given the potential fraud on the court, an evidentiary hearing is warranted.[2]

[2] Defendants contend that dismissal of the complaint is likely warranted as an appropriate sanction for fraud on the Court. The Court need not address this issue before said evidentiary hearing takes place.

Plaintiff's Motion to Reargue

CPLR 2221 (d) provides that a party may seek leave to reargue a prior motion based upon matters of fact or law the Court overlooked or misapprehended. A motion to reargue is not intended to provide the unsuccessful party a second opportunity to reargue issues previously decided. (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 28 [1st Dept 1992].) Nor is a motion to reargue designed to afford unsuccessful parties the opportunity to present alternative positions, new theories of the case, or arguments different from those originally asserted. (*Foley v Roche*, 68 AD2d 558, 547 [1st Dept 1979], *Matter of Settlers v AI Props & Devs (USA) Corp*, 139 Ad3d 492, 492 [1st Dept 2016].) At its sound discretion, the court that decided the prior motion retains the authority to grant or deny reargument motions, and the moving party bears the burden of demonstrating to the Court that it misapprehended or overlooked matters of fact or law. (*Loland v City of New York*, 212 AD2d 674, 674 [2d Dept 1995].) The Court finds that plaintiff has not met his burden here.

Plaintiff argues that the Court's March 2023 Decision misapprehended New York law when it found his "continued, additional efforts on behalf of Patch" to be insufficient consideration to support his claim for the 75 units of equity that Patch CEO Charles Hale allegedly promised shortly after his hiring. For clarity purposes, the Court reproduces below the specific branch of its March 2023 decision that plaintiff objects to:

> [W]hile acknowledging that an at-will employee's decision to "continue employment" or "refrain from leaving" may constitute valid consideration (see *Halliwell v Gordon*, 61 AD3d 932, 933 [2d Dept 2009]), defendants argue that plaintiff never really offered consideration of this type. Rather, since he had just been hired by Patch, plaintiff was never considering leaving when he was offered the additional 75 units, meaning the 'continued, additional efforts' amount to obligations that plaintiff already committed to performing in his employment contract.
>
> The Court agrees. In the absence of allegations as to how plaintiff's employment changed—for example, that defendants required plaintiff to take on new responsibilities or a new position, that the work was somehow more demanding or his performance expectations changed—the Court cannot find that, in exchange for the 75 units, plaintiff promised anything other than to perform obligations already expected of him. The argument, made in opposition, that plaintiff "refrained from resigning," thereby creating consideration, is unpersuasive: there are no allegations that plaintiff contemplated resigning or believed it to be an option at that time because, again, plaintiff had just begun working for Patch.

As the Court explicitly recognized, an employee's decision to continue working for their employer may, under certain circumstances, constitute adequate consideration for a promise to pay additional compensation. The Court's holding, then, related only to whether those circumstances were present when plaintiff had only recently been hired and the terms of his employment contract already covered the same duties and obligations that plaintiff identified as the source of consideration for the additional 75 units of equity. In finding insufficient

consideration, the Court's decision merely reflected, albeit implicitly, the principle that illusory contracts—that is, "agreements in which one party gives as consideration a promise that is so insubstantial as to impose no obligation"—are unenforceable. (*See Lend Lease (US) Const. LMB Inc. v Zurich Am Ins. Co.*, 28 NY3d 675, 684, 685 [2017]; *see also Tierney v Capricorn Investors*, 189 AD2d 629, 631 [1st Dept 1993]; *Taylor v Blaylock & Partners, L.P.*, 240 AD2d 289, 290 [1st Dept 1997] [explaining that, in *Tierney v Capricorn*, the court held that an employee could not recover an alleged additional bonus because he "purported to do no more than he was already obligated to do under the written contract, rendering illusory any promise in support of the employer's enhanced obligations."])[3]

Nothing in plaintiff's memorandum of law requires a different conclusion. Plaintiff relies upon several cases, but none are persuasive. In *Levy v Lucent Technologies, Inc.* (2003 U.S. Dist. LEXIS 414 [SDNY 2003]; the Southern District of New York recognized that the parties had agreed to apply New Jersey law, and thus its holding was based entirely on its interpretation of New Jersey Supreme Court cases; in *Lockette v Stanley* (2018 U.S. Dist. LEXIS 171156 [SDNY 2018]),[4] the court found that the employee's continued employment served as the *employer's* consideration (i.e., since the employer chose to forgo their right to terminate his employment) where the employer modified his contract to include an arbitration agreement; and in *Schlaifer v Kaiser* (84 Misc. 817 [Sup. Ct. NY County 1975), the court did not address whether adequate consideration was paid for a stock subscription agreement, only whether the Statute of Limitations applies to enforce the agreement.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that plaintiff Damian Noto's motion to reargue the Court's Decision and Order dated March 21, 2023, pursuant to CPLR 2221 (d) is granted, and upon reargument, the Court adheres to its prior determination; and it is further

ORDERED that defendants Planck, LLC, DMEP Corporation, and Hawking LLC's motion for a court order scheduling a hearing on sanctions is granted; and it is further

ORDERED that the parties shall appear at 60 Centre Street, Courtroom 341, on October 31, 2023, at 10:00 a.m. for an evidentiary hearing to determine whether plaintiff perpetrated a fraud on the court by knowingly and willfully providing misleading documentary evidence in his opposition to defendants' motion to dismiss in Mot. Seq. 001; and it is further

ORDERED that counsel for defendants shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

This constitutes the Decision and Order of the Court.

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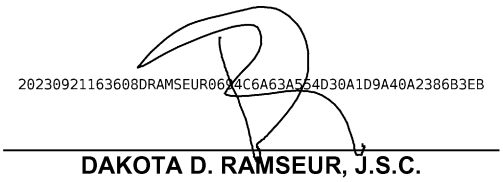
[3] Plaintiff cites *Taylor* as supporting his position. This cannot be the case. The First Department found adequate consideration for an oral modification on both sides where plaintiff worked three months without pay and his employer did not terminate his employment during that time. (Apparently, plaintiff had elected to forgo a salary for a period of time because poor performance within his team contributed to the firm's financial difficulty.)

[4] Plaintiff's parenthetical attributes to *Olivieri v Stifel, Nicolaus & Co.* (2022 U.S. Dist. LEXIS 55560 [EDNY 2022]) the proposition that "continued employment [is] adequate consideration to enforce arbitration agreement." However, *Olivieri* was itself using a parenthetical to describe *Lockette v Stanley*.



9/14/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE