SCANNED ON 1/27/2010

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. CAROL EDMEAD

Justice

PART 35

Index Number : 109439/2009

NICHOLS, SUSANNA

VS.

SG PARTNERS, INC.

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 109439-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

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 branches of the motion by defendant SG Partners, Inc., pursuant to CPLR §3211(a)(5) and (a)(7), to dismiss the first, third and fourth causes of action of plaintiffs Susanna Nichols and Pamela Hickory are denied; and it is further

ORDERED that the branch of the motion to dismiss the second cause of action pursuant to CPLR §3211(a)(7) is granted, and the second cause of action is hereby severed and dismissed; and it is further

ORDERED that defendant SG Partners, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
JAN 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/25/10

HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

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

---X

SUSANNA NICHOLS and PAMELA HICKORY,

Index No. 109439/2009

Plaintiffs,

-against-

SG PARTNERS, INC.,

Defendant.

---X

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

FILED
JAN 27 2010
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

Plaintiffs, Susanna Nichols and Pamela Hickory ("plaintiffs") commenced this action against defendant, SG Partners ("defendant" or "SGP"), alleging breach of a contract, breach of an implied covenant of good faith and fair dealing, unjust enrichment and violation of New York Labor Law ("Labor Law") §193.

Defendant now moves to dismiss the complaint pursuant to CPLR §3211(a)(5) and (7) on the grounds that enforcement of the oral agreements alleged on behalf of each plaintiff is barred by the Statute of Frauds and/or is too vague to be enforced and that the remaining causes of action are duplicative of the breach of contract claim and/or fail to state a claim.

Background[1]

In 2001, plaintiffs were hired by defendant SGP, a financial executive placement company, as placement professionals. According to their oral agreements, SGP agreed to pay each plaintiff a compensation package consisting of a fixed salary of $75,000 plus an additional payment ("additional compensation") based on a certain percentage of the revenues generated for

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[1] These facts are taken from plaintiffs' complaint, affidavit of Susanna Nichols and plaintiffs' opposition papers.

SGP from the job placements made by each of the plaintiffs (Compl. ¶¶ 1, 11, 12). Defendant allegedly agreed, and it was SGP's standard practice, to pay the additional compensation when revenue was received regardless of whether the employee was still employed at SGP at the time SGP received the revenue on account of the employee's placement (id. ¶ 5).

During their careers at SGP, plaintiffs made numerous placements generating millions of dollars in revenues for SGP (id. ¶13). Periodically, "more or less annually," in addition to their salaries, SGP made payments to plaintiffs on account of their respective placements (id. ¶14). "Throughout 2008 and into early 2009," the time period at issue, plaintiffs' placements generated more than $6.5 million dollars in revenues for SGP. According to the agreements and during the relevant time, SGP computed the additional compensation to plaintiffs at 40% of the revenues received on account of the placements made by plaintiffs, less amounts that plaintiffs determined were payable to the support staff (id. ¶¶15, 16; Nichols' Aff. ¶¶ 4, 5, 6). SGP agreed that the additional compensation was fully earned by the employee upon making the placement, regardless of when the revenue was received, and SGP would make payments after an employee's departure if the placements were made prior to departure, but the revenues from those placements were received from SGP after the employee's departure (id. ¶17).

Due to intolerable working conditions, on January 12, 2009, plaintiff Nichols resigned from SGP, and shortly thereafter, plaintiff Hickory tendered her resignation (id. ¶¶ 18-20). Prior to her resignation, Nichols made placements in the latter part of 2008, which generated revenues of approximately $6 million (id. ¶ 22). Hickory also made placements prior to her departure generating revenues of approximately $780,000 (id. ¶ 23). At the time of Hickory's resignation, SGP provided her with a list of the placements she had made and the amounts of payments she

was to receive for those placements (id. ¶ 23). Despite due demand, SGP refused to make payments to plaintiffs for their pre-resignation placements (id. ¶ 24).

Plaintiffs contend in the first cause of action for breach of a contract that, in violation of the terms of the agreements, defendant failed to pay plaintiffs their additional compensation for placements obtained in or about 2008 and the beginning of 2009. In the second cause of action, plaintiffs contend that, by its wrongful conduct, SGP breached its implied covenant of good faith and fair dealing (id. ¶¶ 31- 34). Under these causes of action, Nichols seeks damages for at least $1 million dollars and Hickory seeks damages for at least $265,000. In the third cause of action, plaintiffs allege that SGP has been unjustly enriched by retaining the revenues from the executive placements made by plaintiffs, in excess of $6.5 million dollars (id. ¶¶ 36- 37). Plaintiffs contend in the fourth cause of action that defendant violated Labor Law §193 by wrongfully withholding payment of $1million dollars of Nichols's earned compensation and $265,000 of Hickory's compensation (id. ¶¶ 35-40).

Defendant now moves for an order pursuant to CPLR §3211(a)(5) and (7) dismissing plaintiffs' complaint.

Defendant contends that, pursuant to CPLR §3211(a)(5), plaintiffs' breach of contract claim is precluded by the Statue of Frauds because it is based on the oral agreements which cannot be performed within a year, specifically, for a time covering the job placements made by each plaintiff during 2008 and early 2009. Additionally, the full performance of each agreement is dependent on the actions of third parties, such as the companies with which plaintiffs placed the job candidates.

Alternatively, defendant contends, the breach of contract claim should be dismissed because the contract to pay plaintiffs "compensation for services rendered in negotiating a ... business opportunity," *i.e.*, the contract to supply the "know-who", was not in writing as required by General Obligations Law ("GOL") §5-701(a)(10).

Further, defendant asserts that, pursuant to CPLR §3211(a)(7), the complaint fails to state a cause of action for breach of a contract as it fails to set forth the material terms of the alleged oral agreements (*i.e.*, how and when plaintiffs were to be compensated, the timing and number of the placements they made, and whether SGP has actually collected the revenue from the placements at issue). Additionally, the complaint fails to allege any facts as to whether SGP agreed to pay additional compensation to former employees, such as plaintiffs who left to establish a competing business (id. at 14). Moreover, plaintiffs are not contractually entitled to the additional compensation because they are at best discretionary bonuses, the amounts of which could not be determined until the deductions were made for the staff employees working with plaintiffs (id. at 14-15).

Defendant further asserts that the second cause of action (breach of the implied covenant of good faith and fair dealing) should be dismissed as duplicative of the breach of contract claim because it is predicated on the same facts and seeks the identical damages (id. at 17-18).

Next, defendant argues that the unjust enrichment claim is deficient and also duplicative because plaintiffs voluntarily chose to terminate their employment before receiving their respective additional compensation and that the complaint fails to allege that defendant actually received any of the revenues (id. at 18-19).

Finally, defendant contends that the Labor Law §193 claim is duplicative and fails to state a claim because, as bonuses, additional compensation payments are not wages within the meaning of the Labor Law. Alternatively, even if they were wages, they were not earned by plaintiffs prior to their resignation because the amounts of such payments could not be determined until allocations were made for the staff members.

Plaintiffs oppose defendant's motion contending that (1) the employment agreements were terminable at will and thus, the Statute of Frauds does not apply and (2) the complaint properly states claims for (a) breach of contract, (b) violation of Labor Law §193, (c) unjust enrichment and (d) breach of an implied covenant of good faith and fair dealing.

In opposing the dismissal on the grounds of the Statute of Frauds, plaintiffs argue that the oral agreements, by their terms, were capable of being performed within one year. First, because plaintiffs are at-will employees, their agreements are not required to be in writing. Further, plaintiffs contend that according to the Court of Appeals, even if plaintiffs received their compensations after the revenues were received by SGP, in the context of at-will employment, the oral agreements do not come within the purview of the Statue of Frauds. Additionally, the complaint does not allege that the agreements were impossible to be performed within a year, or that defendant's obligation to pay was continuous, extended indefinitely and dependent solely on the actions of third parties.

Plaintiffs further contend that the "finder's fee" Statute of Frauds provision §5-701(a)(10) does not apply, because plaintiffs were employees who did not merely negotiate business opportunities for SGP and procure only one transaction, and their roles were not limited or transitory.

Plaintiffs also assert that they properly alleged all the elements of a breach of contract claim. First, plaintiffs alleged an existence of an oral agreement which governed the terms of their employment, including their respective compensations in the form of placement payments equal to 40% of the revenues received by SGP, less amounts for the support staff. The absence of the precise calculations of the compensation does not make the contract unenforceable and the sufficiency of the guidelines for such calculations is a factual issue to be determined at trial. Secondly, plaintiffs fully performed under the contracts, including making numerous placements. Third, defendants breached the agreements by failing to pay plaintiffs their compensations for placements. Finally, plaintiffs allege damages.

In addition, plaintiffs argue that the "placement payments" were not discretionary "bonuses." Plaintiffs allege and Nichols's supporting affidavit states, that these payments were an integral part of their compensation packages and, in any case, any conflicting evidence regarding the nature of payments raises an issue for trial (Nichols's Aff. at 2-3).

Plaintiffs further contend that the Labor Law claim is not duplicative of the breach of contract claim because plaintiffs seek liquidated damages pursuant to Labor Law §198.1-a.

Further, plaintiffs assert that the complaint properly pleads a claim for unjust enrichment because plaintiffs conferred a benefit upon SGP by making placements which resulted in earned revenues in excess of $6 million, while SGP obtained the benefit of these placements without adequately compensating plaintiffs for their services.

Finally, plaintiffs acknowledge that, although New York does not recognize an independent cause of action for breach of the implied covenant of good faith and fair dealing, such claim will be sustained if it is based on facts different from the breach of contract claim.

Specifically, in the breach of contract claim, plaintiffs allege that SGP failed to pay their compensation for placements, while the breach of the implied covenant claim is based on SGP's refusal to acknowledge the express terms of the oral agreement in that the payments were fully earned before plaintiffs left their employ.

In reply, defendant reiterates that plaintiffs' allegations are conclusory as they do not allege a pre-agreed formula for determining plaintiffs' "placement payments" or any other material terms of the agreements. That in the past, the revenues from placements were "routinely" collected and paid within a year is insufficient to support plaintiffs' claim that the placement payments were earned when they were made. Therefore, defendant contends, plaintiffs' claims based on oral agreements are unenforceable and must be dismissed.

Discussion

Breach of Contract

GOL §5-701(a)(1) Statute of Frauds

Before addressing whether the complaint states a cause of action for a breach of contract, the crucial issue is the applicability of the Statute of Frauds.[2]

New York law provides that an agreement will not be enforceable if it is not in writing and "subscribed by the party to be charged therewith" when the agreement "by its terms is not to be performed within one year from making thereof" (GOL § 5-701 (a)(1)). Contrary to defendant's assertion, the complaint plainly alleges breach of an oral agreement which, if made as alleged, was terminable at will, and thus could have been performed within one year.

[2] Pursuant to CPLR §3211(a)(5), a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that: . . . the cause of action may not be maintained because of . . . [the] statute of frauds."

Defendant's characterization of the complaint as an attempt to avoid a Statute of Frauds defense by asserting a "magical" duration of the agreements extending for a period of more than one year because the job placements in question happened "throughout 2008 and into the early weeks of 2009" and the revenues would not be calculated until the placed employees receive end of year bonuses, amounts to speculation not warranted here.

It is well settled that the touchstone of an inquiry under GOL §5-701(a)(1) is whether a contract *by its terms* has absolutely no possibility in fact and law of full performance within one year (*Cron v Hargro*, 91 NY2d 362 [1998]; *D & N Boening v Kirsch Beverages*, 63 NY2d 449, 454 [1984]; *Foster v Kovner*, 44 AD3d 23 [1st Dept 2007] (emphasis added)). As long as the agreement may be fairly and reasonably interpreted such that it may be performed within a year, the Statute of Frauds will not act as a bar however unexpected, unlikely, or even improbably that such performance will occur during that time frame (*Cron* quoting *D & N Boening v Kirsch Beverages*, 63 NY2d 449, 454 [1984]). The question is not what the probable, or expected, or actual performance of the contract was, but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year (*D & N Boening*, at 454).

Further, it is well settled law in New York, that absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party (*Horn v New York Times*, 100 NY2d 85 [2003]; *Sabetay v Sterling Drug,* 69 NY2d 329 [1987]). Because an at-will employment relationship may be freely terminated by either party at any time for any reason or even no reason, employment agreements of this type generally do not fall under the proscription of the Statute of Frauds (*Cron* quoting *Murphy v American*

Home Prods. Corp., 58 NY2d 293 [1983]; *Sabetay*; *Weiner v McGraw-Hill*, 57 NY2d 458 [1982]).

Here, according to the complaint, the two plaintiffs each entered into oral agreements with SGP for placements of financial services executives. Nothing in the complaint indicates that the agreements were for a fixed term of months or years, or that they could not be terminated by either party. Therefore, taking the allegations of the complaint as true and resolving all inferences in favor of the plaintiffs, the employment agreements at issue were at-will and not for a fixed term of years (*Guilbert v Gardener,* 480 F3d 140 [2d Cir 2007]).

Further, the alleged agreements' terms neither state that plaintiffs' performance in procuring job positions for financial industry professionals could not be completed within a year, nor require that it should be extended beyond one year. Consequently, the Statute of Frauds does not apply to the agreements at bar.

Contrary to defendant's contention, the employment relationship at issue does not fall within the Statute of Frauds because the calculation of plaintiffs' additional payments would necessarily occur after the passage of a year. The Court of Appeals specifically held that "the presence of bonus or salary terms payable after one year" does not bring at-will employment contracts within the Statute of Frauds (*Cron*, at 367).

In the Court of Appeals's case involving compensation paid after a year, where an employer's determination of plaintiff's salary was based on 1 percent of net sales which may extend beyond one year, the court stated that such determination concerned "... a duty which came into fruition prior to the passing of a year and relates to past performance only. The fact that the amount of the payment due may not be ascertained until some future time creates no

new obligations. Such future satisfaction of a pre-existing liability involves the matter of computation only and is merely mechanical in its application" (*Cron*, at 369, quoting *Rifkind v Web IV Music*, 67 Misc2d 26 [New York Sup New York County 1971]).

In *Cron*, a former employee brought an action against his former employer for breach of an oral agreement to pay the employee a fixed salary plus a bonus equal to 20% of the employer's annual pretax profits. The employer moved to dismiss the complaint based on the Statute of Frauds alleging that the former employee's bonus had to be calculated after a passage of a year. The court held that, "when the employment relationship is terminable within a year and the measure of compensation has become fixed and earned during the same period, the sole obligation to calculate such compensation will not bring the contract within the one-year proscription of the Statue of Frauds" (*Cron*, at 370).

Here, the complaint alleges that plaintiffs, in addition to their base salaries, were to receive a certain percentage of the revenues from the job placements they made (Complaint, ¶¶ 1, 11, 12, 15, 16) and, that these additional payments were fully earned once the plaintiffs procured the job placements (id. ¶¶ 2, 17). Consequently, taking these allegations as true, it is reasonable to infer that, since the measure of plaintiffs' compensation was fixed within a year, all that remained for defendant following the termination of the employment relationship was an obligation to calculate and to pay the plaintiffs' compensation.

The cases cited by defendant for the proposition that the agreements are unenforceable because the performance of such agreements were dependent on the actions of third parties since the revenues for those particular placements from the client-companies are received after one year or after the termination of employment, are distinguishable.

For example, in *Apostolos v RDT Brokerage Corp.* (159 AD2d 62 [1st Dept 1994]), where an insurance broker sued for commissions allegedly earned on policies he secured and on subsequent renewals of those policies, the First Department held that the portion of the agreement for commissions earned by renewal of such policies violated the Statute of Frauds. The court explained that since the agreement was terminable at will as to the earning of commissions on original policies placed by plaintiff, defendant's agreement to pay commissions for original policies was enforceable. However, defendant's promise to pay commissions on the renewals of such policies violated the Statute of Frauds, since it was not alleged that defendant could decline the renewal policies and thus, the potential for defendant's liability was indefinite and dependent solely on the acts of a third party (*Apostolos* at 64-65).

Here, by contrast, the complaint does not allege, nor can it be reasonably inferred, that the payments were to be made indefinitely, for unspecified future placements, or renewals of such placements (*cf. Yudell v Ann Israel & Assoc.*, 248 AD2d 189 [1st Dept 1998] (legal recruiter formerly employed at-will by a legal-recruiting company brought action to recover commissions for two placements allegedly originated by the plaintiff, which were based on a percentage of fees received from placements and finalized after her resignation. The court held that the recruiter was entitled to the post-termination commissions because she did not claim the right to prospective commissions for the indefinite future and she can point to a contract provision that establishes this calculation method and that supports the inference that her termination was not meant to extinguish her rights with respect to those placements)).

In *Sheehy v Clifford Chance Rogers & Wells LLP* (3 NY3d 554 [2004]), also cited by defendant, plaintiff sought to recover certain retirement benefits orally promised to him in

exchange for his agreement to take early retirement from defendant law firm, provided the law firm's Executive Committee entered into a written agreement authorizing such benefits. Because there was no written agreement and defendant's obligation to make payments was to begin in the fifth year after plaintiff's retirement and end with his death, the performance of defendant's alleged promise could not have been completed within one year of the agreement, and thus, plaintiff's claim was barred by the Statute of Frauds. Unlike in *Sheehy*, the agreements as alleged do not have a fixed period by which performance must occur after one year of the agreement's formation and thus, defendant's obligation to pay does not necessarily extend beyond one year.

Further, defendant's reliance on *RTC Properties Inc. v Bio Resources, Ltd.* (295 AD2d 285 [1st Dept 2002]), involving an alleged oral joint venture agreement to develop and operate a power plant on plaintiff's land and to sell electric power to third party over a 30-year period, is misplaced. Here, the complaint does not allege that the agreements were for any fixed term of years and therefore, they could have been terminated at any time by either party within one year.

Contrary to defendant's contention that plaintiffs offer no facts to support their claim that the additional compensation payments were earned before termination of the employment relationship and that defendant had no obligation to pay them, the complaint plainly alleges that SGP agreed and "indeed, it was SGP's standard practice," that "placement payments were fully earned by the employee upon the making of a placement, *regardless of when the revenue was received*" (Complaint, ¶ 17, emphasis added).

Therefore, dismissal on the ground that the oral agreements violated the Statute of Frauds is denied.

GOL §5-701(a)(10)

Further, defendant's assertion that plaintiffs' breach of contract claim is precluded under GOL §5-701(a)(10) because plaintiffs seek compensation for "negotiation of business opportunities" lacks merit. First, it is well established that the finder's fee provision of the Statute of Frauds does not apply to a contract between an employee and an employer (*Festa v Gilston*, 183 AD2d 525 [1st Dept 1992]; *Maemone v Koren-DiResta Constr. Co.*, 45 AD2 684 [1st Dept 1974]).

Further, according to the statute, "'[n]egotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction" (*Id.*) Courts interpreting section 5-701(a)(10) have generally held that "where the transaction results in the acquisition of an existing enterprise or the formation of a new one, it is a business opportunity" (*Freedman v Chemical Const. Corp.*, 43 NY2d 260 [1977] (plaintiff's role is limited and transitory as he was acting as an intermediary in obtaining of a contract to construct a multimillion dollar chemical plant in Saudi Arabia); *Stephen Pevner, Inc. v Ensler*, 309 AD2d 722 [1st Dept 2003]; *Management Recruiters of Boulder v National Economic Research Associates, Inc.*, 2006 WL 2109478 [SDNY 2006]).

Conversely, where an agreement contemplates the hiring of individual employees, it does not concern a business opportunity (*Howard-Sloan Legal Search, Inc. v Todtman, Young, Tunick, Nachamie, Hendler & Spizz, P.C.*, 193 AD2d 404 [1st Dept 1993]; *Festa v Gilston*, 183 AD2d 525 [1st Dept 1992]). Here, the plaintiffs were neither employed as "finders" nor as negotiators for the sale of a business, who were mere intermediaries. According to the complaint, their roles as placement professionals employed by SGP, were not limited and transitory. Their claim that

they rendered services as employees of SGP is broad enough to fall outside the prohibition of the statute (*see Festa v Gilston*; *Maemone v Koren-DiResta*).

Therefore, since plaintiffs' breach of contract claim is not subject to the provision of the GOL §5-701(10), dismissal on this ground is denied.

Failure to State a Cause of Action Pursuant to CPLR §3211 (7)

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "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 into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]; *Suderman v Integrated Systems, Inc.*, 66 AD2d 655, 656 [1st Dept 1978]).

On a motion to dismiss for failure to state a cause of action, where the parties have submitted evidentiary material, including affidavits, or where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence" the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see*

Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279 [1996]). While affidavits may be considered, if the motion is not converted to a 3212 motion for summary judgment, they are *generally* intended to remedy pleading defects and *not to offer evidentiary support for properly pleaded claims*" (*Nonnon v City of New York*, 9 NY3d 825 [2007] [emphasis added]). As to affidavits submitted by the defendant/respondent, "[a]ffidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 unless they "establish conclusively that [petitioner] has no [claim or] cause of action" (*Lawrence v Miller*, 11 NY3d 588, 873 NYS2d 517 [2008] *citing Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). "In deciding such a pre-answer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

To state a cause of action for breach of an agreement, the proponent of the pleading must specify 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 Misc3d 1071, 2006 NY Slip Op 50497 [NY Sup 2006], citing *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged (*Volt Delta Resources LLC, supra quoting Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

Here, plaintiffs allege that each of them entered into an oral employment agreement with defendant SGP (Compl. ¶¶ 1, 2, 11, 12). The terms of the agreements were that SGP promised to pay plaintiffs a base annual salary of $75,000 plus additional payments based on a percentage of the revenues from the executive job placements made by the plaintiffs (Compl. ¶¶ 1, 2, 11, 12), and that plaintiffs commenced their respective employments on the asserted commencements dates in their positions as executive placement professionals (id. ¶¶ 11, 12).

That the complaint does not allege a precise amount of the additional compensation or the precise calculation formula does not render the contract unenforceable (*Guggenheimer v Bernstein Litowitz Berger & Grossman LLP*, 11 Misc 3d 926 [NY Sup New York County 2006]). Plaintiffs clearly allege that SGP was to "more or less annually tally the placements made by plaintiffs and make additional payments based upon a percentage of the revenues from the placements" (*id.* ¶ 14), and that by the time of plaintiffs' respective resignations, they were owed the additional payments equal to 40% of the revenue generated by their respective placements. A determination of whether there exist sufficiently definite guidelines to enable a court to supply a bonus figure is a factual issue and survives a CPLR §3211 motion to dismiss (*Guggenheimer v Bernstein Litowitz Berger & Grossman LLP*, at 923-933).

Thus, plaintiffs sufficiently allege the existence of an oral agreement.

Further, plaintiffs plead the second element of the breach of contract claim by stating that they fully performed "any and all obligations to SGP under their employment agreements, including obtaining job placements (Compl. ¶¶ 3, 13, 22, 29).

And, "when a bonus that is an integral part of a compensation package has already been earned by the time the employer decides not to pay it, ...[a]t that point, failure to pay it constitutes

a breach of the employment agreement" (*Guggenheimer v Bernstein Litowitz Berger & Grossman LLP*, at 932, *quoting Harden v Warner Amex Cable Communications,* 642 FSupp 1080, 1096 [SDNY 1996]).

Here, according to the complaint, it was the parties' understanding that plaintiffs' additional compensation for placements was "fully earned by [each of them] upon making a placement, regardless of when the revenue was received," and that SGP would make such payments even after an employee's departure (Compl. ¶¶ 2, 17). Thus, plaintiffs sufficiently allege the third element of the breach of contract, that SGP breached the agreements by failing to pay plaintiffs additional compensation for the placements they made (Compl. ¶¶ 3, 5, 22- 24).

Finally, plaintiffs properly plead damages by alleging that Nichols and Hickory each suffered damages in estimate exceeding $1 million dollars and $265,000 respectively (Compl. ¶¶ 22, 23).

Therefore, in accepting the facts as alleged in the complaint as true, and according plaintiffs the benefit of every possible favorable inference (*Nonnon v City of New York*, 9 NY3d 825 [2007]), it cannot be said, at this juncture, that plaintiffs failed to state a cognizable action for breach of contract.

Breach of the Implied Covenant of Good Faith and Fair Dealing

While there is a long-standing policy against the forfeiture of earned wages, including commissions, and in the contracts for commissions, the covenant of good faith and fair dealing is "implied by the law as necessary to effectuate the intent of the parties,"[3] it is well-settled New

[3] *Arbeeny v Kennedy Executive Search*, NYLJ, 1/20/10 at 17, *quoting Wakefield v Northern Telecom, Inc.*, 769 F2d 109, 112 [1985].

York law that a claim alleging breach of the implied covenant must be dismissed as duplicative where the conduct constitutes the breach of underlying contract (*Horn v New York Times*, 100 NY2d 85 [2003]; *Rather v CBS Corp.*, 886 NYS2d 121 [1st Dept 2009]; *Norenberg v Thai Magic*, at 4) or, where the claim is intrinsically tied to the damages allegedly resulting from a breach of contract (*Canstar v J.A. Jones Const. Co.*, 212 AD2d 452 [1st Dept 1995]).

Here, plaintiffs allege that defendant, by its wrongful conduct, breached its implied covenant of good faith, depriving plaintiffs of the right to the benefits of the agreements at issue. The same alleged wrongful conduct, *i.e.*, wrongfully withholding the placement payments, is also a predicate of the alleged breach of the employment agreements. Further, since the same damages are alleged in both causes of action, breach of the implied covenant claim is "intrinsically tied to the same damages allegedly resulting from a breach of contract" (*Canstar v J.A. Jones Const. Co.*). Thus, the implied covenant claim is duplicative of the breach of contract claim.

Therefore, the second cause of action for breach of the implied covenant of good faith and fair dealing is dismissed.

Unjust Enrichment

"To state a cause of action for unjust enrichment a plaintiff must allege that (she) conferred a benefit upon the defendant and that the defendant will obtain such benefit without adequately compensating plaintiff therefor" (*Nakamura v Fujii,* 253 AD2d 387 [1st Dept 1998]).

As alleged, SPG agreed to employ plaintiffs as job placement professionals, who conferred a benefit upon SPG by placing the job candidates with the prospective employers, while SPG refused to pay them the additional compensation. Based upon these allegations, the

complaint pleads adequate factual allegations to support relief under the equitable theory of unjust enrichment.

Additionally, although the existence of a valid and enforceable contract generally precludes *quasi*-contractual recovery (*Nakamura*, at 390, quoting *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382 [1987]), where, as here, a *bona fide* dispute exists as to the existence of the contract, the plaintiff may proceed on both breach of contract and quasi-contract theories. (*Foster v Kovner*, 44 AD3d 24, 29 [1st Dept 2007] (inasmuch as the breach of contract claim [is] not barred by the statute of frauds, . . . the unjust enrichment claim should be sustained as an alternative basis for relief in the event it is determined that there was no oral agreement); *Curtis Properties Corp. v Greif Companies et al.*, 236 AD2d 237 [1st Dept 1997]).

Therefore, dismissal of the unjust enrichment claim on the grounds that it fails to state a cause of action and is duplicative of plaintiffs' breach of contract claim is unwarranted.

Violation of Labor Law §193

Labor Law §193 prohibits a "deduction from the wages of an employee" except deductions "which are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency. . . ." The definition of wages is found in Labor Law §190 which includes "the earning of an employee for labor or services rendered regardless of whether the amount of earnings is determined on a time, piece, commissions or other basis."

Defendant does not cite to any New York authority in support of dismissal of a claim under the Labor Law §193 as duplicative of a breach of contract claim and the court has not located any. To the contrary, plaintiffs have been permitted to pursue both a breach of contract claim and the statutory claim under the Labor Law (*Arbeeny*; *Tierney v Capricorn Investors, LP*,

189 AD2d 629 [1st Dept 1993]; *Miller v Hekimian Laboratories, Inc.*, 257 F Supp 2d 506 [NDNY 2003]).

In *Arbeeny v Kennedy Executive Search, Inc. (supra),* the court reinstated plaintiff's Labor Law §191 and §198 claims, previously dismissed by the trial court which held that, even though plaintiff, an executive search consultant, qualified as an employee under the Labor Law, there was no enforceable contract for the commissions. After the First Department held that dismissal of the breach of contract claim was an error, plaintiff was allowed to proceed with the statutory claims (*id.; cf. Tierney v Capricorn Investors, LP,* 189 AD 2d 629 [1st Dept 1993] (plaintiff asserted breach of contract claim alleging defendant's failure to pay additional compensation in connection with a certain transaction, and that it constituted a willful failure to pay wages under the Labor Law § 190 *et seq.* The court dismissed the breach of contract claim for insufficiency and held that plaintiff cannot assert a statutory claim for wages under the Labor Law if he has no enforceable contractual right to those wages)).

Further, Labor Law §198.1-a provides that "in any action instituted upon a wage claim by an employee . . . in which the employee prevails, the court shall allow such employee reasonable attorney's fees," and if it is found that the failure to pay was willful, "an additional amount as liquidated damages equal to twenty-five percent of the total amount of the wages found to be due" (*Rasmussen v Yellow River, Inc.* 298 AD2d 322 [1st Dept 2002]; *Wolintetz v Island Stationary Corp.*, 16 Misc 3d 1133 [NY Dist Ct 2007] (withholding of payment of commissions was a willful act of retaliation for the plaintiff's leaving the defendant's employ)).

In *Arbeeny,* the court held that "the revival of claims under the state's Labor Law means that, if [plaintiff] prevails on either the contract or the implied covenant theory, he would be

entitled to payment of his attorney's fees and a fine [under the statute]..." (*id.*). Plaintiffs' entitlement to damages under the Labor Law § 198.1-a depends upon their successful claim under §193 of the statute (*Gottlieb v Kenneth D Laub & Co., Inc.*, 82 NY2d 457 [1993]; *Nornberg v Thai Magic Co., Inc., supra* (claim under § 198.1-a "rises and falls" with plaintiff's other cause of action under the Labor Law)).

Moreover, where as here, the facts to satisfy the elements of each claim are different, the court cannot say that the Labor Law §193 claim is duplicative of a breach of a contract (*see Hertzoff v Diaz*, 533 F Supp 2d 470 [SDNY 2008] [It is illegal, under New York's Labor Law, for an employer to make deductions from the wages of an employee, unless those deductions are (a) pursuant to a law or a governmental agency rule or regulation, or (b) expressly authorized in writing by the employee for the employee's benefit]).

Here, it is undisputed that SPG is an employer and plaintiffs are employees within the meaning of the statute. Plaintiffs plead a sufficient basis for the "placement payments" to constitute "wages," since plaintiffs assert that, according to each their agreements, they earned the payments after they rendered their services to SGP. Further, as alleged, defendant made deductions from plaintiffs' wages by withholding part of the compensation payments for the job placements. There is no claim that such deductions were either (a) "made in accordance with a law or a governmental agency rule or regulation," or (b) "expressly authorized in writing by the employee and are for the benefit of the employee" (*Hertzoff v Diaz, supra*). Moreover, if it is found that SGP's failure to pay the additional compensation was willful, plaintiffs would be entitled to damages under the Labor Law §198.1-a.

Therefore, dismissal of the Labor Law §193 claim on the grounds that it fails to state a cause of action and is duplicative of plaintiffs' breach of contract claim is unwarranted.

Conclusion

Accordingly, it is hereby

ORDERED that the branches of the motion by defendant SG Partners, Inc., pursuant to CPLR §3211(a)(5) and (a)(7), to dismiss the first, third and fourth causes of action of plaintiffs Susanna Nichols and Pamela Hickory are denied; and it is further

ORDERED that the branch of the motion to dismiss the second cause of action pursuant to CPLR §3211(a)(7) is granted, and the second cause of action is hereby severed and dismissed; and it is further

ORDERED that defendant SG Partners, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 25, 2010

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

HON. CAROL EDMEAD

FILED
JAN 27 2010
NEW YORK
COUNTY CLERK'S OFFICE