STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DAVID J. SCHUELLER

Plaintiff

MEMORANDUM DECISION

vs.

Index No. 10228/05

THE CROSBY COMPANY, INC.

Defendant

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **BUCHANAN, INGERSOLL & ROONEY, P.C.**
Christopher P. Schueller, Esq., of Counsel
Attorneys for Plaintiff

UNDERBERG & KESSLER, LLP
Edward P. Yankelunas, Esq., of Counsel
Attorneys for Defendant

CURRAN, J.

Before the Court is defendant's motion for summary judgment, or, in the alternative, to strike plaintiff's jury demand.

Plaintiff acted as a sales representative for defendant pursuant to a March 23, 1993 Sales Representation Agreement ("Agreement"). Paragraph 9 of the Agreement provides that if the Agreement was not "cancelled [sic] by either party during the first year, it will continue from year to year thereafter, unless or until either party gives to the other sixty days notice in writing, in advance of its anniversary date, of intention to terminate on such anniversary date" (Crosby Aff. Ex. A).

Paragraph 10 of the Agreement provides that "upon any termination of this Agreement, the Representative shall receive commission, upon shipment, for any new parts to which he may be entitled to commission, provided such shipment is made within ninety days of the termination of this Agreement, then 180 days for the second and following years, and said order for such shipment was delivered to the company on or before the expiration date of this contract" (Crosby Aff. Ex. A). The parties agree that since the Agreement was beyond its first year, the 180 day period is applicable to this action.

On January 10, 2005, defendant provided plaintiff with written notice of its intent to terminate the Agreement effective March 23, 2005 (Crosby Aff. Ex. B). The letter also advised that defendant would be "drafting a new agreement which will set forth new terms and certain goals and objectives the Company has established for its Sales Representatives. If you have interest in such new Agreement, please contact us and we can discuss a possible new relationship under those terms." Plaintiff acknowledges receiving the letter sometime between January 10, 2005 and January 12, 2005 and acknowledges that the letter was sent more than sixty days prior to the anniversary date.

Following receipt of the January 10, 2005 letter, plaintiff contacted Peter Crosby ("Crosby"), the President of defendant, to inquire whether he had been terminated. Plaintiff asserts that Crosby assured him that he was not terminated, but admits that during that conversation, he and Crosby discussed the need to reach new and different terms to make plaintiff more accountable (Plaintiff's Depo. pp. 25-26; 29) (Plaintiff's Deposition Transcript is attached to Attorney Schueller's Aff. as Ex. A).

In February 2005, plaintiff contacted Richard Daeing ("Daeing"), the Vice President of Procurement for defendant, to inquire about the status of the new agreement (Plaintiff's Depo. p. 32). According to plaintiff, Daeing did not know if it was going to be a modification of the existing contract or an entirely new document but Daeing advised him that it was being worked out (Plaintiff's Depo. p. 32). Later that month, plaintiff visited with Daeing and Crosby at defendant's offices to inquire about the status of the new agreement (Plaintiff's Depo. pp. 34-36).

On March 18, 2005, plaintiff sent a fax to Crosby as a "follow up to our recent discussions concerning a replacement agreement" (Crosby Aff. Ex. F). In that fax, plaintiff confirmed defendant's termination of his services under the prior written agreement and again inquired about the status of the proposed replacement agreement, since the termination date was coming up soon. Plaintiff requested that defendant contact him and "advise whether a replacement agreement is forthcoming and whether you want me to continue providing services past my termination date pending the execution of a new agreement? If you need more time to prepare the replacement agreement, that is fine we [sic] me. Maybe one way to address the situation is for Crosby to extend the termination date by 30 days so that you can work out the terms of the new agreement. Give me a call and we can talk it through" (Crosby Aff. Ex. F).

When questioned about the March 18, 2005 fax, plaintiff states that he sent the fax because he could not get defendants to "focus in on my issue and I was attempting to do that" (Plaintiff's Depo. p. 39). Plaintiff further stated that the fax was truthful and that he "wrote this out of the frustration of being told that this document was coming and not having it"

(Plaintiff's Depo. p. 40). Plaintiff was "looking to get something in writing from Crosby as to the terms and conditions that they were going to propose to me" (Plaintiff's Depo. p. 41).

After sending that fax on Friday, on the following Monday, March 21, 2005, defendant called plaintiff and said that the proposed agreement was ready. That same day, plaintiff drove from his home in Rochester to defendant's facilities in Buffalo to obtain a copy of the proposed replacement agreement, which he received in hard copy that day and then again via email at his request on March 23, 2005 (Plaintiff's Depo. pp. 44-45). It is undisputed that, as of the effective date of the Agreement's termination (i.e., March 23, 2005), neither an extension of the Agreement nor a replacement agreement had been agreed upon between the parties.

Plaintiff and Crosby again spoke either on March 24 or 25, 2005, according to plaintiff, or during the first week of April 2005, according to Crosby. During that phone conversation, plaintiff indicated that he had some concerns about the new agreement, specifically with regard to commissions, the termination clause and the hold harmless clause (Plaintiff's Depo. pp. 53-55). According to plaintiff, Crosby indicated that he was leaving for a trade show and would speak to plaintiff later about his questions relating to the terms, and that "in the meantime it's business as usual" (Plaintiff's Depo. pp. 55-56). Plaintiff then replied "so you want me to continue working for Crosby until then under the old agreement?" and Crosby answered "yes" (Plaintiff's Depo. p. 56; Plaintiff's Aff. ¶ 4). Plaintiff testified that he understood "until then" to mean "until we resolved what we were discussing," i.e., issues concerning the terms of the agreement (Plaintiff's Depo. pp. 56-57).

At or around the same time, plaintiff states he also had a conversation with Daeing, during which he asked Daeing "so I guess I'm still working for Crosby," to which Daeing replied "Yes, you are. We will work everything out," or words to that effect (Plaintiff's Depo. p. 57; see also Plaintiff's Aff. ¶ 4). Plaintiff interpreted that statement to mean "we would work out the issues on this new proposal that had been presented" (Plaintiff's Depo. p. 57). In other words, they would come to terms on the language - new terms which had not been established yet (Plaintiff's Depo. pp. 57-58).

On April 8, 2005, defendant sent plaintiff a letter "rescinding our proposed Sales Representative Agreement dated March 23, 2005" (Crosby Aff. Ex. I). According to that letter, it was determined that "The Crosby Company would be better served by hiring a full time direct sales manager" (Crosby Aff. Ex. I). Plaintiff believes that the April 8, 2005 letter, as opposed to the January 10, 2005 letter, terminated the relationship, because he "continued to operate under the agreement in place as confirmed verbally by Richard Daeing and Peter Crosby" (Plaintiff's Depo. pp. 60-62; 69; Plaintiff's Aff. ¶ 5). Defendant admits that plaintiff "engaged in limited sales activities between March 23 and April 8, 2005" but states that "no sales resulted from those activities" (Crosby Aff. ¶ 24). Plaintiff does not contradict that assertion.

As summarized by the plaintiff, the complaint alleges two causes of action for breach of contract. In his first cause of action, plaintiff alleges that the January 10, 2005 termination notice is invalid based on waiver and equitable estoppel. If plaintiff is correct, the April 8, 2005 termination notice fails to satisfy the 60-day notice requirement for a termination on the March 23, 2005 anniversary date. Hence, the April 8, 2005 termination notice could only be effective as of March 23, 2006. Plaintiff seeks money damages for commissions due

and payable through March 23, 2006, and the 180-day period thereafter. For his second cause of action, plaintiff alleges that even if the Agreement was terminated on March 23, 2005, defendant failed to pay all the commissions due plaintiff on orders received by defendant for the 180 days following March 23, 2005 (Plaintiff's Memo of Law p. 5).

On this motion, defendant asserts that plaintiff's conduct, pleadings and testimony negate any estoppel or waiver claim, as he cannot establish a clear and unambiguous promise nor reasonable reliance thereon. Defendant further argues that plaintiff cannot establish a change in position or any injury, which is an essential element of estoppel. With regard to the second cause of action, defendant states that there is no ambiguity in the term "expiration date" and that it has paid plaintiff for all commissions due under the Agreement, since March 23, 2005 was the termination date pursuant to the Agreement's terms, not September 23, 2005 as plaintiff asserts. Finally, defendant asserts that should its motion for summary judgment be denied, plaintiff's jury demand must be stricken since he is seeking equitable relief.

In opposition to the motion, plaintiff contends that defendant "waived" or should be estopped from enforcing the January 10, 2005 termination notice by virtue of its conduct, including instructing plaintiff to continue working after the March 23, 2005 termination date, continuing to work with plaintiff after that date, and telling plaintiff he would not be terminated. Plaintiff has submitted an affidavit reiterating that immediately after receiving the termination notice, he contacted Crosby, "who specifically informed me that notwithstanding the content of the January 10 letter, Defendant was not going to terminate my services on March 23, 2005. Instead, Defendant sent the January 10 letter to me to change the terms of my

existing agreement with Defendant" (Plaintiff's Aff. ¶ 2). Plaintiff further asserts that "[b]ased on Mr. Crosby's representations, I did not seek to find a replacement client (called a principal in my industry) for Defendant. I did not search for a replacement until after I received Defendant's letter April 8, 2005" (Plaintiff's Aff. ¶ 3).

With regard to the second cause of action, plaintiff states that he "negotiated the Agreement with Defendant's then Chief Executive Officer Henry Crosby" and that "Henry Crosby and I agreed that the term 'expiration date' in paragraph 10 was intended to mean the 180th day following the termination date. Neither I nor Henry Crosby intended "Expiration Date" to mean the termination date" (Plaintiff's Aff. ¶ 7). Henry Crosby (who was also known as "Woody") was Peter Crosby's brother. Henry Crosby died on March 23, 2004 (Complaint ¶ 12; Crosby Depo. p. 16) (Crosby's Deposition Transcript is attached to Attorney Schueller's Aff. as Ex. B). According to plaintiff, there is a dispute between the parties over the meaning of the term "expiration date" and either the contract should be interpreted as a matter of law in his favor or extrinsic proof must be considered to resolve the ambiguity.

Finally, as for the jury issue, plaintiff contends that his causes of action are for breach of contract only, which is an action at law. He argues that the waiver and equitable estoppel issues do not change the gravamen of the complaint and that equitable estoppel "has been transformed from an exclusively equitable doctrine into one concurrently legal and equitable."

FIRST CAUSE OF ACTION

In the Complaint and in his deposition testimony, plaintiff acknowledges that on January 10, 2005, defendant sent him a notice terminating the Agreement. It is agreed that the termination notice was sent more than sixty (60) days prior to the anniversary date as required by the Agreement. Accordingly, on this record, it is undisputed that the Agreement was terminated on proper notice pursuant to its terms.

Following receipt of the January 10, 2005 termination notice, as detailed in both the Complaint and plaintiff's deposition testimony, the parties undertook negotiations to reach a new agreement whereby plaintiff would continue to act as a sales representative of defendant. Ultimately, those discussions were not fruitful, and on April 8, 2005, defendant rescinded the proposed sales representative agreement and ended any further negotiations.

"It is a well-established principle of law that when a contract affords a party the unqualified right to limit its life by notice of termination that right is absolute and will be upheld in accordance with its clear and unambiguous terms" (*Red Apple Child Dev. Ctr. v Community School Dists. Two*, 303 AD2d 156, 157-158 [1st Dept 2003], *appeal denied* 1 NY3d 503 [2003]). "No distinction, in principle, can be drawn here between a contract which, according to its terms, expires on a date fixed by the parties at the time the contract is made and a contract which expires at a date fixed thereafter by notice given in accordance with the terms of the contract" (*New York Tel. Co. v Jamestown Tel. Corp.*, 282 NY 365, 371 [1940]). Here, notice was so given and according to its terms the contract expired on March 23, 2005, unless that notice was withdrawn or rendered ineffective by acts or words of the parties. The problem

presented is whether the notice was in fact withdrawn or rendered ineffective by the acts or words of the defendant (*see New York Tel. Co.*, 282 NY at 371).

"Where, after the expiration of a contract fixing the reciprocal rights and obligations of the parties, they continue to do business together, the conduct of the parties may at times permit, or even constrain, a finding that the parties impliedly agree that their rights and obligations in connection with such business should continue to be measured as provided in the old contract" *(New York Tel. Co.*, 282 NY at 371; *Computerized Med. Imaging Equip., Inc. v Diasonics Ultrasound, Inc.*, 303 AD2d 962, 963 [4th Dept 2003]); *Twitchell v Town of Pittsford*, 106 AD2d 903, 904-905 [4th Dept 1984], *affd* 66 NY2d 824 [1985]). "Even in such case, however, the reciprocal obligations arise from the new implied contract and, unless an intent to make such a new contract is expressed or may be fairly inferred from the conduct of the parties, the obligations of the parties are as a matter of law not measured by the terms of the contract which has expired" (*New York Tel. Co.*, 282 NY at 371; *Twitchell,* 106 AD2d at 905).

Indeed, "[w]here the parties by their conduct have manifested their mutual intent not to be bound until execution of a formal contract, effect will be given to that intention and, until the written contract is executed, no enforceable obligation will be held to arise" (*Computerized Med. Imaging*, 303 AD2d at 963). "[A]bsent a manifestation of mutual assent sufficiently definite to ensure that the parties are truly in agreement with respect to all material terms of the proposed contract, there is no basis for concluding that there is a contract in effect between the parties" (*Computerized Med. Imaging*, 303 AD2d at 963).

Contrary to plaintiff's contention, the ongoing dealings of the parties following the expiration of the prior written contract and during their attempts to negotiate a replacement

written contract do not establish that there was an implied-in-fact agreement between the parties incorporating the same provisions as those contained in the expired written contract and in the unexecuted replacement contract (*Computerized Med. Imaging*, 303 AD2d at 964; *see also On-Line Power Techs., Inc. v Square D Co.*, 2004 US Dist LEXIS 9655 [SD NY 2004]).

The defendant having given notice that the contract would end on March 23, 2005 did nothing in the interval which evinced any intention to withdraw the notice or which was in any way inconsistent with such notification. Nothing occurred thereafter which dictates or, indeed, permits an inference that the defendant intended to withdraw its notice. On the contrary, it affirmatively appears from correspondence between the parties that the defendant did not intend to withdraw its notice and always contended that the contract was at an end; and the plaintiff recognized that the contract was terminated, though he did suggest, in a fax sent on March 18, 2005 (less than a week before the termination of the Agreement), that pending the making of a new agreement they might govern themselves as they did under the old agreement. "Though after the expiration of an express contract, an implied contract containing the same terms may arise from the conduct of the parties, that is not the case here. Instead of implied acceptance of the old obligations, there was here express repudiation of such obligation" (*New York Tel. Co.*, 282 NY at 372).

Accordingly, it is clear in the present action that defendant's obligations under the Agreement terminated as of March 23, 2005, pursuant to the January 10, 2005 notice. Although the parties attempted in the meantime to negotiate a replacement agreement, at most, the parties came to an unenforceable agreement to agree (*see Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]). Nevertheless, plaintiff attempts to avoid the clear

import of the termination of the Agreement by relying upon the theories of estoppel and/or waiver. In doing so, plaintiff seems to allege a continuation of the former agreement, a theory which is contrary to both the complaint and the Agreement itself.

Equitable Estoppel

"Equitable estoppel prevents one from denying his own expressed or implied admission which has in good faith been accepted and acted upon by another. The elements of estoppel are with respect to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position" (*Airco Alloys v Niagara Mohawk Power Corp.*, 76 AD2d 68, 81-82 [4th Dept 1980]; *see also First Union Natl. Bank v Tecklenburg*, 2 AD3d 575, 577 [2d Dept 2003]).

"Estoppel is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought. Thus, in the absence of evidence that a party was misled by another's conduct or that the party significantly and justifiably relied on that conduct to its disadvantage, an essential element of estoppel is lacking" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., LP*, 7 NY3d 96, 106-107 [2006]; *see also Syracuse Orthopedic Specialists, P.C. v Hootnick*, 42 AD3d 890, 893 [4th Dept 2007]).

An equitable estoppel defense is not established where defendant "made no showing that it relied to its prejudice upon any action by plaintiff" (*Comvest Consulting, Inc. v W.R.S.B. Dev. Co., LLC*, 266 AD2d 890 [4th Dept 1999]). Thus, the defense of equitable estoppel is unavailable where the proof is "devoid of any facts explaining how defendants prejudicially changed their position in reliance on plaintiff's assurances" (*Connecticut Natl. Bank v Peach Lake Plaza*, 204 AD2d 909, 910 [3d Dept 1994]).

Promissory Estoppel

"The elements of promissory estoppel are: a clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his reliance" (*Ripple's of Clearview, Inc. v Le Havre Assocs.*, 88 AD2d 120 [2d Dept 1982], *appeal denied* 57 NY2d 609 [1982]; *see also Reiter Sales, Inc. v Scovill Fasteners, Inc.*, 9 Misc 3d 1109[A], 2005 NY Slip Op 51461[U] [2005]). "In order to recover on a claim for promissory estoppel, the Plaintiff must establish a substantial change in position resulting in an unconscionable injury" (*Reiter*, 9 Misc 3d 1109[A], *citing Gary Powell, Inc. v Mendel/Borg Group, Inc.*, 237 AD2d 407 [2d Dept 1997]).

Where the record demonstrates that the alleged promise was not only vague and indefinite but that it was completely contradicted by the actions of the parties in continuing to negotiate a new replacement agreement, the facts conclusively establish that any reliance by plaintiff upon the alleged oral promise was unreasonable and unwarranted (*see Sanyo Elec., Inc. v Pinros & Gar Corp.*, 174 AD2d 452 [1st Dept 1991]).

Waiver

"To establish waiver, it is necessary to show that there has been an 'intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it'" (*Airco Alloys,* 76 AD2d at 81). With regard to both waiver and estoppel, plaintiff must prove "the necessary element of justifiable reliance" (*Bank of New York v Murphy*, 230 AD2d 607, 608 [1st Dept 1996], *appeal dismissed* 89 NY2d 1030 [1997]). "If the established facts permit reasonable minds to differ as to the inferences or effects from them, a question of fact arises" (*see Alsens Am. Portland Cement Works v Degnon Contr. Co.*, 222 NY 34 [1917]; *Hayes v Crane Hogan Structural Sys.*, 191 AD2d 978 [4th Dept 1993]).

Reliance and Prejudice

Whether the theory is equitable estoppel, promissory estoppel or waiver, all three require some proof of reasonable reliance, and estoppel further requires a prejudicial or substantial change in position as a result. Here, the record is clear that there was never any binding agreement to extend the plaintiff's contract or to enter into a new contract. Accordingly, there is no evidence of a false representation or a clear and unambiguous promise upon which the plaintiff could reasonably rely (*see Adams v Washington Group, LLC*, 11 Misc 3d 1083[A], 2006 NY Slip Op 50672[U] [2006], *appeal dismissed* 42 AD3d 475 [2d Dept 2007]).

Moreover, even if there may have been reasonable reliance on the "misrepresentations" by Crosby and Daeing, plaintiff cannot demonstrate a prejudicial change in position as a result. All plaintiff can demonstrate with respect to this element is that his

expectation of entering into a new contract was unfulfilled; this does not make out a change in position (*Mendez v Reynolds*, 248 AD2d 62, 65 [1st Dept 1998]).

The uncontradicted facts establish that plaintiff was aware that defendant terminated the Agreement on January 10, 2005 and that the parties were attempting to negotiate a new agreement governing their relationship going forward. Thus, any alleged reliance by plaintiff upon his own assumption that the assurances of non-termination meant that the Agreement would somehow continue, despite his own conduct to the contrary in seeking a replacement agreement, was not justifiable or reasonable.

Further, a search of the record reveals that the only "change in position" that plaintiff incurred was that he did not seek to find a replacement client (called a principal) until after he received Defendant's letter dated April 8, 2005 (Plaintiff's Aff. ¶ 3) and that he continued to work for Defendant after March 23, 2005 (Plaintiff's Aff. ¶ 5). However, plaintiff fails to establish any prejudice as a result of either "change." Plaintiff does not identify any specific harm or injury from the two week delay in looking for a new principal and he does not dispute that no sales resulted from his post-termination sales activities. Moreover, each of defendant's representatives testified that it was their understanding that plaintiff continued to work after the termination of the agreement in an effort to obtain a new agreement (Crosby Depo. pp. 58-63; Daeing Depo. pp. 29; 32-33; McCarthy Depo. pp. 13-14) (Daeing's Deposition Transcript is attached to Attorney Schueller's Aff. as Ex. C; McCarthy's Deposition Transcript is attached to Attorney Schueller's Aff. as Ex. D), an assertion which plaintiff does not refute on this motion.

In the absence of a clear and unambiguous promise, reasonable reliance thereon, and a prejudicial change in position as a result, summary dismissal of the first cause of action is appropriate *(see Sanyo Elec.*, 174 AD2d at 452; *see also Comvest Consulting,* 266 AD2d at 890; *Adams,* 11 Misc 3d 1083[A]). At most, plaintiff's "alleged reliance on the oral agreement is no more than the usual situation of parties who orally agree on a deal, intending that there shall be a written contract, and then at the point of signing, one of the parties backs out" (*Mitchell & Titus Assocs., Inc. v Mesh Realty Corp.*, 160 AD2d 465 [1st Dept 1990]; *Roth Young Personnel Serv., Inc. v 1500 Realty Co.*, 204 AD2d 75 [1st Dept 1994]). Here, the discussions did not progress even that far.

Likewise, "the requisite clear manifestation of an intent by [defendant] to relinquish [its] known right" to enforce its January 10, 2005 termination notice is not inferable, under the circumstances, from this record (*see Courtney-Clarke v Rizzoli Intl. Publs., Inc.*, 251 AD2d 13 [1st Dept 1998]; *Peck v Peck*, 232 AD2d 540 [2d Dept 1996]). In each instance that plaintiff refers to a conversation with one of defendant's representatives following the January 10, 2005 termination notice, he concedes that each of those conversations occurred in the context of a discussion about the terms of the new agreement. Moreover, in light of the testimony of each of defendant's representatives that it was their understanding that plaintiff continued to work after the termination of the agreement in an effort to obtain a new agreement (Crosby Depo. pp. 58-63; Daeing Depo. pp. 29; 32-33; McCarthy Depo. pp. 13-14), and plaintiff's failure to refute that testimony, defendant's silence, oversight or thoughtlessness in failing to "direct" plaintiff to stop working does not create an inference of waiver (*see Golfo v*

Kycia Assocs., Inc., 45 AD3d 531, 532-533 [2d Dept 2007], *appeal denied* 10 NY3d 704 [2008]; *Comvest Consulting,* 266 AD2d at 890).

Finally, although the conduct of the parties to a contract following the expiration of that contract can operate to demonstrate that the parties impliedly agree that their rights and obligations should continue to be measured as provided in the old contract, and would therefore ordinarily raise a question of fact as to the existence of such an implied contract, the fact that the parties continued to deal under some sort of informal arrangement does not, without more, mean that all the terms of the expired formal contract continued to apply (*Computerized Med. Imaging*, 303 AD2d at 964; *see also Monahan v Lewis*, 51 AD3d 1308, 1309-1310 [3d Dept 2008]; *Natl. Telecoms. Consultants, Inc. v United Artists Theatre Circuit, Inc.*, 225 AD2d 750 [2d 1996]).

Based on the foregoing, defendant's motion for summary judgment dismissing the first cause of action is granted.

SECOND CAUSE OF ACTION

"Where the intent of the parties is clear from the language of their contract, interpretation of the contract and the issue of intent is to be resolved by the court as a matter of law" (*Boston Concessions Group, Inc. v Criterion Ctr. Corp.*, 200 AD2d 543, 544 [1st Dept 1994]). "The words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning" (*Brooke Group Ltd. v JCH Syndicate 488*, 87 NY2d 530 [1996]).

The Court has already determined that the January 10, 2005 termination notice, sent pursuant to Paragraph 9 of the Agreement, was effective. Therefore, the termination date

for the Agreement was March 23, 2005. Pursuant to Paragraph 10 of the Agreement, plaintiff was entitled to commissions, provided such shipment was made within 180 days of the termination of the Agreement, i.e., within 180 days of March 23, 2005, and said order for such shipment was delivered to the company on or before the expiration date of this contract.

According to Merriam-Webster's Dictionary, the word "expiration" means "the fact of coming to an end or the point at which something ends: termination" and the term "expiration date" means "the date after which something is no longer in effect." Similarly, the word "termination" is defined as the "end in time or existence: conclusion." Given the clear and plain meaning of the words employed by the parties, the terms "expiration" and "termination" are synonymous. Therefore, plaintiff is entitled to commissions provided such shipment was made within 180 days of the termination of the Agreement, i.e., within 180 days of March 23, 2005, and said order for such shipment was delivered to the company on or before the expiration date of this contract, i.e., on or before March 23, 2005.

On this motion, defendant submitted the Crosby affidavit attesting that plaintiff has been paid "commissions totaling $28,107.01 on sales for new parts shipped by September 30, 2005 where the order for the parts was received by Crosby by March 23, 2005" (Crosby Aff. ¶ 33; Ex. K). Plaintiff concedes that defendant paid him commissions "on orders which defendant received prior to March 23, 2005 and shipped before September 23, 2005." Plaintiff is therefore paid in full for the amounts owed under the Agreement.

Accordingly, defendant's motion for summary judgment dismissing the second cause of action is granted.

Defense counsel should settle the Order with plaintiff's counsel.

DATED: September 17, 2008

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HON. JOHN M. CURRAN, J.S.C.