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

PRESENT: CAHN Justice PART 49

Christopher Conroy

- v -

IDING Restaurant Group, Inc.

INDEX NO. 603599/03

MOTION DATE 7/19/05

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ 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

FILED
NOV 09 2005
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . . . .

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 11/3/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

----------X

CHRISTOPHER CONROY,

Plaintiff

-against- Index No. 603599/03

IDINE RESTAURANT GROUP, INC. f/k/a/
TRANSMEDIA RESTAURANT COMPANY, INC.,

Defendant.

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CAHN, J.

Defendant, Rewards Network Establishment Services Inc. (named herein as "Idine Restaurant Group, Inc. f/k/a/ Transmedia Restaurant Company, Inc.) now moves for partial summary judgment on the grounds that: (1) plaintiff fails to state a claim under Labor Law § 191-c; (2) plaintiff's claims arising prior to November 13, 1997 are barred by the applicable six-year statute of limitations; and (3) plaintiff is precluded from seeking commissions for any period following the termination of his employment.

Plaintiff cross-moves for leave to amend the complaint to add causes of action pursuant to Labor Law §§ 191 (1) (c) and 193, CPLR 3025.

Plaintiff, Christopher Conroy, was employed at-will by defendant's predecessor, Transmedia Restaurant Company, Inc., from September 20, 1994 to November 14, 1997, as a Restaurant Consultant. He was paid salary and commissions pursuant to an Employment Agreement. Although plaintiff allegedly disagreed with the company's calculation of his commission balance at the time he left the company, he took no formal steps to complain about the calculation until November 13, 2003, when this action was commenced.

For the reasons set forth below, defendant's motion for summary judgment is

granted, and plaintiff's cross motion is denied.

FACTS

Defendant is the successor-in-interest to Transmedia Restaurant Company Inc. (Transmedia or the Company) during the period that it employed plaintiff (Affidavit of Elliot Merberg, ¶ 2). Plaintiff was employed by Transmedia as a Restaurant Consultant from September 20, 1994 to November 14, 1997 (Complaint, ¶ 3; 5/2/05 Conroy Dep at 73:6-11 [Aff. of Devjani Mishra, Exh A]).

During plaintiff's employment, Transmedia issued membership cards (similar in appearance to credit cards) to individuals who paid a membership fee to participate in a dining rewards program (Merberg Aff., ¶ 3). Throughout the relevant period, Transmedia entered into agreements with individual restaurants, whereby Transmedia would advance funds to the restaurants in exchange for food and beverage credits in an amount equal to twice the amount of the funds advanced. The restaurants then became "Transmedia Restaurants," and part of the "Transmedia Network." The credits were redeemed by Transmedia cardholders when they dined at those participating restaurants (Conroy Dep at 79:11-80:6; 80:15-25, 105:6-13).

On September 20, 1994, plaintiff executed an Employment Agreement with Transmedia (Mishra Aff., Exh E), pursuant to which plaintiff became an "at will" employee of Transmedia (Employment Agreement, ¶ 4.B ["The Employee understands that he/she is accepting this position as an employee 'at will'"]).

As a Restaurant Consultant, plaintiff was required to negotiate with and add at least six new restaurants to the Transmedia Network each month, and maintain a renewal rate of at least 80% with regard to his existing Transmedia Restaurant accounts (Employment

Agreement, ¶¶ 1.A; 1.D; 1.E; 1.F). In the course of soliciting restaurants, plaintiff was responsible for determining whether a prospective participating restaurant was a good credit risk, and for determining the amount of funds to be advanced to a participating restaurant (Conroy Dep at 102:6-103:23; 104:6-18).

Pursuant to the Employment Agreement, plaintiff earned commissions based on "usage," i.e., the actual redemption of food and beverage credits by Transmedia cardholders at those Transmedia Restaurants for whose accounts plaintiff was responsible (Employment Agreement at 1; ¶¶ 2.II.b; 2.II.c; Conroy Dep. at 100:17-25; 116:20-25; 136:8-16). He was paid a weekly salary and draw against commissions (Employment Agreement, ¶ 2.II.a; Conroy Dep. at 112:2-4). Conroy was also eligible for benefits, including paid vacation, participation in the Company's hospitalization and retirement plans, and was given a Transmedia member card to use at the Company's expense (Employment Agreement at 6).

If a Transmedia Restaurant signed up by plaintiff was unable to honor the food and beverage credits it had agreed to provide, rendering those credits "unusable," plaintiff agreed to be responsible for 25% of the outstanding cash advance, or 12.5% of the outstanding unusable credits (id., ¶ 2.II.g; Conroy Dep at 120:2-24; 121:8-23). During plaintiff's employment, and pursuant to the Employment Agreement, Transmedia reserved a percentage of plaintiff's aggregate commissions in a "commission reserve fund" in order to cover potential losses from Transmedia Restaurants for which he was responsible (Employment Agreement, ¶ 2.II.g; Conroy Dep at 121:24-122:16; 122:25-123:5).

While he was employed, plaintiff received monthly commission statements (Conroy Dep. at 129:23-130:3; see e.g. 7/31/97 Commission Statement [Mishra Aff., Exh G]).

The commission statements reflected events pertaining to the restaurants for which plaintiff was responsible, including, inter alia, (1) commissions based on the usage of food and beverage credits at those restaurants; and (2) losses based upon food and beverage credits that had been deemed unusable (Conroy Dep. at 136:8-16; 140:14-25; Mishra Aff., Exh G).

One of the Transmedia Restaurants for which plaintiff was responsible was Bridgehampton Café (Conroy Dep at 170:20-171:10; 181:20-23). On April 24, 1996, Bridgehampton Café and Transmedia entered into a contract pursuant to which Transmedia advanced $100,525 in exchange for $201,050 of food and beverage credits to be used at that restaurant (Mishra Aff., Exh H). On May 29, 1996, Bridgehampton Café and Transmedia entered into a second contract, pursuant to which, inter alia: (1) Transmedia advanced an additional $75,000; and (2) the parties agreed that the outstanding total of $351,050 in food and beverage credits could be utilized at either Bridgehampton Café or Frederick Law Olmsted's, a restaurant that had not yet opened for business (Conroy Dep at 184:3-19; 186:8-187:7; Mishra Aff., Exh I).

The combined Bridgehampton Café and Frederick Law Olmsted's account was plaintiff's largest account (Conroy Dep at 187:17-188:15). Ultimately, Frederick Law Olmsted's never opened for business. In August 1997, plaintiff learned that the Bridgehampton Café had stopped honoring the Transmedia card (Conroy Dep at 200:9-17; Mishra Aff., Exh J), and referred the Bridgehampton Café account to Transmedia's Legal Department (Conroy Dep at 203:5-11: 234:9-11; Mishra Aff., Exh K). At this time, Bridgehampton Café had an outstanding balance of $153,931.61 in unused food and beverage credits (Mishra Aff., Exh K).

In November 1997, Transmedia terminated plaintiff's employment; plaintiff's last

day of work being November 14, 1997 (Mishra Aff., Exh C). Pursuant to the Employment Agreement, upon the termination of his employment, plaintiff had "no further right to commission payments or other compensation for Transmedia Restaurants solicited, assigned or managed prior to his/her termination" (Employment Agreement, ¶ 4.B). In addition, Transmedia explicitly reserved the "sole right and discretion [t]o hold a reasonable amount of earned commission" following the termination of plaintiff employment "in order to offset any cash losses from unusable restaurant credits at [plaintiff's] Transmedia Restaurants (id., ¶ 4.D).

By letter dated November 24, 1997 (Mishra Aff., Exh C), Transmedia took the position that the net commission due plaintiff was $5,860.39.

This action was commenced on November 13, 2003. Plaintiff alleges that "[a]t the time that Transmedia terminated Conroy's services, it owed him commissions of at least $180,000" (Complaint, ¶ 6). Plaintiff admits, however, that the $180,000 figure includes commissions based on usage at restaurants which occurred after the date his employment was terminated (Conroy Dep. at 238:6-239:3; 240:18-21). Plaintiff asserts four causes of action – breach of contract, an accounting, breach of Labor Law § 191-c, and breach of Labor § 198, subdivision 1-a.

DISCUSSION

Defendant contends that it is entitled to partial summary judgment on several grounds.

First, that plaintiff's claim under § 191-c of the Labor Law must be dismissed because plaintiff admits that he was an employee of Transmedia, rather than an independent contractor, and therefore cannot recover under that section.

Labor Law § 191-c provides that "[w]hen a contract between a principal and a sales representative is terminated, all earned commissions shall be paid within five business days after termination or within five business days after they become due." It is well-settled that Labor Law § 191-c does not apply to salaried, commissioned employees such as plaintiff (see Deutschman v First Mfg. Co., Inc., 7 AD3d 363 [1st Dept 2004] [noting the dismissal of sale agent's § 191-c claim, because § 191-c applies only to independent contractors]). Section 191-c's protection extends only to "sales representatives," who are defined as independent contractors (Labor Law, § 191-a [d]; Goldberg v Select Indus. Inc., 202 AD2d 312, 315 [1st Dept 1994] [noting § 191-c's application "only to sales representatives who are independent contractors rather than employees"]).

Deutschman is directly on point. In that case, the Court expressly held that a claim under § 191-c may be brought only by an independent contractor, and not a salaried or commissioned employee. In finding that Deutschman was not an independent contractor, and thus did not have a claim under § 191-c, the Court relied on the fact that the parties had entered into an agreement setting forth the terms of employment, including salary, 401(k) plan eligibility, health insurance, vacation, sick days, and other benefits (7 AD3d 363, supra). Likewise, here, plaintiff admits that "[he] was employed by Transmedia as a salesperson pursuant to a written employment agreement." Like the agreement in Deutschman, the agreement governed his salary, 401(k) plan options, paid vacation time, medical and other benefits (Complaint, ¶ 3; Employment Agreement at 2-7). Because plaintiff concedes that he was an employee rather than an independent contractor, he is outside the parameters of § 191-c's protection (see Deutschman v First Mfg. Co., Inc., 7 AD3d 363, supra; Goldberg v Select Indus. Inc., 202 AD2d 312, supra).

In opposition to the motion, plaintiff contends that the determination of whether he was an independent contractor is an issue of fact, precluding summary judgment on the Labor Law § 191-c claim. He argues that he worked out of his home while performing services for defendant, and paid his own expenses, such as phone bills and car-related items. Plaintiff further alleges that he decided which establishments to solicit, as well as the manner in which he would maintain them for defendant, and that defendant did not control or monitor the manner in which he performed services for defendant. Moreover, plaintiff contends, in defendant's preprinted contracts with its restaurant establishments, defendant identified plaintiff as a "contractor" (Conroy Aff., ¶ 51).

However, these factors are legally insufficient to render plaintiff an independent contractor (see Claim of John Zaweski, 251 AD2d 913 [3d Dept 1998] [holding that claimant was employee, even though he was paid on commission basis, and contract identified him as "independent contractor"]; Claim of Freda T. Braunstein, 250 AD2d 899, 900 [3d Dept 1998] [holding that claimant who worked from home on "schedule of her own choosing" was an employee]). Indeed, Conroy has consistently claimed that he was "employed by Transmedia," and party to a "written employment agreement" (Def Stmt ¶ 4). Thus, Conroy was an employee of Transmedia, as a matter of law, and his § 191-c claim fails as a matter of law, and is dismissed.

Second, defendant contends that plaintiff's claims for commissions earned prior to November 13, 1997 (six years before the filing of this action) are barred by the six-year statute of limitations, which is applicable to both his breach of contract claim, and his wage payment claim under Labor Law § 198.

A breach of contract claim must be brought within six years of the alleged breach (CPLR 213 [2]). Likewise, an action under Labor Law § 198 must be commenced within six years of the alleged violation (Labor Law § 198 [3]). Plaintiff was employed by Transmedia until November 14, 1997. He did not commence this action, however, until November 13, 2003. Plaintiff's claims for commissions set forth on commission statements issued prior to November 13, 1997 are therefore barred by the six-year statute of limitations (see Simpson v Mutual of Omaha Ins. Co., 2000 WL 322780 [SD NY 2000] [granting summary judgment on the ground that plaintiff's claims for commissions due more than six years prior to complaint were time-barred]).

Simpson is directly on point. In that case, an insurance broker alleged that his former employer breached its contract with him and violated Labor Law § 198 by failing to pay him certain sales commissions. The former employer argued that the broker's claims were barred by the six-year statute of limitations. The Court agreed, holding that because the former employee received monthly commission statements, "the account between the parties was a monthly account" (id. at *6). Therefore, [i]f the [broker] determined the [employer] failed to pay him commissions that it allegedly owed him for any month, he could have sued the following month" (id.). Accordingly, the Court found that the limitations period ran from each of the monthly commissions reports, and dismissed the employee's claims as time-barred (id.).

Plaintiff admits that, like the broker in Simpson, he was provided with monthly commission statements detailing commissions due him as calculated by Transmedia (see Conroy Dep. at 129:23-130:3; 136:8-22). Plaintiff could have commenced an action immediately upon receipt of any monthly commission statement that he disagreed with. Instead, he waited until

November 13, 2003 to commence this action. Thus, to the extent that the breach of contract and Labor Law § 198 claims seek commissions which would have been covered or reported in commission statements issued prior to November 13, 1997, the claims are time-barred and must be dismissed (see Simpson v Mutual of Omaha Ins. Co., 2000 WL 322780, supra; Gustafson v Bell Atlantic Corp., 171 F Supp2d 311, 322 [SD NY 2001]).

Plaintiff argues that the claims are not time-barred because, pursuant to CPLR 206 (d), his commission arrangement with Transmedia was a "mutual, open and current account." A mutual, open and current account exists when "the parties regard the items as constituting one account and as capable of being set off one against the other so that it is only the balance that constitutes the claim" (Rodgers v Roulette Records, Inc., 677 F Supp 731, 735 [SD NY 1988] [quotation omitted]). Such an account may be found "only where there is an express or implied agreement between two parties to set off their mutual debts against each other" (Levinson Steel Co. v Schiavone Constr. Co., Inc., 637 F Supp 164, 167 [SD NY 1986]).

Specifically, plaintiff argues that the parties intended that there be a single, running balance between them, and that under this running account, the parties set off plaintiff's claims for commissions, other compensation and credits for restaurant losses which defendant had incorrectly charged plaintiff against defendant's deductions or unusable restaurant credits and other items. Thus, plaintiff argues, the six-year statute of limitations began to run only after the last deduction was taken by defendant, or the last item of compensation was earned by plaintiff, which occurred after November 14, 1997.

Plaintiff's position is without merit, as the record clearly demonstrates that the commission arrangement between the parties was a monthly account. This precise issue was

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addressed in Simpson. Like plaintiff here, the insurance broker in Simpson seeking commissions under the Labor Law contended that his claim was not time-barred because "the account between the [parties] was a mutual, open and current account" (2000 WL 322780 at * 6). The Court rejected the argument based on plaintiff's admission "that on a monthly basis he received from [his employer] an account statement and payments for any renewal premiums owed to him, offset by any amounts he owed to [his employer] (id.). The Court concluded that "[i]t is therefore plain that the account between the parties was a monthly account and it was not therefore mutual, open and current within the meaning of Section 206(d)" (id.) Likewise here, plaintiff admits that he received monthly commission statements, and received commission draw payments on a weekly basis (Conroy Aff., Exh A, ¶ 2.II.a).

Plaintiff attempts to distinguish Simpson by pointing out that Transmedia reserved the right to adjust his commission reserve account to reflect losses associated with his accounts following his termination (Pl Mem at 25-26). However, whether the Company monitored plaintiff's losses after November 14, 1997 is irrelevant as to whether it credited him for completely separate transactions that occurred months or years earlier. Notably, plaintiff's opposition papers complain about transactions that occurred between August 1995 and February 1997 (Pl Mem at 10-12, citing contemporaneous commission statements). Plainly, these commission statements are beyond the six year limitations period.

Plaintiff also argues that the claims arising prior to November 14, 1997 are timely because a November 24, 1997 letter constitutes "acknowledgment of a debt" that would "restart the running of the statute of limitations" (Pl Mem at 26-27) (see Cognetta v Valencia Developers, Inc., 8 AD3d 319 [2d Dept 2004]; Fade v Pugliani, 8 AD3d 612 [2d Dept 2004]). "To constitute

an acknowledgment of a debt, a writing must recognize an existing debt and contain nothing inconsistent with an intention of the part of the debtor to pay it" (Knoll v Datek Securities Corp., 2 AD3d 594, 594 [2d Dept 2003]).

Although plaintiff contends that in its November 24, 1997 letter defendant acknowledged that it owed compensation to plaintiff, the document does not constitute acknowledgment of a debt; it merely states that "over the next six months," defendant would keep "track of [plaintiff's] accounts" before determining whether any amount would be payable to plaintiff, and sets forth the Company's position that, as of that date, the balance in plaintiff's reserve account was no more than $5,860.39 [Mishra Aff., Exh C]). Moreover, a later letter dated May 6, 1998 does not acknowledge any debt at all, but states the Company's position that "Transmedia's audit indicates a substantial difference between what Chris believes he is owed and what Transmedia's records indicate," and that "Transmedia's records indicate that **Chris owes Transmedia $19,629.24**" (Schwartzman Aff., Exh G [emphasis in original]). These documents are "inconsistent with any intention ... to pay" the alleged debt, and thus will not toll the statute of limitations.

Plaintiff also claims that defendant is estopped from invoking the statute of limitations because an unidentified individual allegedly led him to believe that the Company would adjust his commissions, and "misled plaintiff to believe that once Paul Ficarola and Sean Callaghan left the employ of defendant, plaintiff would be able to receive the compensation due and owing to plaintiff" (Pl Mem at 28). He contends that he delayed in filing suit for over five years based upon these claimed representations.

In order to establish equitable estoppel as a reason for rejecting a statute of

limitations defense, the plaintiff bears the burden of proving by clear and convincing evidence some actual misrepresentation or affirmative wrongdoing by the defendant upon which the plaintiff relied in delaying the timely commencement of a lawsuit (see Simcuski v Saeli, 44 NY2d 442 [1978]; Powers Mercantile Corp. v Feinberg, 109 AD2d 117 [1st Dept 1985], affd 67 NY2d 981 [1986]). Plaintiff fails to meet this burden, as he offers only his own unsubstantiated conclusory allegations. He does not set forth sufficient facts to raise an issue of fact on this point.

Moreover, plaintiff is incorrect in asserting that defendant waived the statute of limitations defense by attempting to resolve the underlying dispute before plaintiff filed suit, as it is well-settled that a prospective defendant does not waive its right to rely on the statute of limitations merely by engaging in pre-litigation settlement discussions (see Columbia Pictures Indus., Inc. v Persky-Bright Org., 1993 WL 497845, *1 [SD NY 1993]; Pfister v Allied Corp., 539 F Supp 224, 227 [SD NY 1982]).

Accordingly, the breach of contract and Labor Law § 198 claims for monthly commission payments covered by statements rendered prior to November 13, 1997 are time-barred.

Finally, defendant contends that, insofar as plaintiff purports to seek commissions allegedly "earned" during the period following the November 14, 1997 termination of employment, such claims fail as a matter of law because plaintiff was an at-will employee, and because the Employment Agreement expressly provides that no such post-termination commissions may be earned.

Where an employment is terminable at-will, and no express contract provision

exists entitling the employee to post-termination commissions, he does not have a claim to such commissions (see Mackie v La Salle Indus., Inc., 92 AD2d 821, 822 [1st Dept], appeal dismissed 60 NY2d 612 [1983] [former employee was not entitled to post-termination commissions based on "settled principle of law that a sales representative hired at-will is not entitled to commissions after the termination of employment"]; UWC, Inc. v Eagle Indus. Inc., 213 AD2d 1009 [4th Dept], lv denied 85 NY2d 812 [1995] [granting manufacturer's summary judgment motion because sales employees are not entitled to post-termination commissions unless the parties' agreement expressly provides for such compensation]; see also Frishberg v Esprit de Corp., Inc., 778 F Supp 793, 803 [SD NY 1991], affd 969 F2d 1042 [2d Cir 1992]).

The Employment Agreement clearly sets forth that Conroy was an employee at will. Paragraph 4.B of the Employment Agreement expressly provides:

> The employee understands that he/she is accepting this position as an employee "at will". Further, it is understood that the Company, in its sole discretion, may terminate this agreement with or without notice at any time, for any reason. Upon termination of employment, the Employee has no further right to commission payments or other compensation for Transmedia Restaurants solicited, assigned or managed prior to his/her termination.

Employment Agreement at ¶ 4.B; Conroy Dep. at 74:22-75:23.

In opposition, plaintiff contends that the phrase "the Employee has no further right to commission payments or other compensation for Transmedia Restaurants solicited, assigned or managed prior to his/her termination" (emphasis added by plaintiff) is ambiguous as to whether it bars him from receiving any post-termination commissions, or only those post-termination commissions where another consultant is reassigned to the establishment for which the commissions are earned and gives the establishment new cash advances.

The language of the clause is clear and susceptible to only one interpretation – that plaintiff is not entitled to post-termination commissions. Indeed, the applicable contract language merely confirms the at-will nature of plaintiff's employment. A party cannot create ambiguity where there is none, and straining to suggest an alternative meaning (see United States Trust Co. of NY v Jenner, 168 F3d 630, 632 [2d Cir 1999]; Paine Webber Inc. v Bybyk, 81 F3d 1193, 1199 [2d Cir 1996]).

Plaintiff also contends, for the first time, that he was "forced ... under the threat of termination to execute the [Employment] Agreement" and that the Employment Agreement should not be enforced because it is "unconscionable" (Pl Mem at 30-31). However, a threat to terminate an at-will employee unless he signs an agreement does not amount to duress (see Di Siena v Di Siena, 266 AD2d 673, 675 [3d Dept 1999]).

In addition, "the person claiming duress must act promptly to repudiate the contract ... or he will be deemed to have waived his right to do so" (Nasik Breeding & Research Farm Ltd. v Merck & Co., Inc., 165 F Supp 2d 514, 528 [SD NY 2001]). Between his September 1994 execution of the Employment Agreement and the November 14, 1997 termination of employment, plaintiff accepted compensation and benefits under the Employment Agreement. By doing so, he ratified it, and waived any right to repudiate based on coercion or duress (see Beutel v Beutel, 55 NY2d 957 [1982]; Fruchthandler v Green, 233 AD2d 214 [1st Dept 1996]).

Plaintiff cross-moves for leave to amend the complaint to add causes of action for violation of Labor Law § 191 (1) (c), based upon defendant's alleged failure to timely pay commissions and other wages, and Labor Law § 193, due to defendant's allegedly improper

deductions and charges against the compensation earned by plaintiff. Plaintiff's cross motion for leave to amend is denied.

New York courts have consistently held that leave to amend a pleading is appropriately denied in instances where the proposed amendment would cause prejudice to the opposing party (see e.g. Clark v MGM Textiles, Inc., 18 AD3d 1006 [3d Dept 20005]). Prejudice is defined as the "loss of a special right, a change in position, or significant trouble or expense that could have been avoided had the original pleading contained the proposed amendment" (New York State Health Facilities Assoc., Inc. v Axelrod, 229 AD2d 864, 866 [3d Dept 1996]).

Discovery has long been concluded in this action. Trial is set for January 6, 2006. Moreover, it is clear that plaintiff's "new" claims are "based upon the very same transactions and occurrences which are the subject of Plaintiff's original causes of action in his complaint" (Pl Mem at 17), and thus could have been pleaded earlier. Plaintiff provides no explanation for the delay in moving for leave to add these claims. Accordingly, the cross motion for leave to amend must be denied (See Murray-Gardner Mgt., Inc. v Iroquois Gas Transmission Sys., L.P., 251 AD2d 954 [3d Dept 1998]).

Furthermore, denial of plaintiff's cross motion is also appropriate because amendment would be futile. While leave to amend a pleading is freely granted (CPLR 3025 (b); Edenwald Contr. Co., Inc. v City of New York, 60 NY2d 957 [1983]), "in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted" (Non-Linear Trading Co., Inc. v Braddis Assocs., Inc., 243 AD2d 107, 116 [1st Dept 1998]; see also Nab-Tern Constructors v City of New York (Yankee Stadium), 123 AD2d 571

[1st Dept 1986]). Where, as here, the proposed amended complaint lacks merit, leave to amend is routinely rejected (see e.g. Pasalic v O'Sullivan, 294 AD2d 103 [1st Dept 1002]; Probst v Cacoulidis, 295 AD2d 331 [2d Dept 2002]).

Here, the proposed claims are utterly lacking in merit. Labor Law § 191 (1) (c) provides that "[a] commission salesman shall be paid the wages, salary, drawing account, commissions and all other monies earned or payable in accordance with the agreed terms of employment, but not less frequently than once in each month and not later than the last day of the month following the month in which they are earned." Plaintiff contends that defendant violated § 191 (1) (c) by withholding post-termination commissions and other compensation from him, and not paying them within the time periods required under the statute.

However, Labor Law § 191 (1) (c) is not applicable where, as here, the plaintiff is an at-will employee, and the employment agreement expressly provides that no post-termination commissions may be earned (see Dwyer v Burlington Broadcasters Inc., 295 AD2d 745 [3d Dept], lv denied 98 NY2d 611 [2002] [at-will employee was not entitled to be paid commissions pursuant to Labor Law § 191 [1] [c] for advertisements sold during her employment but broadcast after she left her employment where employment agreement expressly stated that commissions would not be paid on spots broadcast after the effective date of termination of employment, regardless of when the sale was made]).

The Labor Law § 193 claim, which relates to the improper deduction of wages, is equally invalid. It is well-settled that the "unauthorized deduction of wages prohibited in [Labor Law § 193] does not apply to those employed in an 'executive, administrative or professional capacity'" (Cantor Fitzgerald Assocs. v Mines, 1 Misc3d 906(A) [Sup Ct, NY County 2003]).

Here, plaintiff asserts that he exercised substantial discretion in performing his job, as he "decided which establishments to solicit and the manner in which [he] would maintain them for Defendant" (Conroy Aff., ¶ 51). By exercising such discretion in performing his job duties, plaintiff was clearly employed in "an administrative or executive capacity," and therefore not entitled to maintain an action under Labor Law § 193 (see Conticommodity Servs., Inc. v Haltmier, 67 AD2d 480, 482 [2d Dept 1979] [Court found that, because plaintiff exercised "independent judgment in determining for himself which customers to solicit and the extent to which he should advise them and accept their orders to buy and sell," plaintiff was employed in "an administrative or executive capacity," and thus "his terms of employment cannot be considered in violation of section 193 of the Labor Law"]).

The Court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED that defendant's motion for partial summary judgment is granted; and it is further

ORDERED that plaintiff's cross motion to amend the complaint is denied.

Dated: November 3, 2005

ENTER:

J.S.C.