

<b>Hanington v I. Grace Co., Inc.</b>
2005 NY Slip Op 30612(U)
April 12, 2005
Supreme Court, New York County
Docket Number: 110695/04
Judge: Herman Cahn
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

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RICHARD HANINGTON, :  
: Index No. 110695/04  
Plaintiff, :  
- against - :  
THE I. GRACE COMPANY, INC., and :  
DAVID J. COHEN, :  
Defendants. :  
-----X

Herman Cahn, J.

This is an action to recover wages claimed to be due under a series of employment related agreements. The complaint contains causes of action for breach of contract, Labor Law violations, and unjust enrichment. Defendants move to dismiss for failure to state a claim, CPLR 3211 (a) (7).

***The Employment Agreement:***

By Employment Agreement dated October 25, 1996 (Notice of Motion Ex. B),<sup>1</sup> defendant I. Grace Company, Inc., hired plaintiff to serve as its Sales Representative for a term of eight years (Complaint ¶¶ 4-5). As alleged, and as discernable from the Employment Agreement itself, plaintiff's responsibilities were to seek out and procure construction contract opportunities for Grace, which agreed to pay plaintiff an annual base salary of \$100,000.00 (*id.*, ¶ 7; Notice of Motion Ex. B ¶ 4.1).

The Employment Agreement (¶ 5.1) also entitled plaintiff to fiscal year

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<sup>1</sup> There is no dispute concerning the existence and text of the parties' written agreements, annexed to the notice of motion (CPLR 3211 [c] ["Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment"]).

commissions of 2% of the first \$7,500,000.00 in gross receipts from construction and construction management contracts procured by plaintiff, and 4% of such gross receipts exceeding that amount (Complaint ¶ 8).

The Employment Agreement further provides (¶ 4.10) that plaintiff was free to terminate it after February 1, 2000, without cause. In such case, plaintiff would be entitled to his base salary for the remainder of the term, as well as commission for contracts procured prior to termination (Complaint ¶ 10).

***The Agreement to Preserve Good Will:***

Grace and plaintiff entered into an agreement contemporaneous with the Employment Agreement, entitled Agreement to Preserve Good Will (Complaint ¶ 11; Notice of Motion Ex. C). In exchange for a distinct payment of \$309,000.00, plaintiff agreed not to compete with Grace for a three-year period after termination. He further agreed not to divulge Grace's proprietary information "during his employment . . . or at any time thereafter . . . ." (Good Will Agreement ¶ 2.2.)

***The Letter Agreement:***

Grace and plaintiff entered into a letter agreement dated August 12, 2003 (Notice of Motion Ex. D), in connection with two specific construction projects known therein as the "Three Dogs LLC Project" and the "Dauman Residence Project" (Complaint ¶¶ 15-18). The two projects involved, respectively, the complete renovation of 1130 Fifth Avenue, in Manhattan, and a family residence in Chappaqua, New York.

Though not expressed in complete detail, the Letter Agreement makes reference to plaintiff's duties thereunder, as "Project Executive" (Notice of Motion Ex. D; Complaint ¶ 18).

The agreement entitled plaintiff to receive \$1,325,000.00 in connection with the Three Dogs LLC Project, and 2% of the revenue derived by Grace from the Dauman Residence Project through October 24, 2002, and 3% of such revenue after said date.

***This Action:***

The complaint alleges that in March 2004, Grace breached its payment obligations under the foregoing agreements. It is alleged that the following specific amounts remain due: \$55,693.00 under the Employment Agreement; \$17,250.00 under the Good Will Agreement; \$157,882.64 under the Letter Agreement relating to the Dauman Residence Project; \$398,814.66 under the Letter Agreement relating to the Three Dogs LLC Project; and \$8,042.34 “on miscellaneous commissions,” all aggregating a sum demanded of \$637,681.85 (Complaint ¶¶ 21, 24). Plaintiff alleges that Grace’s defaults compelled him to resign on March 26, 2004 (*id.*, ¶ 20).

The complaint asserts causes of action for breach of contract, and violations of sections 191 and 193 of the Labor Law.<sup>2</sup>

***Breach of Contract:***

When considering a motion to dismiss for failure to state a claim, CPLR 3211 (a) (7), the court must afford the pleading a liberal construction (*Sheila C. v Povich*, 11 AD3d 120 [1<sup>st</sup> Dept 2004]). It must also accept as true the allegations contained in the pleading, accord the benefit of every possible, favorable inference to the plaintiff, and decide whether the facts, as alleged, fall within the ambit of any cognizable theory (*id.*).

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<sup>2</sup> A cause of action for violation of section 191-c of the Labor Law was withdrawn.

Defendants fault the complaint for not alleging that Grace received payment on the construction work, a condition precedent to plaintiff's receipt of percentage payments under the Employment and Letter Agreements.<sup>3</sup> However, the complaint clearly sets forth the terms of the agreements, including those portions entitling plaintiff to percentages of Grace's receipts, and plainly alleges that Grace failed to pay plaintiff what he was entitled to under the agreements. "The complaint must be construed 'liberally,' and the court must accept as true not only 'the complaint's material allegations' but also 'whatever can be reasonably inferred therefrom' in favor of the pleader" (*P.T. Bank Central Asia v ABN AMRO Bank N.V.*, 301 AD2d 373 [1<sup>st</sup> Dept 2003] [citations omitted]). Within the context of this motion to dismiss, the allegations sufficiently convey the message that plaintiff has not been paid despite Grace's gross receipts on the construction work.

The motion to dismiss the claims for breach of contract is denied.

***Violations of Labor Law §§ 191, 193:***

**The Employment Agreement**

Labor Law 191 (1) (c) obligates an employer to pay a commission salesman commissions which are "payable in accordance with the agreed terms of employment . . . ." "Commission salesman" is defined as an employee "whose principal activity is the selling of . . . services . . . and whose earnings are based in whole or in part on commissions. The term 'commission salesman' does not include an employee whose principal activity is of a supervisory, managerial, executive or administrative nature." (*Id.*, 190 [6].)

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<sup>3</sup> Paragraph 5.1 of the Employment Agreement entitles plaintiff to percentages of Grace's gross receipts as commission (Notice of Motion Ex. B). The same is true of plaintiff's salary under the Letter Agreement, calculated as percentages of Grace's receipts (*id.*, Ex. D).

Paragraph 5.1 of the Employment Agreement describes plaintiff's commissionable job functions as being the "procure[ment]" of construction and construction management contracts (Notice of Motion Ex. B). Plaintiff was, thus, selling non-executive/supervisory services, which are within the purview of Labor Law 191.

Plaintiff is likewise authorized to seek recovery under Labor Law 193, which prohibits an employer from making deductions from an employee's wages. "Wages" are defined as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis. . . ." (Labor Law 190 [1].) Affording the complaint every reasonable construction and inference, plaintiff is seeking the payment of wages to which he claims to be entitled under the Employment Agreement. His cause of action under Labor Law 193, vis-a-vis that agreement, is viable.

Consequently, the motion to dismiss the Labor Law claims relating to the Employment Agreement is denied.

#### The Letter Agreement

Plaintiff's Labor Law 191 claim arising out of the Letter Agreement cannot be sustained, because his role involving the Three Dogs LLC Project and Dauman Residence Project was of a supervisory and executive nature, as described in that agreement (Notice of Motion Ex. D). The Letter Agreement attaches a rider entitled "Job Description and Duties," which sets forth plaintiff's role as "Project Executive" (*id.*). This position entailed the handling of "financial matters related to a project and its performance" (*id.*). Among other managerial tasks, plaintiff's responsibilities included the approval of new work proposals, acceptance of contracts, settlement of customer and subcontractor disputes, and project oversight (*id.*). Such activities do

not come within the purview of Labor Law 191 (Labor Law 190 [6]). Thus, the motion to dismiss the Labor Law 191 claim relating to the Letter Agreement is granted.

By contrast, there is no language in Labor Law 193 which withholds its protection from executive employees. Consequently, the motion to dismiss the Labor Law 193 claim relating to the Letter Agreement is denied.

***Unjust Enrichment:***

When a valid contract governing a particular matter exists, a party is precluded from equitable theories of recovery for events arising thereunder (*PKO Television, Ltd. v Time Life Films, Inc.*, 169 AD2d 582 [1<sup>st</sup> Dept 1991]). Plaintiff's claims arise out of three, specifically alleged, written contracts, the existence and content of which are not denied. Therefore, the motion to dismiss the cause of action for unjust enrichment is granted.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted only to the extent of plaintiff's claim under Labor Law § 191 arising out of the parties' August 12, 2003, Letter Agreement, and his claim for unjust enrichment, and the motion is otherwise denied; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: April 12, 2005

ENTER:  
COUNTY  
*[Signature]*  
J. S. C.  
FILED  
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CLERK'S OFFICE