

**Personal Recruitment, Ltd. v Fornaro**

2007 NY Slip Op 31202(U)

May 9, 2007

Supreme Court, New York County

Docket Number: 0603920/2005

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON  
Justice

PART 55

Index Number : 603920/2005  
PERSONAL RECRUITMENT, LTD  
vs  
FORNARO, MARIA P.  
Sequence Number : 002  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE 5/7/07  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

This motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

**FILED**  
MAY 14 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

PAPERS NUMBERED  
1-3  
4-6  
7-9

Cross-Motion:  Yes  No

is decided as follows:

Upon the foregoing papers, it is ordered that this motion

Plaintiff moves to dismiss defendant's counterclaim and defenses under CPLR 3124 on the ground that she failed to comply with a demand for a bill of particulars. Defendant cross-moves for summary judgment in her favor. The cross-motion is granted in part.

Plaintiff is a personnel agency. The complaint alleges that it employed defendant as a recruitment manager beginning August 2, 2004. They had a written agreement, which provided that plaintiff would pay defendant \$2083.33 every two weeks as a draw against commissions, and that defendant would be paid a percentage of sales generated. It also provided that plaintiff would supply a computer, fax machine, two-line telephone and telephone lines, along with other business supplies (defendant apparently worked from her home).

Approximately one year later, plaintiff terminated defendant's employment. In this lawsuit, plaintiff demands \$37,729.04, which it alleges represents money plaintiff took as an advance against unearned commissions. In the second cause of action, it demands the return of a computer and facsimile machine. Defendant counter-claimed for breach of contract and fraud.

Dated: \_\_\_\_\_

*page 1 of 3*  
*[Signature]*  
JANE S. SOLOMON, J.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

... THIS CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

At oral argument, defendant agreed to return the facsimile machine. A compliance conference is scheduled for June 4, 2007 at 10 AM for defendant to deliver the machine to plaintiff's counsel. Defendant states that the computer provided to her required significant upgrades, that she installed at her own expense, so return of the computer in its present condition would be a windfall to plaintiff.

Plaintiff's motion is denied because the record shows that its demand for a bill of particulars, which included 139 separate demands, is onerous and unreasonable in light of the nature of this lawsuit, and because the demands call for detailed factual information that go beyond the scope of a proper demand for a bill of particulars. Moreover, defendant served a bill of particulars that substantially provides the information demanded.

The cross-motion seeks summary judgment dismissing the complaint, and to strike the answer for plaintiff's own discovery failures. As a matter of law, an employer cannot recover unearned commissions paid to its employee upon termination absent a specific contractual obligation on the employee's part to return the money. See, First Performance Mtge Corp. v Bartolata, 156 Misc.2d 1012 (Sup Ct Monroe County, 1993); Centerbank Mtge Co. v Shapiro, 237 AD2d 477 (2d Dept. 1997). The contract here does not provide that defendant will return the biweekly draw upon termination, and it does not imply that defendant incurred a personal indebtedness every time she was paid.

Plaintiff cites the decision in the case of Johnson v Quayle & Son Corp. (236 AD 351 [1<sup>st</sup> Dept 1932]), and argues that under some circumstances, commissions advanced to an employee can be recovered where the relationship is terminated due to the employee's breach of the employment contract. Plaintiff's principal, Karen Druziako, submits an affidavit in opposition to the cross-motion stating that defendant was fired because she failed to input data into the company computer. However, the written agreement makes no mention of defendant's duty to input computer data. The verified complaint alleges that defendant was an at-will employee whose employment was terminated, and does not allege defendant was terminated as the result of her breach of the employment contract.

ORDERED that the motion to strike the counterclaims and affirmative defenses, and for other sanctions, is denied; and it further is

ORDERED that the cross-motion is granted to the extent that the first cause of action is dismissed, together with the claim for attorney's fees in the complaint; and it further is

ORDERED that counsel shall appear for a compliance conference in Part 55 on June 4, 2007 at 11 AM. *gjs*

Dated: May 9, 2007

ENTER:

*J.S.C.*  
\_\_\_\_\_  
J.S.C.

~~FILED~~

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