

<b>Reichenstein v CB Richard Ellis Group, Inc.</b>
2007 NY Slip Op 31318(U)
May 14, 2007
Supreme Court, New York County
Docket Number: 0603771/2006
Judge: Leland G. DeGrasse
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LELAND DeGRASSE  
*Justice*

PART 25

Rechenstein, R

INDEX NO. 603771/06

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

CB Richard

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is hereby decided in accordance with  
accompanying Memorandum Decision.

**FILED**  
MAY 21 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

MAY 14 2007

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

*J.S.C.*

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X  
ROBAIR REICHENSTEIN,

Plaintiff,

-against-

Index No. 603771/06

CB RICHARD ELLIS GROUP, INC., CB RICHARD  
ELLIS, INC., and KEVIN DANEHY,

Defendants.

-----X

**FILED**  
MAY 21 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**DeGrasse, J.:**

Defendants move for an order dismissing the third through seventh and ninth causes of action pursuant to CPLR 3211 (a)(7). Plaintiff alleges in the complaint that his employer, defendant CB Richard Ellis Group, Inc. (CBRE), terminated his employment in breach of a written employment agreement. Plaintiff was employed as a salesperson in CBRE's Corporate Advisory Practice (CAP) Group. Under the third cause of action, sounding in quantum meruit, plaintiff seeks "the reasonable value of his services to CBRE including, among other things, the value of the real estate deals procured by [plaintiff] that will not close by the end of 2007." A valid written agreement covering the dispute in issue precludes a quantum meruit claim (*see HGCD Retail Servs., LLC v 44-45 Broadway Realty Co.*, 37 AD2d 43, 54 [2006]). In this case, the quantum meruit claim is precluded by an October 14, 2004 CAP agreement which, by its own terms, "serves to outline and to codify the new salary and bonus compensation structure" for the CAP salespersons including plaintiff. The CAP agreement also precludes the fourth cause of action

for unjust enrichment (*see e. g. SNS Bank, N. V. v Citibank, N. A.*, 7 AD3d 352, 356 [2004]).

Under the CAP agreement CBRE established a pool for the payment of bonuses to its salespersons in lieu of commissions. The agreement provides for the distribution of gross revenues attributable to each salesperson in the form of bonuses prescribed by a formula. Under the fifth cause of action, plaintiff seeks an accounting of payments allegedly due from the bonus pool. Defendants assert that an accounting is not available because there was no fiduciary relationship between the parties. Defendants correctly cite *Michnick v Parkell Prods.* (215 AD2d 462 [1995]) for the proposition that a fiduciary relationship is not created by an employment agreement which provides for a sharing of profits without a sharing of losses. However, in *LoGerfo v Trustees of Columbia University in the City of New York* (35 AD3d 395 [2006]) it was held that allegations of the assignment of revenues in reliance upon an agreement to share same may support a finding of a fiduciary relationship. In the instant case, a fiduciary relationship can be inferred from the complaint's allegation of an agreement to participate in the bonus pool in lieu of the receipt of commissions. The accounting cause of action is also challenged on the ground that it is not alleged that plaintiff has demanded an accounting (*see e. g. Hart v Scott*, 8 AD3d 532 [2004]). The allegation of the required demand is made, however, in plaintiff's answering affidavit which may be considered to remedy defects in the complaint (*see Chaikovska v Ernst & Young, LLP*, 21 AD3d 1324 [2005]). Under the sixth cause of action, conversion is sufficiently pleaded with respect to plaintiff's personal effects but not with respect to reimbursable business expenses. A conversion cause of action requires a showing of legal ownership or an immediate superior right of possession to a specific identifiable thing (*Independence Discount Corp. v Bressner*, 47 AD2d 756 [1975]). The reimbursable expenses

have not been specifically identified.

Plaintiff alleges under the seventh cause of action that defendant Kevin Danehy tortiously interfered with plaintiff's employment agreement by procuring CBRE's breach thereof. Danehy is CBRE's senior managing director and the person who fired plaintiff. "[A]n agent cannot be held liable for inducing his principal to breach a contract with a third person, at least where he [or she] is acting on behalf of his principal and within the scope of his authority" (*Nu-Life Const. Corp. v Bd. of Educ. of the City of New York*, 204 AD2d 106, 107 [1994] *lv dismissed* 84 NY2d 850 [1994]). A cause of action has not been stated against Danehy because it is not alleged that he acted outside of the scope of his authority or committed an independent tort (*see id.*).

The relief requested under the ninth cause of action is a judgment declaring the amount of the distribution to which plaintiff is entitled from the CAP group's 2006 and 2007 bonus pools. A cause of action for a declaratory judgment is unnecessary and inappropriate where there exists an adequate and alternative remedy, such as a contract claim (*Apple Records v Capital Records*, 137 AD2d 50, 54 [1988]). A contract claim provides plaintiff with an adequate means of recovering the bonus pool distributions to which he is entitled.

For the foregoing reasons, the motion is granted to the extent that the third cause of action (quantum meruit), fourth cause of action (unjust enrichment) and seventh cause of action (tortious interference with contract) are dismissed. The sixth cause of action (conversion) is dismissed to the extent that it is based upon plaintiff's claim to reimbursable business expenses. It is further adjudged and declared that the ninth cause of action for a declaratory judgment is not maintainable because plaintiff's contract claim provides him with an adequate and alternative remedy. The Clerk shall enter judgment dismissing the complaint as against defendant Kevin

Danehy. The action is severed and continued with respect to the remaining defendants. The motion is denied in all other respects. A preliminary conference shall be conducted on June 18, 2007 at 2:00 p. m.

Dated: May 14, 2007



J. S. C.

**HON. LELAND DeGRASSE**

**FILED**  
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