

Eluto v Helmsley Spear, Inc.

2008 NY Slip Op 31378(U)

May 13, 2008

Supreme Court, New York County

Docket Number: 601501/2006

Judge: Michael D. Stallman

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

PRESENT: HON. MICHAEL D. STALLMAN

PART 7

Index Number : 601501/2006

ELUTO, STEVEN ELLIOT

vs

HELMSLEY SPEAR

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 11/9/07

MOTION SEQ. NO. _____

MOTION CAL. NO. 37

_____ this motion to/for Summary judgment

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits A-M

Answering Affidavits – Exhibits 1-6; Exhibits 1-6

Replying Affidavits -Exhibits A-C

PAPERS NUMBERED

1-2

3-4

5

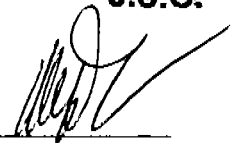
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion "is determined in accordance with the annexed memorandum decision and order."

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

FILED
MAY 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN
J.S.C.



J.S.C.

Dated: 5/13/08

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

-----X
STEVEN ELLIOT ELUTO,

Plaintiff,

- against -

HELMSLEY SPEAR, INC., PARVIS NOGHERY and
IRA FEILER,

Defendants.

-----X
HON. MICHAEL D. STALLMAN, J.:

Index No. 601501/2006

Decision and Order

FILED
MAY 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

A real estate broker brings this action against his former employer and two former co-employees to recover commissions which he allegedly earned and has not been paid. Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

FACTUAL ALLEGATIONS

Plaintiff Steven Eluto was employed as a real estate salesperson and broker by defendant Helmsley Spear, Inc. (Helmsley) from May 1988 until June 27, 2005, when Helmsley terminated his employment. Eluto and Helmsley entered into an employment agreement, dated May 18, 1988 (the Employment Agreement), pursuant to which Helmsley agreed to pay Eluto, as full compensation for his services, a share of the commissions Helmsley earned from property sales, leases and management agreements that Eluto procured and/or negotiated and closed. Under the agreement, Helmsley agreed to pay Eluto 50% of a sale or lease commission, where Eluto procured the listing for the property involved and he alone negotiated and closed the sale or lease, and at least 15% of a management commission, where Eluto procured a new property management agreement. In 1991, Eluto's share of sale and lease commissions allegedly increased from 50% to 60%.

Eluto claims that Helmsley has failed to pay him various amounts that he is entitled to receive including: part of the sale commissions on two properties located at 210-220 Nagle Avenue and 57 West 35th Street; part of the lease commissions on three properties located at 216 Nagle Avenue, 641 Lexington Avenue and 25-27 West 26th Street; a management commission on the property located at 350 West 31st Street; and reimbursements for expenses that Eluto incurred after Helmsley

terminated his employment, in connection with the sale of a property located at 1854 Westchester Avenue. Defendant Parvis Noghrey, sued herein as Parvis Noghery, and defendant Ira Feiler are two other salesperson/brokers employed by Helmsley. According to Eluto, Noghrey and Feiler wrongfully claimed, and Helmsley wrongfully paid to them, certain of the sale and lease commissions that should have been paid to Eluto.

Eluto also alleges that Helmsley had a practice or policy (the Chargeback Policy) of deducting from the commissions that it paid to its salespersons a share of certain of the expenses that were incurred in the marketing of properties, including, inter alia, advertising, printing, transportation and messenger costs. According to Eluto, those deductions, which regularly reduced the amount of his commissions by thousands of dollars per year, were unlawful under Labor Law (LL) § 193.

The complaint asserts 11 causes of action which allege claims: (1) against Helmsley for violation of LL §§ 191 and 193, based upon Helmsley's purported failure to pay Eluto his accrued commissions; (2) against Helmsley for violation of LL § 193, based upon Helmsley's deduction of purportedly unauthorized expenses from Eluto's commissions; (3) against Helmsley for breach of contract, i.e., the Employment Agreement; (4) against Helmsley for quantum meruit; (5) against Helmsley for breach of fiduciary duty; (6) against Noghrey for fraud; (7) against Feiler for fraud; (8) against Noghrey for intentional interference with contract; (9) against Feiler for intentional interference with contract; (10) against Noghrey for unjust enrichment; and (11) against Feiler for unjust enrichment.¹

DISCUSSION

Defendants' motion for summary judgment is granted, but only to the extent that the complaint's fourth through seventh and ninth through eleventh causes of action are dismissed in their entirety, and the first through third and eighth causes of action are dismissed in part.

¹The complaint identifies each of the last two causes of action as the "tenth cause of action." The second of those will be referred to herein as the eleventh cause of action.

I. Claims Against Helmsley Spear, Inc.

A. Labor Law §§ 191 and 193. LL § 191 (1) (c) requires an employer to pay a commission salesperson “the wages, salary, drawing account, commissions and all other monies earned or payable in accordance with the agreed terms of employment” LL § 193 (1) prohibits an employer from making “any deduction from the wages of an employee” apart from those which are specified therein. The complaint’s first and second causes of action allege, respectively, that Helmsley violated: (1) LL §§ 191 and 193 by failing to pay Eluto his accrued commissions; and (2) LL § 193 by making deductions from Eluto’s wages, in accordance with Helmsley’s Chargeback Policy, that were not authorized under the statute.

Defendants argue that Eluto’s claim under LL § 191 should be dismissed because he expressly agreed to the Chargeback Policy as a term and condition of his employment. Eluto apparently concedes that he was advised of the Chargeback Policy, by a senior vice president of Helmsley, at or around the time when he entered into the Employment Agreement (see Eluto Affid., ¶ 3). Eluto alleges that he “raised a concern about this policy with [the senior vice president],” but “was told that the policy of deducting expenses from commissions was not negotiable” (id.).

However, the first cause of action asserts broadly that Helmsley violated LL § 191 “[b]y failing to pay Eluto accrued commissions” (Complaint, ¶ 12). Pursuant to the Employment Agreement, Eluto was compensated for the services he rendered as an employee solely on a commission basis. The expansive phrasing of Eluto’s LL § 191 claim clearly encompasses Helmsley’s failure to pay him commissions for a variety of allegedly wrongful reasons which are enumerated in the complaint (see Complaint, ¶ 10), and not merely Helmsley’s failure to pay commissions on account of the Chargeback Policy. Therefore, even assuming, arguendo, that Eluto had no viable LL § 191 claim based upon the Chargeback Policy, that would not warrant dismissal of his LL § 191 claim.²

²In fact, Eluto’s claim based upon the Chargeback Policy appears to be asserted primarily in the second cause of action, which alleges a violation of LL § 193 rather than LL § 191. The second

Defendants argue that Eluto's LL § 193 claim should be dismissed because certain of the amounts that Helmsley did not pay to Eluto -- including, specifically, the commissions which Helmsley paid to Noghrey and Feiler instead of to Eluto, a management commission which Helmsley stopped paying to Eluto after it terminated his employment, and reimbursements for expenses that Eluto incurred after Helmsley terminated his employment -- did not constitute "deductions from ... wages" as those words are used in LL § 193, citing Kletter v Fleming (32 AD3d 566 [3d Dept 2006]). According to defendants, Eluto's claims regarding those commissions relate merely to disputed calculations as to the net amount actually due him, and should more properly be addressed in the context of Eluto's breach of contract claim rather than asserted as a claim under LL § 193.

Defendants' reliance upon Kletter v Fleming is misplaced. In Kletter, the defendant, a dentist, raised in his supplemental bill of particulars that plaintiff withheld some of his pay to compensate other dentists for the correction of his work. By contract, defendant was to paid "33% of all net fees collected." Id. at 568. The Appellate Division ruled that defendant did not set forth a violation of Labor Law § 193, because the parties' dispute was over calculation of net fee and defendant's share, which was not covered under Labor Law article 6.

Here, by contrast, Eluto's claim under LL § 193 appears to be predicated primarily upon the

cause of action asserts that Helmsley violated LL § 193 "[b]y requiring Eluto to pay expenses not authorized by law," and appears to be premised solely upon those allegedly "improper deductions" (Complaint, ¶¶ 15, 16). Whereas LL § 191 concerns the nonpayment of wages generally, LL § 193 is concerned specifically with unauthorized deductions from wages. Thus, LL § 193 is more clearly implicated than LL § 191 by Eluto's claim that the deductions Helmsley made pursuant to its Chargeback Policy were unlawful.

Moreover, even assuming that Eluto did agree to the Chargeback Policy as a term and condition of his employment, that would not necessarily preclude his claim that deductions from his wages made pursuant to that policy were unlawful under LL § 193 (see e.g. Gennes v Yellow Book of N.Y., 3 Misc 3d 519, 520 [Sup Ct, Nassau County 2004] [holding that "the protective provisions of section 193 cannot be waived"], affd 23 AD3d 520 [2d Dept 2005]; Pachter v Bernard Hodes Group, 2005 WL 2063838, *6, 2005 US Dist LEXIS 18005, *20 [SD NY 2005] [stating that "New York courts have held that an employee cannot waive the protections of Section 193 through an agreement with an employer"]).

deductions which Helmsley made from Eluto's compensation pursuant to the Chargeback Policy. The parties' dispute relating to the Chargeback Policy does not concern merely the manner of calculating the amounts properly due Eluto in connection with certain discrete and isolated transactions. Rather, the parties' dispute relating to the Chargeback Policy concerns whether Helmsley's ongoing practice of deducting a certain type of expense from the commissions paid to Eluto and Helmsley's other salespersons -- namely, advertising and other costs incurred in the marketing of properties -- was lawful under LL § 193. Accordingly, defendants have failed to establish that Eluto's claim under LL § 193 should be dismissed on the ground that Eluto's claims to unpaid commissions involve merely disputed calculations rather than "deductions from ... wages" implicating LL § 193.

However, Eluto's claims under LL §§ 191 and 193 are dismissed to the extent that either claim seeks to recover commissions that were allegedly earned and not paid, and/or amounts that were deducted from Eluto's commissions, prior to April 28, 2000. This action was commenced by filing on April 28, 2006 and -- as defendants correctly argue and as Eluto apparently concedes (see Galison Affirm, Ex. J, Eluto EBT [hereinafter, Eluto EBT], at 297; Pl. Mem. of Law, at 19 n 4) -- an action to recover upon a liability imposed by article 6 of the LL must be commenced within six years (see LL § 198 [3]).

Defendants raise several other arguments for dismissal of Eluto's LL §§ 191 and 193 claims in their reply papers which defendants did not raise in their moving papers: (1) that Eluto's LL § 191 claim is duplicative of his breach of contract claim; (2) that the deductions made pursuant to the Chargeback Policy were not unauthorized deductions from "wages," under LL § 193, but only nonactionable deductions from advances or loans, against future commissions, to which Eluto had no enforceable contractual right; and (3) that the deductions for chargebacks were permissible because they were made, pursuant to LL § 193 (1) (b), "for the benefit of the employee" (see Def. Reply Mem. of Law, at 12-14). The Court declines to consider those arguments, inasmuch as defendants have raised them for the first time, improperly, only in their reply papers (see e.g. Leeds

v Lenox Hill Hosp., 6 AD3d 232, 233-234 [1st Dept 2004]; Cumpston v Marcinkowska, 275 AD2d 340, 341 [2d Dept 2000]). However, the Court grants defendants leave to make a second summary judgment to raise these arguments.

B. Breach of Contract. The third cause of action alleges that Helmsley breached the Employment Agreement by failing to pay Eluto the full amount of the sale and lease commissions owed to him under that agreement. Defendants assert that Eluto's breach of contract claim should be dismissed because Helmsley was contractually entitled to act as it did, under the Employment Agreement, with respect to the various properties and transactions that are the basis of Eluto's claim.

1. 641 Lexington Avenue. Eluto asserts that he did not receive the full amount of the commission that he is owed in connection with the lease of the seventh floor of 641 Lexington Avenue because: although he was solely responsible for effecting the lease transaction, a real estate firm known as Newmark Realty and/or Newmark and Company (Newmark) nevertheless demanded that Helmsley pay it \$40,000 of the \$146,000 brokerage commission on the transaction; Helmsley's outside counsel advised Helmsley that Newmark's claim was meritless; Eluto suggested that Newmark's claim be litigated, if necessary, and advised Helmsley that he would personally pursue and finance the litigation if Helmsley did not wish to do so; Helmsley nevertheless declined to litigate, or to permit Eluto to litigate, the matter; and Helmsley paid Newmark the \$40,000 it was demanding, thereby reducing Eluto's share of the commission by \$24,000.

However, the Employment Agreement expressly provides that:

Employee agrees that Employer may waive, reduce, adjust, compromise or settle with third parties any commission in which Employee is or claims to be entitled to share. In addition, Employer shall have the exclusive right to determine what steps or procedures, if any, should be undertaken to collect or enforce any claim for commissions, or share thereof, against third persons, the expense for which shall be charged, pro rata, against commissions due Employee.

(Galison Affirm., Ex. C, Employment Agreement, ¶ 4.) Thus, Helmsley had a contractual right, under the Employment Agreement, both to cede \$40,000 of the commission on the 641 Lexington Avenue lease transaction to Newmark -- with the result that Eluto's share of the commission was reduced -- and also to decide that neither it nor Eluto would pursue litigation in connection with

Newmark's claim. Eluto's breach of contract claim is accordingly dismissed insofar as it is based upon Helmsley's alleged failure to pay him the full amount of the commission he is owed in connection with the 641 Lexington Avenue lease transaction.

2. 210-220 Nagle Avenue, 57 West 35th Street and 216 Nagle Avenue. Eluto claims that he did not receive the full amount of the sale and lease commissions that he was entitled to receive -- with respect to the properties located at 210-220 Nagle Avenue, 57 West 35th Street and 216 Nagle Avenue -- because Helmsley wrongfully paid a portion of those commissions to Noghrey and Feiler instead of to Eluto. Helmsley asserts that it did not breach the Employment Agreement by paying a portion of the commissions to Noghrey and Feiler, because it determined the apportionment of the subject commissions amongst Eluto, Noghrey and Feiler by conducting an internal arbitration in accordance with the express terms of the Employment Agreement.

The Employment Agreement contains an arbitration provision which provides that, where "there is a dispute as to the apportionment of a brokerage ... commission by and among one or more employees, Employer shall arbitrate the dispute, at an informal hearing ... in front of an Executive Officer who has been mutually agreed upon by the disputing employees" (Employment Agreement, ¶ 3). The arbitration provision sets forth a process for selecting the executive officer who shall act as the arbitrator, giving each disputing employee certain rights in the selection process, and providing that, if the selection process fails to yield an arbitrator satisfactory to all the disputing parties, "then the President of the Employer shall be deemed to have been selected as the arbitrator" (*id.*).

However, Eluto has raised issues of fact as to whether Helmsley gave him proper notice of the arbitration proceeding and complied with the procedure set forth in the Employment Agreement for selecting an arbitrator. Defendants assert that Helmsley gave Eluto proper notice of the arbitration proceeding when Helmsley's head of human resources, Olga Ferdinand, telephoned Eluto, on or about August 26, 2005, and informed him that there would be a "commission dispute meeting" at Helmsley's office on August 30, 2005 (*see* Def. Reply Mem. of Law, at 9; Galison Reply Affirm.,

¶ 3 and Ex. A). According to defendants, Eluto simply elected not to participate in the arbitration.

However, Helmsley's notification to Eluto concerning a "commission dispute meeting" was not, without more, sufficient notice that there would be an arbitration proceeding of the type prescribed in the Employment Agreement. A meeting may be nothing more than a coming together of persons, and need not result in any dispositive or conclusive action being taken with respect to any matter which is a subject of the meeting. By contrast, an arbitration proceeding to resolve a commission dispute, as described in the Employment Agreement, involves a "hearing ... in front of an Executive Officer who has been mutually agreed upon by the disputing employees," and ends in a determination as to the apportionment of the disputed commission which is "final, conclusive and binding on [the] Employee" (Employment Agreement, ¶ 3).

Eluto asserts in his affidavit: that, during his telephone conversation with Ferdinand, she "did not elaborate on ... the purpose of the meeting," or "say the 'meeting' was concerning [his] employment agreement or resolving disputes through arbitration"; that he informed Ferdinand that he had retained an attorney, that discussions between his attorney and Helmsley's attorney were already in progress, and that further communications should "be made through counsel to avoid misunderstandings"; that he was "never ... involved in the selection of an arbitrator as required by [his] employment agreement"; and that, under the Employment Agreement, "failure to mutually select an arbitrator required the President of [Helmsley], Lynn Schneider, to be the arbitrator," but she was not the arbitrator (Eluto Affid., ¶¶ 37-39).

Proper notice of an arbitration hearing is "essential to the validity of the proceedings unless the parties waive the notice requirement" (5 NY Jur 2d, Arbitration and Award § 147). "Arbitrators ... may act only upon proof adduced at a hearing of which due notice has been given to each party (CPLR 7506 [b], [c])" (Matter of Goldfinger v Lisker, 68 NY2d 225, 231 [1986]). "Precisely because arbitration awards are subject to ... judicial deference, it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded" (*id.* at 230). Thus -- by raising issues of fact as to whether Helmsley gave him proper notice of the

arbitration proceeding and complied with the procedure set forth in the Employment Agreement for selecting an arbitrator -- Eluto has also raised an issue of fact concerning the validity of the arbitration proceeding which precludes summary judgment dismissing of any part of Eluto's breach of contract claim on the basis of that proceeding.

3. **25-27 West 26th Street.** Eluto alleges, with respect to the property located at 25-27 West 26th Street: that he procured the listing for the property, and negotiated and closed the lease on the property; that Religious Zionists of America (RZA) refused to pay the brokerage commission that it owed to Helmsley in connection with the transaction; that Helmsley sued RZA to recover the amount owed; that RZA agreed to pay Helmsley \$81,000 to settle the litigation; that Helmsley's and Eluto's attorneys entered into a separate agreement, dated September 1, 2005, pursuant to which Helmsley agreed to pay \$34,800 of the settlement amount to Eluto; and that Helmsley has not paid Eluto \$17,114 of the amount that he is owed under the September 1, 2005 agreement.

Defendants do not dispute that Eluto's share of the settlement proceeds is \$34,800. Rather, they contend that Eluto was paid the entire share after deduction of attorneys' fees and various social security deductions. Defendants cite an eight-line excerpt from the deposition testimony given by Kenna Bock, the manager of Helmsley's commission department (see Def. Mem. of Law, at 11 [citing Galison Affirm., Ex. M, Bock EBT, at 103:7-14]; Def. Reply Mem. of Law, at 12 [same]).

Bock's testimony only apparently indicates that Eluto was charged back for attorneys' fees and other deductions. However, whether the law permits defendants' chargeback policy has not been resolved as a matter of law. Thus, defendants have not met their prima facie burden of establishing, as a matter of law, that they were entitled to charge back Eluto for attorneys' fees on his share of the RZA settlement. Defendants have failed to establish as a ground for dismissal of Eluto's breach of contract claim, insofar as it alleges that Helmsley failed to pay an amount owed to him in connection with the leasing of the property located at 25-27 West 26th Street.

4. **350 West 31st Street.** Eluto asserts that he procured a new management agreement for the building located at 350 West 31st Street in July 1996, and that he is entitled, under

the Employment Agreement, to receive at least 15% of the management commission earned by Helmsley pursuant to the management agreement.³ Eluto testified that he was an Account Executive for the property, and that he made sure that “rents were collected, expenses were paid, and any management issues were dealt with as quickly as possible” (Eluto EBT, at 470). He received \$300 a month for his services (*id.* at 472).

Defendants contend that Eluto is not entitled to any compensation as an Account Executive because of his termination (Mem. at 24). Because Eluto thereafter ceased to perform the duties of an account executive for the building, defendants argue that he is not entitled to any further compensation. Eluto argues that the compensation is a management commission which he is entitled to receive even after his termination. Eluto cites Paragraph 6 of the Employment Agreement which provides that “Employer shall pay Employee for any commissions, as received, and earned by Employee, even though Employee has been previously terminated.” In reply, defendants counter that Eluto would not have earned any commission for management services for the property once he was terminated.

The Employment Agreement itself implies that a management commission is earned when the employee has procured a new management agreement, and the Employment Agreement does not set any other conditions for a management commission to be earned. However, it is unclear whether the monthly compensation that Eluto received as an Account Executive constitutes a management commission under his Employment Agreement. Eluto only presumes that the compensation

³Because the third cause of action alleges Helmsley’s breach of contract by reason of its failure to pay **sale** and **lease** commissions, the third cause of action does not, strictly speaking, encompass Eluto’s claim that he is owed a **management** commission in connection with the building located at 350 West 31st Street. However, Eluto clearly intends the cause of action for breach of contract to encompass his claim to the management commission (*see* Pl. Mem. of Law, at 22-23, 24), and defendants, as well, evidently understand that claim to be encompassed within the complaint’s third cause of action for breach of contract (*see* Def. Mem. of Law, at 23-24; Def. Reply Mem. of Law, at 8, 11).

constitutes a management commission.⁴ Insofar as there is an unresolved question as to whether Eluto's compensation as Account Executive for the property was a management commission, defendants' motion for summary judgment is denied as to this claim.

5. 1854 Westchester Avenue. Eluto asserts that Helmsley owes him \$1,238 for reimbursable expenses -- including various advertising, transportation and marketing costs -- that he incurred in effecting the sale of the property located at 1854 Westchester Avenue. Defendants assert that Helmsley has no obligation to reimburse Eluto for those expenses, because he incurred the expenses after Helmsley terminated his employment, and because no one at Helmsley with authority to do so ever approved or agreed to pay them.

However, Eluto testified at his deposition that, "shortly after" Helmsley terminated his employment, he had a conversation with Bock, in which he said "there were going to be expenses [in connection with the sale of the 1854 Westchester Avenue property]," and "[s]he said, [f]ine. Send us the bills" (Eluto EBT, at 462). He testified, additionally, that Bock made a statement to the effect that "[w]hatever the expenses are, send them and we will treat them in the normal way" (*id.* at 459; *see also* Eluto Affid., ¶ 13). Eluto allegedly understood Bock's statement to mean that Helmsley would reimburse him for the subject expenses in accordance with the practice that it had normally used when he was still employed by Helmsley (*see* Eluto EBT, at 465-466). In light of Eluto's deposition and affidavit testimony, defendants have failed to establish, to the preclusion of any issue of fact, that there was not an oral agreement between Helmsley and Eluto that Helmsley would reimburse, either in whole or in part, the necessary expenses incurred by Eluto in connection with the sale of the property located at 1854 Westchester Avenue.

For the foregoing reasons, defendants have demonstrated their entitlement to dismissal of Eluto's third cause of action, for breach of contract, only insofar as that claim is predicated upon Helmsley's purported failure to pay Eluto the full amount of the lease commission that he is owed

⁴ The management agreement with 350 West 31st Street has not been submitted as part of the record.

in connection with the property located at 641 Lexington Avenue.

C. Quantum Meruit. The fourth cause of action sounding in quantum meruit, which asserts that Helmsley has failed to compensate Eluto for the services that he performed and Helmsley accepted, is dismissed.

“[T]he existence of a valid and enforceable contract governing a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter” where there is no dispute between the parties that the contract exists and covers the dispute in issue (IIG Capital LLC v Archipelago, L.L.C., 36 AD3d 401, 404-405 [1st Dept 2007] [citation and internal quotation marks omitted]; see also HGCD Retail Servs., LLC v 44-45 Broadway Realty Co., 37 AD3d 43, 54 [1st Dept 2006]; Aviv Constr. v Antiquarium, Ltd., 259 AD2d 445, 446 [1st Dept 1999]). Here, there is no dispute between the parties that the Employment Agreement exists, and that it covers the transactions and claims which form the basis for Eluto’s cause of action in quantum meruit (see Eluto EBT, at 308-309). Accordingly, as Eluto concedes, his quantum meruit claim must be dismissed (see Pl. Mem. of Law, at 22 n 5).

D. Breach of Fiduciary Duty. The fifth cause of action alleges that Helmsley breached its fiduciary duty to Eluto by ceding a portion of Helmsley’s lease commission for the seventh floor of 641 Lexington Avenue to Newmark -- and thereby reducing Eluto’s share of that commission -- without his consent and over his objections. That cause of action is also dismissed.

An employer ordinarily owes no fiduciary obligation to an at-will employee (see Weintraub v Phillips, Nizer, Benjamin, Krim, & Ballon, 172 AD2d 254, 254 [1st Dept 1991]; see also Schenkman v New York Coll. of Health Professionals, 29 AD3d 671, 672 [2d Dept 2006]; Vitale v Steinberg, 307 AD2d 107, 108 [1st Dept 2003]; Michnick v Parkell Prods., 215 AD2d 462, 462-463 [2d Dept 1995]; Budet v Tiffany & Co., 155 AD2d 408, 409 [2d Dept 1989]), and Eluto has neither pleaded nor established the existence of any facts which would preclude application of that general rule. Accordingly, Eluto has failed to demonstrate that Helmsley owed him any fiduciary duty, with respect to the lease commission for the property at 641 Lexington Avenue, that could be

breached.

Moreover, as previously stated, the Employment Agreement expressly permitted Helmsley to cede a share of the subject lease commission to Newmark. Eluto cannot maintain a claim against Helmsley for breach of fiduciary duty which is based on nothing more than Helmsley's exercise of a contractual right that was expressly granted to it under the Employment Agreement (cf. Carter Fin. Corp. v Atlantic Med. Mgt., 268 AD2d 233, 233 [1st Dept 2000]).

II. Claims Against Noghrey and Feiler

A. Fraud. The sixth and seventh causes of action allege claims for fraud, against Noghrey and Feiler respectively, on the grounds that: Noghrey fraudulently claimed that he was entitled to part of the sale commission on the 57 West 35th Street property without having performed any services in connection with that sale; and Feiler fraudulently claimed that he was entitled to part of the sale commission on the 210-220 Nagle Avenue property without having performed any services in connection with that sale.

“In order to recover for fraud, [a] plaintiff[] must show a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance **by the plaintiff**, and resulting injury” (Pope v Saget, 29 AD3d 437, 441 [1st Dept 2006] [emphasis added]). Each of the essential elements of a fraud claim “must be supported by factual allegations sufficient to satisfy CPLR 3016 (b), which requires, in the case of a cause of action based on fraud, that ‘the circumstances constituting the wrong shall be stated in detail’” (Ambassador Factors v Kandel & Co., 215 AD2d 305, 307-308 [1st Dept 1995]).

The allegations in the complaint would suggest, and Eluto indicated at his deposition, that his fraud claims are based upon misrepresentations which were purportedly made by Noghrey and Feiler -- i.e., that they were entitled to part of the sale commissions on certain properties when, in fact, they had not performed any services in connection with those sales -- to some person or persons in Helmsley's commission department (see Complaint, ¶¶ 28, 30; Eluto EBT, at 262-263, 278-279). At his deposition, Eluto conceded that he himself did not rely upon the purported misrepresentations,

and that the misrepresentations were harmful to him only insofar as persons in the commission department relied upon the representations in deciding how the subject commissions would be apportioned amongst Noghrey, Feiler and him (see Eluto EBT, at 263, 279). Thus, Eluto's fraud claims against Noghrey and Feiler fail because they do not allege, and the record contains no facts indicating, either that Eluto himself justifiably relied upon the purported misrepresentations, or that he suffered any injury as the result of such reliance.

Apparently conceding the foregoing defects in his fraud claims, Eluto asserts two new theories of liability in his opposition papers: (1) that his fraud claims are based upon misrepresentations that were made to him rather than to the commission department, i.e., that "Feiler and Nogh[re]y made material misrepresentations to Eluto when they accepted Eluto's terms for participation (Nogh[re]y) or declined to participate on Eluto's terms (Feiler)"; and (2) that, "[w]hether or not ... Feiler or Nogh[re]y committed fraud, they both aided and abetted the fraud committed by each other and/or by [Helmsley]" (Pl. Mem. of Law, at 28 n 9).

However, Eluto cannot rely upon these new theories of liability -- which are raised for the first time, improperly, only in Eluto's papers in opposition to defendants' motion for summary judgment -- as a means for salvaging his fraud claims (see Nikitin v Lexandra, 24 AD3d 522, 523 [2d Dept 2005]). The newly-raised theories would be insufficient, in any event, to remedy the defects in Eluto's fraud claims. Insofar as Eluto's claim against Noghrey were premised upon Noghrey's purportedly fraudulent acceptance of "Eluto's terms for participation" in the sale of the property located at 57 West 35th Street, the claim would merely have alleged that Noghrey did not intend to carry out the terms of an agreement at the time when he made it (see e.g. Federal Realty Ltd. Partnership v Choices Women's Med. Ctr., 289 AD2d 439, 442 [2d Dept 2001]; Sandra Greer Real Estate v Johansen Org., 182 AD2d 468, 469 [1st Dept 1992] [stating that "(a) fraud claim is not sufficiently stated where it alleges that a defendant did not intend to perform a contract ... when he made it"; citation and internal quotation marks omitted]).

Insofar as Eluto's fraud claim against Feiler were premised upon the theory that Feiler made

a misrepresentation to Eluto -- by “declin[ing] to participate on Eluto’s terms” in the sale of the property located at 210-220 Nagle Avenue -- the claim would fail, again, to allege any manner in which Eluto justifiably relied upon the purported misrepresentation or suffered any injury as the result of such reliance. Eluto’s fraud claims against Noghrey and Feiler would be defective insofar as they were based upon the purported misrepresentations made directly to Eluto, additionally, in that Eluto has failed to plead or establish any facts indicating “that the defendants knew, at the time the alleged misrepresentations were made, that they were false, and that at such time, the defendants had the intent to deceive” (New York Med. Coll. v. Histogenetics, Inc., 6 AD3d 410, 411 [2d Dept 2004]).

Neither has Eluto established that there is a basis for a claim against Noghrey and/or Feiler for aiding and abetting a fraud (which was not pleaded in the complaint). The elements of a claim for aiding and abetting fraud are: “(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud” (Gabriel Capital, L.P. v NatWest Fin., 94 F Supp 2d 491, 511 [SD NY 2000] [applying New York law; citation and internal quotation marks omitted]). However, Eluto has not alleged any underlying fraud claim which survives defendants’ motion for summary judgment and, accordingly, has not established the basis for a claim of aiding and abetting a fraud. For the foregoing reasons, the sixth and seventh causes of action are dismissed.

B. Tortious Interference With Contract. The eighth and ninth causes of action allege claims for “intentional interference with contractual rights,” against Noghrey and Feiler respectively, on the grounds that: (1) by “claiming that he is entitled to commissions on 210-220 Nagle Avenue and 57 West 35th Street, knowing that [Eluto] had performed the services on those sales, Nogh[re]y has intentionally interfered with Eluto’s contractual right to the commissions on those sales”; and (2) by “claiming that he is entitled to a commission on 210-220 Nagle Avenue, knowing that Eluto had performed the services on [that] sale[], Feiler has intentionally interfered with Eluto’s contractual right to the commission on that sale” (Complaint, ¶¶ 32, 34). Helmsley awarded portions

of the commissions on the foregoing sales to Noghrey and Feiler in the internal arbitration proceeding which has already been discussed.

In order to prevail on a claim for tortious interference with contract, a plaintiff must establish “the existence of a valid contract between the plaintiff and a third party, defendant’s knowledge of that contract, defendant’s intentional procurement of the third party’s breach of the contract without justification, actual breach of the contract, and damages resulting therefrom” (Lama Holding Co. v Smith Barney, 88 NY2d 413, 424 [1996]). In order to establish “the existence of a valid contract between the plaintiff and a third party,” the plaintiff must establish, inter alia, that the defendant was not a party to the contract (see e.g. Finley v Giacobbe, 79 F3d 1285, 1295 [2d Cir 1996] [applying New York law]; Cohen v Davis, 926 F Supp 399, 404 [SD NY 1996] [applying New York law]). In order to establish that the defendant was not a party to the contract -- where, as here, the contract is an employment contract, the third party is the plaintiff’s employer and the defendants are plaintiff’s co-employees -- the plaintiff must establish “that [the] defendant coemployees acted outside the scope of their authority” (Marino v Vunk, 39 AD3d 339, 340 [1st Dept 2007]; see also Kosson v Algaze, 203 AD2d 112, 113 [1st Dept 1994], affd 84 NY2d 1019 [1995]).

Insofar as Eluto’s tortious interference claims relate to the commission on the sale of 210-220 Nagle Avenue, the claims are dismissed. In view of the evidence contained in the record, Eluto cannot establish that Noghrey’s or Feiler’s purported interference in connection with that sale commission was either outside the scope of his authority as an employee of Helmsley or without justification.

Eluto testified at his deposition to the effect: that he and Noghrey agreed that Noghrey would assist in selling the property at 210-220 Nagle Avenue; that Noghrey did, in fact, perform certain work in connection with the selling of the property; and that Eluto and Noghrey agreed that Noghrey would receive some amount from the commission on the sale of the property (see Eluto EBT, at 271-272, 332-333, 348-349, 357-359). Eluto has submitted a copy of a letter, dated April 8, 2005, pursuant to which Noghrey agreed that Feiler would receive a share of the sale commission for the

property at 210-220 Nagle Avenue if an individual named Richard Esposito purchased that property (see Eluto Affid., ¶ 33 and Ex. 5). It was Esposito who subsequently purchased the property.

Eluto does not dispute that he himself sent a memorandum to Bock, dated July 5, 2005, in which he: (1) stated that there was a dispute among Noghrey, Feiler and himself as to the apportionment of the sale commission for 210-220 Nagle Avenue; (2) acknowledged that he “brought [Noghrey] on [the 210-220 Nagle Avenue sale transaction] with the understanding that we would negotiate [Noghrey’s] split at the end”; (3) acknowledged that “Feiler supplied the name and phone number of [the] customer” who ultimately purchased the property, although Eluto also claimed in the letter that he “already had” that customer; and (4) expressed his belief that, of the 60% employee share of the commission received by Helmsley on the sale of the property, he should receive 50% and Noghrey and Feiler should jointly receive 10% (see Galison Affirm., Ex. F). In light of the foregoing statements and concessions made by Eluto himself, he cannot establish that either Noghrey or Feiler -- insofar as he claimed that he was entitled to a portion of the sale commission on 210-220 Nagle Avenue -- acted outside the scope of his authority as an employee of Helmsley or without economic justification. Defendants have, therefore, established their entitlement to dismissal of Eluto’s tortious interference claims against Noghrey and Feiler insofar as the claims relate to the sale commission for the property located at 210-220 Nagle Avenue.

However, defendants have not established that the eighth cause of action should be dismissed insofar as it alleges that Noghrey tortiously interfered with Eluto’s contractual right to receive the sale commission on the property located at 57 West 35th Street. Eluto stated at his deposition that Noghrey did no work in connection with this sale except that, on one occasion, Noghrey sent copies of a fax concerning the subject property to a number of potential purchasers whose names appeared on a list. Noghrey allegedly sent the faxes after Eluto had told him that, if any of the recipients of the fax bought the property, Eluto would give Noghrey “something ... very, very small, like 500

bucks or something” (Eluto EBT, at 278; see also Eluto Affid., ¶ 21).⁵ However, Eluto asserts, none of the faxes resulted in any offers for the property.

Defendants have submitted no evidence which refutes Eluto’s testimony concerning the nature of Noghrey’s involvement in the sale of the 57 West 35th Street property. Accordingly, defendants have failed to establish that Noghrey’s assertion of a claim to a part of the sale commission on that property was either: (1) within the scope of his authority as an employee rather than a predatory act -- undertaken in bad faith and solely for personal, pecuniary gain -- that was unrelated to the furtherance of Helmsley’s business (see BIB Constr. Co. v City of Poughkeepsie, 204 AD2d 947, 948 [3d Dept 1994]; see also White v Alkoutayni, 18 AD3d 540, 541 [2d Dept 2005]); or (2) economically justified, inasmuch as it is not clear that Noghrey, on the basis of his conversations with Eluto, could have had any legitimate expectation that he was entitled to receive a portion of the sale commission.

Defendants argue that Eluto’s tortious interference claim against Noghrey should be dismissed on the independent ground that there was no breach of the Employment Agreement by Helmsley, i.e., because Helmsley had a contractual right to determine the apportionment of the commissions which were in dispute between Eluto and Noghrey by conducting the internal arbitration. However, as previously stated, defendants have failed to establish that any part of Eluto’s breach of contract claim should be dismissed based upon the arbitration proceeding.

For the foregoing reasons, defendants have established their entitlement to dismissal of the ninth cause of action against Feiler in its entirety, and to dismissal of the eighth cause of action against Noghrey insofar as that claim relates to the sale commission for 210-220 Nagle Avenue, but not insofar as that claim relates to the sale commission for the property located at 57 West 35th Street.

C. Unjust Enrichment. The tenth and eleventh causes of action -- which allege claims for

⁵Helmsley apparently paid \$14,250 of the sale commission for the 57 West 35th Street property to Noghrey.

unjust enrichment against Noghrey and Feiler, respectively, on the ground that each of them requested and accepted commission payments that he was not entitled to receive -- are also dismissed.

“The criteria for recovery under a theory of unjust enrichment are: (1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services” (Joan Hansen & Co. v Everlast World’s Boxing Headquarters Corp., 296 AD2d 103, 108 [1st Dept 2002] [citation and internal quotation marks omitted]). However, in order to recover on an unjust enrichment claim against a particular defendant,

a plaintiff must demonstrate that services were performed *for the defendant* resulting in [the defendant’s] unjust enrichment. It is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery

(id. [citations and internal quotation marks omitted; emphasis in original]; see also Liberty Marble v Elite Stone Setting Corp., 248 AD2d 302, 304 [1st Dept 1998]; Heller v Kurz, 228 AD2d 263, 264 [1st Dept 1996]; Kagan v K-Tel Entertainment, 172 AD2d 375, 376 [1st Dept 1991]).

Insofar as Eluto performed services in connection with the sale of the properties for which Noghrey and Feiler are alleged to have wrongfully accepted commissions, Eluto performed those services not for or at the behest of Noghrey and/or Feiler, but for Helmsley and/or himself. The tenth and eleventh causes of action are, therefore, dismissed.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion for summary judgment is granted, but only in part, to the extent that:

(1) the complaint is severed and dismissed as against defendant Ira Feiler, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk;

(2) the fourth, fifth, sixth and tenth causes of action are dismissed in their entirety;

(3) the first and second causes of action are dismissed in part, but only insofar as they relate to commissions that were allegedly earned and not paid, and/or deductions from commissions that were allegedly made, prior to April 28, 2000;

(4) the third cause of action is dismissed in part, but only insofar as it relates to the lease commission for the seventh floor of 641 Lexington Avenue, New York, New York; and

(5) the eighth cause of action is dismissed in part, but only insofar as it is relates to the sale commission on the property located at 210-220 Nagle Avenue, New York, New York;

and it is further

ORDERED that the first, second, third and eighth causes of action, as delimited by the preceding subparagraphs, shall continue; and it is further

ORDERED that defendants are granted leave to bring a second summary judgment motion to raise arguments that were raised for the first time in defendants' reply papers.

Dated: 5/13/08
New York, NY

ENTER:

Michael D. Stallman
J.S.C.

FILED
MAY 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN
J.B.C.