

**Garber v Inter Capital Resources LLC**

2009 NY Slip Op 31403(U)

June 19, 2009

Supreme Court, New York County

Docket Number: 117189/08

Judge: Judith J. Gische

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

PRESENT: **JUDITH J. GISCHE, J.S.C.**

PART 10

Index Number : 117189/2008

GARBER, YOEL

vs

INTER CAPITAL RESOURCES LLC

Sequence Number : 001

DISMISS ACTION

**FILED**  
JUN 22 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

INDEX NO. \_\_\_\_\_  
MOTION DA \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

PAPERS NUMBERED

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

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

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

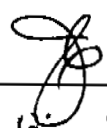
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

*and PC to be held  
on 7/16/09 in  
Part 10.*

Dated: 6/19/09

  
**JUDITH J. GISCHE, J.S.C.** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X

YOEL GARBER,  
  
Plaintiff,

- against -

INTER CAPITAL RESOURCES LLC and SCOTT  
NUNNALLY,  
  
Defendants.

-----X

**Decision/Order**

Index No. 117189/08  
Seq. No. : 001

Present:  
Hon. Judith J. Gische  
J.S.C.

**FILED**  
JUN 22 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Recitation, as required by CPLR 2219 [a], of the papers considered for the review of this (these) motion(s):

|  |          |
|--|----------|
| <b>Papers</b>  | Numbered |
| Def pre-answer motion [dismiss] w/HK affirm in support, exhs | 1        |
| JG affid in opp  | 2        |

*Upon the foregoing papers, the decision and order of the court is as follows:*

Defendants Inter Capital Resources LLC ("ICR") and Scott Nunnally ("Nunnally") move, pre-answer, for an order dismissing plaintiff's complaint for failure to state a cause of action. CPLR § 3211 (a) (7). Plaintiff opposes the motion, and alternatively, requests leave to replead should the motion be granted.

The following facts are based upon the allegations contained in a three-page complaint, as well as plaintiff's own affidavit which is barely more than a page. Plaintiff was employed as a loan analyst by defendant ICR from October 2004 through April 2008, when his employment was terminated. Plaintiff alleges that Nunnally "hired... and fired" plaintiff on behalf of ICR. Plaintiff maintains that Nunnally is an "employer" under the definition of the Labor Law.

Plaintiff has asserted two causes of action, both sounding in breach of contract. In

the first claim, plaintiff alleges that he has not been paid (1) previously agreed severance of \$15,000, (2) one month health coverage of \$1,300, (3) a 2008 pension contribution of \$500, and (4) a bonus for 2007 of \$8,000. Plaintiff also seeks as damages for the first cause of action an "additional 25% of the total wages due as liquidated damages which equals an additional \$6,200, plus reasonable attorneys' fees, plus pursuant to Labor Law § 198 (1)."

In the second claim, plaintiff seeks to recover unpaid commissions of \$25,030. Plaintiff seeks additional damages equal to 100% of the total commissions due, plus reasonable attorneys fees, pursuant to Labor Law § 198 (1).

Despite the fact that the only two causes of action alleged in the complaint arise from defendant's alleged breach of some contract, the terms of which are not otherwise pled, plaintiff states in the first paragraph of the complaint:

This is an action for breach of contract, breach of fiduciary duty, quantum meruit, unjust enrichment, and a violation of NY Labor 191-c *et seq.*

This blanket statement seeming to allege alternative theories of recovery does not satisfy plaintiff's burden to interpose any claims other than breach of contract. Plaintiff has not alleged any facts to support claims that the defendants owed plaintiff a fiduciary duty, breached a substantive provision of the Labor Law, or that plaintiff should recover under theories of quantum meruit or unjust enrichment.

As a basis for Nunally's personal liability, plaintiff argues that Nunnally has exercised such "complete domination of the hiring and firing process he has personal liability under the Labor Law, as does the corporate defendant."

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (see CPLR 3026; Leon v Martinez, 84 NY2d 83, 87 [1994]). The court accepts the facts as alleged by plaintiff as true, affording them the benefit of every possible

favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1<sup>st</sup> Dept 2003]), unless clearly contradicted by evidence submitted in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1<sup>st</sup> Dept 2006]).

In addition, in asserting a motion under CPLR § 3211 (a) (7), the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*id.*, quoting Guggenheimer v Ginsburg, 43 NY2d 268 [1977]).

Defendants argue that it is black letter law that statutory liquidated damages and attorneys’ fees under Labor Law 198 (1-a) are unavailable on a breach of contract claim. The court agrees. The Court of Appeals has squarely held that such damages are not available in a breach of contract claim not “founded on the substantive provisions of Labor Law article 6.” Gottlieb v. Kenneth D. Laub & Co., Inc., 82 NY2d 457, 464 (1993).

The court rejects plaintiff’s argument that Gottlieb is irrelevant or that Pachter v. Bernard Hodes Group, 10 NY3d 609 (2008) clarified the holding in Gottlieb in such a way as to support its claim for statutory damages on the first cause of action. In Pachter, the Court of Appeals answered two certified questions from the United States Court of Appeals for the Second Circuit and held that “an ‘executive’ falls within the ambit of the protections afforded to ‘employees’ under sections 190 and 193 of the Labor Law, and that the determination of when a commission is earned is governed by the parties’ express or implied agreement.” Plaintiff’s argument utterly mis-characterizes Pachter, *supra*, which is clearly inapplicable here. Accordingly, defendants’ motion to dismiss that aspect of plaintiff’s request for statutory liquidated damages and attorneys’ fees under Labor Law § 198 (1-a) in the first

cause of action is hereby granted.

Defendants also seek dismissal of the complaint outright because plaintiff has failed to allege the elements of a breach of contract. However, this argument fails. In order to state a cause of action for breach of contract, the pleading must allege the existence of a valid and enforceable agreement, due performance by plaintiff, and a failure of performance by defendant, resulting in damages (see Furia v Furia, 116 AD2d 694, 695 [2d Dept 1986]). Plaintiff's burden on a motion to dismiss is easily met here, where plaintiff must simply allege sufficient facts to demonstrate a *prima facie* cause of action for breach of contract. Plaintiff alleges that the defendants promised to pay him wages, severance and commissions as well as make contributions to his retirement plan and pay 2007 and 2008 bonuses. This allegation, along with plaintiff's allegations that the defendants breached an agreement by withholding such wages, commissions, severance and benefits, is sufficient to meet his burden at this stage of the litigation.

Defendants' last argument is that the claims against Nunnally, personally, should be dismissed since plaintiff has failed to allege a basis for personal liability. Reading the allegations in the complaint and plaintiff's affidavit in a most favorable light, plaintiff's claims against Nunnally arise solely insofar as Nunnally acted within the scope of his employment with ICR. Plaintiff has not pled sufficient facts which would establish that Nunnally breached an agreement under which he was personally liable causing plaintiff's damages. Accordingly, the court hereby severs and dismisses the claims against Nunnally, personally.

### **Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that defendants' motion to dismiss is granted only to the extent that: [1]

plaintiff's claim for liquidated damages and attorneys' fees on the first cause of action pursuant to Labor Law 198 (1-a) is hereby severed and dismissed; and [2] the claims against Nunnally, personally, are hereby severed and dismissed; and it is further

**ORDERED** that defendants' motion is otherwise denied; and it is further

**ORDERED** that the defendants shall serve their answer within twenty (20) from the date of this decision and order. Plaintiff's reply, if any, shall be served within the time provided by the CPLR; and it is further

**ORDERED** that a preliminary conference be held in this matter on July 16, 2009 at 9:30 a.m. at Part 10.

The clerk is hereby directed to enter judgment in accordance herewith.

Any requested relief which has not been addressed herein has been considered and is hereby expressly denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
Jun 19, 2009

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH A. GISCHE, J.S.C.

**FILED**  
JUN 22 2009  
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NEW YORK