

**Cohen v One Step Up LLC**

2009 NY Slip Op 32630(U)

November 4, 2009

Supreme Court, New York County

Docket Number: 601479-09

Judge: Edward H. Lehner

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

PRESENT: EDWARD H. LEHNER

PART 19

*Justice*

Index Number : 601479/2009

COHEN, STACEY

vs.

ONE STEP UP, LLC

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 601479-09

MOTION DATE

MOTION SEQ. NO. #001

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

\_\_\_\_\_ were read on this motion to/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 is decided in accordance

with accompanying memorandum decision

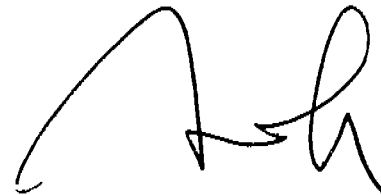
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Dated: \_\_\_\_\_



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: IAS PART 19

-----X  
STACEY COHEN

Plaintiff,

-against-

ONE STEP UP LLC, ONE STEP UP APPAREL GROUP  
LLC and ONE STEP UP LTD.,

Defendants.

Index No.  
601479/09

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-----X  
**EDWARD H. LEHNER, J.:**

Before the court is a motion by defendants to dismiss the complaint against them pursuant to CPLR 3211 based upon the Statute of Frauds. At oral argument the action was dismissed as against defendants other than One Step Up, Ltd. (the "Company") (tr. p. 4).

Plaintiff's complaint has one cause of action for breach of contract. She alleges: that she worked for the company since 1993 (complaint ¶ 6); that she met with the Company's president, Harry Adjmi, in January 2007 for the purpose of discussing an employment agreement (plaintiff affidavit, ¶¶ 2, 3); that Adjmi proposed a new four-year agreement with a base salary of \$1.2 million and an annual bonus of \$500,000 in 2007, with the bonus increasing by \$100,000 each year thereafter (Id. ¶ 6); that the parties reached an "oral agreement" (Id. ¶ 9); that the terms of the oral agreement were written on a paper (the "Note," Exhibit A) and that Adjmi stated that there was a contract (Id. ¶¶ 9, 10); that the company maintained the Note in its files (Id. ¶ 12); that when plaintiff received a \$200,000

advance on her bonus the Company's director of Human Resources Sherlene Ayuso wrote on the Note to that effect (Id. ¶ 13); that Adjmi admitted that there was an employment agreement by making payments in accordance with the Note (Id. ¶ 16); that plaintiff was terminated on March 30, 2009 (complaint ¶ 22) and the Company failed to pay her the salary provided for under the contract, with the consequence that the Company is in breach of its employment contract with her.

Defendant contends: that plaintiff's employment agreement was an oral agreement (tr. p. 5); that the Note is not a sufficient writing by itself to satisfy the Statute of Frauds (Id.), which plaintiff acknowledges (Id. p. 5); that plaintiff's salary after the Note was essentially as before the Note (Id. p. 14); that the writing on the Note was predominantly plaintiff's (Id. p. 21); that defendant denies that Adjmi said there was a contract between plaintiff and the Company, and that therefore since there is no writing subscribed by the Company, the Statute of Frauds warrants dismissal of the action.

General Obligations Law (the "Statute of Frauds"), § 5-701(a) states:

"Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith ... if such agreement, promise or undertaking: (b)y its terms is not to be performed within one year from the making thereof"

In the context of an employment agreement "(t)o satisfy the Statute of Frauds, a writing must identify the parties, describe the subject matter, state all the essential terms of an agreement, and be signed by the party to be charged ... (and the essential elements) consist

of ‘the identity of the parties, the terms of the employment which include the commencement date, the duration of the contract and the salary’” [Durso v. Baisch, 37 AD3d 646, 647 (2<sup>nd</sup> Dept. 2007)]. Plaintiff has contended that the Statute of Frauds is inapplicable since she alleges defendant admitted the oral contract (tr. p. 11).

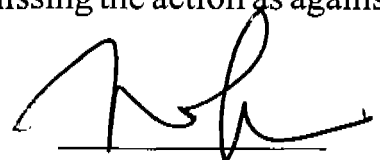
“(O)ral agreements that violate the Statute of Frauds are nonetheless enforceable where the party to be charged admits having entered into the contract” [Matisoff v. Dobi, 90 NY2d 127, 134 (1997)]. See also, Bono v. Cucinella, 298 AD2d 483 (2<sup>nd</sup> Dept. 2002). The reason for this is that “(t)he Statute of Frauds was designed to guard against the peril of perjury; to prevent the enforcement of unfounded fraudulent claims. ... ‘(It) was not enacted to afford persons a means of evading just obligations; nor was it intended to supply a cloak of immunity to hedging litigants lacking integrity; nor was it adopted to enable defendants to interpose the Statute as a bar to a contract fairly, and admittedly, made’” [Morris Cohon & Company v. Russell, 23 NY2d 569, 574 (1969)]. See also, Cron v. Hargro Fabrics, Inc., 91 NY2d 362 (1998).

Plaintiff contends that defendant admitted the existence of the oral agreement (plaintiff affidavit ¶¶ 9, 10, 16), which defendant denies. This, however, does not create a triable issue when the issue relates to the applicability of the Statute of Frauds. Here there is no acknowledgment that an oral contract was ever made between the parties. “Although a court ordinarily might take plaintiff’s affidavits into account on a dismissal motion, different considerations apply where the basis for the dismissal motion is a Statute

of Frauds defense. Parol evidence, even in affidavit form, is immaterial to the threshold issue whether the documents are sufficient on their face to satisfy the Statute of Frauds. Consideration of parol evidence in assessing the adequacy of a writing for Statute of Frauds purposes would otherwise undermine the very reason for a Statute of Frauds in the first instance. That issue must be determined from the documents themselves, as a matter of law” [Bazak International Corp. v. Mast Industries, Inc., 73 NY2d 113, 117-118 (1989)] (internal citation omitted). See also, DeRosis v. Kaufman, 219 AD2d 376 (1<sup>st</sup> Dept. 1996). The Note admittedly does not contain all the essential terms of the purported agreement since it does not contain a commencement date, a job description, the terms of employment, the duration of the purported agreement, and was not signed by the Company. Consequently, as stated in Schenk v. Francis, 26 NY2d 466, 472 (1970), since “the writings are plainly insufficient on their face, the conclusion follows, as a matter of law, they do not satisfy the Statute of Frauds.”

In light of the foregoing, defendant’s motion to dismiss the complaint is granted and the Clerk shall enter judgment accordingly, dismissing the action as against all defendants.

Dated: November 4, 2009

  
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 J.S.C.

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