

**Garber v Inter Capital Resources LLC**

2010 NY Slip Op 30319(U)

February 11, 2010

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: HON. JUDITH J. GISCHE  
J.S.C.

PART 10

Index Number : 117189/2008

GARBER, YOEL

vs

INTER CAPITAL RESOURCES LLC

Sequence Number : 002

REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. 002

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

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

**FILED**  
FEB 17 2010

NEW YORK  
COUNTY CLERK'S OFFICE  
MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 2/11/10

HON. JUDITH J. GISCHE 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: PART 10

-----X  
YOEL GARBER,

Plaintiff,

- against -

INTER CAPITAL RESOURCES LLC and SCOTT  
NUNNALLY,

Defendants.  
-----X

**Decision/Order**

Index No. 117189/08  
Seq. No. : 002

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

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

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

-----X

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

Defendant Inter Capital Resources LLC ("ICR") moves to reargue the court's decision/order dated June 19, 2009 on the ground that the court overlooked or misapprehended defendant's request to dismiss plaintiff's claim for statutory liquidated damages and attorneys' fees under Labor Law § 198 (1-a) in plaintiff's second cause of action. Plaintiff opposes the motion and cross-moves for leave to amend his complaint to assert causes of action sounding in violations of Labor Law § 191 (d) against ICR and Scott Nunnally, personally, and for breach of contract against Scott Nunnally, personally. CPLR § 3025 (b).<sup>1</sup>

\_\_\_\_\_  
<sup>1</sup> Although plaintiff claims to be moving for leave to replead pursuant to CPLR § 3211 (e), plaintiff has provided a copy of his proposed amended complaint as well as an affidavit of merit. The court, therefore, will treat the motion as one to amend in light of the relief sought.

The court will first address plaintiff's cross-motion since the amended claims are asserted in an effort to address the pleading deficiencies identified by the court in its prior decision and otherwise related to defendant's arguments in the context of its motion-in-chief.

After the prior decision/order granting in part the defendants' motion to dismiss, the complaint contained two causes of action for breach of contract against ICR and Nunnally in his capacity as an employee of ICR. The first claim arose from the defendants' failure to pay plaintiff "agreed severance of \$15,000, one month health coverage of \$1,300, a 2008 pension contribution of \$500 and a bonus for 2007 in the amount of \$8,000." The second claim arose from the defendants' failure to pay plaintiff commissions due on loans plaintiff placed.

Plaintiff seeks to amend his complaint to assert the following four causes of action: [1] violation of Labor Law § 191 (d) for failure to pay severance and other benefits within two weeks of plaintiff's termination (first cause of action) against ICR and Nunnally; [2] failure to pay a "non-recoverable draw against commissions" as well as additional earned commissions against both defendants (second cause of action); [3] ICR's breach of contract for failure to pay salary and commissions (third cause of action); and [4] breach of contract for failure to pay salary and commissions against Nunnally (fourth cause of action). Plaintiff also seeks to recover an additional 25% of the total wages due as liquidated damages plus reasonable attorneys fees pursuant to Labor Law § 198 (1-a) on the first, second and fourth causes of action.

The motion to amend must be denied. Although leave to amend a pleading is freely given, "the sufficiency or meritoriousness of a proposed pleading or matter"

should be resolved at the outset “to obviate the possibility of needless time consuming litigation.” Sharapata v. Town of Islip, 82 AD2d 350, 362 *aff'd* 56 NY2d 332 (1982).

The moving party is required to show that it the new claims have a colorable basis. NAB Construction Corp. v. Metropolitan Transportation Authority, 167 AD2d 301 (1st dept. 1990).

The proposed pleading is legally deficient in the following ways. Insofar as plaintiff seeks to assert any claim against Nunnally, personally, the court specifically held in the prior decision:

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.

Plaintiff's proposed amended pleading again fails to allege enough facts to state a claim against Nunnally personally. Plaintiff's statement that Nunnally hired him, and was his employer, is belied by plaintiff's claims against ICR. Nor has plaintiff alleged that he entered into a contract with Nunnally personally. Therefore, the proposed claims against Nunnally fail.

The first cause of action is defective because plaintiff incorrectly alleges in his proposed amended complaint that he is a “clerical and other worker” under Labor Law § 190 (7). Instead, plaintiff is a “commissioned salesman” under Labor Law § 190 (6) because he alleges that ICR and Nunnally did not pay him commissions due in the second and third quarters of 2008. Under Labor Law § 190 (6), a “commissioned salesman” is “any employee... whose earnings are based in whole or in part on commissions.” A “clerical and other worker” is any employee not included in, *inter alia*,

Labor Law § 190 (6).

Plaintiff's second cause of action is a recapitulation of the second cause of action in the original complaint. Similarly, the third cause of action is identical to that portion of the first cause of action which survived the defendants' motion to dismiss. Otherwise, plaintiff's demands for liquidated damages and attorneys fees under Labor Law § 198 (1-a) were squarely rejected by this court in its prior decision/order. Breach of contract claims do not give rise to the relief afforded under Labor Law § 198 (1-a). See Gottlieb v. Kenneth D. Laub & Co., Inc., 82 NY2d 457, 464 (1993); Pachter v. Bernard Hodes Group, 10 NY3d 609 (2008).

Accordingly, plaintiff's cross-motion is denied in its entirety.

Defendant seeks to reargue its prior motion to clarify the court's holding. Specifically, defendant seeks an order which clearly dismisses plaintiff's request for liquidated damages and attorneys fees under Labor Law § 198 (1-a) in the second cause of action. The court grants reargument, and upon reargument, modifies the prior order to dismiss plaintiff's demand for such relief. The court's reasoning clearly applied to plaintiff's demand for liquidated damages and attorneys fees on both causes of action, and the court overlooked the defendant's request to dismiss that portion of the second cause of action.

### **Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that defendant's motion to reargue is granted, and upon reargument, the court orders that plaintiff's claim for liquidated damages and attorneys fees on the second cause of action pursuant to Labor Law § 198 (1-a) is hereby severed and

dismissed; and it is further

**ORDERED** that plaintiff's motion to amend is denied in its entirety; and it is further

**ORDERED** that the court hereby schedules a status conference in this action to be held on March 4, 2010 at 9:30 a.m. in Part 10, 60 Centre Street.

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  
February 11, 2010

So Ordered:

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

**FILED**  
FEB 17 2010  
NEW YORK  
COUNTY CLERK'S OFFICE