SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

TRIAL/IAS PART 20

Justice.

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ROBERT BARKER,

Plaintiff,

- against-

Index No. 016438/08
Motion Sequence...03
Motion Date...12/09/09
XXX

TIME WARNER CABLE, INC., TIME WARNER CABLE LLC; TIME WARNER NEW YORK CABLE LLC; TIME WARNER CABLE COMMUNICATIONS COMPANY, LLC; and TIME WARNER CABLE OF NEW YORK CITY a division of TIME WARNER ENTERTAINMENT COMPANY, L.P.; RALPH BORGHESE,

Defendants.

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Papers Submitted:
Notice of Motion and Affirmation.....x
Affirmation in Opposition.....x
Memorandum of Law.....x
Reply Affirmation.....x
Sur-Reply Memorandum of Law.....x

The Plaintiff, Robert Barker, moves for an Order of this Court: (a) pursuant to CPLR § 2221(d) for leave to reargue the Decision and Order of this Court dated July 1, 2009; and (b) pursuant to CPLR § 3025(b) granting him leave to amend his Verified Complaint. The motion is determined as herein set forth below.

This is an action for the breach of an agreement for the payment of commissions and bonuses in an at-will employment context. On July 1, 2009, this Court granted the Defendants' motion to dismiss the Plaintiff's complaint in its entirety. This Court held that the Plaintiff, a former employee of Time Warner Cable Inc.[1], failed to state causes of action against the Time Warner defendants for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, fraud, fraudulent misrepresentation, declaratory judgment, and against the individual Defendant, Ralph Borghese, tortious interference with contractual relations. In an attempt to revive three of these claims, upon the instant motion, the Plaintiff moves, *inter alia*, for leave to reargue this Court's July 1, 2009 Decision and Order with respect to the breach of contract, breach of the implied covenant of good faith and fair dealing and unjust enrichment causes of action.

A motion to reargue is addressed to the discretion of the court and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law (CPLR § 2221[d][2]). It is not designed as a vehicle to afford the unsuccessful party an opportunity to argue once again the very questions previously decided (*Gellert & Rodner v. Gem Community Mgt., Inc.*, 20 A.D.3d 388 [2nd Dept. 2005]). Nor is it designed to

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[1]Defendants "Time Warner Cable LLC", "Time Warner NY Cable LLC", and "Time Warner Cable of New York City" are affiliates of defendant "Time Warner Cable Inc." and are collectively referred to herein as "Time Warner."

provide an opportunity for a party to advance arguments different from those originally tendered (*Amato v. Lord & Taylor, Inc.*, 10 A.D.3d 374, 375 [2nd Dept.2004]) or argue a new theory of law or raise new questions not previously advanced (*Levi v. Utica First Ins. Co.*, 12 A.D.3d 256, 258 [1st Dept. 2004]; *Frisenda v. X Large Enterprises, Inc.*, 280 A.D.2d 514, 515 [2nd Dept. 2001]). Instead, the movant must demonstrate the matters of fact or law that he believes the court has misapprehended or overlooked (*Hoffmann v. Debello-Teheny*, 27 A.D.3d 743 [2nd Dept. 2006]). Absent a showing of misapprehension or the overlooking of a fact, the court must deny the motion (*Barrett v. Jeannot*, 18 A.D.3d 679 [2nd Dept. 2005]). Further, a motion to reargue is based solely upon the papers submitted in connection with the prior motion. New facts may not be submitted or considered by the court (*James v. Nestor*, 120 A.D.2d 442 [1st Dept. 1986]; *Philips v. Village of Oriskany*, 57 A.D.2d 110 [4th Dept. 1997]).

Notably, in requesting reargument, the Plaintiff fails to identify any portion of the decision in which the Court has overlooked or misapprehended the law or facts. Rather, the Plaintiff maintains that this Court misapprehended his legal argument. This is not a basis on which to grant reargument. Specifically, the Plaintiff submits that he did not receive all of the commissions and bonuses that he "earned" with respect to the Sprint account. The Plaintiff contends that his "breach of contract action was not intended to be based upon a breach of the at-will employment agreement between the parties...[i]n fact, plaintiff's breach of contract claim is based upon the failure of [Time Warner Cable] to

pay Barker commissions and bonuses due to him pursuant to the Sales Compensation Plan put into effect by Defendants...at the time each contract or amendment to each contract was entered into between Defendant's [sic] and/or its affiliates and Sprint and/or its affiliates. The fact that Defendants may have the right does not in any way negate [Time Warner Cable]'s obligations to pay commissions owed to Barker that he earned while he was working on the Sprint account" (*Aff in Supp. Of Motion*, ¶5; *see also* ¶¶15, 25).

In the Plaintiff's original complaint and opposition papers, he asserted that the Defendants breached the Sales Compensation Plan when they transferred him off the Sprint account and failed to pay him future commissions and bonuses in respect to the Sprint account. In a thorough analysis of the Plaintiffs' allegations, this Court dismissed his claims because (a) the terms of the "Sales Compensation Plan" expressly authorized the company to transfer [Plaintiff] off the Sprint account...[and] the very document upon which the Plaintiff bases his breach of contract claim establishes that he fails to state a cause of action for breach of contract; and more importantly (b) the Plaintiff admitted that he received his commissions and bonuses from the Sprint account until the time he was transferred off the Sprint account and the program was discontinued with respect to the Plaintiff (Decision, pp. 9-10).

Thus, the same arguments advanced in support of reargument here were made by the Plaintiff in opposition to the Defendants' original motion to dismiss pursuant

to CPLR § 3211(a)(7), considered by the Court and rejected in a detailed decision. The Plaintiff has failed herein to demonstrate facts which the Court overlooked or law it misapplied. The Plaintiff's request to reargue is, therefore, **DENIED**.

Insofar as the Plaintiff's motion also seeks leave to amend his complaint, said relief is also **DENIED**. The Plaintiff, as the party seeking leave to serve an amended pleading, must make an evidentiary showing establishing merit to the proposed amendment (*Joyce v. McKenna Assocs., Inc.*, 2 A.D.3d 592 [2nd Dept. 2003]; *Morgan v. Prospect Park Assocs. Holdings, L.P.*, 251 A.D.2d 306 [2nd Dept. 1998]). A motion for leave to amend a complaint is properly denied where "the proposed amendment is palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise" (*Fahey v.. County of Ontario*, 44 N.Y.2d 934 [1978]; *Sunrise Plaza Associates, L.P. v. International Summit Equities Corp.*, 288 A.D.2d 300 [2nd Dept. 2001]; *Northbay Construction Co., Inc. v. Bauco Construction Corp.*, 275 A.D.2d 310 [2nd Dept. 2000]).

In support of his motion herein, the Plaintiff attempts to backtrack and argue that he did not receive all of the commissions and bonuses that he "earned" with respect to the Sprint account. To do this, he argues for the first time that commissions and bonuses are actually "earned" (or he is "entitled") to them at the time Time Warner Cable signs general contracts with wholesale customers such as Sprint, as opposed to when actual installations occur on the accounts and Time Warner Cable receives revenue

for such installations. He bolsters this new argument with an affidavit signed by Bhupender (Bob) Kaul, his former supervisor, who reiterates the Plaintiff's understanding. The Plaintiff's and Kaul's recitations, however, fly in the face of the express language of the Sales Compensation Plan as to when commissions and bonuses are "earned," and their self-serving and conclusory recitations of their "understanding" are impermissible parol evidence which this Court simply will not consider in interpreting the Sales Compensation Plan (*South Road Assoc. LLC v. International Business Machines Corp.*, 4 N.Y.3d 272, 278 [2005]; *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 [2002]; *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157 [1990]). In this case, the Sales Compensation Plan expressly states that all commissions are "Earned upon installation" and bonuses are earned based on achievement of quarterly revenue targets. Moreover, consistent with the definition of when commissions are earned, the Sales Compensation Plan also provides that commissions paid to employees who resign or are terminated, are payable "for only those Contracts signed and/or renewed and installed prior to the date o[f] resignation or dismissal. These statements in the Sales Compensation Plan unambiguously and plainly define when commissions and bonuses are earned under the plan, and plainly refute the Plaintiff's position. Therefore, because no ambiguity exists, the terms of the Sales Compensation Plan speak for themselves, and this Court simply will not consider extrinsic evidence such as the Plaintiff's and Kaul's

"understanding" of when commissions and bonuses are earned (*Sips v. Fastrack Healthcare Sys., Inc.*, No. 4567/05, 2006 WL 1642694 [Sup. Ct. Nassau 2006]).

Insofar as the Plaintiff's argument can be construed as one for not being paid for any installations that occurred prior to his transfer off the Sprint account, it cannot be overlooked by this Court that the Plaintiff has already confirmed, under oath, that he was duly paid for such installations prior to his transfer off the Sprint account.

Therefore, the additional facts and theories that the Plaintiff proposes to include in his complaint are invalid, reflect a misapprehension of the applicable law and do not in any manner change the outcome of this Court's dismissal of the Plaintiff's complaint. The Plaintiff's proposed amended complaint is therefore "palpably insufficient" and "devoid of merit" and his motion to amend his complaint is therefore **DENIED**.

This constitutes the decision and order of this court.

DATED: Mineola, New York
February 22, 2010

Hon. Randy Sue Marber, J.S.C.
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