

Ramlall v Choice Money Transfer, Inc.

2010 NY Slip Op 31538(U)

June 11, 2010

Supreme Court, Nassau County

Docket Number: 021683-07

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ALLAN INDERJEET RAMLALL,

Plaintiff,

-against-

CHOICE MONEY TRANSFER, INC.,

Defendant.

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 021683-07
Motion Seq. Nos. 1 and 2
Submission Date: 5/17/10**

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The following papers have been read on these motions:

- Notice of Motion and Affidavit in Support.....X**
- Book of Exhibits to Defendant’s Motion to Dismiss.....X**
- Defendant’s Memorandum of Law in Support.....X**
- Notice of Cross Motion, Affidavit in Support,
Affirmation in Support and Exhibits.....X**
- Defendant’s Affidavit in Opposition and Exhibits.....X**
- Defendant’s Memorandum of Law in Opposition.....X**
- Affidavit of P. von Siemens in Opposition.....X**
- Reply Affidavit.....X**

This matter is before the Court for decision on 1) the motion filed by Defendant Choice Money Transfer, Inc. on March 8, 2010, and 2) the cross motion filed by Plaintiff Allan Inderjeet Ramlall on April 9, 2010, both of which were submitted on May 17, 2010. For the reasons set forth below, the Court 1) denies Defendant’s motion in its entirety, except that the Court grants Defendant’s motion to strike the Errata Sheet submitted by Plaintiff to the transcript of his May 27, 2009 deposition; and 2) denies Plaintiff’s cross motion in its entirety.

BACKGROUND

A. Relief Sought

Defendant Choice Money Transfer, Inc. (“Choice” or “Defendant”) moves for an Order, pursuant to CPLR § 3212, granting Choice summary judgment dismissing the Second Amended Complaint (“Complaint”) on the grounds that the “no oral modification clause” of the relevant employment agreement between the parties bars this action; and/or 2) dismissing the Complaint, pursuant to CPLR §§ 3126 and 3212, in light of Plaintiff’s alleged spoliation of evidence essential to Choice’s defense; and/or 3) dismissing the Complaint, pursuant to CPLR § 3126, for Plaintiff’s allegedly wilful and contumacious conduct in refusing to respond to Defendant’s discovery demands; or, alternatively, 4) precluding Plaintiff Allan Inderjeet Ramlall (“Ramlall” or “Plaintiff”) from introducing into evidence any of the documents and information provided by Ramlall to Choice on January 19, 2010, and any other documents not produced pursuant to Choice’s pre-Note of Issue discovery demands; and/or, in the alternative, 5) striking the Note of Issue filed by Ramlall on the ground that all discovery in this matter has not been completed; and/or 6) permitting Choice to conduct additional discovery based on the additional documents and information supplied by Ramlall to Choice on January 19, 2010 and, if necessary postponing the August 9, 2010 trial date to allow Choice to complete the additional discovery needed; and 7) rejecting the errata sheet “corrections” submitted by Ramlall to the transcript of his May 27, 2009 deposition and, if necessary, conducting a hearing at which the court reporter would verify the accuracy of her transcription of Ramlall’s deposition testimony. Plaintiff opposes Defendant’s motion.

Plaintiff cross moves for an Order 1) granting Plaintiff a money judgment for commissions allegedly due Plaintiff based on the agreement of the parties; and 2) granting Plaintiff counsel fees incurred in connection with this motion pursuant to the applicable provision of the parties’ agreement. Defendant opposes Plaintiff’s motion.

B. The Parties’ History

The Complaint (Ex. A of D’s Exhibit Book) alleges as follows:

Plaintiff is an individual residing in Nassau County, New York and Defendant is a domestic and/or foreign corporation doing business in the State of New York. Prior to the commencement of the action, Plaintiff and Defendant entered into an agreement (“Agreement”)

pursuant to which Defendant employed Plaintiff.

On or about July 1, 2007, Defendant discharged Plaintiff from his employment. Plaintiff alleges that Defendant breached the Agreement by failing to pay Plaintiff certain monies and that, as a result of that breach, Plaintiff has been damaged in the sum of \$565,807.25.

In the Second Cause of Action, Plaintiff alleges that Defendant was obligated to pay Plaintiff certain monies representing profits and bonuses pursuant to the Agreement. Plaintiff alleges, further, that he is unaware of the amount of money that Defendant failed to pay him, and demands an accounting by Defendant of those sums which Plaintiff alleges are at least \$565,807.25.

In the Third Cause of Action, Plaintiff alleges that Defendant has converted monies rightfully belonging to Plaintiff and, as a result, Plaintiff has been damaged in the sum of \$565,807.25. In the Fourth Cause of Action, Plaintiff alleges that Defendant has been unjustly enriched in the sum of \$565,807.25. In the Fifth Cause of Action, Plaintiff seeks legal fees incurred as a result of Defendant's alleged breach of the Agreement, pursuant to a provision in the Agreement that entitles the prevailing party to recover legal fees and costs.

In its Answer to Second Amended Complaint ("Answer") (Ex. A to D's Exhibit Book), Defendant refers the Court to the Agreement and denies that Defendant owes Plaintiff any money. Defendant also asserts seven (7) counterclaims: 1) the Complaint fails to state a cause of action from which relief can be granted; 2) Plaintiff did not substantially comply with the terms of the Agreement and, therefore, is precluded from bringing this action; 3) Plaintiff was discharged for just cause; 4) Plaintiff moved to India where he obtained other employment and, therefore, has suffered no damages; 5) Plaintiff's recovery, if any, should be reduced by the amount that Plaintiff could have earned in other employment, or by Plaintiff's actual earnings from other sources after his discharge; 6) Plaintiff has been fully paid for all monies to which he was entitled under the Agreement; and 7) Plaintiff is barred from equitable relief pursuant to the doctrines of waiver, estoppel and unclean hands.

Defendant also asserts a Counterclaim. In that Counterclaim, Defendant alleges that it is entitled to an award of reasonable attorney's fees and other costs, pursuant to the applicable provision of the Agreement.

Defendant provides an Affidavit in Support of Kevin Neuschatz ("Neuschatz") dated

March 3, 2010. Neuschatz affirms, *inter alia*, as follows:

Choice is a New York State Licensed Money Transmitter. On or about January 31, 2005, Choice hired Ramlall whose duties included the operation of Choice's West Africa business. Ramlall's work included 1) supervising the transfers of money sent by United States residents to individuals in West Africa; 2) generating money transmitter business in New York; 3) recruiting and signing up agents for money transmitting customers, primarily in New York; and 4) supervising those agents from the New York office. Ramlall reported daily to management in New York and his office was located in New York. In connection with Ramlall's employment, Ramlall and Choice entered into the Agreement (Ex. B to D's Exhibit Book) dated January 31, 2005 which is signed by Neuschatz in his capacity as Chief Operating Officer of Choice, and by Ramlall.

Paragraph 11 of the Agreement, titled "Entire Agreement: Oral Statements Not Binding," provides as follows:

This Agreement contains the entire agreement of the parties or of the Employee and Employer relating to the subject matter hereof and may not be waived, changed, modified, extended or discharged orally but only by agreement in writing, consented to in writing by Employer and signed by the party against whom enforcement of any such waiver, change, modification, extension or discharge is sought. Employee acknowledges that Employer is not bound by any oral or other unauthorized statements or promises regarding salary, benefits, length of employment or any other conditions of Employee's employment.

Prior to June of 2007, Ramlall mentioned to Neuschatz on more than one occasion that many companies were moving their back office operations to India, and that it might be beneficial for Choice to do the same. Ramlall offered to move to India with his family to supervise Choice's operations there. Although Neuschatz listened to Ramlall's suggestion, he never encouraged the idea or gave Ramlall reason to believe that Neuschatz would implement his suggestion. At the end of June of 2007, Ramlall advised Neuschatz that he was moving to India with his family. Shortly after Ramlall left, Choice formally terminated the Agreement.

As reflected in Ramlall's Response to Defendant's First Demand for Production of Documents ("Response") (Ex. D to D's Exhibit Book) and deposition testimony on May 27, 2009 (Ex. E to D's Exhibit Book), Ramlall concedes that there is no writing reflecting the purported agreement between the parties regarding Ramlall's relocation to India to work for

Defendant. In his Response, Ramlall asserted that he was “not in possession of the documents demanded” in response to, *inter alia*, Plaintiff’s demands for documents relating to 1) any request by Ramlall to Choice for permission to relocate, 2) any approval by Choice of Ramlall’s request to relocate, and 3) employment activities of Ramlall on behalf of Choice after Ramlall moved to India.

Neuschatz avers that Choice never requested or agreed to Ramlall leaving for India on behalf of Choice. Neuschatz submits that Ramlall left for personal reasons, thereby breaching the Agreement, and Defendant properly terminated his employment thereafter.

Neuschatz affirms, further, that Ramlall asserts that there are memoranda and other documentation supporting this alleged agreement which were on his laptop computer (“Computer”). Ramlall claims that this documentation was lost when he sold his Computer nearly seven months after he commenced this action, and that he never made any backup copies of this information.

Neuschatz avers that, notwithstanding Ramlall’s alleged loss of relevant in documentation, in January of 2010, Ramlall produced an e-mail dated March 7, 2007 (Ex. F to D’s Exhibit Book) from Ramlall to an A.K. Aurora, an individual who is not associated with Choice and whom Neuschatz does not know. That e-mail, which is not entirely legible, contains the subject line “Re: Choice Money Transfer - INDIA” and includes the following sentence:

As an introduction to the matters discussed with yourself and Amer [?] last week, I need to mention that I am in a position where I have to convince my NY company that it will make a dramatic economic sense for us to establish back office operations in India.

Neuschatz affirms that Ramlall never tried to convince him of the proposed move to India, as the e-mail suggests. Rather, Ramlall mentioned the issue casually in passing. Neuschatz suggests that Ramlall moved to India and, dissatisfied with his situation there, filed this action in an effort to continue to receive income from Choice.

Neuschatz submits that Ramlall’s deposition testimony regarding the Computer is inconsistent with his recent production of documents that he submits are relevant to this action. Neuschatz contends further that some of the documents produced by Ramlall are fabrications. Neuschatz cites examples, including the following:

- 1) Bates stamped document number 0043 (Ex. H to D’s Exhibit Book) purports to be an

unsigned letter on Choice letterhead that Neuschatz allegedly wrote to the Indian Consulate in Manhattan on Ramlall's behalf to facilitate his move to India. Neuschatz affirms that he never drafted, or had any involvement in drafting, this letter.

2) Bates stamped document number 0040-0041 (Ex. H to D's Exhibit Book) is a document titled "Business Agenda in India," which Plaintiff's counsel characterized in January of 2009 as having been compiled by Choice and Neuschatz on Ramlall's behalf. Neuschatz affirms that he had never seen this letter prior to its production and had nothing to do with its preparation.

3) At his deposition on May 27, 2009, Ramlall, *inter alia*, 1) conceded that outsourcing half of its staff to India would have been a big decision for Choice (p. 207); 2) testified that after receiving the termination letter from Choice, he immediately disconnected everything to the Choice computer system, never logged on again, sold the Computer in India and never downloaded onto a disc or any other website the contents of the Computer (pp 11-12); and 3) testified that there were no other records so that when the Computer was gone "everything was wiped out from it..." (p. 226).

Neuschatz submits that, in light of the foregoing, 1) the Court should dismiss the action or, alternatively, preclude Ramlall from using the documentation that he recently produced; or 2) permit further depositions of Ramlall and other parties referred to in the recently produced documentation.

With respect to Defendant's application for counsel fees and costs, paragraph 16 of the Agreement, titled "Attorneys' Fees and Litigation Costs," provides as follows:

If any legal action or any arbitration or other proceeding is brought for the enforcement of this Agreement, because of an alleged dispute, breach or default in connection with any of the provisions of this Agreement, the successful or prevailing party shall be entitled to recover reasonable attorneys' fees and other costs incurred in that action or proceeding, in addition to any other relief to which [that] party would be entitled.

Plaintiff submits an Affidavit in Support/Opposition of Ramlall dated April 5, 2010 in which he affirms, *inter alia*, as follows:

In or about August of 2006, Ramlall spoke with Neuschatz and advised him that India has "a proven highly skilled labor pool geared towards outsourcing from businesses in the United States and Europe" (Ramlall Aff. at ¶ 6). During this conversation, Neuschatz expressed

a “substantial interest” in this subject (Ramlall Aff. at ¶ 8). Ramlall asked Neuschatz whether his relocation would create an issue with respect to his salary and compensation package as set forth in the Agreement, and Neuschatz responded that Ramlall could keep his current salary. Neuschatz also inquired of Ramlall how moving a portion of Choice’s operations to India could reduce Choice’s costs.

Ramlall affirms that Neuschatz advised him to keep this proposal quiet because it would be detrimental to Choice’s New York office operation. Ramlall outlines in detail the conversations and meetings he had that, he submits, support his belief that Choice agreed to continue to employ and compensate him if he relocated to India. Those conversations included 1) a conversation in 2006 among Amar Gogal, a real estate and relocation broker, Neuschatz and Ramlall regarding the cost of rental space and labor in India, 2) conversations between Ramlall and Neuschatz, after Ramlall’s trip to India in 2007, during which Neuschatz advised him that an individual named Peter Schultz Von Seimens (“Seimens”), president of a holding company that owned shares in Choice, was “extremely excited” (Ramlall Aff. at ¶ 24) about Ramlall’s proposed move to India in conjunction with Choice’s relocation of its back-office operations to India, and 3) conversations in 2007 between Ramlall and Iris Pinedo, the Operations Manager of Choice, regarding the costs of computer operations in New York and how those costs could be reduced by relocation to India. Ramlall does not affirm that any writing was prepared reflecting Choice’s alleged consent to his relocation in the manner required by the Agreement.

Ramlall provides details regarding his move to India in June of 2007 which included setting up his computer to give him access to Choice’s database, including its customer transactions. Ramlall affirms that, within a few days of his move to India, he received an e-mail from Neuschatz advising him that 1) Ramlall was fired; 2) Neuschatz wanted to change the terms of the Agreement; and 3) Neuschatz would immediately discontinue paying Ramlall’s salary until they came to a new arrangement. Ramlall does not provide a copy of this purported e-mail.

Ramlall affirms that he and Neuschatz subsequently attempted to renegotiate the Agreement, but were unable to agree. Ramlall provides a copy of this alleged proposed agreement (Ex. C to Ramlall Aff.) which is a typed document containing certain handwritten notations. This purported new agreement is unsigned.

Ramlall provides a copy of the faxed letter that Neuschatz sent to Ramlall on August 20, 2007, advising him of his termination (Ex. D to Ramlall Aff.). That letter, which is signed by Neuschatz, reads as follows:

Dear Allan:

Please be advised that, as per the Board of Director's determination, you are in default of your employment obligations, specifically the provisions of paragraph 3(B)(iii)(III)(B), among others, under our January 31, 2005 Employment Agreement. As a result of such breach the Board of Directors has voted to terminate your employment agreement for cause as of June 29, 2007.

Sincerely,

Kevin A. Neuschatz, CEO

Paragraph 3(B)(iii)(III)(B), to which the August 20, 2007 letter ("Termination Letter") refers, provides as follows:

Employee's employment under Paragraph 2 [titled "Duties During Employment Period"] may be terminated at any time during the Employment Period for Cause (as hereinafter defined) by action of the Board upon giving the Employee written notice of such termination. As used herein, the term "Cause" shall mean any of the following events:

the Employee's neglect of duties or failure to act or otherwise engaging in any conduct that, in the good faith judgment of the Board, may adversely affect the Employer[.]

With respect to his possession of relevant documentation, Ramlall concedes that, in response to Defendant's demands for documents and his deposition, he asserted that he did not have anything in writing to back up his assertions. He avers further, however, that "in January of this year upon a further search of a box of papers that I had forgotten existed in my home, I discovered not one but three pieces of paper which document the discussions and proposed move of the "back-office" operations of defendant to India" (Ramlall Aff. at ¶ 120).

Ramlall affirms that those documents include 1) a letter dated January 8, 2007 (Ex. G to Ramlall Aff.) from and signed by Neuschatz, addressed to a New Delhi Bank, that was prepared in connection with Choice establishing a presence in India, 2) a letter dated January 29, 2007 (Ex. H to Ramlall Aff.) that was allegedly prepared by Neuschatz reflecting conversations between Neuschatz and Ramlall regarding the proposed relocation. Ramlall, apparently

conceding that this letter is unsigned, affirms that “the signed copy of which I am no longer in possession of” (Ramlall Aff. at ¶ 122), and 3) a copy of a document titled “Business Agenda in India” (Ex. I to Ramlall Aff.) that Ramlall claims he prepared in conjunction with his conversations with Neuschatz regarding Choice’s alleged proposed relocation to India.

Ramlall also submits that Defendant 1) failed to pay the balance of his salary from June 20, 2007 to the end of 2007, and for calendar years 2008 and 2009; and 2) failed to pay commissions due him for 2008 and 2009. Ramlall concedes that he received payment for 2007 commissions that were due to him under the Agreement.

In his Affidavit in Opposition to Plaintiff’s Cross Motion dated May 6, 2010, Neuschatz outlines what he believes to be the implausibilities of Ramlall’s assertions in this action. Those proposed implausibilities include that 1) Ramlall, without any written confirmation from Choice, would agree to have his wife quit her job and move the entire family to India, at his own expenses; and 2) Choice immediately fired Ramlall once he went to India, despite all the alleged efforts that Ramlall made on Choice’s behalf.

Nauschatz submits that Ramlall’s lack of credibility is further demonstrated by changes that Ramlall made on September 22, 2009 to the Errata Sheet to his May 27, 2009 deposition (part of D’s Exhibit Book). On that Errata Sheet, Ramlall affirmed that 1) the word “guess” in the line “I just made a guess, using 2006 numbers” (p. 224, lines 11-12); and 2) the word “guesstimate” in the line “Was a guesstimate, yes” (p. 224, line 15) were erroneous. Ramlall swore on the Errata Sheet that, in both instances, the words “guess” and “guesstimate” were, in fact, “professional assessment.” Defendant, however, provides an Affidavit of Court Reporter Renate Reid (“Reid”) dated May 5, 2010 (Ex. A to D’s Aff. in Opp.). In that Affidavit, Reid affirms that “[b]ased on my re-review of my stenographic record of the Deposition, I stand by the Transcript language in question as being completely accurate. The statements set forth in Ramlall’s errata sheet are not correct” (Reid Aff. at ¶ 9).

Defendant also provides Affidavits of Ousmane Dieng (“Dieng”), Iris Pinedo (“Pinedo”) and Siemens.

Dieng, the Vice President of Sales and Marketing of the West African Department of Choice, affirms as follows:

He has known Ramlall since 1999 and they worked together at several companies,

including Choice. While they were both employed at Choice, Ramlall performed solely administrative functions. Dieng was surprised when Ramlall announced he was moving to India, and does not believe Ramlall would have been able both to perform his duties in New York and open up an operation in India.

Although Ramlall was supposed to recruit new agents as part of his duties, Ramlall never recruited a single agent while he worked at Choice, and concentrated his efforts on administrative matters. Ramlall's inability to recruit agents for the West African Department was attributable to 1) his not being known in the relevant West African communities, 2) his lack of fluency in the French language, and 3) his lack of fluency in any of the local languages spoken in the West African communities. Dieng affirms that he alone recruited new agents for Choice's West African Departments.

Pinedo affirms that he is the operations manager for Choice whose duties include heading Choice's computer operations. Pinedo confirms that he helped Ramlall set up and configure the pre-loaded software on his Computer so that he could access Choice's database on its website. Pinedo affirms, however, that Ramlall asked Pinedo to do this for him "as a 'personal favor'" (Pinedo Aff. at ¶ 3) and Pinedo never completed such a configuration for anyone else at Choice.

Pinedo also disputes Ramlall's claims regarding conversations between them, and specifically denies discussing 1) the costs of computer operations in the New York office, and 2) Ramlall's suggestions regarding lowering Choice's costs by moving to India. Pinedo describes Ramlall claims as a "fabrication" (Pinedo Aff. at ¶ 4(a)). Pinedo also denies that he worked with Ramlall to insure that he would have complete access to necessary information from Choice's computer database in India. Moreover, when Ramlall left Choice in 2007, Pinedo was instructed to disable his user name and password so that he could no longer access Choice's website.

Pinedo also submits that Ramlall's claims that his Computer could access Choice's database from India are false. Pinedo affirms that the only manner in which Ramlall could have accessed Choice's database was through Choice's website, and his access to that website was deactivated when he left Choice.

Siemens affirms that he is a shareholder and Chairman of the Board of Choice. He disputes Ramlall's allegations regarding conversations they had. Specifically, Siemens 1) denies

having any conversation with Ramlall, “other than brief pleasantries and small talk” (Siemens Aff. at ¶ 3) during the times he saw him at Choice’s New York office; 2) affirms that he has never seen Ramlall anywhere other than at Choice’s New York office; 3) denies ever discussing with Ramlall his alleged prospective move to India or purported plans to open a back-office operation for Choice; 4) denies ever discussing with Neuschatz, prior to the filing of this action, Ramlall’s alleged plans to open a Choice office in India; and 5) never explicitly or implicitly approved Ramlall’s plans to move to India and open an office there for Choice.

In his Reply Affidavit, Ramlall restates his version of the events, and disputes certain assertions in the Affidavits of Dieng, Pinedo and Siemens. Ramlall, *inter alia*, 1) disputes Siemens’ denial that he discussed Ramlall’s relocation plans with Neuschatz; 2) disputes the assertion that there was a language barrier affecting his ability to perform work in West Africa, affirming that his “knowledge of the French language is presently sufficient and was sufficient for the foregoing success” (Ramlall Reply Aff. at ¶ 55); and 3) suggests that Pinedo’s affidavit is consistent with Ramlall’s position that she configured his Computer to provide him with access to Choice’s entire database, but then deactivated his access to the Choice website after he was terminated.

C. The Parties’ Positions

Defendant submits that 1) in light of the no oral modification clause in the agreement, and Ramlall’s acknowledgment that no written modification exists, Plaintiff is entitled to summary judgment; 2) Ramlall’s spoliation of critical evidence by selling his Computer after the commencement of this action mandates dismissal of the Complaint; 3) Ramlall’s failure to comply with discovery, by denying the existence of records and then producing records over one year later, warrants the striking of the Complaint; 4) should the Court not dismiss the Complaint, the Court should issue orders of preclusion prohibiting Ramlall from introducing documents inconsistent with his Response; or, alternatively; 5) the Court should strike the Note of Issue and grant Choice permission to conduct additional discovery, in light of the new information raised by Ramlall’s late production of documents; and 6) the Court should reject the corrections on the Errata Sheet because they are unsupported by an explanation.

Plaintiff submits, *inter alia*, that 1) Defendant has not demonstrated that Plaintiff committed spoliation of evidence because Defendant has not identified the document or record

that could be considered evidence; and 2) Plaintiff has produced writings, specifically the two letters dated in January of 2007, supporting Plaintiff's claim of a subsequent agreement regarding Plaintiff's relocation to India. One of those documents is a January 8, 2007 letter from Neuschatz to ICICI Bank, New Delhi India, Bates document 0042, which contains what appears to be Neuschatz' signature and reads as follows:

Dear Sir/Madam

This letter is in regards to the Bonus/Commission status for Allan I. Ramlall - our Senior Vice President for Business Development.

In addition to a salary of \$75,000 annually, based on our historical bonus structure, Allan Ramlall normally receives an additional \$30,000 to \$50,000 per year.

Thank you for your attention to this matter.

Kevin Neuschatz
CEO
Choice Money Transfer

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d 58 (1st Dept. 2001).

A cause of action alleging conversion of funds must allege legal ownership or an immediate right of possession to specifically identifiable funds and that the defendant exercised an unauthorized dominion over such funds to the exclusion of the plaintiff's rights. *Zendler Const. Co., Inc. v. First Adjustment Group, Inc.*, 59 A.D.3d 439, 440 (2d Dept. 2009), citing *Selinger Enters., Inc. v. Cassuto*, 50 A.D.3d 766 (2d Dept. 2008), quoting *Whitman Realty Group, Inc. v. Galano*, 41 A.D.3d 590, 592 (2d Dept. 2007).

In order to maintain an action for an accounting, the party seeking the accounting must establish that a fiduciary or trust relationship exists. *Schantz v. Oakman*, 163 N.Y. 148 (1900); *Akkaya v. Prime Time Transport*, 45 A.D.3d 616 (2d Dept. 2007); *Darlagiannis v. Darlagiannis*, 48 A.D.2d 875 (2d Dept. 1975). A fiduciary relationship exists between two people when one is under a duty to act for or give advice for the benefit of another regarding matters within the scope of the relation. Whether the parties are in a fiduciary relationship is ordinarily a fact-specific inquiry, and courts look to the parties' agreement to discover the nexus of the parties' relationship and the particular contractual expression establishing the parties' interdependency. *EBC I v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19-20 (2005).

C. Effect of No-Oral Modification Provision

General Obligations Law ("GOL") § 15-301(1) provides as follows:

A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent.

The text of the General Obligations Law is not, however, the end of the inquiry. Rather, in *Rose v. Spa Realty Assoc.*, 42 N.Y.2d 338 (1977), the Court of Appeals outlined the analysis a court should conduct in determining whether a no-oral modification clause precludes relief by a defendant alleging an oral modification to the parties' agreement. The Court in *Rose* held as follows:

Parties to a written agreement who include a proscription against oral modifications are protected by [GOL § 15-301(1)]. Any contract containing such a clause "cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement * * * is sought". Put otherwise, if the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls. Thus, the authenticity of any amendment is ensured (*DFI Communications v. Greenberg*, 41 NY2d 602, 606-607).

On the other hand, where the oral agreement to modify has in fact been acted upon to completion, the same need to protect the integrity of the written agreement from false claims of modification does not arise. In such case, not only may past oral discussions be relied upon to test the alleged modification, but the actions taken may demonstrate, objectively, the nature and extent of the modification. Moreover, apart from statute, a contract once made can be unmade, and a contractual prohibition against oral modification may itself be waived [citation omitted]. Thus, section 15-301 nullifies only "executory" oral modification. Once executed, the oral modification may be proved. [Citations omitted.]

Id. at 343.

The Second Department reaffirmed these principles in *B. Reitman Blacktop, Inc. v. Missirlian*, 52 A.D.3d 752, 753 (2d Dept. 2008). In *B. Reitman*, the Second Department held that the statute of frauds bars oral modifications to a contract that expressly provides that modifications must be in writing, citing, *inter alia*, GOL" § 15-301(1), but also noted that an oral modification is enforceable if there is part performance that is "unequivocally referable to the oral modification" and a showing of equitable estoppel. *Id.*, quoting *Rose, supra*, at 343 and 345.

D. Errata Sheet

CPLR 3116(a) provides as follows:

The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the

witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.

E. Violation of Discovery Orders

Although actions should be resolved on the merits whenever possible, the court may, among other things, issue an order striking out pleadings or parts thereof when a party refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed. *Chen v. Fischer*, 2010 N.Y. App. Div. LEXIS 4500 (2d Dept. May 25, 2010), quoting CPLR § 3126(3) and *Ingoglia v. Barnes & Noble College Booksellers, Inc.*, 48 A.D.3d 636, 636-637 (2d Dept. 2008).

F. Application of these Principles to this Action

The Court is mindful that Defendant has identified numerous aspects of Plaintiff's action that Defendant characterizes as implausible, including 1) the absence of a writing signed by a representative of Choice setting forth the terms of the alleged oral amendment to the Agreement, 2) Ramlall's claims that he discussed his proposed relocation to India with representatives of Choice who adamantly deny that those discussions took place, 3) Ramlall's initial claim that he possessed no relevant documentation because the documentation was on a Computer that he sold when he moved to India, and his subsequent claim that he located relevant documentation, and 4) Ramlall's reliance on numerous documents that are unsigned by a representative of Choice. Moreover, it is undisputed that the Agreement contained a no-oral modification clause. Nevertheless, in light of the applicable case law and Ramlall's claim that (1) the parties entered into an oral modification and (2) he moved to India based on that alleged oral modification and in reliance on Defendant's alleged representations, the Court is constrained to conclude that there are factual disputes making summary judgment inappropriate. With respect to Plaintiff's claim for unjust enrichment, the existence of the Agreement does not preclude that cause of action as a matter of law, in light of Plaintiff's claim that there was a subsequent oral modification to the Agreement. These same factual disputes compel the Court's denial of Plaintiff's cross motion in its entirety.

The Court is also aware that Defendant is urging the Court to reject Ramlall's

explanation of his failure initially to produce the purportedly relevant documentation as incredible and to impose sanctions on Ramlall for that late disclosure. Defendant suggests, alternatively, that the Court permit Defendant additional discovery in light of that late disclosure, but does not identify the specific nature of that additional discovery. With respect to Ramlall's belated discovery production, the Court cannot definitively conclude that Ramlall's initial denial of possession of relevant documentation, and subsequent production of that documentation, was a wilful violation of the Court's directives regarding discovery. Thus, the Court concludes that the imposition of sanctions is inappropriate. The Court also denies Defendant's application for the opportunity to conduct additional discovery, based on the Court's conclusion that Defendant has had sufficient time to complete any additional discovery regarding the documentation that Ramlall belatedly produced.

The Court also denies Plaintiff's application for counsel fees pursuant to the applicable provision of the Agreement, as there has not yet been a determination as to which party is the prevailing party. Finally, the Court grants Defendant's application to strike the Errata Sheet to Ramlall's deposition on the basis that it was completed in an untimely fashion.

All matters not decided herein are hereby denied.

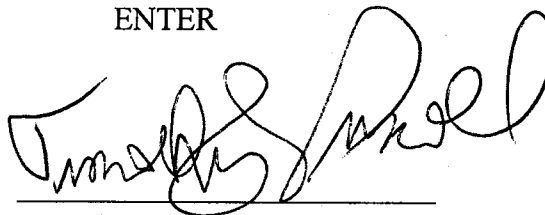
This constitutes the decision and order of the Court.

The court directs counsel for the parties to appear before the Court for a pretrial conference on July 15, 2010 at 9:30 a.m., at which time counsel shall provide all submissions required by Commercial Division Rules 26 to 32. Trial shall commence as previously scheduled on August 9, 2010 at 9:30 a.m.

DATED: Mineola, NY

June 11, 2010

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
JUN 16 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE