Cuttino v West Side Advisors
2011 NY Slip Op 32009(U)
July 8, 2011
Sup Ct, NY County
Docket Number: 103895/09
Judge: Joan A. Madden
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 7/19/2011

[* 1]

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

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

Index Number : 103895/2009

CUTTINO, DAVID

VS

WEST SIDE ADVISORS

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ 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 is determined in accordance with the annexed decision and order.

FILED

JUL 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: July 8, 2011

HON. JOAN A. MADDEN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11
----------X

DAVID CUTTINO,

Plaintiff,

Index No. 103895/09

-against-

WEST SIDE ADVISORS,

Defendant.

----------X

FILED
JUL 19 2011
NEW YORK
COUNTY CLERK'S OFFICE

Joan Madden, J.:

In this action by plaintiff David Cuttino (Cuttino) to recover wages and other compensation, under both an alleged contract and the New York Labor Law (Labor Law), defendant West Side Advisors (West Side) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

I. Background

West Side is an investment management firm, trading in mortgage bonds. Commencing in 2002, Cuttino was employed by West Side as a Portfolio Manager Assistant, working up to the role of Portfolio Manager by 2004, assigned to complex financial transactions involving the buying and selling of bonds for West Side, and other duties in which West Side placed its trust in Cuttino's growing experience in the field of financial markets. Cuttino worked without a contract until 2005, receiving a salary and bonus each year apparently commensurate to his rising value

to West Side.

In May 2005, the parties entered into a written contract to settle Cuttino's compensation issues (the 2005 Compensation Agreement)(Wenger Aff., Ex D). The 2005 Compensation Agreement was limited by its terms to the period of 2005. That is to say, the 2005 Compensation Agreement was not for a fixed term, but only included compensation during 2005.

Cuttino's earnings under the 2005 Compensation Agreement included payment of $5,769.23 by-weekly, amounting to approximately $150,000 per year, plus an "incentive compensation" which would be calculated under a formula as a percentage of net profits resulting from fees from the various funds managed by West Side, less Cuttino's salary. Thus, Cuttino's incentive compensation was tied to West Side's productivity, not his own.

On December 15, 2005, the parties entered into a compensation Agreement for 2006 (2006 Compensation Agreement) (*id.*, Ex. E). As with the previous year's agreement, the 2006 Compensation Agreement was not for a fixed term, but would apply during 2006.

In the 2006 Compensation Agreement, Cuttino was to be paid a by-weekly salary which amounted to approximately $200,000 per year, an increase from the year before. The percentage used to calculate his incentive compensation was also raised, from 7.5% to 10%.

On December 12, 2006, the parties entered into the 2007 Compensation Agreement (the 2007 Compensation Agreement). The compensation promised in the 2007 Compensation Agreement remained the same as the year before. Cuttino received compensation in the amount of $800,000 in 2005; $1,598,425.89 in 2006, and $899,990 in 2007.

The parties never negotiated a written compensation agreement for 2008. January 15, 2008 appears to be the first time the matter was broached. On that day, Cuttino, another Portfolio Manager, Michael Nutting (Nutting) and West Side's managing director, Gary Lieberman (Lieberman), discussed the matter briefly at an unscheduled meeting. At the meeting, Cuttino apparently asked that the previous arrangement for 2007 be continued into 2008, to which Lieberman agreed. There is no dispute that Cuttino and Lieberman agreed to "revisit" the matter later in the year. The matter was never discussed again.

2008 was a tumultuous year for West Side due to industry-wide issues with respect to mortgage-backed securities. Sometime in 2008, Lieberman allegedly became dissatisfied with Cuttino's performance and, on November 3, 2008, discharged him. Cuttino denies that there were any improprieties, or that he was discharged for cause, claiming that his discharge was motivated by a need to cut costs.

Cuttino, up to his discharge, received the equivalent in by-

weekly payments to his $200,000 salary, in accordance with the alleged continuation of the 2007 Compensation Agreement's terms into 2008. Although Cuttino was paid incentive payments under the 2007 formula for the first two quarters of 2008, he did not receive incentive compensation for the third or fourth quarters of the year at the time of his discharge or after. Cuttino alleges that West Side's Chief Financial Officer, Tonya Shaw (Shaw), calculated Cuttino's incentive compensation for the period ending September 30, 2008 as $53,499, but that this sum was never paid.

Cuttino brings this action to recover salary he believes is owed to him from the date of his discharge through December 31, 2008, and incentive compensation for the last two quarters of 2008. He brings claims for breach of contract, for quantum meruit, and claims under Labor Law section 190, 193 and 198. Cuttino also claims that West Side participated in the spoliation of evidence in the form of unsaved e-mails, which might have shown, among other things, that Lieberman passed on to Shaw the fact that Cuttino's compensation for 2007 was to continue into 2008.

II. Discussion

A. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute,

and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Gross v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

B. Spoliation Of Evidence

Cuttino insists that there may be evidence, in the form of e-mails between Shaw and Lieberman, confirming that Cuttino's compensation in 2008 was to be a continuation of his compensation in 2007, including the arrangement to pay Cuttino incentive compensation. There is no dispute that West Side no longer has any e-mails from the period in question, having deleted them in the ordinary course of business.

> On a motion for spoliation sanctions involving the destruction of electronic evidence, the party seeking sanctions must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were

> destroyed with a culpable state of mind, and (3) the destroyed evidence was relevant to the moving party's claim or defense. A culpable state of mind, for purposes of a spoliation inference, includes ordinary negligence [internal quotation marks and citation omitted].

Ahroner v Israel Discount Bank of New York, 79 AD3d 481, 482 (1st Dept 2010). If evidence is destroyed when the party in possession of the evidence had no reason to know that the evidence would be needed for future litigation, there is no spoliation. *See Schidzick v Lear Siegler Inc.*, 222 AD2d 841 (3d Dept 1995); *see also Santos v Ford Motor Co.*, 69 AD3d 502, 503 (1st Dept 2010)(evidence destroyed in "ordinary course of business" with no "notice of its potential evidentiary value" not presumed to be spoliated). Further, speculation of the existence of relevant evidence destroyed by a party is an insufficient ground to invoke sanction for spoliation. *See Riley v ISS International Service System, Inc.*, 304 AD2d 637 (2d Dept 2003).

Cuttino has not shown that any relevant evidence was destroyed when his claim was pending, or that there was evidence lost which would further his action. There is no cause to sanction West Side for spoliation of e-mails deleted in the ordinary corse of West Side's business.

C. Breach of Contract

> To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure the parties are truly in agreement with respect to all material terms. This requirement assures that the judiciary can give teeth to the parties' mutually

> agreed terms and condition when one party seeks to uphold them against the other. Generally, courts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract [citation omitted].

Matter of Express Industries and Terminal Corp. v New York State Department of Transportation, 93 NY2d 584, 589 (1999); *see also Minelli Construction Co., Inc. v Volmar Construction, Inc.*, 82 AD3d 720 (2d Dept 2011); *Bellevue Builders Supply Inc. v Belmonte*, 271 AD2d 849 (3d Dept 2000). "'The manifestation or expression of assent necessary to form a contract may be by word, act, or conduct which evinces the intention of the parties to contract.'" *Minelli Construction Co., Inc. v Volmar Construction Inc.*, 82 AD3d at 721, quoting *Maffea v Ippolito*, 247 AD2d 366, 367 (2d Dept 1998).

West Side argues that the conversation between Cuttino and Lieberman fails to meet these definitions of an integrated contract because, by use of the word "revisit," Lieberman left open material terms of the agreement for further negotiation. In this argument, the conversation "merely provid[ed] the framework for continuing negotiations aimed at the execution of a binding agreement, and therefore is itself an unenforceable agreement to agree." *Schneider v Jarmain*, ___AD3d___, 2011 WL 2448025, *1, 2011 NY App Div LEXIS 5239, *1 (1st Dept 2011).

West Side's argument utilizes the common precepts that "[i]f an agreement is not reasonably certain in its material terms,

there can be no legally enforceable contract" and "a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable [interior quotation marks and citations omitted]." *Trueforge Global Machinery Corp. v Viraj Group*, 84 AD3d 938 (2d Dept 2011); *see also Minelli Construction Co., Inc. v Volmar Construction Inc.*, 82 AD3d 720, *supra* (letter of intent only an agreement to agree).

This court finds that the conversation between Lieberman and Cuttino on January 15, 2008 did not result in a mere "agreement to agree." In its wholesale incorporation of all of the terms of the 2007 Compensation Agreement into Cuttino's continuing employment into 2008, the conversation lacked no material terms, and did not suggest that further terms were needed before an integrated contract was reached. While West Side claims that the agreement to "revisit" the agreement at a later date creates an "agreement to agree," the ordinary meaning of that word does not indicate the lack of a full understanding, but merely that the parties agreed that the agreement, as it stood, would be "visited again," "returned to," or "consider or take up again" at some later date. Merriam-Websters Dictionary, m-w.com. "Revisit" by its definition, indicates the existence of a whole agreement which the parties might choose to change at some future date. The fact that such future date never came is irrelevant to the creation of an enforceable 2008 compensation agreement between

the parties on January 15, 2008.

In consequence, a valid compensation agreement existed in 2008 under which Cuttino was to receive his salary and incentive payments up to the date of his termination. However, the court notes, and the parties agree, that Cuttino was an at-will employee, who could be terminated at any time. *See Frank Crystal & Co. v Dillmann*, 84 AD3d 704 (1st Dept 2011)(employer retained "an unfettered right" to terminate at-will employee); *see also Wood v Long Island Pipe Supply, Inc.*, 82 AD3d 1088 (2d Dept 2011). Therefore, nothing in any of the previous agreements or, particularly, the 2007 Compensation Agreement, required West Side to pay Cuttino beyond the date of his termination. In consequence, Cuttino was contractually entitled to receive compensation in 2008 commensurate with all the terms of the 2007 Compensation Agreement, up to the date of his termination. This includes an incentive payment for the third quarter of 2008, but not the fourth, Cuttino having left before the fourth quarter elapsed.

D. Labor Law Art. 6

Cuttino brings claims under sections 191, 193 and 198 of the Labor Law, as a basis to recover unpaid compensation. As an initial matter, it is noted that a party cannot bring a claim for unpaid wages under the Labor Law unless he or she has a contract under which the compensation is payable. *Tierney v Capricorn*

Investors, L.P., 189 AD2d 629 (1st Dept 1993); *Bar-Tur v Arience Capital Management, L.P.*, ___ F Supp 2d___, 2011 WL 565333, 2011 US Dist LEXIS 14114 (SD NY 2011). A contract has been established in this case.

"Article 6 of the Labor Law sets forth a comprehensive set of statutory provisions enacted to strengthen and clarify the rights of employees to the payment of wages." *Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220, 223 (2000). "Wages" is broadly defined in Labor Law § 190 (1) as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." It is established that an executive such as Cuttino is an "employee" for purposes of Article 6 of the Labor Law. Labor Law § 190 (2); *Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609 (2008).

Under Labor Law § 193, an employer may not make any deductions from wages earned by employees, except for some instances enumerated in that section, which have no bearing on the present matter.

Cuttino, in his complaint, claims that West Side impermissibly deducted monies from his wages by failing to pay him "wages" in the sum of $53,392, allegedly due from July 1, 2008 through November 3, 2008, and earned incentive compensation from October 1, 2008 to his departure in November 3, 2008. The

issue is whether these incentive compensation wages are "wages" for purposes of Labor Law § 193.

Cuttino argues that his incentive payments are really wages because, as part of the formula for determining the incentive, Cuttino's base salary was deducted from the incentive payment. However, Cuttino was paid, and received, his base salary despite the use of that amount in calculating the incentive payments. Thus, the formula for issuing the incentive payment did not render the incentive payment salary.

Cuttino argues that the third quarter incentive payment constitutes wages because the incentive payment was not discretionary, but was, allegedly, guaranteed as a term of employment, citing *Schutty v Pino* (1997 US Dist LEXIS 9266 [SD NY 1997]) and *Farricker v Penson Development, Inc.* (2009 US Dist LEXIS 27484 [SD NY 2009]).

Both *Schutty* and *Farricker* recognize that, in general, incentive compensation is not "wages" for purposes of the Labor Law, citing *Tischmann v ITT/Sheraton Corp.* (882 F Supp 1358 [SD NY 1995]), and *Dean Witter Reynolds, Inc. v Ross* (75 AD2d 373 (1st Dept 1980]). However, *Schutty* and *Farricker* found, respectively, that a bonus guaranteed under a contract of employment, that "was to be determined by a fixed formula based upon the gross fees earned by the firm," was wages (*see Schutty*, 1997 US Dist LEXIS 9266, *7), and that "Participation Payments"

"clearly tied to Plaintiff's individual performance" and which did "not involve management discretion so as to render them incentive compensation" were wages. *Farricker*, 2009 US Dist LEXIS 27484, *21-22.

This court finds that the present state of the law with regard to Labor Law § 193, is governed by the Court of Appeals decision in *Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220, *supra*. In *Truelove*, the Court found that a bonus compensation plan was not wages when the terms of the plan "did not predicate bonus payments upon plaintiff's own personal productivity nor give plaintiff contractual right to bonus payments based on his productivity." *Id.* at 224. As in the present case, the bonus payments were "dependant solely upon his employer's overall financial success," not his own work. *Id.* The Court in *Truelove* felt that "the wording of the statute, in expressly linking earnings to an employee's labor or services personally rendered, contemplates a more direct relationship between an employee's own performance and the compensation to which that employee is entitled." *Id.* The *Truelove* Court finally determined that "[d]iscretionary additional remuneration, as a share in a reward to all employees for the success of the employer's entrepreneurship, falls outside the protection of the statute." *Id.*

In the present case, Cuttino's incentive compensation was

not "discretionary," in that it was promised to him in the 2008 agreement, as set forth above. Therefore, its recovery is governed by his contract with West Side. However, for purposes of Labor Law § 193, this court finds that the incentive payments, based on the productivity of West Side, regardless of Cuttino's own productivity, were not wages impermissibly "deducted" from his earnings. Thus, Cuttiono is left with his contractual remedies, not statutory ones.

E. Quantum Meruit.

A cause of action for quantum meruit cannot stand in the face of a express contract, as exists here. *See American Curtainwall, Inc. v NTD Construction Corp.*, 83 AD3d 597, 598 (1st Dept 2011)(quantum meruit "is precluded by the valid and enforceable written contracts"). As there is a contract governing Cuttino's employment with West Side, recovery in quantum meruit is not available to him. The cause of action is dismissed.

III. Conclusion

Contrary to West Side's contentions, there was a valid oral contract in effect between it and Cuttino for the year 2008, mirroring the compensation Cuttino was entitled to under the written 2007 Compensation Agreement. The 2008 compensation agreement which resulted entitled him to wages through the date of his termination, and incentive compensation for the third

quarter of 2008, which he completed before his final termination.

CPLR 3212 (b) permits the court to grant summary judgment to a non-moving party if that party establishes a right to such relief. *See Atiencia v MBBCO II, LLC*, 75 AD3d 424 (1st Dept 2010). Cuttino, despite the lack of a cross motion, has established his right to summary judgment on his first cause of action to the extent set forth above. As such, this court grants summary judgment to Cuttino for compensation due through September 30, 2008. As Cuttino does not claim to have lost any salary, his recovery is limited to that incentive compensation. As an at-will employee, West Side had the right to terminate Cuttino at any time, and, in the absence of a contract term, West Side is not responsible to pay Cuttino compensation through to the end of the fourth quarter of 2008. West Side has offered no response to Cuttino's claim that Shaw calculated Cuttino's incentive compensation through the third quarter of 2008 as $53,499, and so, summary judgment shall be granted to Cuttino in that amount.

Accordingly, it is

ORDERED that the motion for summary judgment brought by defendant West Side Advisors is granted solely as to the dismissal of the second and third causes of action in the complaint, and is otherwise denied; and it is further

ORDERED that summary judgment on the first cause of action

in the complaint, sounding in breach of contract, is granted to plaintiff David Cuttino, pursuant to CPLR 3212 (b); and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff David Cuttino and against defendant West Side Advisors in the amount of $53,499.00, together with interest as computed by the Clerk from the date of September 30, 2008, and costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: July 8, 2011

FILED

JUL 19 2011

ENTER:

NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.