SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
Justice

TRIAL/IAS PART 18

_____X

CHRIS CHIAFFITELLI,

Plaintiff,

-against-

Index No.: 003150/11
Motion Sequence...01
Motion Date...09/14/11

INTERNATIONAL BUSINESS MACHINES, CORPORATION,

Defendant.

_____X

Papers Submitted:
Notice of Motion.....x
Affidavits in Support.....x
Memorandum of Law in Support.....x
Affidavit in Opposition.....x
Memorandum of Law in Opposition.....x
Reply Memorandum of Law.....x

Upon the foregoing papers, the Defendant, International Business Machines, Corporation's (hereinafter "IBM") motion seeking an order pursuant to CPLR § 3211(a) (1) and (7) dismissing the complaint is determined as hereinafter provided.

This action was brought by the Plaintiff, a salesman employed by IBM, seeking earned commissions which it is alleged the Defendant has wrongfully refused to pay.

From April 2, 1979 until April 30, 2009, the Plaintiff was employed by IBM. From November 1, 1987 through April 30, 2009 the Plaintiff was employed in a commissioned sales position in the division then known in IBM as IBM Global Services Information Technology Services (ITS) business unit (See Verified Complaint, ¶¶ 6-7 attached as Exhibit A to the Affidavit of Kevin G. Lauri, Esq.) The Plaintiff was responsible for in excess of three billion dollars in Total Contract Value (TCV) awarded to IBM during his tenure with IBM. As part of the Plaintiff's employment, ITS provided him with incentives which included sales and bonus plans pursuant to which the Plaintiff could earn a commission. For the 2004 calendar year, ITS presented the Plaintiff with a sales and bonus plan that allowed uncapped earnings (2004 ITS IBM Sales Plan). Under the 2004 ITS IBM Sales Plan, sales commissions were to be calculated according to the Commissions Tool for IBM Global Services Information Technology Services (CT Tool). (Verified Complaint, ¶¶ 8-11). The Plaintiff was provided with a handout which described the plan as having "Unlimited Earning Potential" and being an "Uncapped Plan." The 2004 ITS IBM Sales Plan was the only sales and bonus plan presented to the Plaintiff as applied to the deals he sold in 2004.

In 2004, there was another business unit that was part of the IBM Global Services division known as the IBM Global Services Strategic Outsourcing (SO) business unit. Prior to 2003, the IBM Global Services ITS business unit had much of the J.P.Morgan Chase, Inc. (JPMC) business for the maintenance and project management of JPMC's IT

hardware, both IBM brands and other brands, in the United States and in approximately thirty (30) other countries.

During 2003 and 2004, the IBM Global Services SO business unit structured and sold JPMC an outsourcing agreement that included the aforesaid maintenance scope, the acquisition by the IBM Global Services SO business unit of approximately 3,000 former JPMC employees, and other related scopes of business. The intention was for the IBM Global Services SO business unit to own and manage all of this for JPMC on an outsource basis. (Verified Complaint, ¶¶ 13-17).

The Plaintiff asserts that Jamie Diamond, the new CEO of the merged JPMC/Bank One Corporation decided to dissolve the IBM SO outsourcing agreement, resulting in the loss of the entire IBM SO scope of business. During calendar year 2004, JPMC put out for competitive bid the maintenance scope across the United States and approximately thirty (30) other countries. During the 2004 calendar year, the Plaintiff was one of three sales principals involved in bidding on and selling this large, complex and competitively bid worldwide maintenance deal for the IBM ITS business unit to J.P.Morgan Chase (JPMC Deal). The JPMC Deal was signed on or about December 13, 2004, worth approximately $487,000,000 in revenue to IBM over 5 years, written on ITS paper and structured in accordance with ITS guidelines including ITS terms and conditions, the ITS maintenance special bid process, and the ITS Gross Profit Estimator (GPE). (Verified Complaint, ¶¶ 13-24).

The Plaintiff alleges he was entitled to earn a commission on the JPMC Deal calculated pursuant to the CT Tool. As per the applicable 2004 ITS IBM Sales Plan, commissions were calculated at $2,180,581 for the JPMC Deal. On January 5, 2005, Valerie Heidbreder (Heidbreder), the National Sales Executive, Technical Support Solutions for IBM Global Services, wrote an email confirming that the commission pool for the JPMC Deal was $2,180,518. Heidbreder was an IBM manager authorized to oversee the commission calculation process. Pursuant to the 2004 ITS IBM Sales Plan, commissions figures were to be finalized, approved, and paid out to the sales principals involved in the deal by no later than March 31, 2005. (Verified Complaint, ¶¶ 25-28). The Executive Review Board (ERB) decided that IBM Executive, Nick Maneri, was to receive a 40% split and the Plaintiff and IBM Account Principal, John Meehan, were each to receive a 30% split of the calculated commission pool for the JPMC Deal. At a 30% split, the Plaintiff was entitled to $654,174.30 out of the commission pool of $2,180,581 for the JPMC Deal.

Between the signing of the contract on December 13, 2004, and receipt of the commission payment on April 29, 2005, IBM Executive Nick Maneri (Maneri), the Plaintiff's immediate manager, Richard Byrnes (Byrnes), and ranking IBM maintenance executives Tom York (York) and Scott Dougall (Dougall) all agreed that the calculated commissions pool were to be paid in full in accordance with the 2004 ITS IBM Sales Plan. However, Pat Kerin (Kerin), Robert Zapfel (Zapfel) and other IBM executives determined that the sales commissions for the JPMC Deal should not be calculated according to the 2004

ITS IBM Sales Plan. The Plaintiff contends this decision was an unjustified exception to the "uncapped" 2004 ITS IBM Sales Plan. (Verified Complaint, ¶¶ 30-34).

When the Plaintiff inquired about his options for appealing the decision to deviate from the process provided for under the 2004 ITS IBM Sales Plan, Byrnes and Stergio informed the Plaintiff that he could attempt to appeal the decision through a peer review/appeal process, but advised against pursuing that option because they believed his employment status would be adversely impacted on the basis of their discussions with upper management. The Plaintiff's performance rating was downgraded from a "1" rating to a "3" rating. Two consecutive "3" ratings would result in dismissal at IBM for performance reasons. The Plaintiff's rating for the prior year was a "1". As a result of the conversation with Stergio and Byrnes, the Plaintiff believed that if he pursued the peer review/appeal process, he would lose his job with IBM. On April 29, 2005, the Plaintiff was paid $180,000 out of the $654,170.30 commission owed to him according to the CT Tool. The Plaintiff has not received any additional funds in payout of the commission owed for the JPMC Deal to date. In fear of losing his job, the Plaintiff did not pursue the issue until shortly before he retired from IBM in 2009 and, as a condition of retirement, he was requested to release his right to bring any claims against IBM.

A year and a half after the JPMC Deal was signed, the Plaintiff and another IBM ITS sales colleague (Bruce Johnson) increased the deal structure with JPMC in 2006. The commission for the increase to the deal structure with JPMC in 2006 was paid according

to the ITS CT Tool. Also, for the first time, it was explained in 2009 that IBM had used the IBM Global Services Strategic Outsourcing Sales Commission Plan (SO Sales Plan) to calculate the commission payout for the JPMC Deal, and the method used was never explained to the Plaintiff. (Verified Complaint, ¶¶ 37-50). The Plaintiff asserts that in late December 2004, after the JPMC Deal had been signed and before the financial books and records of the IBM Global Services division were closed for the year, Zapfel, and other senior IBM executives arbitrarily chose to book the JPMC Deal with $5 million of ITS' revenue on the JMPC Deal switched onto the books of the SO business unit even though the SO unit had lost the original contract with JPMC and had nothing to do with winning back the maintenance portion which constituted the JPMC Deal, resulting in the SO business unit's 2004 year end revenue attainment position being unfairly enhanced by $5 million, while concurrently unfairly reducing ITS' year end 2004 revenue position by the same $5 million (Verified Complaint, ¶¶ 54-55).

The Plaintiff's first course of action is for breach of contract. The Plaintiff contends the Defendant deprived him of the full commission ($474,170.30 plus interest) to which he was entitled pursuant to the 2004 IBM ITS Sales Plan on the basis of an internal arbitrary decision.

The Plaintiff's second cause of action asserts that the Defendant used coercion and duress by threatening that the Plaintiff would lose his job if he pursued a peer review/appeal to challenge both the decision to deviate form the 2004 IBM ITS Sales Plan

and the methodology used to calculate the reduced commission.

The Plaintiff's third cause of action sounds in quasi-contract and alleges that the Defendant has been unjustly enriched at the expense of the Plaintiff.

On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 414; *see People ex rel. Cuomo v. Conventry First LLC*, 13 N.Y.3d 108; *Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46, 54; *Leon v. Martinez*, 84 N.Y.2d 83, 88; *Feldman v. Finkelstein & Partners, LLP*, 76 A.D.3d 703 [2d Dept. 2010]). Notably, on a motion to dismiss, the plaintiff is not obligated to demonstrate evidentiary facts to support the allegations contained in the complaint *(see, Stuart Realty Co. v. Rye Country Store, Inc.*, 296 A.D.2d 455 [2d Dept. 2002]; *Paulsen v. Paulsen*, 148 A.D.2d 685, 686 [2d Dept. 1989]; *Palmisano v. Modernismo Pub.*, 98 A.D.2d 953, 954 [4th Dept. 1983]), and "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19; *International Oil Field Supply Services Corp. v. Fadeyi*, 35 A.D.3d 372 [2d Dept. 2006]). "In assessing a motion under CPLR 3211 (a) (7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint," and if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not

whether he has stated one" (*Leon v. Martinez, supra*; *see also Uzzle v. Nunzie Court Homeowners Ass'n, Inc.*, 55 AD3d 723 [2d Dept. 2008]). It appears to the satisfaction of this Court that the pleading has satisfied said criteria.

Moreover, "[t]o succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Manfro v. McGivney*, 11 A.D.3d 662 [2d Dept. 2004]; *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326; *Jorjill Holding Ltd. v. Greico Associates, Inc.*, 6 A.D.3d 500 [2d Dept. 2004]); *see, Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felter and Steiner, L.L.P.*, 96 N.Y.2d 300, 303.

The documentary evidence in support of the motion to dismiss is a copy of a one (1) page 2004 Sales Plan letter attached to Exhibit B to the affidavit of the attorney for the Defendant submitted in support of the Defendant's motion to dismiss. The 2004 Sales Plan letter is not signed. It does not appear to contain the entire terms of the document since there is a notation that says "Further details of this plan can be found on the IBM Global Services Incentive Plan Intranet Site at the Incentive Plans website." In opposition to the motion is an affidavit sworn to by the Plaintiff in which he states that "I do not admit that I ever received the document which is attached as Exhibit B (to the affidavit) and I do not concede that any such document was part of the commission agreement between myself and IBM that is the subject of this lawsuit." (Plaintiff's Affidavit, sworn to on July 19, 2011 at

¶ 2). "The document" attached as Exhibit B to the Laurie Affidavit is hearsay as it is an out of court statement offered for the truth of its contents, namely that it truthfully sets forth the agreement between the parties that IBM had the discretion to deny a salesman an earned commission whenever it felt like it and for whatever reason. The Plaintiff does not sue upon the "Letter" nor does he admit that it truthfully sets forth his agreement with IBM. For the "documentary evidence" to be considered by the Court, some exception to the hearsay rule must be satisfied. Although hearsay evidence may be considered, it is insufficient to bar dismissal if it is the only evidence submitted. *Phillips v. Kantor & Co.*, 31 N.Y.2d 307; *Rodriquez v. Sixth President, Inc.*, 4 A.D.3d 406 (2d Dept. 2004).

The Plaintiff correctly argues that merely attaching the "letter" to the affidavit of its outside counsel and offering it without any factual support from anyone with knowledge precludes its use as documentary evidence pursuant to CPLR § 3211 (a) (1). The affidavit of Pam Carroll the employee of IBM submitted as a Reply Affidavit to establish the admissibility of the "2004 Sales Plan letter" cannot be considered by the Court. A movant is precluded from relying on evidence submitted for the first time in its reply papers to sustain its burden. *See, Regifo v. City of New York*, 7 A.D.3d 773 (2d Dept. 2004); *Adler v. Suffolk County Water Authority*, 306 A.D.2d 229 (2d Dept. 2003); *see, Schulte Roth & Zabel, LLP v Kassover*, 28 A.D.3d 404 (1st Dept. 2006).

Even if the Court considers the Reply Affidavit, it is not sufficient documentary evidence to dismiss pursuant to CPLR § 3211 (a) (1), the substance of which is contradicted

by the Plaintiff, and does not "utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Stein v. Garfield Regency Condominium*, 65 A.D.3d 1126 (2d Dept. 2009), quoting *Goshen v. Mutual Life Ins. Co. of N.Y., supra; see also, AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 5 N.Y.3d 582.

In support of the motion to dismiss the second cause of action, the Defendant argues that the Plaintiff's assertion in his opposition brief that "[t]he very existence of an internal appeal process raises factual issues concerning the finality of the commission reduction if plaintiff had been permitted to present his arguments in an appeal proceeding" is baseless (Opposition Brief, at ¶ 12), since whether the Plaintiff chose to appeal the amount of his commission payment pursuant to IBM's internal process and why he chose not to do so is irrelevant because IBM was under no contractual obligation to provide him with an appeal or increase in the amount of commission. However, the question of whether or not there is a contract, and if so, a breach of same constitutes the basis for the underlying issues raised in the allegations in both the first and second causes of action which cannot be determined on a motion to dismiss pursuant to CPLR § 3211 (a) (1) or (7). Moreover, since the Court has found that the 2004 Sales Plan letter is not sufficient documentary evidence to dismiss the complaint and that the Plaintiff questions ever receiving a timely copy of same, the fact that other courts have "held that as a matter of law IBM's incentive plan/plan letters do not create enforceable contracts" (Defendant's Memorandum of Law in Support, pg. 2) is not germane to the issues now before the Court. As such, the branch of the Defendant's

motion seeking to dismiss the Plaintiff's first and second causes of action should be **DENIED**.

Parties are permitted under New York law to plead causes of action in the alternative and even to plead causes of action that conflict with one another. CPLR § 3014; *Cohn v. Lionel Corp.*, 21 N.Y.2d 559. A party may proceed on both a breach of contract and quasi-contract theories where there is a *bona fide* dispute as to the existence of a contract. The attorney for the Defendant relies on this Court's decision in *Barker v. Time Warner Cable*, 016438/08, 2009 NY Slip Op. 51446U, 24 Misc3d 1313A; 897 N.Y.2d 668 (J. Marber, Nassau County Sup. Ct. 2009) where it was held that a claim for unjust enrichment cannot substitute for an unsustainable breach of contract claim. The complaint in the within action can be distinguished from *Barker, supra*. In *Barker, supra*, unlike in the within action, neither the plaintiff nor the defendant disputed the enforceability or validity of the contract; therefore, the cause of action sounding in unjust enrichment was duplicative of the cause of action sounding in breach of contract. Again, in the within action there is a sharp dispute as to the existence of a valid contract in the first instance and whether there was a breach of a contract if one is found to have been controlling. As such, the branch of the Defendant's motion seeking to dismiss the Plaintiff's third cause of action should be **DENIED**.

Accordingly, it is hereby

ORDERED, that the Defendant's motion is **DENIED**; and it is further

ORDERED, that the Defendant shall serve the Plaintiff's counsel with an

answer to the Verified Complaint within thirty (30) days of the date of this Order; and it is further

ORDERED, that a Preliminary Conference (see 22 NYCRR 202.12) in this matter shall be held at the Preliminary Conference Part, located at the Nassau County Supreme Court on **January 5, 2012, at 9:30 a.m.** This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require; and it is further

ORDERED, that the Plaintiff's counsel shall serve a copy of this Order upon the Defendant's counsel, pursuant to CPLR § 2103 (b) 1, 2, 3 or 6, within ten (10) days of the date of this Order. **PROOF OF SERVICE MUST BE FILED WITH THE COURT.**

This constitutes the Decision and Order of the Court.

All applications not specifically addressed herein are **DENIED**.

DATED: Mineola, New York
November 29, 2011

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