

**Antolino v Distribution Mgt. Consolidators  
Worldwide, LLC**

2011 NY Slip Op 33138(U)

November 28, 2011

Sup Ct, NY County

Docket Number: 101541/2011

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

ANTHONY ANTOLINO,  
Plaintiff,

INDEX NO. 101541/2011

-against-

MOTION SEQ. NO. 001

DISTRIBUTION MANAGEMENT  
CONSOLIDATORS WORLDWIDE, LLC,  
DISTRIBUTION MANAGEMENT CONSOLIDATORS,  
LLC, DMC CAPITAL FUNDING, LLC, COCOON  
INNOVATIONS, LLC, COPIA INTERACTIVE, LLC  
BEN LOWINGER in his official and individual  
capacities, ANDREW LOWINGER in his official and  
individual capacities, EDITH LOWINGER in her official  
and individual capacities and RONALD LOWINGER in  
his official and individual capacities,  
Defendants.

**FILED**

DEC 05 2011

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The following papers were read on this motion by defendants to dismiss.

Notice of Motlon/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1,2

Answering Affidavits — Exhibits (Memo)

3,4

Reply Affidavits — Exhibits (Memo)

5

Cross-Motion:  Yes  No

Distribution Management Consolidators Worldwide, LLC (Worldwide), Distribution Management Consolidators, LLC (Management), DMC Capital Funding, LLC (DMC), Cocoon Innovations, LLC (Cocoon), Copia Interactive, LLC (Copia), Ben Lowinger (Ben), Andrew Lowinger (Andrew), Edith Lowinger (Edith) and Ronald Lowinger (Ronald) move, pursuant to CPLR 3211 (a) (7) to dismiss plaintiff's second cause of action (Labor Law), third cause of action (Labor Law retaliation), fifth cause of action (unjust enrichment) and sixth cause of action (quantum meruit); to dismiss the portion of plaintiff's first cause of action (breach of contract), fourth cause of action (equitable estoppel), fifth and sixth causes of action that seeks attorneys' fees; to dismiss the complaint against Ben, Andrew, Edith and Ronald (collectively, the

Individual Defendants); and to dismiss the complaint against Management, DMC, Cocoon and Copia (collectively, the Affiliated Companies).

### BACKGROUND

Plaintiff alleges that he was hired by Worldwide on January 1, 2008 as senior vice-president (complaint, ¶¶ 1, 4, 16). Worldwide is a New York corporation that hired plaintiff pursuant to a three-year contract (the Contract), effective January 1, 2008 (*id.*, ¶¶ 5, 16, 25). Management is a non-operating New York holding company that owns Worldwide (*id.*, ¶ 6). DMC is a New York corporation that invests in other companies (*id.*, ¶¶ 7, 22). Cocoon is a New York corporation that manufactures and sells computer bags, cases and organizational accessories (*id.*, ¶¶ 8, 22). Copia is a New York corporation that is involved in digital content (*id.*, ¶¶ 9, 24).

Ben has an ownership interest in, and is executive vice-president of each of the Affiliated Companies (*id.*, ¶ 10). Andrew has an ownership interest in, and is president and chief executive officer of each of the Affiliated Companies (*id.*, ¶ 11). Edith has an ownership interest in each of the Affiliated Companies (*id.*, ¶ 12). Ronald has an ownership interest in, and is president and co-chairman of each of the Affiliated Companies (*id.*, ¶ 13).

Plaintiff alleges that he was hired pursuant to the Contract as senior vice-president of Worldwide, that he reported to Andrew and Ben and that he developed the DMC, Cocoon and Copia businesses (*id.*, ¶¶ 16, 21-24). He states that he also worked for the Affiliated Companies (*id.*, ¶¶ 17, 62) and that he diligently fulfilled his duties (*id.*, ¶ 20).

Plaintiff further states that the Contract included a written term sheet, which set forth a yearly annual salary of \$275,000, guaranteed annual \$25,000 bonuses, payable by December 31 of each year, plus performance bonuses and 2% sales commissions on new business (*id.*, ¶¶ 25-26, 31-33). The Contract is not annexed to the complaint. He contends that he was never paid the \$25,000 annual bonuses for 2009 and 2010, was not paid the sales

commissions for the business he generated and was fired without cause on November 17, 2010 for seeking payment of these unpaid wages (*id.*, ¶¶ 38-39, 41-42, 44-45).

Plaintiff further states that Ben told employees of the Affiliated Companies not to associate with him (*id.*, ¶ 51). He seeks to impose liability on the Affiliated Companies, asserting that they "operated as a single, integrated enterprise, a single employer, or as joint employers" (*id.*, ¶ 57). He also states that he received payroll checks from DMC and Copia, as well as Worldwide, expense reimbursements from each of the Affiliated Companies and that the Affiliated Companies share the same business address and have common ownership and management (*id.*, ¶¶ 61, 64).

In the complaint, plaintiff alleges that defendants have violated Labor Law § 190 *et. seq.*, but in his memorandum of law opposing defendants' motion at page 2, he has narrowed his Labor Law claim to purported unlawful deductions from wages under Labor Law § 193, attorneys' fees under Labor Law § 198 and retaliation under Labor Law § 215.

#### STANDARDS

In determining a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord them every possible favorable inference and determine whether the facts as alleged fit within any cognizable legal theory (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, allegations that are bare legal conclusions or are inherently incredible, or that are flatly contradicted by the documentary evidence, are not accorded such favorable inferences, and need not be accepted as true (*see Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

Labor Law § 193 provides:

1. No employer shall make any deduction from the wages of an employee, except deductions which: a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or b. are expressly authorized in writing by the employee and are for the benefit of the employee ... [such as] insurance premiums, pension or health and welfare benefits, contributions to charitable organizations ... and similar payments for the benefit of the employee.

Labor Law § 198 provides:

1-a. In any action instituted upon a wage claim by an employee ... in which the employee prevails, the court shall allow such employee reasonable attorney's fees.

Labor Law § 215 provides:

1. No employer ... shall discharge [or] penalize ... any employee because such employee has made a complaint to his employer.  
2. An employee may bring a civil action ... against such employer or person alleged to have violated the provisions of this section. ... At or before the commencement of any action under this section, notice thereof shall be served upon the attorney general by the employee.

## DISCUSSION

### Labor Law § 193

Initially, defendants contend that Labor Law § 193 does not apply to plaintiff, since he was a senior vice-president of Worldwide and, therefore, an executive (*Cohen v ACM Med. Lab.*, 178 Misc 2d 130 [Sup Ct, Monroe Cty 1998] *affd for reasons stated*, 265 AD2d 839 [4th Dept 1999]). However, "an 'executive' falls within the ambit of the protections afforded to 'employees' under sections 190 and 193 of the Labor Law" (*Pachter v Bernard Hodcs Group, Inc.*, 10 NY3d 609, 612 *rearg denied*, 11 NY3d 751 [2008]). Dismissal of plaintiff's second cause of action on this ground is, therefore, denied.

Labor Law § 193 prohibits deductions from wages (see *Matter of Hudacs v Frito-Lay, Inc.*, 90 NY2d 342, 346-347 [1997]). Generally, bonus payments are discretionary and, therefore, are not

considered wages for the purpose of Labor Law § 193 (see *Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 223-224 [2000]; *Epifani v Johnson*, 65 AD3d 224, 236-237 [2d Dept 2009]).

In this case, plaintiff has alleged that the 2009 and 2010 annual bonuses were "guaranteed annual bonuses" (complaint, ¶ 32) and "ordinarily the question of whether unpaid compensation constitutes a discretionary bonus or nonforfeitable earned wages is a question of fact" (*Kaplan v Capital Co. of Am.*, 298 AD2d 110, 111 [1st Dept 2002] *lv denied* 99 NY2d 510 [2003]). While a discretionary bonus does not fall within the ambit of Labor Law § 193's protection (*Truelove*, 95 NY2d at 223-224; *Hunter v Deutsche Bank AG, N.Y. Branch*, 56 AD3d 274 [1st Dept 2008]), a guaranteed bonus more closely resembles an annual salary and, accordingly, dismissal of plaintiff's second cause of action for violation of Labor Law § 193 is denied.

#### **Retaliation**

Labor Law § 215 bars dismissal of an employee for complaining to an employer about a substantive Labor Law violation (see *Epifani*, 65 AD3d at 235; *Quintas v Pace University*, 23 AD3d 246 [1st Dept 2005]). However, it also requires that notice be given to the attorney general "[a]t or before the commencement" of the action (see *Crosland v City of New York*, 140 F Supp 2d 300, 312 [SD NY 2001] *affd* 54 Fed Appx 504 [2d Cir 2002]). Plaintiff has not alleged that he timely served the attorney general at, or prior to, this action's commencement on February 7, 2011. Rather, after defendants made this motion to dismiss on April 4, 2011, plaintiff served the attorney general (Gilky affirmation, ¶ 2). Since plaintiff notified the attorney general by letter dated April 20, 2011, he failed to timely comply with Labor Law § 215's requirement and, consequently, the third cause of action is dismissed.

#### **Unjust Enrichment and Quantum Meruit**

"The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation that the law creates in the absence of any agreement" (*Goldman*, 5 NY2D at 572; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Similarly, a quantum meruit claim is an obligation incurred by

the acceptance of goods or services with the reasonable expectation of payment [but without an agreement] (see *Heller v Kurz*, 228 AD2d 263, 263-264 [1st Dept 1996]).

Plaintiff has alleged that he entered into a written contract with Worldwide (complaint, ¶ 16). Since plaintiff has based his claim upon the Contract and its term, he is barred from seeking relief for quasi-contract and unjust enrichment (see *Goldman*, 5 NY3d at 572, *Clark-Fitzpatrick*, 70 NY2d at 388-389; *De La Cruz v Caddell Dry Dock & Repair Co., Inc.*, 22 AD3d 404, 405 [1st Dept 2005]). The portion of defendants' motion that seeks dismissal of plaintiff's fifth and sixth causes of action is, therefore, granted.

### **Attorneys' Fees**

Generally, attorneys' fees are an incident of litigation and they may not be recovered in the absence of a contractual provision, statute or court rule (see *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). In this action, plaintiff has set forth the purportedly material terms of the Contract (complaint, ¶¶ 31-35), but he has not alleged that there was a contractual provision for attorneys' fees and, consequently, the portion of defendants' motion that seeks dismissal of the claim for attorneys' fees in the first and fourth causes of action is granted.

### **Contract**

Plaintiff has alleged that the Contract was signed by Worldwide. However, since the Individual Defendants and the Affiliated Companies were "not signatories to the [Contract], ... no cause of action for breach of contract can be asserted against them" (*Balk v 125 W. 92nd St. Corp.*, 24 AD3d 193, 193 [1st Dept 2005]; *Hampton Hall Pty Ltd. v Global Funding Services, Ltd.*, 82 AD3d 523, 524 [1st Dept] *lv denied* 17 NY3d 707, [2011]).

### **Alter Ego Liability**

To overcome the hurdle that only Worldwide was a signatory of the Contract, plaintiff seeks to impute liability for Worldwide's conduct to the Individual Defendants and the Affiliated Companies. He contends that the Individual Defendants had ownership interests in each of the Affiliated Companies,

that Ben, Andrew and Ronald were officers in each of the Affiliated Companies and that the Affiliated Companies had "an interrelation of operations and control, common management, and common ownership" (complaint, ¶ 64) and that they "shared the same business address" (*id.*, ¶ 61).

"Since, by definition, a corporation acts through its officers and directors, to hold a shareholder/officer ... personally liable, a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in 'bad faith' while representing the corporation .... [Rather, he must allege] acts amounting to an abuse or perversion of the corporate form" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011]).

Common ownership and common control does not meet the threshold of complete domination and abuse of the corporate form for the purpose of wrongdoing in the transaction at issue (*see East Hampton*, 16 NY3d at 776; *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141-142 [1993]; *Nuevo El Barrio Rehabilitacion de Vivienda y Economia, Inc. v Moreight Realty Corp.*, 87 AD3d 465 [1st Dept 2011]; *Itamari v Giordan Dev. Corp.*, 298 AD2d 559, 560 [2d Dept 2002]). Therefore, the portion of defendants' motion that seeks to dismiss plaintiff's complaint against the Individual Defendants and the Affiliated Companies is granted.

#### CONCLUSION

It is, therefore,

ORDERED that the portion of defendants' motion that seeks to dismiss the second cause of action is denied; and it is further

ORDERED that the portion of defendants' motion that seeks to dismiss the third, fifth and sixth causes of action and the claim for attorneys' fees in the first and fourth causes of action is granted; and it is further

ORDERED that the portion of defendants' motion that seeks to dismiss the complaint as against Distribution Management Consolidators, LLC, DMC Capital Funding, LLC, Cocoon Innovations, LLC, Copia Interactive, LLC, Ben Lowinger, Andrew Lowinger, Edith Lowinger and

Ronald Lowinger is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgement accordingly in favor of said defendants; and it is further


ORDERED that the action is severed and continued against Distribution Management Consolidators Worldwide, LLC; and it is further

ORDERED that the remaining parties are directed to appear for a preliminary conference in Part 7, 60 Centre Street, Room 341 on January 4, 2012 at 11:00 A.M.; and it is further

ORDERED that Distribution Managements Consolidators Worldwide, LLC is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: 11/28/2011

  
PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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