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| <b>Rosenthal v Quadriga Art, Inc.</b>  |
| 2011 NY Slip Op 33413(U)   |
| December 21, 2011  |
| Supreme Court, New York County   |
| Docket Number: 116974/2006   |
| Judge: Barbara R. Kapnick  |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA R. KAPNICK

PRESENT:

PART 39

Justice

Enlora Rosenthal, as Executrix of the Estate of Alfred J. Rosenthal

INDEX NO.

116974/2006

MOTION DATE

MOTION SEQ. NO.

002

MOTION CALL NO.

Quadriga Art, Inc.

The following papers numbered 1 to were read on this motion to/for

PAPER NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits

Replying Affidavits

FILED

Cross Motion

Yes

No

DEC 22 2011

Upon the foregoing papers, it is ordered that this motion

NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated:

12/22/11

BARBARA R. KAPNICK

JSC

Check one:

FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

MOTION CASES REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 39

-----X  
GLORIA ROSENTHAL, as Executrix of the  
Estate of ALFRED J. ROSENTHAL,

Plaintiff,

- against -

QUADRIGA ART, INC.,

Defendant.  
-----X

**DECISION/ORDER**  
Index No. 116974/06  
Motion Seq. No. 002

**FILED**

**BARBARA R. KAPNICK, J.:**

**DEC 22 2011**

This action arises out of a written contract, dated August 4, 1994 (the "Contract") between Alfred J. Rosenthal ("Rosenthal") and defendant Quadriga Art, Inc. ("Quadriga"). Pursuant to the Contract, Rosenthal worked for Quadriga as an independent commissioned salesperson until his death on July 4, 2004.

In November 2006, Gloria Rosenthal brought this action on behalf of her husband's estate. The Verified Complaint, dated November 9, 2006, asserts five causes of action:

- (1) breach of contract for failing to make commission payments on and after July 5, 2004 (first cause of action);<sup>1</sup>

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<sup>1</sup> By Order of the Hon. Helen E. Freedman, dated May 9, 2008, defendant was granted summary judgment dismissing plaintiff's first cause of action, which sought to recover an alleged death benefit of three years' worth of commissions on sales made by Quadriga after Rosenthal's death on July 4, 2004. The Order was affirmed by the Appellate Division, First Department, by Decision dated January 21, 2010 (69 AD3d 504).

- (2) breach of contract for (a) failure to pay the alleged agreed upon commission rate of 10% on multiple occasions from January 1, 2002 through July 4, 2004 and (b) failure to provide Rosenthal with invoices and/or commission statements for his sales, beginning in September 1994 (second cause of action);
- (3) conversion of portions of commission payments belonging to Rosenthal from September 1994 through July 4, 2004 (third cause of action);
- (4) breach of implied duty of good faith and fiduciary duty (fourth cause of action); and
- (5) accounting for the monies received by defendant from 2002 to 2004 by virtue of Rosenthal's performance under the Contract (fifth cause of action).

Defendant now moves for an order pursuant to CPLR 3212 granting:

- (1) summary judgment dismissing with prejudice all causes of action to the extent such causes of action seek damages for periods of time beyond the applicable statute of limitations;
- (2) partial summary judgment dismissing with prejudice the second cause of action to the extent that it seeks commissions for the period of time from November 15, 2000 (i.e., the beginning of the applicable limitations

period) through December 31, 2003 on the grounds that there were accords and satisfactions between Quadriga and Rosenthal for the years 2000, 2001, 2002 and 2003;

- (3) summary judgment dismissing the third, fourth and fifth causes of action with prejudice for failure to state a cause of action;
- (4) summary judgment holding that, under the Contract, Rosenthal was entitled to commissions only on orders actually taken by him and the amount of such commission was not required to be 10% on all such orders; and
- (5) granting such other and further relief as the Court deems just and proper.

### Discussion

To prevail on its motion, Quadriga "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (citations omitted). To defeat this motion, plaintiff must produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

Turning to the second cause of action, the Complaint seeks to recover for defendant's alleged failure to pay the agreed upon

commission rate *only* from January 1, 2002 through July 4, 2004. In its motion papers, defendant specifically seeks summary judgment on the second cause of action with respect to commissions allegedly due for sales made through December 31, 2003 on the grounds that there were accords and satisfactions between defendant and Rosenthal for the years 2000, 2001, 2002 and 2003. Defendant does not seek summary judgment for 2004.

"[A]ccord and satisfaction is an affirmative defense which must be pleaded and proved." *Progressive Northeastern Ins. Co. v. North State Autobahn, Inc.* 71 AD3d 657, 658 (2d Dep't 2010). In *Merrill Lynch Realty/Carll Burr, Inc. v. Skinner*, 63 NY2d 590, 596 (1984) the Court of Appeals held that:

[a]s a general rule, acceptance of a check in full settlement of a disputed claim operates as an accord and satisfaction discharging the claim. The theory is that the parties have made a new contract discharging all or part of their obligations under the original contract.

\* \* \*

Such agreements are enforceable, however, only when the person receiving the check has been clearly informed that acceptance of the amount offered will settle or discharge a legitimately disputed unliquidated claim.

(citations omitted).

In the Affidavit of Thomas B. Schulhof ("Schulhof"), the Executive Chairman of Quadriga, dated May 18, 2010, Schulhof made the following statements regarding the alleged accord and

satisfaction:

28. Once a year Rosenthal and I would meet to review and agree what commissions, if any, were due to him for the prior year above his monthly draw. On occasion, my nephew, Mark Schulhof, who is also an officer of Quadriga, would attend part of the meeting. In addition, my assistant, Gene Mirasol, would be available to provide any information about the prior year's sales that might come up at the meeting.
29. Prior to our meeting, Mr. Rosenthal would provide Quadriga with a detailed recap of his sales for the prior year. . . .
30. Quadriga would typically take Rosenthal's recap, put it on Quadriga's computer system as a spreadsheet, and provide space on the spreadsheet to indicate the applicable commission rate and commission amount. On occasion, Quadriga would indicate the previously-agreed commission rate on the spreadsheet.
31. At our annual meeting, Rosenthal and I would review and, where appropriate or necessary, mark up the recap spreadsheet and reach agreement on the amount of commissions owed Rosenthal. Quadriga's form of the recap spreadsheet would reflect the agreed commission rate and the amount of commission owed Rosenthal. . . .
32. At the end of the meeting, Gene Mirasol would be called into the meeting and, in Rosenthal's presence, I would show Ms. Mirasol the recap spreadsheet that Rosenthal and I had reviewed and direct her to prepare a check for the agreed amount of commissions, specifically advising her to put the words "Settlement" on the check stub. Ms. Mirasol would prepare the check and bring it into the meeting, where, in her presence, I would give the check to Rosenthal and confirm that the check was being given to him in full settlement of the prior year's commissions. . . .

33. Rosenthal accepted and deposited the checks without objection or protest. . . .<sup>2</sup>

Defendant has also submitted copies of both sides of the checks and check stubs (marked "Settlement") for the years 2003, 2001 and 2000. (Schulhof Aff. Exs. M, N, and O.) In the Reply Affidavit of Gene Mirasol ("Mirasol") In Support of Defendant's Motion For Summary Judgment, Mirasol, stated the following, in relevant part:

In one of the years, 2002, the marked-up recap sheet indicated that Mr. Rosenthal's draw for the previous year, plus a further advance against commissions that he had been paid at his request, exceeded the commissions he was owed. Accordingly, there was no settlement check for that year.

(Mirasol Aff., sworn to on September 16, 2010, n.1.)

The Court finds that defendant has met its burden in establishing the affirmative defense of accord and satisfaction for the years 2000, 2001 and 2003. It is clear from the use of the phrase "Settlement" on the check stubs, the fact that the checks were deposited without any objection, and from Schulhof's

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<sup>2</sup> The Court notes plaintiff's objection to its consideration of this evidence based on hearsay. The Court, however, finds this objection misplaced where, as here, the majority of the quoted Affidavit testimony does not contain out-of-court statements. The phrase "I would give the check to Rosenthal and confirm that the check was being given to him in full settlement of the prior year's commissions" (Schulhof Aff., ¶ 32 [emphasis added]), may arguably be considered an "out-of-court statement." However, this Court finds that it is not hearsay as it is a verbal act or legally operative phrase. See 5A NY Prac., Evidence in New York State and Federal Courts § 8:3 (2011).

Affidavit that the checks were being offered and accepted in full payment of Rosenthal's outstanding commissions for the years 2000, 2001 and 2003.

With respect to the 2002 commissions, however, the Court finds that defendant has failed to meet its burden of establishing that there was an accord and satisfaction. There is no evidence to make out the elements of an accord and satisfaction with respect to the 2002 commissions, when Rosenthal never accepted a check or other payment and there are no allegations that "the parties . . . made a new contract discharging all or part of their obligations under the original contract." *Merrill Lynch Realty/Carll Burr, Inc., supra* at 596 (citations omitted).

Accordingly, defendant has established its entitlement to summary judgment dismissing the second cause of action to the extent it seeks to recover for unpaid commissions for the years 2000, 2001 and 2003. That portion of the second cause of action seeking recovery of alleged unpaid commissions for the period of January 1, 2002 through December 31, 2002 and from January 1, 2004 through July 4, 2004 remains.

Also, that portion of the second cause of action which sets forth a claim for breach of contract for failure to provide Rosenthal with invoices and/or commission statements for his

sales, beginning in September 1994, is dismissed, except for the years of 2002 and 2004, on the grounds that recovery for any alleged breach prior to November 14, 2000 is barred by the applicable statute of limitations, which is six years,<sup>3</sup> and recovery for the years of 2000, 2001 and 2003 has been denied by this Court's finding of accords and satisfactions.

Defendant also asks this Court to grant it summary judgment holding that, under the plain language of the Contract, Rosenthal was entitled to commissions only on orders actually taken by him and the amount of such commission was not required to be 10% on all such orders. The Contract provides, in relevant part, that

. . . in the event of termination, the following shall survive:

\* \* \*

b. Quadriga agrees to pay commission to you on any accounts introduced to Quadriga, not previously served by Quadriga, by you and which were being served by you at the time of termination and for which orders are shipped during the same three year period.

\* \* \*

Employment Compensation: We shall pay you a commission rate on all orders of 10%. However, commissions on certain orders shall be decided on a per order basis. .

. . .

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<sup>3</sup> There is no dispute that this action was commenced by filing the Summons and Complaint with the New York County Clerk on November 14, 2006. Accordingly, the statute of limitations bars any claims prior to November 14, 2000. See CPLR 203; 213.

While defendant's position may constitute a defense to plaintiff's remaining claims, defendant has not pled any counterclaims in its Verified Answer, dated December 19, 2006, which would allow the Court to grant defendant such affirmative declaratory relief. Accordingly, this portion of defendant's motion is denied.

Defendant next argues that the third, fourth and fifth causes of action must be dismissed for failure to state a claim.

Defendant argues that the third cause of action for conversion fails because Rosenthal cannot identify specific property that was allegedly converted. "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[s] exercised an unauthorized dominion over such funds to the exclusion of the plaintiff's rights.'" *Zendler Constr. Co., Inc. v. First Adj. Group, Inc.*, 59 AD3d 439, 440 (2d Dep't 2009) (citations omitted); see also *M.D. Carlisle Realty Corp. v. Owners & Tenants Elec. Co. Inc.*, 47 AD3d 408, 409 (1<sup>st</sup> Dep't 2008). "The mere right to payment cannot be the basis for a cause of action alleging conversion." *Zendler, supra* at 440 (quoting *Selinger Enterprises, Inc. v. Cassuto*, 50 AD3d 766, 768 [2d Dep't 2008]).

Here, plaintiff has alleged a contractual right to payment, but has not alleged a "specifically identifiable fund," to which she had a right of possession. This is insufficient to sustain an action for conversion. See e.g., *Interstate Adjustors, Inc. v. First Fidelity Bank, N.A.*, 251 AD2d 232 (1<sup>st</sup> Dep't 1998); *Stack Electric, Inc. v. DiNardi Construction Corp.*, 161 AD2d 416, 417 (1<sup>st</sup> Dep't 1990). Accordingly, defendant has established its entitlement to summary judgment dismissing the third cause of action.

With respect to the fourth cause of action, to the extent that it pleads a breach of a fiduciary duty, it is dismissed for the reasons stated on the record on December 1, 2010. To the extent that the fourth cause of action alleges a breach of the implied covenant of good faith and fair dealing, the Court finds that the allegations in the Verified Complaint state a claim that is duplicative of the breach of contract cause of action. *Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 (1<sup>st</sup> Dep't 2010), *lv. den.* 15 NY3d 704 (2010). Although plaintiff's memorandum in opposition states that the basis for the breach of the implied covenant of good faith and fair dealing is that defendant was converting Rosenthal's accounts to house accounts to avoid payment of commissions, not only are these allegations not contained anywhere in the Verified Complaint, but plaintiff does not cite to any affidavit or document to support

these allegations. Accordingly, defendant is entitled to summary judgment dismissing the third cause of action.

Plaintiff's fifth cause of action is for an accounting. "The existence of a fiduciary relationship is essential for a cause of action in equity for an accounting arising out of a contract between the parties." *Waldman v. Englishtown Sportswear*, 92 AD2d 833, 835 (1<sup>st</sup> Dep't 1983). This Court has already found that a fiduciary relationship does not exist here. Accordingly, the cause of action for an accounting must fail and defendant is entitled to summary judgment dismissing the fifth cause of action.


Counsel are directed to appear in IA Part 39, 60 Centre St., Rm. 208 on January 18, 2012 at 10:00 AM to discuss scheduling a trial on the remaining portions of the second cause of action and defendant's Motion to Strike the Jury Demand (Mot. Seq. No. 003).

This constitutes the Decision and Order of this Court.

Dated: *Dec. 21*, 2011

**FILED**

**DEC 22 2011**

  
 BARBARA R. KAPNICK  
 J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**