

**Cole v LexisNexis**

2011 NY Slip Op 33844(U)

July 19, 2011

Sup Ct, New York County

Docket Number: 600797/10

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

STEVEN COLE,  
Plaintiff,

Index No.: 600797/10

Motion Date: 10/13/10

- v -

Motion Seq. No.: 01

LEXISNEXIS and its wholly-owned subsidiary  
LEXISNEXIS APPLIED DISCOVERY,  
Defendants.

The following papers, numbered 1 to 5 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No (s) .	1 - 3
Answering Affidavits - Exhibits	No (s) .	4
Replying Affidavits - Exhibits	No (s) .	5

**FILED**

Cross-Motion:  Yes  No

JUL 27 2011

Upon the foregoing papers, it is ordered that this motion is

In this action alleging breach of contract, plaintiff is seeking damages for unpaid sales commissions. Defendants move to dismiss the complaint and except as to the cause action for promissory estoppel, which was withdrawn with prejudice at oral argument, plaintiff opposes the motion.

Plaintiff's first cause of action entitled "Breach of Express Written Contract" claims that "Plaintiff is owed and entitled to receive the full amount of his Accrued Obligations due to be paid to him, of which he was paid zero." Defendants argue that plaintiff's claims are "bare and conclusory" because

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

1. CHECK ONE: CASE DISPOSED

NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: MOTION IS:  GRANTED

DENIED  GRANTED IN PART

OTHER

3. CHECK IF APPROPRIATE:  SETTLE ORDER

SUBMIT ORDER

of the failure to allege with specificity the creation and terms of the contractual obligations the defendants are said to have breached.

The court agrees with defendants that plaintiff has not met the pleading burden. Plaintiff fails to allege in the complaint any facts as to the formation of any contract pursuant to which the defendants were obligated to pay him commissions. There are no factual allegations as to the formula for calculating plaintiff's commissions nor any information as to plaintiff's salary or duties as allegedly set forth in an agreement between the parties. As stated by the Court

These vague and conclusory allegations are insufficient to sustain a breach of contract cause of action. . . . Moreover, the complaint is fatally deficient because it does not demonstrate how the defendant's alleged breach of the . . . agreement caused plaintiffs any injury. The complaint contains only boilerplate allegations of damage. In the absence of any allegations of fact showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint, and the pleadings must set forth facts showing the damage upon which the action is based.

Gordon v Dino De Laurentiis Corp., 141 AD2d 435, 436 (1<sup>st</sup> Dept 1988). The Court further stated in a factually similar case that

[D]evoid of merit is the plaintiff's third cause of action, asserting a breach of contract claim for sales commissions he purportedly would have earned at the end of the last year of his employment had he not been discharged, since the plaintiff failed to allege the existence of any contract entitling him to such unearned commissions nor the precise terms thereof.

McEntee v Van Cleef & Arpels, Inc., 166 AD2d 359, 360 (1<sup>st</sup> Dept 1990). See also Marino v Vunk, 39 AD3d 339, 340 (1<sup>st</sup> Dept 2007) ("Vague and conclusory allegations are insufficient to sustain a breach of contract cause of action. Since plaintiff failed to allege the existence of any contract entitling her to the unspecified compensation she claims to have been denied, or the precise terms thereof, her second cause of action was properly dismissed."). Accordingly, the court shall grant dismissal of plaintiff's first cause of action for breach of contract.

In the absence of any factual allegations that a contractual obligation was created, plaintiff's claim for breach of implied contract also fails. The Court has held in pertinent part that

We rejected plaintiff's invitation to find an implied covenant of good faith in the employment contract. In so ruling, we distinguished an employment contract from other types of contract where the implied-in-law theory has been adopted. Noting that a covenant of good faith can be implied only where the implied term is consistent with other mutually agreed upon terms in the contract, we stated [that] New York does recognize that in appropriate circumstances an obligation of good faith and fair dealing on the part of the party to a contract may be implied and, if implied, will be enforced. In such instances the implied obligation is in aid and furtherance of other terms of the agreement of the parties. No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship.

Sabetay v Sterling Drug, Inc., 69 NY2d 329, 335 -336 (1987)

(internal quotations and citations omitted).

The court shall however sustain plaintiff's third cause of action for unjust enrichment based upon plaintiff's allegations

that it was the parties' understanding that plaintiff would receive commissions based upon services rendered by the plaintiff and the plaintiff was not compensated for those services. See Furman v Watchman, 229 AD2d 358, 359 (1st Dept 1996) (plaintiff's cause of action for unjust enrichment based on allegation defendants failed to pay commissions for income generated for defendant set forth a cause of action).

Accordingly, it is

ORDERED that defendants motion to dismiss the complaint is GRANTED ONLY as to the first, second, and sixth causes of action and is otherwise DENIED, and the fourth cause of action is withdrawn with prejudice; and it is further

ORDERED that the defendants are directed to answer the complaint if they have not already done so within 20 days of service of a copy of this Order with notice of entry; and it is further

ORDERED that the parties are directed to attend a preliminary conference on September 13, 2011 in IAS Part 59, Room 103, 71 Thomas Street, New York, New York, 10013, at 9:30 A.M.

This is the decision and order of the court.

Dated: July 19, 2011

ENTER:

**FILED**

**JUL 27 2011**

NEW YORK  
COUNTY CLERK'S OFFICE -4-

Debra A. James  
**DEBRA A. JAMES**  
J.S.C.