

Engelhardt v Abraham
2011 NY Slip Op 33907(U)
April 20, 2011
Supreme Court, New York County
Docket Number: 651373/2010
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

MARK ENGELHARDT,

Plaintiff,

INDEX NO. 651373/2010

MOTION DATE Feb. 14, 2011

-against-

MOTION SEQ. NO. 002

MICHAEL ABRAHAM, et al.,

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 9 were read on this motion to dismiss the complaint.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4-8</u>
Replying Affidavits _____	<u>9</u>

Cross-Motion: Yes No

Upon the foregoing papers, defendants' motion to dismiss the complaint and plaintiff's cross-motion to amend the complaint are decided in accordance with the accompanying decision and order.

Dated: April 20, 2011

APR 20 2011



O. PETER SHERWOOD, J.S.C.

O. PETER SHERWOOD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49**

-----X
MARK ENGELHARDT,

Plaintiff,

- against -

**DECISION AND
ORDER**

Index No. 651373/2010

**MICHAEL ABRAHAM,
TRANSWORLD INVESTMENT GROUP PLC,
LIFE POLICY GROUP, PLC,
LIFE POLICY GROUP, LLC,
LIFE SETTLEMENT LEADS, INC.,
LIFE POLICY GROUP DISTRIBUTION, INC.,**

Defendants.

-----X
O. PETER SHERWOOD, JSC:

Defendants Transworld Investment Group PLC (Transworld), Life Policy Group, PLC (LPG PLC), Life Policy Group, LLC (LPG LLC), Life Settlement Leads, Inc. (LSL), and Life Policy Group Distribution, Inc. (Distribution) (collectively, corporate defendants) and Michael Abraham (Abraham) move, pursuant to CPLR 3211 (a) (1), (7) and (8), to dismiss all claims asserted against each of them by plaintiff Mark Engelhardt. Plaintiff commenced this action to recover \$6.5 million in commission payments allegedly owed him under the terms of an employment agreement. Besides opposing the motion, plaintiff cross-moves for an order (i) granting him leave to amend the complaint and (ii) for jurisdictional discovery.

For the following reasons, defendants' motion is granted in part and denied in part and plaintiff's cross motion is granted in part and denied in part.

Background¹

According to the complaint, the relationship among the defendants is as follows: Abraham is a controlling shareholder in Transworld, a holding company that is also the parent company of LPG PLC. Both Transworld and LPG PLC are foreign companies formed under the laws of the Cayman Islands. LPG PLC is, in turn, the parent company of three Delaware entities: LGS LLC, LSL and Distribution.

¹ The factual allegations are drawn from plaintiff's verified complaint, dated August 25, 2010 (complaint).

Plaintiff alleges that Abraham makes all of the major decisions relating to each of the corporate defendants even though Abraham has no corporate title or position of employment within the hierarchy of the corporate defendants, and instead, holds himself out as a consultant for, and/or board member of, each of the corporate defendants.

The Employment Agreement: By letter agreement dated January 9, 2010 (the Employment Agreement), LPG PLC offered plaintiff the position of managing director of sales (MD) for Distribution. The Employment Agreement was signed by Lisa Jackson (Jackson), administration director of LPG PLC. On January 11, 2010, plaintiff accepted the terms of the Employment Agreement and began performance of his duties shortly thereafter. The Employment Agreement defines plaintiff's compensation and includes both non-variable compensation and variable compensation components.

At about the same time that plaintiff accepted the MD position with Distribution, the Chief Executive Officer (CEO) of LPG PLC resigned. Abraham offered plaintiff the newly-vacant position, advising him that, in spite of the new title, the terms of the Employment Agreement and the compensation structure and duties thereunder would not change. Although there was no documentation memorializing the new arrangement, defendants issued press releases announcing plaintiff's appointment as CEO of LPG PLC, and Abraham introduced plaintiff at business meetings as the CEO of LPG PLC.²

The Elias Transaction: On April 26, 2010, plaintiff attended a conference in London on the subject of life settlement policies (the London Conference). In May 2010, Elias Elia (Elia) called plaintiff to discuss the various life-settlement investment opportunities available through LPG PLC - Elia had apparently obtained plaintiff's name from someone who had spoken with plaintiff at the London Conference. During their conversation, Elia expressed his interest in certain LPG PLC life settlement investments, and invited Engelhardt to return to London to finalize an agreement. Plaintiff traveled to London and met with Elia on June 2, 2010 and June 3, 2010 (the London

² Although plaintiff claims that he never resigned from this position, defendants have submitted an affidavit attaching as an exhibit a letter purporting to be plaintiff's resignation from his position as a director of LPG PLC (*see ex. A, annexed to the affidavit of Lisa Jackson in further support, dated December 14, 2010*). However, plaintiff swears that he is completely unfamiliar with the document and never signed or authorized the use of his electronic signature on this document (*see affidavit of Mark Engelhardt in support of plaintiff's cross motion, dated December 10, 2010, ¶¶ 20-28*).

Meetings). At the conclusion of the London Meetings, plaintiff persuaded Elia to meet Abraham in Spain to finalize the terms of the business arrangement.

The following week, Elia flew out to Spain to meet Abraham (the Spain Meeting). Plaintiff participated in the Spain Meeting via teleconference. For the remainder of June and through July, plaintiff worked with Abraham and Jackson to finalize the Memorandum of Understanding and Sales Agreement (the Sales Agreement), memorializing LPG PLC's business arrangement with Elia's business entity, E. Elias Capital Limited (Elias Capital). The final Sales Agreement included certain material terms, including: (a) Elias Capital's investment commitment of two hundred million dollars, and (b) the schedule of dates over which Elias Capital would make its investment. The Sales Agreement was signed on behalf of defendants by plaintiff, as CEO of LPG PLC.

On July 10, 2010, Abraham met Elia in London to deliver the final Sales Agreement. According to plaintiff, Elia executed the Sales Agreement on behalf of Elias Capital that same day and the transaction closed. Plaintiff further alleges that, as a result of his procurement of the Elia Transaction, and in accordance with the terms of the Employment Agreement, he earned: (i) a commission of not less than 2.25% of the value of the assets raised through the deal (\$4.5 million); as well as (ii) shares of restricted stock in an amount equal to 1% of the value of the assets raised (\$2 million). On July 11, 2010, Abraham circulated an e-mail amongst certain of defendants' executives (not including plaintiff), announcing, "[a]ttached is the agreement Elias signed yesterday - just waiting for the money \$25m that he is taking off deposit tomorrow so it should be with us within 10 days!"

Plaintiff's Termination: Beginning July 2010, Abraham began to exclude plaintiff from communications with Elia. On July 26, 2010, defendants' Chief Financial Officer, Dan Gordon (Gordon), advised plaintiff that he had received an e-mail from Abraham (the Abraham e-mail), requesting feedback on an e-mail exchange between Abraham and his attorneys, regarding the termination of plaintiff's employment, purportedly in an effort avoid paying him the commissions he earned in connection with the Elia Transaction. Gordon provided plaintiff with the login identification and password for his e-mail account so that plaintiff could view the Abraham e-mail. When plaintiff logged on to Gordon's e-mail account, he located an e-mail chain, that included exchanges between Abraham, his attorney Brian Casey (Casey), and other third parties who were not employees of the corporate defendants and were entirely unrelated to the Elia Transaction (the Casey

e-mail). The Casey e-mail included a short memorandum from Casey, responding to an inquiry posed by Abraham, advising him on the issue of terminating plaintiff's employment.

At first, Abraham only attempted to restructure plaintiff's position, offering him a new role, that paid less fixed compensation and extinguished any rights plaintiff had to previously earned commissions. Through early August, plaintiff and Abraham continued to discuss the terms of the new position. In an e-mail dated August 10, 2010, Abraham took the position that the Employment Agreement "terminated on the 31st July and you will be paid until the 15th August so a new contract if agreed can begin then." Subsequently, on August 16, 2010, plaintiff received an e-mail from Jackson stating, "[a]s identified in our email of [August 12, 2010] your employment with Life Settlement Leads a Life Policy Group company is terminated. You will be paid up until the 15th August as advised."

Maintaining that he never agreed to waive or forfeit his right to commissions arising from the Elia Transaction, plaintiff asserts claims for violation of New York Labor Law § 193, breach of contract, unjust enrichment, breach of the implied covenant of good faith and fair dealing, piercing the corporate veil and for injunctive relief. Defendants move to dismiss the complaint on the grounds that: (i) the court lacks personal jurisdiction over certain defendants, and (ii) plaintiff fails to state a cause of action because the Elia Transaction, on which plaintiff's claims are based, never closed and no funds were received. Plaintiff opposes and cross-moves for jurisdictional discovery pursuant to CPLR 3211 (d), and for leave to amend the complaint pursuant to CPLR 3025.

The Court previously denied plaintiff's application for a temporary restraining order because the relief sought by plaintiff in this action is for money damages (*see* order, dated August 30, 2010 [Order], this index No., Doc. No. 11).³

Discussion

When determining a motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 [2001]). The court will not accept as true factual and legal conclusions that are "either inherently incredible or flatly contradicted by documentary evidence" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692

³ Accordingly, plaintiff's seventh cause of action, for injunctive relief, is dismissed.

[1st Dept 1994]). In addition, in the context of a CPLR 3211 (a) (8) motion to dismiss, a plaintiff need only demonstrate that jurisdictional facts “may exist” and that it is entitled to the disclosure expressly sanctioned by CPLR 3211 (d) (*see Peterson v Spartan Indus.*, 33 NY2d 463, 466 [1974]). In determining whether a plaintiff has carried this minimal burden, the court must view the jurisdictional allegations in the pleadings and supporting affidavits in the light most favorable to the plaintiff and resolve all doubts in its favor (*see Brandt v Toraby*, 273 AD2d 429, 430 [2d Dept 2000]).

A. Personal Jurisdiction

As a threshold matter, defendants contend that this Court has no basis to exercise personal jurisdiction over certain defendants, requiring their dismissal from this action. More specifically, defendants claim that none of the allegations in the complaint, or in the affidavits submitted by plaintiff, support general jurisdiction pursuant to CPLR 301 or long-arm jurisdiction pursuant to CPLR 302 over defendants Abraham, Transworld and LPG PLC.

Under CPLR 301, a court can exercise personal jurisdiction over a person or corporation if they are present within the state. A foreign corporation not licensed to do business in New York is present in the state if it is engaged in “a continuous and systematic course of ‘doing business’” here (*Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY2d 426, 430-31 [1972]). Under CPLR 302, a defendant can become subject to the long-arm jurisdiction of the courts of New York so long as there is a substantial relationship between business activity conducted in the state and the claims asserted, and the defendant’s activities here are purposeful (*see Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). Applying these standards, the Court examines whether it has any basis to exercise personal jurisdiction over Abraham, LPG PLC and Transworld.

1. **Abraham**: Plaintiff acknowledges that Abraham is a national of Great Britain and currently resides in Spain (Compl. ¶ 6). Nevertheless, plaintiff alleges that Abraham “transacts and solicits substantial business in the United States, and the State of New York, individually, and on behalf of the Corporate Defendants” (*id.*). As well, plaintiff avers that Abraham was personally served while he was in New York (*see* affidavit of Mark Engelhardt in opposition, dated November 19, 2010 [Engelhardt Aff.], ¶ 77), and, therefore, jurisdiction over him is proper pursuant to CPLR 301 (*see Burnham v Superior Court of California, County of Marin*, 495 US 604, 619 [1990]).

In moving to dismiss, defendants argue that there is no specific allegation in the complaint that Abraham engaged in any commercial activity in New York other than on behalf of the corporate defendants, and, therefore, there is no basis to assert jurisdiction over Abraham, individually. Further, even assuming *arguendo* that the corporate defendants are “present” in New York, Abraham’s activities on their behalf does not bring him, in his individual capacity, within the jurisdiction of the Court (*see Laufer v Ostrow*, 55 NY2d 305, 313 [1982]). Defendants also contend, citing *Stanko v LeMond* (1991 WL 152940 [ED Pa 1991]), that once service of a summons and complaint has been successfully made, a subsequent service is completely redundant and without consequence. In this regard, defendants argue that the personal service of the complaint on Abraham in New York was meaningless because, pursuant to a stipulation, counsel for defendants had already agreed to accept service on behalf of defendants (*see* reply affirmation of Kenneth Pasquale, dated December 7, 2010, ex. B [stipulation]). However, defendants’ reliance on *Stanko*, is misplaced, to say the least. There, a federal district court held that an in-state (Pennsylvania) service of a complaint on the agent of the defendant was insufficient to give it jurisdiction, not because a prior service had made the second service redundant, but rather, because “the defendant was lured into the forum” to engage in settlement discussions, violating “traditional notions of fair play and substantial justice” (*id.* at *4-5). Here, unlike the agent in *Stanko*, the service on Abraham was made while he was voluntarily present in New York for reasons that were unrelated to the instant litigation (Engelhardt Aff., ¶ 77). In addition, when stipulating to accept service, counsel for defendants expressly reserved the right to raise “all defenses including whether jurisdiction is proper in the state of New York” (*see* stipulation). Under these circumstances, plaintiff was entitled to re-serve the summons and complaint to cure any anticipated jurisdictional objections (*see Helfand v Cohen*, 110 AD2d 751, 751 [2d Dept 1985] [holding that where plaintiff re-served defendants to address objections related to jurisdiction, “[s]uch reservice was entirely appropriate and served to cure the jurisdictional defects of which defendants complained” (internal citations omitted)]).

Therefore, because Abraham was personally served with the summons and complaint while he was in New York, this Court may exercise jurisdiction over Abraham pursuant to CPLR 301 (*see Kelly v Kelly*, 300 AD2d 547, 548 [2d Dept 2002]).

2. **LGP PLC**: Defendants claim that there is no general jurisdiction over LPG PLC because it does not do business in the state of New York (*see* affidavit of Lisa Jackson, dated October 27,

2010 [Jackson Aff.], ¶ 3). Regardless, plaintiff has established that the court has specific jurisdiction over LPG PLC in this case, pursuant to CPLR 302 (a) (1). Specifically, plaintiff submits that: (i) Jackson (the administration director of LPG PLC) and Abraham interviewed plaintiff in New York, (ii) during this interview, the terms of plaintiff's employment were negotiated, and (iii) the interview was held in LPG PLC's New York office (*see* Englehardt Aff., ¶¶ 10, 78-79).⁴ Thus, the present action arises out of LPG PLC purposeful transaction of business in New York, *i.e.*, the Employment Agreement (*see* Englehardt Aff., ex. A [Employment Agreement], at 1 ["As we discussed during your interviews..."]). This is sufficient to confer long-arm jurisdiction over LGP PLC for any claims that arise out of the Employment Agreement (*see Kreutter v McFadden Oil Corp.*, 71 NY2d, at 467 [holding that "proof of one transaction in New York is sufficient to invoke jurisdiction"]).

Accordingly, the Court may properly exercise jurisdiction over LGP PLC for the purposes of this action.

3. **Transworld:** To defeat jurisdiction, defendants aver that Transworld: (i) is a foreign company that is not authorized to do business in New York, (ii) does not itself do business in New York, (iii) does not own or lease property in New York, (iv) does not solicit business in New York, (v) does not pay New York taxes, and (vi) none of its directors reside in New York (*see* affidavit of Michael Abraham, dated October 27, 2010 [Abraham Aff.], ¶ 5). Anticipating plaintiff, defendants also submit that the various corporate defendants are not mere departments of one another, because LPG PLC: (i) operates independently from Transworld and Distribution, (ii) has a separate board of directors and staff, (iii) controls its own marketing and day-to-day activities and (iv) is not financially dependent on Transworld or Distribution (Jackson Aff., ¶ 5; *see Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp.*, 751 F2d 117, 120-22 [2d Cir 1984] [citing factors used by New York courts in determining whether one corporation is a mere department of another corporation for jurisdictional purposes]).

For his part, plaintiff submits that Transworld has a New York presence through Abraham's sponsorship of, and attendance at, various seminars on Transworld's behalf (*see* Englehardt Aff., ¶¶ 104-112). However, these allegations amount to "mere solicitation," and do not, without more, subject Transworld to the Court's jurisdiction (*see Landoil Resources Corp. v Alexander &*

⁴ The Employment Agreement is written on LPG PLC letterhead and lists a New York address for LPG PLC, at 245 Park Ave., New York, NY 10167 (*see* Englehardt Aff., ex. A, at 1).

Alexander Servs., 77 NY2d 28, 33-34 [1990]). Nevertheless, and despite defendants' submission to the contrary, plaintiff also avers that Transworld and its subsidiaries operate as a "mere department of a single entity" (*see Engelhardt Aff.*, ¶¶ 113-165).⁵

In spite of plaintiff's voluminous (but not necessarily convincing) submissions, the Court declines the opportunity to make a jurisdictional determination with respect to this defendant, when, in any event, such an inquiry amounts to little more than an academic exercise. As discussed more fully below, plaintiff cannot maintain any of his claims against this defendant - Transworld is not a party to the Employment Agreement that is the basis of plaintiff's claims, and the allegations in support of veil piercing are insufficient as a matter of law (*infra*, sections C and D).

Based on the foregoing analysis, that portion of plaintiff's cross motion seeking jurisdictional discovery, is denied. Specifically, with respect to defendants Abraham and LPG PLC, the motion is moot because plaintiff has made a sufficient showing to permit the exercise of jurisdiction over these defendants. With respect to Transworld, jurisdictional discovery is unwarranted as it serves no practical purpose.

B. First Cause of Action: Violation of Labor Law § 193 (against corporate defendants)

Second Cause of Action: Violation of Labor Law § 193 (against Abraham)

Under these causes of action, plaintiff alleges that the failure of defendants to pay him his commission on the Elias Transaction when it became due, constitutes an improper deduction from plaintiff's wages within the meaning of Labor Law § 193. As such, plaintiff seeks the remedies provided by Labor Law § 198 (1-a), *i.e.*, attorney's fees and liquidated damages. Labor Law Labor Law § 193 (1) (b) expressly prohibits an employer from deducting monies from the wages of an employee except as required by law or as authorized by the employee (*Matter of Angello v Labor Ready, Inc.*, 7 NY3d 579, 584 [2006]). "Wages" are further defined 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" (Labor Law § 190 [1]). However, section 193 does not prohibit

⁵ The Court notes that with regard to LPG PLC's and Distribution's financial dependence on Transworld, a factor that courts consider in evaluating whether a subsidiary is a mere department of a parent (*see e.g. Porter v LSB Indus.*, 192 AD2d 205, 213 [4th Dept 1993]), plaintiff's averments are based on conjecture, not personal knowledge (*Engelhardt Aff.*, ¶ 154 ["It is my understanding that [Gordon] made a monthly request from one of the other entities for cash to cover the months's bills, including salary. Thereafter the money was wired in from Spain, *but I believe* it was coming from Transworld directly" [emphasis supplied]).

deductions “[i]f the adjustments were made before the commissions were earned” (*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 617 [2008]). Whether a commission is earned is dependent upon the express or implied agreement providing for such commissions between the parties (*see Gennes v Yellow Book of N.Y., Inc.*, 23 AD3d 520, 521 [2d Dept 2005]). When the value of the compensation depends on the firm’s overall financial success, not simply on the employee’s personal productivity, it does not constitute a “wage” protected by the Labor Law (*Guiry v Goldman, Sachs & Co.*, 31 AD3d 70, 72 [1st Dept 2006]); *Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 223-24 [2000] [noting that the definition of wages excludes those forms of incentive compensation that are “both contingent and dependent, at least in part, on the financial success of the business enterprise”]).

Here, plaintiff’s variable compensation is more clearly tied to Distributions’s overall financial success than to his individual contribution. Significantly, the agreement does not provide for commissions based on each sale made by plaintiff. Rather, plaintiff’s variable compensation is a percentage of assets raised by the whole company. To wit, the Employment Agreement provides that “[plaintiff] may receive up to 2.25% on all assets raised by the Company during 2010” (Employment Agreement, at 3). In addition, plaintiff’s entitlement to an additional 1% of total assets raised (in the form of restricted stock) is expressly made contingent on *the company* achieving its minimum target of \$30 million in assets raised (*id.*). Significantly, plaintiff relies on these very provisions to support his claimed entitlement to a commission of \$6.5 million (*see* Compl. ¶¶ 66-67). Thus, because plaintiff’s variable compensation was dependent on Distribution’s overall success, and not just on his personal productivity, the commissions allegedly due plaintiff from the Elia Transaction do not constitute wages within the meaning of Labor Law § 193.⁶

Accordingly, plaintiff’s Labor Law claims are dismissed.

⁶ At a hearing on the motion, counsel for plaintiff directed the Court to language in the Employment Agreement, in a section titled “Examples,” that states: “[Plaintiff’s] earnings will be governed by the amount of direct sales facilitated by [plaintiff] *in addition to* the total sales for the Company” (*see* transcript, dated December 20, 2010, at 20:5-9 [emphasis supplied]). However, a review of the illustrations that follow conforms to the above-referenced provisions and confirms that plaintiff’s variable compensation is, at bottom, a function of the company’s overall financial success.

C. Third Cause of Action: Breach of Contract

Fourth Cause of Action: Unjust Enrichment

Fifth Cause of Action: Breach of the Implied Covenant of Good Faith and Fair Dealing

The “essential elements of a cause of action to recover damages for breach of contract [are]: the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages” (*JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]). “To prevail on a claim of unjust enrichment, [a] plaintiff must show that (1) defendant was enriched (2) at plaintiff’s expense, and (3) that it is against equity and good conscience to permit . . . defendant to retain what is sought to be recovered” (*Lake Minnewaska Mtn. Houses v Rekis*, 259 AD2d 797, 798 [3d Dept 1999] [citation and internal quotation marks omitted]). In New York, the implied covenant of good faith and fair dealing in the course of performance “embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002] [citation and internal quotation marks omitted]).

1. **Breach of Contract:** As an initial matter, defendants argue that the breach of contract claim, as against defendants Abraham, Transworld, LPG PLC, LPG LLC, and LSL, must be dismissed because documentary evidence - the Employment Agreement - establishes that these defendants, unlike Distribution, were not parties to the Employment Agreement, and, therefore, have no contractual obligation to plaintiff (*see HDR, Inc. v International Aircraft Parts*, 257 AD2d 603, 604 [2d Dept 1999]). The Court agrees - at least with respect to Abraham, Transworld, LPG LLC, and LSL, and accordingly, the claim is dismissed as against these defendants.

The same cannot be said with regard to LPG PLC. Rather, based on the documentary evidence, it is unclear whether the Employment Agreement was between plaintiff and Distribution alone or whether LPG PLC was a party to this agreement as well. In this connection, the Employment Agreement: (i) is written on LPG PLC letterhead; and (ii) is signed by Lisa Jackson as administration director of LPG PLC. Additionally, it is LPG PLC that is making the offer to plaintiff (*see Employment Agreement*, at 1 [“Life Policy Group, plc, is pleased to offer you the position of Managing Director of Sales (‘MD’) for our distribution organization, [Distribution] (‘the Company’)”]). Accordingly, at this stage of the litigation, plaintiff has sufficiently stated a claim for breach of contract against LPG PLC, as well as Distribution.

In a separate argument, defendants contend that plaintiff cannot allege a breach of the Employment Agreement by Distribution (or LPG PLC) because a plain reading of the Employment Agreement establishes that Distribution owed no obligation to pay plaintiff commissions or additional compensation beyond those already paid to him during his employment. More specifically, defendants argue that “the Agreement conditions the payment of commissions upon the receipt of certain sums of money by the company” (*see* defendants’ memorandum of law in support, dated October 22, 2010, at 16 [emphasis supplied]). Defendants claim that, in spite of plaintiff’s efforts to secure the Elia Transaction, the deal never closed and no funds were ever “received” from the Elia Transaction (*see* Jackson Aff., ¶ 7). The Court notes, however, that throughout, the Employment Agreement uses the term “assets raised,” not “received” when discussing the terms of plaintiff’s variable compensation. In other words, defendants’ argument is not based on the plain language of the agreement, rather, it is based on their interpretation of the term “assets raised.”

In opposing the motion, plaintiff first argues that defendants’ averment that the transaction never closed is belied by several e-mails exchanged between the executives of the corporate defendants. For example, on July 11, 2010, Abraham circulated an e-mail announcing “[a]ttached is the agreement Elias signed yesterday - just waiting for the money \$25m that he is taking off deposit tomorrow so should be with us within 10 days!” (*see* Engelhardt Aff., ex. CC). Also, in an e-mail, dated August 16, 2010, addressed to plaintiff (but never sent), Abraham states, “[y]ou did not close the deal with Elia, I did” (*see* Engelhardt Aff., ex. V). Moreover, plaintiff contends that the term “assets raised” does not mean (as defendants say it does), assets received. Instead, plaintiff claims that he “raised” the \$200 million as soon as Elia purportedly executed the Sales Agreements.

As there is an ambiguity in the Employment Agreement, insofar as the correct interpretation of the term “assets raised,” as well as a factual question as to whether or not the contract was ever executed by Elia, dismissal of the plaintiff’s breach of contract claim is premature. Accordingly, plaintiff has adequately set forth facts sufficient to state a cause of action for breach of contract, as against Distribution and LPG PLC.

2. Unjust Enrichment: Here, the subject matter of plaintiff’s unjust enrichment claim arises out of the same subject matter covered by the Employment Agreement. Accordingly, this claim must be dismissed (*see Neos v Lacey*, 2 AD3d 812, 814 [2d Dept 2003]).

3. **Breach of the Implied Covenant:** As presently plead, the cause of action for breach of the implied covenant of good faith and fair dealing is duplicative of the breach of contract claim and is dismissed as a matter of law (*see Jacobs Private Equity, LLC v 450 Park LLC*, 22 AD3d 347, 347-48 [1st Dept 2005]). Nevertheless, plaintiff cross-moves to amend this claim because in drafting the complaint, “[p]laintiff was operating under the assumption that the Elia Transaction was closed and that monies would be transferred to Plaintiff’s employer in accordance with the terms of the negotiated Sales Agreement” (*see* plaintiff’s memorandum of law in opposition, dated November 19, 2010 [plaintiff’s memo], at 24). Based on defendants’ assertion that the Elia Transaction never closed, plaintiff seeks leave to amend this claim on the theory that defendants “undertook certain actions to interfere with and/or cancel the Elia Transaction and thereby deprive Plaintiff of the benefits of his Employment Agreement” (*id.* at 25). Under this proposed theory of harm, plaintiff’s claim does not depend on the same allegations as his breach of contract claim. Accordingly, that portion of plaintiff’s cross motion, seeking leave to amend his complaint pursuant to CPLR 3025 (b), is granted.

D. Sixth Cause of Action: Piercing the Corporate Veil

Plaintiff alleges that Abraham made all of the business decisions for, and exercised complete domination over, the corporate defendants, including with respect to his termination so as to avoid paying him his commission (Compl. ¶¶ 137-139). Based on this, plaintiff contends that the Court should pierce the corporate veil with respect to all the defendants.

In New York, veil piercing requires a showing that: (1) the owners of a corporation exercised complete domination with respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]).

As an initial matter, this claim must be dismissed because New York “does not recognize a separate cause of action to pierce the corporate veil” (*Fiber Consultants, Inc. v Fiber Optek Interconnect Corp.*, 15 AD3d 528, 529 [2d Dept 2005]). In any event, plaintiff has not satisfied his burden. Here, there is no allegation in the complaint that Abraham failed to adhere to corporate formalities, commingled assets or undercapitalized the corporate defendants or used corporate funds for personal use, traditional indicia courts consider when piercing the corporate veil (*see Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005]). Still, in opposing the motion, plaintiff asserts that he

has evidence demonstrating that Abraham was stripping the various subsidiaries of their assets, to possibly hide the funds received from the Elia Transaction, and advising members of these subsidiaries to transfer their interest to Transworld (*see* plaintiff's memo, at 28). However, the Court's review of an e-mail between Abraham and Gordon, on which plaintiff relies (*see* Engelhardt Aff., ex. X ["The best way to protect your value is to take shares in Transworld"]), simply does not support plaintiff's inference - there is not even a veiled reference to either plaintiff or the Elia Transaction in the entire e-mail; nor is there anything in the exchange to suggest that Abraham's advice is being given with dark motives. Consequently, plaintiff has failed to state a claim for piercing the corporate veil, and this cause of action is dismissed.

Conclusion

Based on the foregoing, it is:

ORDERED that defendants' motion to dismiss the complaint is granted with respect to the first, second, fourth, fifth, sixth and seventh causes of action; and is denied with respect to the third cause of action; and it is further

ORDERED that the complaint is dismissed in its entirety as against defendants Transworld Investment Group PLC, Life Policy Group, LLC, Life Settlement Leads, Inc., and Michael Abraham with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants Life Policy Group, PLC and Life Policy Group Distribution, Inc.; and it is further

ORDERED that the branch of plaintiff's cross motion seeking jurisdictional discovery is denied, and that the branch of plaintiff's cross motion seeking leave to amend the complaint is granted and the amended complaint in the proposed form annexed as Exhibit A to the affirmation of Scott W. Paterson in support of plaintiff's cross motion shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendants Life Policy Group, PLC and Life Policy Group Distribution, Inc. shall serve their answers to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel shall appear at a preliminary conference on Wednesday, June 8, 2011 at 9:30 AM, in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: April 20, 2011

APR 20 2011

ENTER,



**O. PETER SHERWOOD
J.S.C.**

O. PETER SHERWOOD