

Posner v Advanced Mkts., LLC
2012 NY Slip Op 31565(U)
May 30, 2012
Supreme Court, Nassau County
Docket Number: 016821-11
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
JONATHAN POSNER,

Plaintiff,

-against-

ADVANCED MARKETS, LLC,

Defendant.
-----x

**TRIAL/IAS PART: 16
NASSAU COUNTY**

**Index No: 016821-11
Motion Seq. No. 1
Submission Date: 4/11/12**

The following papers having been read on this motion:

**Notice of Motion.....X
Affidavit of A. Brocco and Exhibit.....X
Affidavit of S. Janjic and Exhibits.....X
Letter dated May 24, 2012 with copy of Verified Complaint.....X
Memorandum of Law in Support.....X
Affidavit in Opposition and Exhibits.....X
Memorandum of Law in Opposition.....X
Reply Affirmation in Support.....X.**

This matter is before the Court for decision on the motion filed by Defendant Advanced Markets, LLC ("Advanced" or "Defendant") on February 22, 2012 and submitted on April 11, 2012. For the reasons set forth below, the Court 1) grants Defendant's motion to dismiss the first cause of action in the Verified Complaint, alleging a violation of New York Labor Law Section 191-c; and 2) denies Defendant's motion to dismiss the second, third and fourth causes of action in the Complaint alleging breach of contract, *quantum meruit* and unjust enrichment.

A. Relief Sought

Defendant moves for an Order, pursuant to CPLR § 3211(a)(7), dismissing the complaint and imposing costs and sanctions in favor of Defendant.

Plaintiff Jonathan Posner (“Posner” or “Plaintiff”) opposes Defendant’s motion.

B. The Parties’ History

The Verified Complaint (“Complaint”) alleges as follows:

Advanced is a North Carolina corporation that conducts business in the State of New York (“New York”) through its office located at 55 Water Street, 10th Floor, New York, New York. At all relevant times, Steve Janjic (“Janjic”) was Global Head of Foreign Exchange and Managing Director of Advanced. Plaintiff was a resident of the State of Florida who allegedly relocated his family to New York following his acceptance of Advanced’s offer of employment to begin on January 20, 2011 (“Offer”).

In connection with the Offer, Plaintiff completed all documentation requested by Defendant including but not limited to an employment eligibility verification form and documentation permitting Defendant to directly deposit Plaintiff’s paychecks into his bank account. In addition, Defendant provided Plaintiff with a personal business email address.

Following Plaintiff’s relocation to New York, in reliance on the Offer, Janjic repeatedly delayed the date of commencement of Plaintiff’s employment. Plaintiff finally began working at Advanced on March 3, 2011, almost six (6) weeks after the agreed-upon commencement date. Plaintiff alleges that he was promised that 1) he would receive an annual salary of \$60,000 plus commissions which were expected to amount to an additional \$65,000 to \$115,000; and 2) although the term of employment was indefinite, Plaintiff would be “afforded the opportunity to a one (1) year’s compensation” (Compl. at ¶ 15).

Two days after Plaintiff began working, Defendant advised Plaintiff that his base salary had been reduced to \$50,000 annually. On April 12, 2011, Defendant advised Plaintiff that there was no annual base salary and he would only receive commissions. On April 12, 2011, Defendant “effectively terminated” Plaintiff’s employment by refusing to pay him for services he had rendered at the agreed-upon compensation (Comp. at ¶ 18). Defendant refused to pay the agreed-upon wages and failed to provide other compensation to Plaintiff for the services Plaintiff provided to Defendant. Despite Plaintiff’s repeated demands for payment for the services he provided to Defendant, Defendant has refused to pay Plaintiff his wages and other compensation.

The Complaint contains four (4) causes of action: 1) violation of New York Labor Law (“Labor Law”) § 191-c for failing to pay Plaintiff, a commissioned salesman, wages to which he was entitled, 2) breach of contract, 3) *quantum meruit*, and 4) unjust enrichment.

In support of Defendant's motion, Janjic affirms that he is the Global Head of Sales of Advanced and has held that position since February 1, 2011. In or about October of 2010, a mutual friend named Barry Dorfman ("Dorfman") introduced Janjic to Posner, who was relocating from Florida to New York and needed employment. At the time, Janjic was employed by GFI Group, LLC ("GFI") as Vice President, Sales Person. As a courtesy to Dorfman, Janjic advised Dorfman that he could invite Posner to call Janjic when he arrived in New York so that they could meet. Approximately a week later, Posner called Janjic at which time Janjic invited him to GFI's offices and offered to introduce him to other companies located on the same floor as GFI, and to individuals at GFI responsible for sales positions.

Posner visited Janjic at GFI in October or November of 2010. Janjic affirms that, although he held the title of Vice President, he did not have authority to hire a new employee for GFI and could only make a recommendation. Janjic told Posner that he could call Janjic when he moved permanently to New York and he would introduce him to someone at GFI, or another company with which he was familiar, if he knew of any available positions.

Posner called Janjic "from time to time" (Janjic Aff. at ¶ 6). In January of 2011, Posner called Janjic, advised him that he was living in New York and forwarded his new address to Janjic via email. Janjic invited Posner in for another meeting, to introduce him to other companies that might be hiring a new salesperson. Janjic affirms that, by January of 2011, there was a "strong possibility" that he would be moving to Advanced and would require new sales personnel (*id.*), but states that he was only making introductions at the time that he spoke to Posner. Janjic affirms that he introduced Posner to a company known as Alpari and the "interest rate swaps desk at GFI" (*id.*).

In or about February of 2011, Janjic transferred to Advanced. As was the case when he was employed by GFI, he was only permitted to recommend individuals for employment at Advanced, and any potential employees were required to be interviewed by the Chief Executive Officer and processed by the Human Resources Department. Janjic affirms that there are no salaried sales personnel at Advanced, and all sales people work on a commission basis only.

Janjic affirms that Posner has been corresponding with Janjic and stating that he is looking forward to starting his position at Advanced. Janjic has repeatedly advised Posner that Janjic would not begin his work at Advanced until February, and reminded him that the sales personnel at Advanced work strictly on a commission basis.

Janjic affirms that his initial weeks at Advanced were very busy and he did not respond to Posner's emails. At the end of February, Janjic began to seek new personnel and sent to Posner "standard materials to see if he was interested in a commission position" (Janjic Aff. at ¶ 8). Specifically, Janjic sent to Posner a standard form describing Advanced's policies and procedures, as well as other standard employment documents, but did not provide him with an Offer Letter. Janjic provides copies of the materials forwarded to Posner (Ex. A to Janjic Aff.), which were also sent to two other potential salespeople ("Other Hirees").

Janjic advised Posner that he could meet with Janjic on March 9 or 10 of 2011, when Janjic would be meeting with the Other Hirees. Janjic reminded Posner that the position did not include a salary, and was on a commission basis only, and Posner expressed interest. The Other Hirees accepted a position, on a commission only basis, and traveled to North Carolina to meet with Anthony Brocco ("Brocco"), the Chief Executive Officer of Advanced. Brocco approved the employment of the Other Hirees and provided them with equipment, including computers, for their position. Advanced provided the Other Hirees with Offer Letters, to finalize the employment process. In light of the fact that Posner did not accept the position offered, he did not travel to North Carolina and did not receive an Offer Letter. Posner had clearly communicated to Janjic that he wanted long term employment with a guaranteed salary.

Janjic affirms that Advanced never offered Posner a position, either orally or in writing. As Janjic's departure from GFI was amicable, he provided Posner, as a courtesy, with a visitor's pass to allow him to use two desks often occupied by Advanced employees where he could seek other employment. Posner had befriended employees of GFI and wanted continued exposure to them and other companies on the same floor. During this time, Posner performed no work for Advanced. In April of 2011, Janjic permitted Posner to work at other desks at GFI, and Posner sent his resume to a staff member of GFI with a notation that he had done so at the suggestion of Janjic (*see* Ex. B to Janjic Aff.). Janjic submits that, in filing this action, "Posner is attempting to take advantage of my attempts to help him locate a position due to the fact that he had a mutual good friend" (*id.* at ¶ 11).

Anthony Brocco ("Brocco"), the Chief Executive Officer of Advanced since its formation, affirms that he makes all final decisions relating to the hiring and termination of any employees. The only other officer of Advanced with authority to hire, at Brocco's direction, is Geoffrey Gooch ("Gooch"), the Chief Financial Officer. Brocco receives recommendations for potential sales personnel from Janjic, but all employees hired for the sales department must be

interviewed by Brocco, or by Gooch if Brocco is unavailable. Once final approval is given for a new employee, Brocco directs that an offer letter ("Offer Letter"), a sample of which is provided (Ex. A to Brocco Aff. in Supp.), be provided to the potential candidate. The Offer Letter states the compensation, position and terms of employment. All sales personnel work on commission only. They receive a draw against their commissions on a regular basis, but no sales personnel receive a straight salary, or a salary/commission combination.

Brocco affirms that he never met or interviewed Posner, and never issued, or directed Gooch to issue, an Offer Letter to Posner. If Posner had been approved for employment by Advanced, he would have received an Offer Letter. In addition, when a potential employee accepts an offer of employment, Brocco directs that he be placed on Advanced's payroll, which was never done with respect to Posner.

Brocco avers that he is aware that Janjic provided a visitor's pass onto GFI's offices, where Advanced occupies two desks, as a courtesy to Posner while he was seeking employment. To Mr. Brocco's knowledge, however, Posner never performed work for Advanced during that time. Posner refused Janjic's offer of a sales position because he did not want to work on a commission basis. Upon that refusal, Posner used the visitor's pass to pursue other employment.

Brocco describes as "ridiculous" Posner's allegation that he relocated as a result of an offer by Advanced (Brocco Aff. at ¶ 7), and affirms that it is Advanced's practice to pay relocation costs for a new hiree where relocation is necessary, and those payments are always reduced to writing. Brocco affirms that Advanced made no record regarding relocation payments to Posner.

In opposition, Posner affirms that in or about January of 2011, he entered into an oral employment agreement with Advanced as a sales representative, which employment was to commence on January 24, 2011 and would be followed by the execution of an employment contract. In support, Posner provides copies of several emails (Exs. A-1 through A-7 to Posner Aff. in Opp.). Those emails read as follows:

Email dated January 10, 2011 from Posner to Janjic:

Steve, I would once again like to thank you for this terrific opportunity on your desk. I look forward to quickly becoming a valued member of the team. As requested for the final paperwork, below is my contact information.

[Contact address and telephone numbers]

Looking forward to the January 24th start date. Thank you again.

Email dated January 21, 2011 from Janjic to Posner:

Subject line: Re: Jon Posner information as needed

Hey Steve,

I just left you a Voicemail for Mondays

Email dated January 22, 2011 from Janjic to Posner:

Subject line: Re: Jon Posner information as needed

John please give me a call today. We are probably looking at FEB 1 start the desk is still not set up.

Email dated January 24, 2011 from Posner to Janjic:

Subject line: Re Jon Posner information as needed

Hey Steve,

February 1 sounds good. Would you like me to come in this week to complete all papers and meet with HR so we can hit the ground running Feb 1? If you need any help in setting up the desk let me know. I am happy to come in and give a hand.

Email dated February 8, 2011 from Janjic to Posner:

Subject line: RE: GFI

Jon,

I am in NC this week putting together a game plan to move forward. I will reach out to you by Friday so we can meet Mon. or Tuesday. Thanks.

Email dated February 28, 2011 from Janjic to Posner:

Subject line: Employment docs

(Contains two attachments, one of which reads "New Emplo...pdf" and the other of which reads "Advanced...pdf")

Please fill these out for me. Thanks.

Email dated March 1, 2011 from Posner to Janjic:

(Contains 1 attachment which reads "Jon Posne...pdf")

Hey Steve,

I have attached the signed employment documents as well as a copy of a voided check. Let me know if you want me to come in Wednesday; if not I will see you Monday morning (28th Floor?). Let me know if there is anything else I need to bring.

Thank you.

Jon Posner

Email dated March 1, 2011 from Janjic to Posner:

Subject line: RE: Employment Docs

Jon,

Lets [sic] meet here on Friday I have 2 others starting as well say 2pm?

Email dated March 24, 2011 from Bert Reynolds, Director of Marketing at Advanced, to Posner:

Hey Jon!

Your e-mail has been set up. See the information below:

[Sets forth new username, password, email address, and the procedure for logging into his e-mail]

Posner affirms that he began work as an employee of Advanced on March 3, 2011 at Advanced's office in New York City and that his email was set up on or about March 24, 2011. Janjic repeatedly advised Posner that he would be receiving an official letter of employment soon, but said that Advanced needed Posner to start working before that was done, so Posner began his employment without the letter of employment. Posner avers that he held all necessary licenses and registrations to perform his duties as a sales representative at Advanced's New York City Office, and affirms that he "gave my best effort and loyalty to [Advanced]" (Posner Aff. in Opp. at ¶ 9).

Posner affirms that his annual salary was supposed to be \$60,000 plus expected commissions of \$65,000 to \$115,000, but his annual salary was then reduced to \$50,000 two days after he began working for Advanced. Prior to his "voluntary termination," Advanced had

not paid him the agreed-on salary and wages (Posner Aff. in Opp. at ¶ 11). Accordingly, on April 12, 2011, Posner pursued other employment. Posner affirms that Advanced was to pay him a salary of \$50,000 until the end of 2011, plus any commissions earned during that time. He affirms, further, that he was to be paid \$21,370.00 for compensation, consisting of wages plus anticipated commission, from March 3, 2011 to April 12, 2011.

C. The Parties' Positions

Defendant submits that 1) the breach of employment contract claim is not viable in light of the fact that no employment contract was formed between the parties; the affidavits of Janjic and Brocco establish that Defendant never extended an offer of employment to Plaintiff, particularly in light of the fact that Defendant does not employ any salaried sales personnel and Plaintiff refused a commission-only offer of employment; 2) Plaintiff has failed to state a cause of action for a New York Labor Law violation because he has not established that he is an employee entitled to the statute's protection; 3) Plaintiff has failed to state a cause of action based on *quantum meruit*, in part because he has failed to allege that he performed services for Defendant; and 4) the Court should sanction Plaintiff for commencing this allegedly frivolous action.

In opposition, Plaintiff submits, *inter alia*, that 1) Plaintiff has adequately pled his breach of contract claim by alleging that there was a contract for employment, he performed pursuant to the agreement, and Defendant failed to pay him the commissions and salary owed to him pursuant to the parties' agreement; 2) Plaintiff has adequately pled an offer of employment by Defendant, and Plaintiff's acceptance of that offer, in light of evidence including a) Advance's establishment of an email account for Plaintiff, and b) Plaintiff's providing to Advance certain documentation at Advance's request; 3) with respect to the Labor Law claim, Plaintiff has adequately pled the existence of an employer-employee relationship in light of the allegations, *inter alia*, that, a) Plaintiff began working for Advanced, with its permission, following lengthy communications between the parties; b) Advanced determined the start date and work schedule of Plaintiff; and c) Advanced set up an email account for Plaintiff under its email accounts; 4) Plaintiff has pled a viable *quantum meruit* claim by virtue of his allegations that a) Plaintiff performed services for Defendant during a designated time period; b) Defendant accepted Plaintiff's services; c) Plaintiff expected to be compensated for his services; and d) Plaintiff has provided the reasonable value of his services; and 5) there is no basis for the imposition of sanctions.

RULING OF THE COURT

A. Standards of Dismissal

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Breach of Contract

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia, supra*.

The existence of a binding contract is not dependent on the subjective intent of the parties. *Minelli Construction Co. v. Volmar Construction, Ind.*, 82 A.D.3d 720, 721 (2d Dept. 2011), quoting *Brown Bros. Elec. Contrs. v. Beam Constr. Corp.*, 41 N.Y.2d 397, 399 (1977). In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look, rather, to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds. *Id.*, quoting *Brown Bros., supra*, at 399. Generally, courts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds. *Id.*, quoting *Matter of Express Indus. & Term. Corp. v. New York State Dept. of Transp.*, 93 N.Y.2d 584, 589 (1999), *rearg. den.*, 93 N.Y.2d 1042 (1999). The manifestation or expression of assent necessary to form a contract may be by word, act, or conduct which evinces the intention of the parties to contract. *Id.*, quoting *Maffea v. Ippolito*, 247 A.D.2d 366, 367 (2d Dept. 1998).

C. Unjust Enrichment

The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in good conscience should be paid to the plaintiff. *Corsello v. Verizon New York, Inc.*, 2012 N.Y. LEXIS 583, * 18 (2012), citing *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011), quoting *Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y.2d 415, 421 (1972), *reh. den.*, 31 N.Y.2d 709 (1972), *cert. den.*, 414 U.S. 829 (1973). Unjust enrichment is not a catchall cause of action to be used when others fail, and is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. *Id.* at * 18-19.

D. Quantum Meruit

To establish a *quantum meruit* claim, plaintiff must show the performance of services in good faith, acceptance of the services by the person to whom they are rendered, an expectation of compensation therefor, and the reasonable value of the services. *Georgia Malone & Company, Inc. v. Rieder*, 86 A.D.3d 406, 410 (1st Dept. 2011), quoting *Freedman v. Pearlman*, 271 A.D.2d 301, 304 (1st Dept. 2000).

E. New York Labor Law Section 191-c

New York Labor Law § 191-c, titled “Payment of sales commission,” provides as follows:

1. When a contract between a principal and a sales representative is terminated, all earned commissions shall be paid within five business days after termination or within five business days after they become due in the case of earned commissions not due when the contract is terminated.
2. The earned commission shall be paid to the sales representative at the usual place of payment unless the sales representative requests that the commission be sent to him or her through the mails. If the commissions are sent to the sales representative by mail, the earned commissions shall be deemed to have been paid as of the date of their postmark for purposes of this section.
3. A principal who fails to comply with the provisions of this section concerning timely payment of all earned commissions shall be liable to the sales representative in a civil action for double damages. The prevailing party in any such action shall be entitled to an award of reasonable attorney's fees, court costs, and disbursements.

In *Clifford v. Remco Maintenance, LLC*, 2012 N.Y. App. Div. LEXIS 3569 (2d Dept. 2012), the Second Department affirmed the trial court's order granting defendant's motion to dismiss the cause of action alleging a violation of Labor Law § 191-(c)(1) as asserted against it.

Id. at * 4. The Second Department held that Labor Law § 191-c(1) was inapplicable to the action before it because oral agreements are not covered by that statute. *Id.*, citing *DeLuca v. Access IT Group, Inc.*, 695 F. Supp. 2d 54, 61 (S.D.N.Y. 2010) and *Gould Paper Corp. v. Madisen Corp.*, 614 F. Supp. 2d 485, 491 (S.D.N.Y. 2009).

F. Application of these Principles to the Instant Action

The Court grants Defendant's motion to dismiss the first cause of action in the Complaint based on the Court's conclusion that, because Plaintiff's action is based on an allegedly oral agreement between the parties, Plaintiff's claim under Labor Law § 191-c is not viable.

The Court denies Defendant's motion to dismiss the second, third and fourth causes of action in the Complaint based on the Court's conclusion that 1) Plaintiff has adequately alleged the existence of a contract between the parties, particularly in light of the emails between Posner and Janjic which make reference, *inter alia*, to Posner's starting date, email account and employment paperwork; and 2) Plaintiff has adequately alleged a cause of action for unjust enrichment based on the allegation that Defendant obtained a benefit, in the form of services provided by Plaintiff, which in good conscience should be paid to the Plaintiff; and 2) Plaintiff has alleged a viable cause of action for *quantum meruit* by alleging that he performed services in good faith, Defendant accepted those services and Plaintiff expected compensation for those services, for which Plaintiff has provided the reasonable value.

Defendant's application for sanctions is denied.

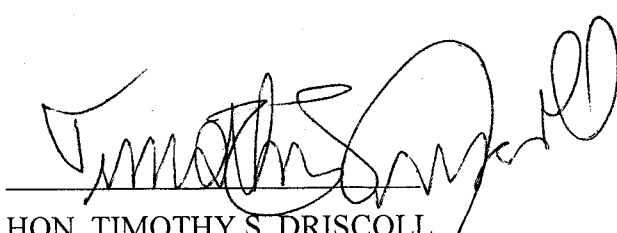
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on June 28, 2012 at 9:30 a.m.

DATED: Mineola, NY

May 30, 2012


HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
JUN 07 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE