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

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

SILVANA L. PERELLI,

Plaintiff,

- v -

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant.

Index No.: 101928/09

Motion Date: 06/15/12

Motion Seq. No.: 01

Motion Cal. No.: _____

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1 - 3
Answering Affidavits - Exhibits	4
Replying Affidavits - Exhibits	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, the court shall deny defendant's motion for summary judgment based upon binding appellate precedent cited herein.

Plaintiff is a former employee of defendant who began working as a Group Benefit Sales Consultant on October 2, 2006. By letter dated March 18, 2008, plaintiff advised defendant that she would be voluntarily terminating her employment with defendant on March 28, 2008. On March 20, 2008, defendant terminated plaintiff's employment.

Plaintiff's complaint sets forth four causes of action. The first three causes of action-- for breach of contract, breach of

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

implied duty of good faith and fair dealing, and violation of Labor Law 198-- are based upon defendant's failure to pay additional incentive compensation (the "Commission") plaintiff alleges is due to her under defendant's Large Case Benefit Sales Consultant Incentive Compensation Plan (the "Plan"). Plaintiff's fourth cause of action alleges disparate treatment in the payment of plaintiff's commission upon termination.

The Plan in Section II, "Incentive Compensation", states "Your Incentive Compensation under the Plan will consist of the following components" and then sets out the formulas for the various types of incentive compensation, including "Commissions for New Business" and "Commissions for New Business Old Customer". Section III.D.3, "Compensation Payment Timing - Incentive Compensation Payments - Annual Payments" states in relevant part that "Your total compensation consists of base salary plus incentive compensation. . . Incentive compensation will be paid on three schedules outlined below: . . . Annual Payments - Case Count Bonus, Service and Renewal Bonus, and other miscellaneous finders fees will be paid on an annual basis within 90 days of the close of the Plan year (where administratively possible)." Section IV of the Plan states "In order to be eligible for incentive/additional compensation you must be employed by Liberty Mutual on the date when such incentive/

additional compensation is paid and any incentive/ additional compensation is not considered earned until the payment date."

Defendants argue that plaintiff's case should be dismissed because it is uncontroverted that the Commission payment date was March 28, 2008, and plaintiff's employment was terminated on March 20, 2008, and therefore plaintiff, pursuant to the terms of the Plan was not entitled to any payment thereunder.

Plaintiff counters, and the court agrees, that binding precedent requires denial of defendant's motion as to causes of action concerning the Commission. In the case of Arbeeny v Kennedy Executive Search, Inc. (71 AD3d 177, 178 [1st Dept 2010]) plaintiff was employed as a commissioned consultant. As stated by the Court, plaintiff's employment agreement in Arbeeny provided that "plaintiff was eligible to earn commission compensation in respect of placements arranged by Employee" but that "no commission shall be due in the event plaintiff is not in the employ of KES at the date the commission payment would otherwise be made." Id. at 178-179 (internal quotation marks omitted). Plaintiff was fired in March 2007 and sued for commissions which were due to be paid the following month. The Court held

> Plaintiff, however, has sufficiently stated a breach of contract claim for unpaid earned commissions that he "arranged" prior to his termination. Although generally an at-will employee is not entitled to post-termination commissions, the parties are certainly free to provide otherwise in a written agreement. For example, in Yudell

> v Israel & Assoc. (248 AD2d 189 [1st Dept 1998]), the employee earned commissions based on a percentage of all fees actually received that were "originated by" her. She brought an action to recover commissions for her role in securing two placements that were completed post-termination. The employer contended that as a matter of law, the employee could not recover commissions for placements that were finalized after she left. In denying summary judgment, this Court held that the words "placements . . . originated by you" did not alone specify when or how the placement must be completed in order to entitle the employee to a commission (id. at 189). Had the employer meant to foreclose the possibility of the employee earning a post-termination commission on a placement unquestionably originated by her, it could have said so explicitly, such as "placements . . . originated and completed by you" or "placements . . . originated by you which occur during your employment here" (id. at 190).

Arbeeny, 71 AD3d at 180-181. The Court concluded that "Once the commission is earned, it cannot be forfeited. There is a long-standing policy against the forfeiture of earned wages, and this applies to earned, uncollected commissions as well." Id. at 177.

The Arbeeny Court expressly rejected the argument made by defendant here that the language in the Plan precluded any entitlement to commissions as "earned." The Court stated that language in an employment contract that states that commissions are not earned unless an employee is employed on a payment date in the future "is thus enforceable only to the extent it seeks to foreclose the right to prospective commissions for the indefinite future." Id. at 183. The Court reasoned that "[e]nforcing it in the manner argued by defendants would deprive plaintiff of earned

commissions, and thus would be inconsistent with . . . the agreement as well as the public policy against forfeiting commissions." Id. The Court concluded that

> Aside from the wording of the contract, inasmuch as an employee is entitled to the fruits of his or her labor, the at-will doctrine should not preclude plaintiff from raising a breach of contract claim for earned commissions. The implied covenant of good faith does not give rise to a contract action for the wrongful discharge of an at-will employee. While an at-will employee cannot recover for termination per se, an employee's contract for payment of commissions creates rights distinct from the employment relation, and . . . obligations derived from the covenant of good faith implicit in the commission contract may survive the termination of the employment relationship
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> . . . .
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> Although an at-will employee such as plaintiff would not be able to sue for wrongful termination of the contract, he should nonetheless be able to state a claim that the employer's termination action was specifically designed to cut off commissions that were coming due to the employee. A contract cannot be read to enable the defendant to terminate an employee for the purpose of avoiding the payment of commissions which are otherwise owed. Such an interpretation would make the performance by one party the cause of the other party's non-performance"

Arbeeny, 71 AD3d at 183-184.

In this case, the plain wording of Section II of the Plan sets forth that the incentive compensation calculation and entitlement is based upon plaintiff's work on specific placements during the period before the commissions are paid. Thus, as in Arbeeny, absent express language in the Plan that a termination of employment acts as a waiver of compensation for work previously performed, the Plan must be interpreted as prohibiting

the prospective commissions rather than retroactive commissions. See Yudell v Israel & Assoc., 248 AD2d 189 (1st Dept 1998).

The cases cited by the defendant are inapposite. Truelove v Northeast Capital & Advisory (95 NY2d 220 [2000]) and Hall v United Parcel Service of America (76 NY2d 27 [1990]) concerned cases where employees sued for bonuses which were based not upon their individual work or contribution to the company but upon corporate factors such as profit performance. The Court of Appeals held in those cases that the bonuses, which were never said to be part of the plaintiffs' compensation packages, were wholly within the discretion of the corporations. These payments were therefore not in the nature of commissions which are explicitly tied to the performance and efforts of the individual.

The court shall grant defendant's motion to the extent of dismissing plaintiff's fourth cause of action for disparate treatment as there is insufficient evidence in the record to set forth a prima facie case and the plaintiff does not argue otherwise.

Finally, the court shall deny summary judgment as to defendant's counterclaims for breach of contract and breach of the duty of loyalty. The only evidence argued by the defendant in favor of this claim on this motion is that plaintiff failed to sell any product during the three months prior to her resignation and that at some point prior to her resignation plaintiff placed

the name and contact information of her future employer on the defendant's auto-reply email system. Such evidence is insufficient to establish defendant's entitlement to judgment as a matter of law on the counterclaims where there is no evidence adduced that plaintiff solicited defendant's clients or used defendant's time and facilities to start a competing business. See Island Sports Physical Therapy v Burns, 84 AD3d 878, 879 (2d Dept 2011); 30 FPS Productions, Inc. v Livolsi, 68 AD3d 1101, 1102 (1st Dept 2009).

Accordingly, it is

ORDERED that defendant's motion for summary judgment is GRANTED only as to plaintiff's fourth cause of action for disparate treatment and plaintiff's fourth cause of action is hereby DISMISSED; and it is further

ORDERED that defendant's motion is otherwise DENIED; and it is further

ORDERED that the parties are directed to attend a pre-trial conference on April 2, 2013, at 2:30 PM at the Courthouse, Room 103, 71 Thomas Street, New York, NY 10013, to set a date for the trial of this action.

This is the decision and order of the court.

FILED

Dated: March 4, 2013

ENTER:

MAR 07 2013

NEW YORK
COUNTY CLERK'S OFFICE

DEBRA A. JAMES J.S.C.