

**O'Neill v Swiss Post Solutions, Inc.**

2013 NY Slip Op 31406(U)

July 1, 2013

Sup Ct, NY County

Docket Number: 154976/12

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS Part 8

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D'Arcy O'Neill,  
Plaintiffs,

-against-

Swiss Post Solutions, Inc.,  
Defendants.

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**DECISION AND ORDER**  
Index Number: 154976/12  
Motion Seq. No.: 001

**KENNEY, JOAN M., J.**

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

| <b>Papers</b>                                | <b>Numbered</b> |
|--|-----------------|
| Notice of Motion, Affirmations, and Exhibits | 1-5             |
| Opposition Affirmation and Exhibits          | 6-7             |
| Reply Memo of Law                            | 8               |

In this action, defendant, Swiss Post Solutions, Inc. (Swiss), moves for an Order, pursuant to CPLR 3211, dismissing certain causes of action against them.

**Factual Background**

On January 4, 2010, plaintiff was hired by Swiss as a Sales Executive, with a salary of \$90,000.00 plus commissions. Plaintiff alleges that she was told by one of Swiss' managers, Dave Delventhal, that based on the accounts assigned to her, she could expect to make approximately \$150,000.00 per year. On or about February 10, 2010, plaintiff and Swiss entered into a written agreement concerning the commissions. This commission agreement was updated and renewed in January of 2011.

Plaintiff alleges that she identified a new business opportunity to bid on the Jones Lang Lassalle/Diageo account (Jones) in early 2010. On or about February 14, 2011, the Jones account was installed. The contract value of the Jones account was in excess of \$3,000,000.00. In mid

2011, Delventhal advised plaintiff that the net profits concerning the Jones account was over 10%. Plaintiff asserts that it is industry standard that sales executives and associates receive their commissions based on total contract value.

Plaintiff alleges that as per the 2011 commissions plan she is entitled to receive in excess of \$30,000.00 commission from the Jones account. Plaintiff alleges that she was only paid \$2,800.00 on commissions from the Jones account. Plaintiff claims she was not and still is not aware of any changes Swiss made to the January 2011 commission plan.

Plaintiff also claims that she referred one of her previous clients, Howard University, to another Swiss employee, Jamie Lawless, because Howard was located in Washington, D.C., and outside of plaintiff's territory. The Howard account was allegedly worth \$4,680,000.00. Plaintiff alleges she was told by Swiss that she qualified for 50% commission from the Howard deal, and to this date has only received \$234.00 as her commission.

Plaintiff also claims that she referred another one of her clients, Care First, to Swiss. That contract was allegedly worth \$3,000,000.00, and she received no commissions.

Plaintiff alleges she did a significant amount of work on a number of other accounts, and that she has failed to receive any commissions on them. Plaintiff claims she inquired about her outstanding commissions with Swiss VP Deventhal on multiple occasions. Allegedly Delventhal told plaintiff that he would look into it, and despite numerous requests, Swiss failed to produce to plaintiff any financial documents concerning her outstanding commissions.

Plaintiff was terminated from her position on June 20, 2011.

Plaintiff claims that defendant discriminated against her because of her gender, and did not favor female employees. Plaintiff asserts that because she is a woman, she was given less

favorable accounts than her male counterparts. In particular, plaintiff contends that Swiss paid different wages to employees of the opposite sex, and that plaintiff was paid less than male employees who had qualifications, skills, duties, and responsibilities that were identical to her own. Plaintiff further alleges that one of her male counterparts advised her that he was guaranteed \$150,000.00 per year in salary.

Plaintiff contends that the reason she was not paid the commissions owed to her is because she is a woman, and that Swiss asked plaintiff to refer her customers to male sales executives so that they could make more money than plaintiff. Plaintiff claims that her performance was above average during the course of employment with Swiss, and that during this employment she was regularly exposed to a discriminatory and hostile work environment.

Plaintiff now brings 7 causes of action, asserting: 1.) Breach of contract; 2.) Anticipatory repudiation; 3.) Article 6 NY Labor Law §§ 190 and 191; 4.) Discrimination under NYC Administrative Code § 8-107(1); 5.) Discrimination under NYC Administrative Code § 8-107(6); 6.) Discrimination under the NYC Administrative Code § 8-107(19); and 7.) Discrimination under the NYC Administrative Code § 8-107(13).

Defendant seeks dismissal on causes of action 2, 4, 5, 6, and 7.

### **Arguments**

Defendant asserts that plaintiff's gender discrimination claims fail as a matter of law; and the anticipatory repudiation claim is duplicative, and should be dismissed.

Plaintiff argues that her discrimination claims are sufficiently pled to withstand CPLR 3211 scrutiny, and that the anticipatory repudiation claim is an alternative remedy should her breach of contract claim fail.

### Discussion

When deciding whether or not a complaint should be dismissed pursuant to CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law (see, *World Wide Adjustment Bureau et al., v Edward S. Gordon Company, Inc., et al.*, 111 AD2d 98 [1st Dept. 1985]). In assessing the sufficiency of the complaint, this court must also consider the allegations made in both the complaint and the accompanying affidavit, submitted in opposition to the motion, as true and resolve all inferences which reasonably flow therefrom, in favor of the plaintiff (*Joel v Weber*, 166 AD2d 130 [1st Dept. 1991]). A motion to dismiss is made pursuant to CPLR 3211(a)(7), which allows such a motion on the ground that the pleading fails to state a cause of action. The sufficiency of a pleading to state a cause of action generally depends upon whether or not there is substantial compliance with CPLR 3013, which requires that statements in a pleading be sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved and the material elements of each cause of action. Further, every pleading question should be approached in the light of CPLR 3026 requiring that pleadings shall be liberally construed and that defects shall be ignored if a substantial right of a party is not prejudiced. Thus, the burden is placed upon one who attacks a pleading for deficiencies in its allegations to show that he is prejudiced.

"A motion to dismiss for failure to state a claim assumes truth of complaint's material allegations and whatever can be reasonably inferred therefrom. A motion to dismiss for failure to state a claim should be denied if, from pleading's four corners, factual allegations are discerned

which taken together manifest any cause of action cognizable at law." (*McGill v Parker*, 179 AD2d 98 [1st Dept. 1992]).

"To prevail on motion to dismiss based on documentary evidence, documents relied upon must definitively dispose of plaintiff's claim." (*Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248 [1st Dept. 1995]). A "proponent of motion to dismiss on ground of a defense founded upon documentary evidence is required to provide such evidence conclusively establishing a defense to the asserted claims as a matter of law." (*IMO Industries Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10 [1st Dept. 1999]).

#### 2<sup>nd</sup> Cause of Action—Anticipatory Repudiation

The doctrine of anticipatory breach is expressed by one authority as follows: "Where there has been an anticipatory breach of a contract by one party, the other party may treat the entire contract as broken and may sue immediately for the breach." (*Rachmani Corp. v 9 East 96<sup>th</sup> St. Apartment Corp.*, 211 AD2d 262 [1<sup>st</sup> Dept. 1995]). "A party repudiates contract where that party, before time of performance arrives, puts it out of his power to keep his contract, i.e., a party repudiates contract when it voluntarily disables itself from complying with its contractual obligations." (*Computer Possibilities Unlimited, Inc. v Mobil Oil Corp.*, 301 AD2d 70 [1<sup>st</sup> Dept. 2002]). An "anticipatory breach of contract is one that occurs before performance by breaching party is due, *and cannot be committed by party already in material breach of executory contract.*" (*Kaplan v Madison Park Group Owners, LLC.*, 94 AD3d 616 [1<sup>st</sup> Dept. 2012]; emphasis added).

Here, plaintiff has already been terminated from her employment, and as such, the contract for her commissions has ended, and performance on defendant's end is already due.

Because of this, it is impossible for defendant to anticipatorily breach the contract since the contract has already been terminated. Therefore, plaintiff's 2<sup>nd</sup> cause of action for anticipatory repudiation is dismissed.

### Discrimination Claims

New York City Administrative Code § 8-107(6) defines the unlawful discrimination by aiding and abetting, stating, "It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so." "In general, an individual who actually participates in the conduct of an employer that gives rise to a discrimination claim under the New York State Human Rights Law (NYSHRL) or the New York City Human Rights Law (NYCHRL) may be liable as an aider and abettor..." under 8-107(6). (*Miloscia v B.R. Guest Holdings, LLC.*, 33 Misc.3d 466 [Sup. Ct. NY County 2011; aff'd 1<sup>st</sup> Dept. 2012]). Here, plaintiff has failed to name any individual defendant(s), and as such, has failed to adequately name an individual who "actually participate[d] in the conduct of" Swiss. Plaintiff's 5<sup>th</sup> cause of action for aiding and abetting is dismissed.

NYC Admin. Code § 8-107(1)(a) states: "It shall be an unlawful discriminatory practice for an employer..., because of the actual or perceived...gender...to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment."

Here, defendant has submitted a redacted copy of a commission report, demonstrating that there were 7 sales executives working for Swiss, and 5 of them were women. (Moving

papers, Exhibit C)<sup>1</sup>. Facially, the demographic makeup of the office is against an inference of discrimination. Additionally, a review of the commission numbers on the report shows that plaintiff's sales were the worst performing of any of the sales executives. (*Id.*). Together, the fact that 5 of the 7 sales executives at Swiss were female, and that plaintiff had the worst sales numbers of the sales executives, favors the conclusion that plaintiff was terminated for performance reasons rather than because she was a woman. Plaintiff's 4<sup>th</sup> cause of action is therefore dismissed, having failed to set forth sufficient facts to support a claim of gender discrimination.

NYC Admin. Code § 8-107(19) states, "It shall be an unlawful discriminatory practice for any person to coerce, intimidate, threaten or interfere with, or attempt to coerce, intimidate, threaten or interfere with, any person in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected pursuant to this section." Here, plaintiff's complaint does not plead any facts alleging any coercion, intimidation, or threats by defendant. Plaintiff's 6<sup>th</sup> cause of action is dismissed.

NYC Admin. Code § 8-107(13) outlines employer liability for discriminatory conduct by an employee, stating that "an employer shall be liable for unlawful discriminatory practice based upon the conduct of an employee...which is in violation of any provision of this section." Here again, plaintiff did not allege in her complaint that any employees committed any discriminatory acts. In fact, plaintiff only lists specific actions against her committed by defendant itself (given less favorable accounts, paid differently than men, asked to refer customers to males, etc.).

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<sup>1</sup>This Court directed defendant to submit an un-redacted copy of the commission report for in camera review and indeed, from this list provided, 5 of the 7 sales executives were women.

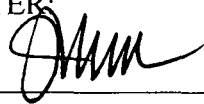
Plaintiff's 7<sup>th</sup> cause of action is therefore dismissed. Accordingly, it is hereby

ORDERED, that defendant's motion is granted, and plaintiff's 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> causes of action are dismissed; and it is further

ORDERED, that defendant is directed to file an answer to the remaining causes of action within 21 days from the date of entry of this Order; and it is further

ORDERED, that the parties are directed to appear for a preliminary conference on October 10, 2013, at 9:30 am, at 71 Thomas St., NYC 10013, Room 304.

Dated: 7/1/13

ENTER:  
  
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Joan M. Kenney, J.S.C.