

**Swift v Broadway Neon Sign Corp.**

2013 NY Slip Op 31618(U)

July 17, 2013

Sup Ct, Suffolk County

Docket Number: 0015021-2010

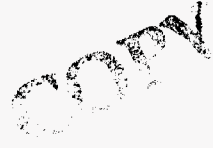
Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION - PART 46 SUFFOLK COUNTY**



**Present: HON. EMILY PINES**  
J. S. C.

Original Motion Date: 04-15-2013  
Motion Return Date: 04-30-2013  
Motion Sequence Number: 002 MD

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**THOMAS SWIFT,**

**Plaintiff,**

**- against -**

**BROADWAY NEON SIGN CORP.,**

**Defendant.**

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On February 17, 2006, the plaintiff, Thomas T. Swift (“Swift” or “Plaintiff”) and Defendant, Broadway Neon Sign Corp. (“Broadway” or “Defendant”) entered into a written Employment Agreement which provides, in relevant part:

Article 1. Employment. The Company hereby employs Swift as a Sales Executive and Swift hereby accepts employment upon the terms and conditions herein and the terms of the letter dated January 13, 2006 addressed to Swift from Dennis J. Hickey of the Company, incorporated herein by reference and in [sic] the terms of which are included in this Agreement . . . This Agreement is not intended to be an Employment Agreement for any duration, and the employment relationship remains “at

will,” terminable at any time by any party for any reason or no reason at all.

## Article 2. Compensation

Compensation for the services rendered by Swift under this Agreement is as follows:

(a) Compensation is based solely on commission. The commission percentage is based upon the profitability of the “Gross Sale” amount of the Company as defined. Commissions will be paid based on the commission schedules attached hereto and incorporated herein by reference. Commissions will be paid on the 2nd week of each month for all projects that do not require additional work, that are closed and are paid in full prior to the end of the prior month. The Company, in its sole discretion may make exceptions to the payment of commission schedules and advance monies to Swift based upon deposits received on large and long lead projects. Upon termination other than for cause, as defined, commission will be based on the work completed by the Company on the date of termination. Commission will be paid upon full payment by the customer for the project.

(b) Company agrees to pay Swift a taxable salary/draw in the gross amount of \$52,000.00 per year payable on a weekly pro-rata basis. With the exception of the first three (3) months of Swifts employment (or \$13,000.00) all salary/draw will be reimbursed by Swift to the Company. Additional commission will be paid based on the commission schedules, if any, attached hereto and incorporated herein by reference.

\* \* \*

## Project Division Commission Schedule

\* \* \*

The Sales Executive will be compensated on profitability sold from each estimate sheet.

According to the Defendant, on March 17, 2008, Plaintiff and Defendant signed a Memorandum of Understanding regarding the payment of commissions in connection with a project at Citi Field (“Citi Field Agreement”) which states, in relevant part:

Broadway National and Tom Swift agree on the following in connection with the Citi Field Ballpark Signage.

1. The parties agree that Tom Swift and Broadway will split equally the Employee Commission Rate as per the following schedule:

\* \* \*

2. Tom Swift shall be paid his commission upon the project’s completion, client acceptance and full payment received by customer.

3. As with other projects, the “company mark up” shall be computed by actual costs, which are recognized at the conclusion of the project.

Although the Plaintiff’s First Amended Complaint dated March 16, 2011, alleges, among other things, that Plaintiff signed the Citi Field Agreement and that it governed the job at Citi Field, he now denies that he signed it and that he agreed to its terms. The Citi Field Agreement reduced Swift’s commissions by 50%.

Plaintiff commenced this action in 2010 alleging, among other things, that Defendant failed to pay him commissions earned in the course of his employment from 2006-2009 in violation of the Employment Agreement. The First Amended Complaint asserts eight causes of action. The first cause of action alleges that Defendant’s willful failure to pay Plaintiff earned commissions violates Article 6 of the New York Labor Law and that pursuant to §§ 198(1) and 198(1-A) of the Labor

Law, he is entitled to statutory costs, attorneys' fees, and liquidated damages in the amount of the wages found to be due. The second cause of action alleges that Defendant converted Plaintiff's earned wages to which he was entitled to immediate possession. The third cause of action, plead in the alternative, is for unjust enrichment. The fourth cause of action is for breach of the Employment Agreement. The fifth through eighth causes of action mirror the first through fourth causes of action but are based on the Citi Field Agreement.

The Defendant interposed counterclaims for breach of the Employment Agreement, breach of fiduciary duty, breach of the duty of loyalty, unfair competition, unjust enrichment, tortious interference with prospective economic advantage, and tortious interference with contractual relations.

Defendant now moves (Mot. Seq. 002) for summary judgment dismissing the complaint. Defendant does not seek summary judgment on its counterclaims.

In support of its motion, Defendant submits, among other things, an affidavit from William Paparella, the owner of Broadway. Paparella states, among other things, that pursuant to the terms of the Employment Agreement, Swift only earned a commission on a job he sold upon completion of the job and payment by the customer. If the job was incomplete or unpaid at the time Swift's employment with Broadway was terminated, Swift did not earn a commission. Paparella provides a list of jobs that were incomplete and/or unpaid at the time of Swift's termination, and argues that because the jobs were incomplete and/or unpaid Swift is not entitled to any commissions on those jobs. According to Defendant, at the time Swift's employment was terminated, he had drawn more in salary than he had earned in commissions. Paparella testified at a deposition that Swift was terminated on May 21, 2009, because, in part, he had steered a job directly to one of Defendant's subcontractors instead of through Defendant.

Defendant argues that summary judgment dismissing Plaintiff's complaint should be granted because the clear and unambiguous language of the Employment Agreement only entitles Swift to a commission on a project when the project is

complete and paid in full. Because the projects on which Swift now seeks commissions were not complete and paid at the time Swift was terminated, he is not entitled to commissions on those jobs. Additionally, Defendant contends that because Swift was terminated, pursuant to the terms of the Employment Agreement commissions were to be based on work completed by Defendant on the date of termination. Defendant argues that as of May 21, 2009, the date of Swift's termination, he had only earned a total of \$89,791 in commissions pursuant to the Employment Agreement during the approximate three-year period of his employment, and that he had been paid over \$181,000 in salary draw during that time period. Therefore, Defendant claims that Swift is not entitled to any further commissions. Defendant also argues that Plaintiff's claims for unjust enrichment and conversion should be dismissed as duplicative of Plaintiff's breach of contract claims.

In opposition to Defendant's motion, Plaintiff relies on, among other things, his own deposition testimony. Plaintiff testified, among other things, that he did not agree to the terms of the Citi Field Agreement and he did not sign it. According to Plaintiff, it was not until after the Citi Field deal was closed that William Paparella threatened to cut Plaintiff's commission on the project. Thereafter, Plaintiff engaged in an exchange of proposals with Defendant regarding the payment of commissions on the Citi Field project. However, Plaintiff claims that he and Defendant never came to an agreement. Plaintiff argues, among other things, that the provisions of the Employment Agreement regarding payment of commissions to Plaintiff are contradictory and, therefore, ambiguous. On the one hand, the Employment Agreement provides that commissions are to be calculated based upon the profitability from the estimate sheet. On the other hand, the Employment Agreement provides that Plaintiff shall not receive payment of commissions until the projects are completed and fully paid. Thus, Plaintiff contends that Defendant's motion for summary judgment should be denied because the Employment Agreement is ambiguous as to when commissions are earned. Additionally, Plaintiff confirms that he does not seek commission for an indefinite period of time after his termination. Rather, he seeks commissions that he claims were earned prior to his termination but only became payable after his termination because that it when the jobs were completed and paid.

### Discussion

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2<sup>nd</sup> Dept. 1996]). “[I]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant” (*Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2d Dept 1994]).

“A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties. To determine whether a writing is unambiguous, language should not be read in isolation because the contract must be considered as a whole. Ambiguity is determined within the four corners of the document; it cannot be created by extrinsic evidence that the parties intended a meaning different than that expressed in the agreement and, therefore, extrinsic evidence may be considered only if the agreement is ambiguous. Ambiguity is present if language was written so imperfectly that it is susceptible to more than one reasonable interpretation’ (*Brad H. v City of New York*, 17 NY3d 180, 185-186 [citations and internal quotation marks omitted]).”

(*Critelli v Commonwealth Land Title Ins. Co.*, 98 AD3d 556 [2d Dept. 2012]).

“Whether a commission is earned is dependent upon the terms of the agreement

providing for such commission” (*Gennes v. Yellow Book of New York, Inc.*, 23 AD3d 520 521 [2d Dept 2005]).


Here, the Defendant has not made a prima facie showing of entitlement to a judgment as a matter of law dismissing the Plaintiff’s breach of contract claims. The terms of the Employment Agreement and the Citi Field Agreement are not clear and unambiguous and, therefore, do not conclusively refute the Plaintiff’s breach of contract claims. On the one hand, Defendant argues that pursuant to the Employment Agreement, Plaintiff is not entitled to any commissions because the projects for which Plaintiff seeks commissions were not completed and paid at the time his employment was terminated. On the other hand, Defendant explicitly acknowledges that the Employment Agreement provides that if Plaintiff was terminated other than for cause, he was to be paid commissions “based on the work completed by [Defendant] on the date of termination”. Thus, because there are conflicting terms in the Employment Agreement, the Defendant has not demonstrated, as a matter of law, that Plaintiff is not entitled to be paid commissions on jobs that were not completed at the time of his termination. Moreover, the submissions in support of and in opposition to Defendant’s motion demonstrate the existence of issues of fact as to the formula to be utilized in calculating the amount of commissions and whether the Plaintiff signed the Citi Filed Agreement and agreed to its terms. Accordingly, the Defendant’s motion for summary judgment is denied to the extent that it seeks dismissal of Plaintiff’s breach of contract claims.

However, Defendant’s motion is granted to the extent that it seeks summary judgment dismissing the causes of action for unjust enrichment and conversion. There is no dispute that a valid and enforceable contract (Employment Agreement) existed between the parties. Therefore, recovery in quasi-contract may not be obtained (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 [2009]; *Whitman Realty Group, Inc. v. Galano*, 41 AD3d 590, 593 [2d Dept 2007]). Moreover, a conversion claim may not be maintained where, as here, damages are merely sought for a breach of contract (*Daub v Future Tech Enter., Inc.*, 65 AD3d

1004 [2d Dept 2009]).

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: July 17, 2013  
Riverhead, New York

  
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EMILY PINES  
J. S. C.