

<b>Cohen v HDS Trading Corp.</b>
2014 NY Slip Op 31368(U)
May 27, 2014
Supreme Court, New York County
Docket Number: 157995/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART 11

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ADAM COHEN and ASC SALES  
AND IMPORTS, LLC.,

Index No.: 157995/12

Plaintiff,  
-against-

HDS TRADING CORP,

Defendant.  
-----X

**JOAN A. MADDEN, J.:**

In this action seeking unpaid commissions, defendant moves for summary judgment on the grounds that the alleged agreement at issue is barred by General Obligations Law (GOL) § 5-701(a)(1). Specifically, defendant argues that this section requires that the agreement at issue must be in writing as it cannot be performed within a year. Plaintiffs oppose the motion, which is denied for the reasons below .

Plaintiffs are in the business of providing independent, third party sales brokerage services. The amended verified complaint alleges that defendant “engaged” plaintiff Adam Cohen (“Cohen”), who is the President of the plaintiff corporation, as an independent sales person to broker deals for goods and products that defendant sold to third parties, including sales to a retail store called Menard’s. Plaintiffs allege that they entered into an agreement whereby plaintiffs would obtained orders for, and present orders to, defendant, a manufacturer of home products. Defendant was free to accept or reject such orders. If accepted, defendant would pay plaintiffs a commission fee of between 5 and 8 percent of gross sales. A dispute arose between the parties in 2012 with respect to orders from Menard’s, when defendant allegedly asked

plaintiffs to accept a commission of 5%, which is less than he previously received on such orders, and that his commission be based on net proceeds, instead of gross sales. Plaintiffs allege that the parties' relationship terminated when plaintiff would not agree to these terms. Plaintiffs then commenced the instant suit seeking commissions on past and future orders from Mernard's.

In support of its argument that the statute of frauds requires the parties' agreement to be in writing, defendant relies on the following response by plaintiffs to defendant's interrogatory regarding the start and termination dates of any alleged oral contract:

Such agreements had no termination dates because such orders were ongoing and indefinite and could be renewed and/or modified by Menard's at any time after the agreed upon order was completed. Renewal or modification would (and did) result in [defendant] paying additional commissions to [plaintiffs] each time and for approximately four years on each order, until such time as [defendant] breached the agreement.

Defendant also points out that in his affidavit in opposition to defendant's pre-answer motion to dismiss, Cohen described that parties' agreement as "not a one time 'finders fee' but an ongoing sales commission for each deal..." (Cohen Aff., ¶ 3).

In opposition, plaintiffs submit Cohen's affidavit and based on his description of the agreement argue that the statute of frauds is inapplicable as each order and acceptance is a separate contract and the parties are performing and executing a series of contracts all of which are to be performed immediately. Specifically, Cohen describes the parties' agreement as follows:

*for each deal* I brokered, I would be paid a commission upon payment by the client to [defendant]. Additionally, *each time a program was renewed* we would negotiate the terms, and I would again be paid the same percentage for the gross sale. In essence,

this is not a one-time “finders fee” but a sales commission for a “one-off” promotion<sup>1</sup>; and then a “one-off” for every renewal that deal, with renewals of deals being paid as if they were new deals, since the size and terms might be different for each renewal. Each transaction was separate.

Cohen Aff., ¶ 3 (emphasis in the original).

Plaintiffs also argue that the contract is evidenced by various writings, including emails, purchase orders and other documents which are sufficient to satisfy the statute of frauds.<sup>2</sup>

Under the statute of frauds, an oral agreement that cannot be performed within a year of its creation is void. See GOL § 5-701(a)(1). “The application of § 5-701(a)(1) is limited to contracts that ‘have absolutely no possibility in fact and law of full performance within one year’” Gural v. Drasner, 114 AD3d 25, 26 (1<sup>st</sup> Dept 2013), quoting Cron v. Hargro Fabrics, Inc., 91 NY2d 362, 366 (1998). Therefore, “[t]he statute does not include an agreement which is simply not likely to be performed, nor yet one which is simply not expected to be performed within the space of a year. Neither does it include an agreement which, fairly and reasonably interpreted, admits of a valid execution within that time, although it may not be probable that it will be.” Id (internal citation and quotation omitted). Accordingly, “the determination of

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<sup>1</sup>A one-off promotion is “a single promotion that will only happen once is recorded on the company’s ledger.” [www.businessdictionary.com/definition/one-off](http://www.businessdictionary.com/definition/one-off).

<sup>2</sup> Plaintiff further argues that the motion is procedurally defective as defendant failed to support its motion with an affidavit. This argument is unavailing as defendant supports its motion with various evidence, including Cohen’s affidavit submitted in opposition of defendant’s pre-answer motion to dismiss and plaintiffs’ sworn interrogatory responses. See Maragos v. Fakurai, 92 AD3d 992 (2d Dept 2012)(“where a moving party supports a summary judgment motion with an attorney’s affirmation..and other proof the failure to submits an affidavit from a person with knowledge is not fatal”).

whether an alleged oral contract can possibly be performed within one year of its making is not conducted by looking back at the actual performance; it requires analysis of what was possible, looking forward from the day the contract was entered into.” Id. In this connection, ““if the terms of contract...include an event which might end the contractual relationship between the parties within a year, defendant’s possible liability beyond that time would not bring the contract within the statute.”” Cron v. Hargro Fabrics, 91 NY2d at 370, quoting Martocci v. Greater N.Y. Brewery, 301 NY 57, 62 (1950).

In applying these principles to oral sales agreements for commissions, the courts have found that when the agreement is subject to possible termination by the parties within a year it falls outside the statute of frauds. See Bennett v. Atomic Products Corp., 74 AD3d 1003 (2d Dept 2010)(oral agreements to pay sales commission were not subject to statute of frauds as they could be performed within a year where continuation of contract was based on the will of the parties to such contract). In contrast, where the agreement “would necessitate new payments to the plaintiff indefinitely” or when termination is contingent on events outside the parties’ control, the agreement must be in writing. Cron v. Hargro Fabrics, 91 NY2d at 370; see also, Zupan v. Blumberg, 2 NY2d 547, 550 (1957)(contract falls within statute of frauds where the obligation to remit new payments continued indefinitely and is not within the control of the parties to the contract).

Defendant, relying on Zupan v. Blumberg, and similar holdings, argues that the statute of frauds applies here based on plaintiffs’ description of the oral contract in their interrogatory response as without “termination dates,” and “ongoing and indefinite.” However, the relevant response also indicates that the agreement “could be renewed and/or modified by Menard’s at

any time after the agreed upon order was completed. Renewal or modification would (and did) result in [defendant] paying additional commissions to [plaintiffs] each time.” Moreover, plaintiffs maintain that defendant had no obligation to accept reorders or renewals from Menard’s which require them to pay plaintiffs’ commission. Accordingly, it would appear that defendant could terminate its agreement to pay commission to plaintiffs by not renewing the order or reordering. Thus, there are issues of fact as to whether the obligation to pay was indefinite and/or could not be performed within a year such that statute of frauds applies.

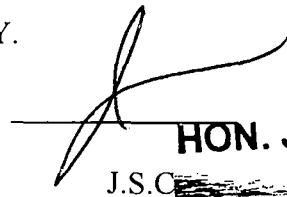
Finally, it cannot be determined on this record whether the emails, purchase orders and other documents relied on by plaintiffs that allegedly memorialized the parties’ agreement are sufficient to constitute a writing for the purposes of the statute of frauds.

In view of the above, it is

ORDERED that the defendant’s motion for summary judgment is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on May 29, 2014 at 9:30 am in Part 11, 60 Centre Street, New York, NY.

DATED: May 27 2014

  
**HON. JOAN A. MADDEN**  
J.S.C.  **J.S.C.**