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SHORT FORM ORDER

INDEX No. 14-14158

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 8-28-14
ADJ. DATE 10-23-14
Mot. Seq. # 001 - MG; CASEDISP

JOHN MONTUORI,

Plaintiff,

- against -

CSC HOLDINGS, LLC,

Defendant.

STEVEN A. MORELLI, ESQ.
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Upon the following papers numbered 1 to 20 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 15 - 17; Replying Affidavits and supporting papers ___; Other memoranda of law 14, 18, 19 - 20; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant for an Order, pursuant to CPLR 3211 (a) (7), dismissing the complaint is granted.

This action was commenced, among other things, to recover damages after the plaintiff was terminated from employment with the defendant as a residential account executive ("RAE"). In his complaint, the plaintiff sets forth four causes of action sounding in breach of contract, prima facie tort, quantum meruit, and misrepresentation/fraud respectively.

The plaintiff was formerly employed by the defendant which operates as Cablevision in Long Island, New York. The plaintiff alleges that he was a successful RAE, who earned significant commissions, received excellent performance evaluations, and received several awards for his work selling Cablevision services during the course of his employment. He alleges that he was awarded an all-expense paid trip to the Bahamas for his work in February 2014, that he told his supervisor that his sister was a potential sales lead in March 2014, and that his supervisor told him that he "would assign him [his sister's] 'card' as a lead, which would allow him to complete the sale." The plaintiff further alleges that the Cablevision was installed at his sister's house on March 17, 2014, and that he received a

call from his manager that day telling the plaintiff that he had not obtained approval for the sale. The plaintiff alleges that he told his manager that his supervisor had approved the sale the prior day, that his supervisor denied giving such approval, and that he was terminated from his employment with Cablevision on April 2, 2014. The plaintiff claims that he was not paid commissions for 11 sales that he completed prior to his termination by the defendant, and that he was not permitted to go on the Bahamas trip.

The defendant now moves to dismiss the complaint on the grounds that it fails to state a cause of action, that the plaintiff was not entitled to receive commissions on the above-referenced sales or to travel to the Bahamas, and that the complaint fails to properly plead a cause of action for fraud. In support of the motion, the defendant submits, among other things, its Residential Account Executive Compensation Policy & Procedures ("Compensation Policy"), its Employee Handbook ("Handbook"), its Standards, Practices & Procedures for full-time RAEs ("Standards"), its Recognition Program governing awards for sales performance, the plaintiff's signed acknowledgment of receipt of the aforesaid documents, and a record of the plaintiff's sales installed on or after April 1, 2014.

Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v Martinez***, *supra*; ***Thomas v Lasalle Bank N. A.***, 79 AD3d 1015, 913 NYS2d 742 [2d Dept 2010]). However, the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*see* ***Leon v Martinez***, *supra*; ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 389 NYS2d 314 [1976]). When evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010] quoting ***Guggenheimer v Ginzburg***, *supra*; ***Thomas v Lasalle Bank N. A.***, *supra*). Dismissal under CPLR 3211 is not warranted unless it is established "conclusively that the plaintiff has no cause of action" (***Sokol v Leader***, 74 AD3d at 1182, 904 NYS2d at 156 quoting ***Lawrence v Graubard Miller***, 11 NY3d 588, 595, 873 NYS2d 517 [2008]).

First Cause of Action For Breach of Express or Implied Contract of Employment

An employee who does not work under an agreement for a definite term of employment, is an at-will employee who may be discharged at any time with or without cause (*see* ***Lobosco v New York Tel. Co.***, 96 NY2d 312, 727 NYS2d 383 [2001]; ***Sabetay v Sterling Drug***, 69 NY2d 329, 514 NYS2d 209 [1987]). Nonetheless, an at-will employee may maintain an action for breach of an employment contract where an employment handbook or other documents contain a clear and express limitation that the employee will only be discharged for cause and the employee relies on such policy (***Matter of De Petris v Union Settlement Assn.***, 86 NY2d 406, 633 NYS2d 274 [1995]; ***O'Neill v New York Univ.***, 97 AD3d 199, 944 NYS2d 503 [1st Dept 2012]; ***Oross v Good Samaritan Hosp.***, 300 AD2d 457, 751 NYS2d 580 [2d Dept 2002]).

Here, the Handbook establishes that there was no agreement establishing a fixed duration for the plaintiff's employment, and the plaintiff does not allege otherwise. Rather, the plaintiff alleges that, "according to [the Handbook], Defendant generally implements a progressive system of discipline," that he had never been subject to disciplinary action of any kind, and that he at all times acted according to the defendant's "policies, procedures, and protocols." That is, the plaintiff essentially contends that the defendant breached his employment contract because he was not "afforded any such process or opportunity to correct alleged deficiencies in his performance or conduct."

In order to succeed on its motion, the defendant must establish that there is no express written policy limiting its right to discharge the plaintiff for any reason or no reason (***Murphy v American Home Prods. Corp.***, 58 NY2d 293, 461 NYS2d 232 [1983]; ***Ingle v Glamore Motor Sales, Inc.***, 73 NY2d 183, 538 NYS2d 771 [1989]; ***McGimpsey v J. Robert Folchetti & Associates, LLC***, 19 AD3d 658, 798 NYS2d 498 [2d Dept 2005]). The Handbook provides, in pertinent part:

> **4. A Clear Statement of Company Rules, Regulations and Expectations**
>
> Cablevision believes in ... communicating Company policies and practices so that all employees are aware of what is expected of them. All employees must comply with the Company policies and procedures. Failure to do so may result in corrective action, up to and including separation from the company.
>
> * * *
>
> **Corrective Action Process**
>
> The Company expects all employees to perform their responsibilities and conduct themselves in accordance with established policies and procedures, honesty and the highest standard of personal integrity.
>
> Open communication provides a means for employees to receive feedback by both formal and informal means. When a problem concerning performance or conduct is identified ... corrective action may be taken. Since the Company deals with each case individually, nothing in this Employee Handbook should be construed as a promise of specific treatment in a given situation.
>
> Where a performance issue has been identified, verbal counseling, a verbal warning documented to file, or a formal written reprimand with or without suspension may be issued ... [u]nder some circumstances, the Company may take corrective action up to and including termination of employment without prior corrective action where, for example, there are serious

> infractions of Company policies or if the Company believes that additional corrective action is unlikely to resolve the problem.

Here, the plaintiff has not pled any statutory or contractual right requiring the defendant to engage in a formal process to terminate his employment as an at-will employee (***Lobosco v New York Tel. Co.***, *supra*; ***Sabetay v Sterling Drug***, *supra*; ***Negron v JP Morgan Chase***, 14 AD3d 673, 789 NYS2d 257 [2d Dept 2005]). The plaintiff's allegation that the defendant "generally implements a progressive system of discipline," belies his contention that the defendant was obligated to engage in such a process. Regardless, the evidence establishes that the defendant has not adopted an express written policy limiting its right to discharge the plaintiff for any reason or no reason. Here, the Handbook explicitly disclaims any contractual relationship (*see* ***Lobosco v New York Tel. Co.***, *supra*), and the plaintiff has not pled that he relied on any document or verbal assurance issued by the defendant as to his employment in accepting the position or continuing his employment at Cablevision. Accordingly, the plaintiff's first cause of action for breach of contract is dismissed.

Second Cause of Action For Prima Facie Tort

New York does not recognize a cause of action for the tort of abusive or wrongful discharge of an at-will employee (*see* ***Lobosco v New York Tel. Co.***, *supra*; ***Murphy v American Home Prods. Corp.***, 58 NY2d 293, 461 NYS2d 232 [1983]; ***Daub v Future Tech Enter., Inc.***, 65 AD3d 1004, 885 NYS2d 115 [2d Dept 2009]). In addition, an employee may not circumvent this rule by using other causes of action to substitute for such a claim (*see* ***Murphy v American Home Prods. Corp.***, *supra*; ***La Duke v Lyons***, 250 AD2d 969, 673 NYS2d 240 [3d Dept 1998]). There is no implied obligation of good faith and fair dealing in an employment at-will relationship (*see* ***Ingle v Glamore Motor Sales***, 73 NY2d 183, 538 NYS2d 771 [1989]; ***Matter of DePetris v Union Settlement Assn.,*** 86 NY2d 406, 633 NYS2d 274 [1995]). Thus, the act of terminating an at-will employment relationship may not form the basis for a cause of action of intentional or negligent infliction of emotional distress or prima facie tort in circumvention of the at-will employment rule (***Minovici v Belkin BV***, 109 AD3d 520, 971 NYS2d 103 [2d Dept 2013]; ***Fama v American Intl. Group***, 306 AD2d 310, 760 NYS2d 534 [2d Dept 2003]; ***Tramontozzi v St. Francis College***, 232 AD2d 629, 649 NYS2d 43 [2d Dept 1996]).

In any event, because the complaint does not allege that the defendant's sole motivation was disinterested malevolence, the prima facie tort cause of action must fail (*see* ***Burns Jackson Miller Summint & Spitzer v Lindner,*** 59 NY2d 314, 464 NYS2d 712, 721 [1983]; ***Wiggins & Kopko, LLP v Masson***, 116 AD3d 1130, 983 NYS2d 665 [3d Dept 2014]; ***Avgush v Town of Yorktown,*** 303 AD2d 340, 755 NYS2d 647 [2d Dept 2003]). The elements of a cause of action for prima facie tort are: (1) the intentional infliction of harm; (2) causing of special damages; (3) without lawful excuse or justification; and (4) by an act or series of acts that would be otherwise unlawful (*see* ***Freihofer v Hearst Corp.***, 65 NY2d 135, 490 NYS2d 735 [1985]; ***Curiano v Suozzi,*** 63 NY2d 113, 480 NYS2d 466 [1984]). There can be no recovery under this tort unless malevolence is the sole motive for the defendant's otherwise lawful act (*see* ***Burns Jackson Miller Summit & Spitzer v Lindner***, *supra*; ***Lynch v McQueen***, 309 AD2d 790, 765 NYS2d 645 [2nd Dept 2003]). Accordingly, the plaintiff's second cause of action for prima facie tort is dismissed.

Third Cause of Action For Unjust Enrichment/Quantum Meruit

In his complaint, the plaintiff alleges that the defendant has refused to compensate him for the commissions earned on 11 orders that he had completed prior to the termination of his employment and refused to permit him to travel to the Bahamas. It is well settled that an at-will sales representative is entitled to post-discharge commissions "only if the parties' agreement expressly provided for such compensation" (***UWC Inc v Eagle Indus.***, 213 AD2d 1009, 1011, 624 NYS2d 321 [4th Dept 1995]; *see also* ***McGimpsey v J. Robert Folchetti & Assoc., LLC***, 19 AD3d 658 [2d Dept 2005]; ***Production Prods. Co. v Vision Corp.***, 270 AD2d 922, 706 NYS2d 289 [4th Dept 2000]). The Compensation Policy provides in pertinent part:

> Section 2.1
> Direct Sales Video Commission Calculation (continued)
>
> The commission is calculated based on the number of total video connects achieved, and corresponding Performance Tier for that month. A minimum number of connects must be achieved in the calendar month before any commission can be earned. Once the RAE has achieved the minimum connect goal for the month, he/she will be credited for every connect achieved during that month.
>
> * * *
>
> Section 8
> Commission Payment Policy for RAEs that leave the Company or Department for any reason
>
> RAEs are entitled to receive full payment for all earned commissions as stated previously in this document. To earn a commission, the sale must be completely installed on, or before the employee's last date of employment with the Company ...
>
> * * *
>
> • Commission, Bonus and Incentives cannot be earned beyond an RAE's final date of employment with the Company. An RAE must be employed, by Cablevision, on the day of connection (or the date that the bonus or incentive is paid) to earn the commission, bonus or incentive for that connect.

Here, the plaintiff has failed to plead that the allegedly "completed" orders were connected or installed prior to his termination from employment or that he met the minimum number of "connects" for the month of April 2014, to entitle him to collect any commission as earned pursuant to the parties' agreement, and he does not dispute the evidence submitted by the defendant regarding these issues. More importantly, the existence of a sales compensation agreement governing commissions precludes the plaintiff's unjust enrichment claim (***Barker v Time Warner Cable, Inc.***, 83 AD3d 750, 923 NYS2d

118 [2d Dept 2011]; ***Swits v New York Systems Exchange Inc.***, 281 AD2d 833, 722 NYS2d 300 [3d Dept 2001]), and his quantum meruit claim (***Mucerino v Firetector, Inc.***, 306 AD2d 330, 761 NYS2d 269 [2d Dept 2003]) arising out of this commission dispute.

In addition, the plaintiff has failed to plead that he satisfied the requirements of his agreement with the defendant regarding the all-expenses paid trip to the Bahamas. The Recognition Program governing awards for sales performance provides, in pertinent part, that an award recipient "must be employed as an active full-time member of the Residential Direct Sale Organization in good standing ... at the time of trip distribution and fulfillment to be eligible." As noted above, the existence of an agreement governing this claim precludes the plaintiff's third cause of action. Accordingly, the plaintiff's third cause of action for unjust enrichment/quantum meruit is dismissed.

Fourth Cause of Action For Misrepresentation/Fraud

In his complaint, the plaintiff alleges that his supervisor's denial that he had authorized the sale to the plaintiff's sister was false, that the supervisor's statement assigning him his sister's "card" to allow him to complete the sale was intentionally made by the supervisor to induce the plaintiff to make said sale, that the plaintiff relied on said statement, and that he suffered injury as a result. Regardless whether the plaintiff has properly plead a cause of action for misrepresentation or fraud, such an action cannot be maintained against the defendant herein. As noted above, an at-will employee cannot circumvent the general rule precluding a claim for breach of contract or wrongful discharge by using other causes of action to substitute for such a claim (*see* ***Murphy v American Home Prods. Corp.***, *supra*; ***La Duke v Lyons***, *supra*). There is no implied obligation of good faith and fair dealing in an employment at-will relationship (*see* ***Ingle v Glamore Motor Sales***, *supra*; ***Matter of DePetris v Union Settlement Assn.***, *supra*).

Conclusion

Here, the defendant has established "conclusively that the plaintiff has no cause of action" (***Lawrence v Graubard Miller***, *supra*; ***Sokol v Leader***, *supra*). Accordingly, the defendant's motion to dismiss the complaint is granted.

Dated: February 11, 2015

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION