

**Swezey v Michael C. Dina Co., Inc.**

2016 NY Slip Op 31098(U)

June 13, 2016

Supreme Court, New York County

Docket Number: 158793/14

Judge: Robert R. Reed

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 43

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WILLIAM SWEZEY,

Plaintiff,

Index No. 158793/14

-against-

**DECISION and ORDER**

MICHAEL C. FINA CO., INC. and MICHAEL  
C. FINA CORPORATE SALES, INC.,

Defendants.

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**Robert R. Reed, J.:**

Defendants' motion is GRANTED in part and DENIED in part.

Plaintiff, a commission sales representative for defendants from 1999 until his involuntary termination on September 9, 2011, sues to recover damages upon claims of breach of contract, New York Labor Law violation, age discrimination under the New York City Human Rights Law, breach of duty of good faith and fair dealing, and quantum meruit/unjust enrichment. Aside from his age discrimination claim, plaintiff seeks to be compensated, notably, for unpaid commissions on sales generated after his termination which he alleges arose from contracts he procured on behalf of defendants before his termination. Under plaintiff's theory of recovery, he would, be entitled to receive commissions from defendants, in effect, in perpetuity, as long as a sale

could be traced to a contract he had previously procured. Defendants move to dismiss the complaint, pursuant to CPLR sections 3211(a)(1), 3211(a)(5), and 3211(a)(7), arguing that the perpetual commission agreement alleged by plaintiff, which was not committed to writing, is unenforceable under the statute of frauds.

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp.*, 60 AD3d 491; *Skillgames, LLC v Brody*, 1 AD3d 247, 250, citing *McGill v Parker*, 179 AD2d 98, 105; see also *Cron v Harago Fabrics*, 91 NY2d 362, 366). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (*Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff (*Amaro*, 60 NY3d at 491). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly

contradicted by documentary evidence are not entitled to such consideration" (*Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" [*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88].

To the extent the complaint here is predicated upon an assertion of entitlement to unpaid commissions generated from sales occurring after plaintiff's termination, it runs afoul of the statute of frauds. "[A]greement[s] to pay commissions to a salesperson on sales to a customer procured by the salesperson ... generally are enforceable while the sales person is still employed by the defendant, since employment is generally terminable at will; however, an agreement to continue to pay such commissions after the termination of the salesperson's employment falls within the statute of frauds, on the ground that performance and the duration of the obligation to perform is dependent, not on the will of the parties to the contract,

but rather, on the will of the third-party customer" [*Bennett v Atomic Prods. Corp.*, 74 AD3d 1003, 1005 (citation omitted), quoted in *Niyazov v Park Fragrance, LLC*, 2014 N.Y. Misc. LEXIS 1073, 2014 NY Slip Op 30610(U)]. Accordingly, plaintiff's breach of contract cause of action fails as a matter of law, and must be dismissed.

Plaintiff seeks recovery under the Labor Law based upon defendants' failure "[i]n September 2011 and continuing thereafter" to pay "wages," as defined under that statute, "in the form of his earned commissions." Thus, plaintiff's Labor Law cause of action stems from the same factual predicate as the breach of contract cause of action -- that is, the claim of entitlement to post-termination compensation based upon an alleged oral perpetual commission agreement. For this reason, plaintiff's Labor Law cause of action also fails as a matter of law, inasmuch as "plaintiff cannot assert a statutory claim for wages under the Labor Law if he has no enforceable contractual right to those wages" (*Tierney v. Capricorn Investors, L. P.*, 189 A.D.2d 629, 632).

Plaintiff's claim of age discrimination under the NYCHRL is

minimally adequate to satisfy notice pleading requirements. Defendants may engage in appropriate discovery to assess the factual particulars of plaintiff's claim in this regard, and the court will entertain defendants' summary judgment motion on this cause of action at a later date. However, at the pleading stage, the court will not dismiss the complaint's age discrimination cause of action.

Finally, the complaint's causes of action for breach of duty of good faith and fair dealing and quantum meruit/unjust enrichment must be dismissed. "The principle that quasi-contract or equitable claims cannot be used as an end-run around legal claims is ... well settled" [*Niyazov v Park Fragrance, LLC, supra, citing, among others, Mark Bruce Int't Inc. v Blank Rome LLP*, 19 Misc3d 1140[A], 2008 NY Slip Op 51081[U], at \*7, *aff'd* 60 AD3d 550 (unjust enrichment claim not viable when claim merely seeks the enforcement of unenforceable contract itself); *Tallini v Bus. Air, Inc.*, 148 AD2d 828, 830-31 ("plaintiff's claim that he was denied commissions which he was entitled to under a theory of unjust enrichment depends on proof of the oral contract and therefore is also barred by the Statute of Frauds")].

According, it is hereby:

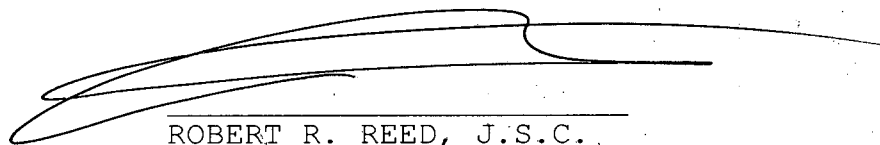
ORDERED that defendants' motion to dismiss the complaint is granted in part and denied in part; and it is further

ORDERED that the first ("Count I" - contract), second ("Count II" - Labor Law), fourth ("Count IV" - good faith/fair dealing) and fifth ("Count V" - quantum meruit/unjust enrichment) causes of action of the complaint are hereby dismissed with prejudice; and it is further

ORDERED that defendants shall e-File an answer to the remaining cause of action of the complaint ("Count III" - NYCHRL age discrimination") by July 15, 2016; and it is further

ORDERED that the parties by their counsel shall appear for a preliminary conference in Part 43 of this court at 111 Centre Street, Room 581, New York, New York at 9:30 a.m. on August 4, 2016.

Dated: June 13, 2016



ROBERT R. REED, J.S.C.