Bradley v Pride Tech. of N.Y., LLC
2017 NY Slip Op 30808(U)
April 20, 2017
Supreme Court, New York County
Docket Number: 151752/12
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 45

TIM BRADLEY,

Plaintiff,

- against -

PRIDE TECHNOLOGIES OF NEW YORK, LLC, and LEO RUSSELL,

Defendants.

Index No.: 151752/12

DECISION/ORDER

SINGH, ANIL, J.:

In this action, plaintiff Tim Bradley (Bradley) sues his former employer to recover compensation allegedly owed under the terms of an employment agreement and a profit sharing agreement. The complaint alleges causes of action for breach of contract, New York Labor Law violations, unjust enrichment, and conversion. Defendants Pride Technologies of New York, LLC (Pride) and Leo Russell (Russell) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Background

Pride is a limited liability company, headquartered in New York City, which provides temporary and permanent staffing services. Russell Affidavit in Support of Defendants' Motion (Russell Aff.), ¶ 2. Russell formed Pride in 2004 and is its President and Managing Member. *Id.* Plaintiff was employed by Pride as a Managing Director from 2004 until he resigned in December 2010. As set out in an offer letter from Pride, plaintiff was offered as compensation a $150,000 annual salary; a

$90,000 guarantee during the first year; a "mutually agreeable bonus" to be put in place; and "[a] 10% profits interest in Pride Technologies Ltd. 50% of this interest would be distributed on a quarterly basis . . . [and] [t]he other 50% would be held in a capital account and used as working capital in the business." Offer Letter, Russell Aff., Ex. A.

In January 2007, plaintiff and defendants executed an Executive Employment Agreement (employment agreement or EEA). Plaintiff alleges that, at the same time, the parties entered into a Profit Sharing Unit Agreement (profit sharing agreement or PSUA). Plaintiff submits copies of the agreements he claims were executed by him and Russell. *See* Affirmation of Russell Moriarty in Opposition to Defendants' Motion (Moriarty Aff.), Ex. B (EEA [plaintiff's version]), Ex. C (PSUA). The PSUA provided, in pertinent part, that, if Pride earned a profit, plaintiff would be "awarded a Credit in the amount of ten (10%) percent of such Net profit," applied to plaintiff's Capital Account, and, upon termination of employment, plaintiff would be "entitled to receive payment of the balance, if any, of his Capital Account." *Id.*, Ex. C, ¶¶ 3 (b), 4 (a).

Defendants do not dispute that the parties entered into a written employment agreement, but dispute that the agreement submitted by plaintiff is authentic, and submit a copy of what they claim is the employment agreement executed by the parties.

See EEA, Russell Aff., Ex. B (defendants' version). Defendants deny that any profit sharing agreement was ever executed. Russell attests that he considered such an agreement, which was contemplated when plaintiff was hired, but ultimately agreed only to a discretionary bonus, as set out in defendants' version of the employment agreement. Russell Aff., ¶ 8.

The terms of the employment agreement as set out in the parties' versions differ only, albeit significantly, in two provisions under Article 3 related to compensation and vacation. According to plaintiff, the provisions in question, §§ 3.1.2 and 3.1.5, entitle him to profit sharing under the PSUA and to four weeks of vacation per year, which carry over from year to year. In contrast, defendants' version provides for no guaranteed profit sharing and grants plaintiff two weeks of vacation per year which do not carry over.

More specifically, in plaintiff's version, § 3.1.2 provides:

> "Executive shall additionally be entitled to participate in the profits of the Company as set forth and pursuant to the terms and conditions set forth in the Profit Sharing Agreement."

In defendants' version, § 3.1.2 provides:

> "Executive shall additionally be eligible for a discretionary bonus paid from time to time, the timing and amount of which will be at the sole discretion of the Company."

The provision pertaining to vacation, § 3.1.5, provides, in plaintiff's version:

> "Executive shall be entitled to four weeks of paid vacation each calendar year . . . and vacation time shall carry over from year-to-year."

The same section in defendants' version provides:

> "Executive shall be entitled to two weeks of paid vacation each calendar year . . . and vacation time shall not carry over from year-to-year."

The terms of the parties' versions of the employment agreement otherwise are identical, although the documents vary in two other respects. At the top of the first page, where the parties to the agreement are identified, the parties' names are, in plaintiff's version, printed; and in defendants' version, handwritten. Defendants' version also includes, on the last page, below the parties' signatures, a printed notation, or file name: "Hoffman/pride/executive agreement November 2007/."

Defendants have submitted two other versions of the employment agreement, purportedly attached to emails sent by plaintiff to Pride's bookkeeper, Kathleen Greto (Greto), and to Pride's counsel, Andrew Hoffman (Hoffman). *See* Affirmation of Hoffman in Support of Defendants' Motion (Hoffman Aff.), Ex. C (Greto version), Ex. D (Hoffman version). The Greto version includes the same terms as plaintiff's version, but it is not signed by Russell, and it includes the file name at the bottom of the last page. It also has, at the top of the first page, a letter "c" in front of the document title, Executive Employment

Agreement. The Hoffman version appears to be the same as plaintiff's version, except that it includes the file name on the last page. Plaintiff disputes that the Greto and Hoffman versions were the versions he attached to his emails.

Plaintiff claims he is entitled, under the employment agreement, to payment for unused vacation days in the amount of nearly $24,000, and to his contractual share of Pride's profits earned during 2006-2010, in the amount of approximately $296,000. He also claims that he is entitled under the profit sharing agreement to an additional amount of approximately $149,000, representing profits defendants failed to account for. Defendants contend that none of the documents produced by plaintiff are authentic, and he is not entitled to any compensation.

Discussion

It is well settled that, on a motion for summary judgment, the moving party has the initial burden to make a prima facie showing of entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to demonstrate the absence of any material issues of fact. *See* CPLR 3212 (b); *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "Failure to make such prima facie 'showing requires denial of the motion, regardless of the sufficiency of

the opposing papers.'" *Pullman v Silverman*, 28 NY3d 1060, 1062 (2016), quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). If such showing is made, the burden shifts to the opposing party to demonstrate that genuine material issues of fact exist which require a trial of the action. *See Jacobsen*, 22 NY3d at 833; *Zuckerman*, 49 NY2d at 562.

The "'facts must be viewed in the light most favorable to the nonmoving party' 'and every available inference must be drawn in the [nonmoving party's] favor.'" *Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1022 (2016) (citations omitted); *see De Lourdes Torres v Jones*, 26 NY3d 742, 763 (2016); *Jacobsen*, 22 NY3d at 833. The motion must be denied "where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is even arguable." *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013), citing *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 (1968). It further "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 (2012); *see Ferrante v American Lung Assn.*, 90 NY2d 623, 631 (1997). The court's function "is merely to determine if any triable issues exist, not to determine the merits of any such issues." *Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 (1st Dept 2010); *see Sheehan v Gong*, 2 AD3d 166, 168 (1st Dept 2003).

Breach of Contract

Defendants move to dismiss the breach of contract claims on the ground that the copies of the employment agreement and the profit sharing agreement submitted by plaintiff are forged documents, and are, therefore, void and unenforceable. *See Orlosky v Empire Sec. Sys., Inc.*, 230 AD2d 401, 403 (3d Dept 1997) ("a forged signature renders a contract void *ab initio*"); *Opals on Ice Lingerie v Bodylines Inc.*, 320 F3d 362, 370 (2d Cir 2003) (same). Defendants contend that their copy of the employment agreement is the true copy of the parties' actual agreement and refutes plaintiff's claims.

In support of their motion, defendants chiefly rely on the affidavit of Robert Baier, a forensic document examiner retained by defendants' attorneys, Hoffman & Associates, to review the authenticity of a number of documents, including plaintiff's copies of the employment agreement and the profit sharing agreement; the Greto and Hoffman versions; and three copies of the profit sharing agreement provided by defendants. Affidavit of Baier in Support of Defendants' Motion (Baier Aff.), ¶¶ 3-4. Baier does not question that the signatures appearing on the documents are Russell's, but opines that they are not authentic and were not "penned" by him. *Id.* at 5.

According to Baier, after comparing Russell's signatures on plaintiff's copies of the employment agreement and the profit

sharing agreement, and finding the signatures to be identical, he can "state without reservation" that plaintiff was lying at his deposition when he said that he personally saw Russell sign both documents. *Id.*, ¶¶ 6-7. Because, Baier attests, "[i]t is impossible for a human being to replicate his or her signature," Russell could not possibly have signed both documents. *Id.*, ¶ 7.

Comparing the Greto and Hoffman versions of the employment agreement with plaintiff's version, and noting discrepancies among the three versions, Baier concluded that these versions also were fabricated documents. *Id.*, ¶¶ 8-12. After reviewing copies of the profit sharing agreement provided to him by defendants, and noting that the signature page on each document differs from the signature page on plaintiff's copy of the PSUA, Baier opines that it is "highly probable" that all of the profit sharing agreements are fraudulent documents, created by "cutting-and-pasting" or "photoshopping" "[i]dentical materials from executive employment agreements" or otherwise altering other documents. *Id.*, ¶¶ 14, 16.

Baier then reviewed defendants' version of the employment agreement, which Russell asserts was delivered to him in 2012 by plaintiff's ex-wife, in a package with three copies of the PSUA. Notwithstanding that defendants' version of the EEA is not an original, and that Russell's signature on defendants' version is exactly the same as on the other versions, Baier represents that

defendants' version is "a true copy of an authentic agreement," which "does not appear to be manipulated in any manner." *Id.*, ¶¶ 14, 17, 18. He also opines that plaintiff's handwriting is on the first page of defendants' version. *Id.*, ¶ 18; Ex. K. Baier's apparent conclusion, although not expressly so stated, is that plaintiff electronically manipulated the original employment agreement, and/or other unidentified executive employment agreements, and copied Russell's signature to create the documents he has submitted.

No original of any agreement has been produced by any party. Baier thus could not compare the documents he reviewed to original documents, and otherwise does not identify what documents, or what portions of documents, may have been copied or manipulated. Baier's affidavit, while raising doubts about the authenticity of plaintiff's versions of the agreements, does not eliminate all material questions of fact, even in the absence of an opposing expert affidavit, as to the whether plaintiff's documents were forged, as to the authenticity of defendants' version, as to which, if any, version of the employment agreement submitted by the parties accurately sets out the terms of their agreement, and as to whether the parties reached or executed any profit sharing agreement. As to Baier's opinion that the writing on the front page of defendants' version of the agreement is plaintiff's handwriting, based on his comparison of this

handwriting to two employment documents filled out by plaintiff, such a handwriting comparison "'is not appropriate on a motion for summary judgment, but, rather, gives rise to an issue of fact.'" *Seoulbank, N.Y. Agency v D&J Export & Import Corp.*, 270 AD2d 193, 194 (1st Dept 2000), quoting *Dyckman v Barrett*, 187 AD2d 553, 555 (2d Dept 1992).

The weight and persuasiveness to be accorded to Baier's opinion should be determined by a trier of fact, as assessed against other credible evidence. *See Felt v Olson*, 51 NY2d 977, 979 (1980); *Matter of Sylvestri*, 44 NY2d 260, 266 (1978); *Bryant v Bryant*, 58 AD3d 496 (1st Dept 2009) (court assessed expert testimony and made credibility determinations following nonjury trial). While plaintiff, at trial, bears the burden of proof that the documents on which he relies are authentic (see *D&N Prop. Mgt. & Dev. Corp., Inc. v Copeland Cos.*, 56 Fed Appx 545, 546 [2d Cir 2003]; *Mota v Imperial Parking Sys.*, 2010 WL 3377497, 2010 US Dist LEXIS 87593, *38 [SD NY 2010]), "[t]he trier of fact is not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony and/or the facts disclosed on cross-examination of the expert witness." *Herring v Hayes*, 135 AD2d 684, 684 (2d Dept 1987); *see Curry v Hudson Valley Hosp. Ctr.*, 104 AD3d 898, 900 (2d Dept 2013); *Lelekakis v Kamamis*, 41 AD3d 662, 665 (2d Dept 2007) ("trial court was not required to credit the testimony of the plaintiff's

handwriting expert"). "Even where there is no testimony 'to contradict' the testimony of experts, the 'weight to be given' to opinion evidence is ordinarily 'entirely for the determination of the jury.'" *Matter of City of New York (Fifth Ave. Coach Lines)*, 22 NY2d 613, 630 (1968), quoting *Commercial Cas. Ins. Co. v. Roman*, 269 NY 451, 456-457 (1936) (other citations omitted); *see also J&K Parris Constr., Inc. v Roe Ave. Assoc., Ltd.*, 47 Misc 3d 1227(A), 18 NYS3d 579, 2015 NY Slip Op 50864(U), **7 (Sup Ct, Suffolk County 2015) (expert's opinion "is not, of course, sacrosanct and the fact-finder may reject it, even if it is uncontradicted").

Moreover, the conflicting testimony of defendants and their witnesses and plaintiff and his witnesses, as well as Baier's affidavit, raise credibility issues not properly decided on this motion.

In his affidavit, Russell states that, in late 2006, he asked Hoffman to draft an executive employment agreement, and when counsel prepared the draft, he left the names of the parties blank and plaintiff wrote in the parties' names at the time the agreement was signed. Russell Aff., ¶¶ 8-9, 10. Although Russell attests that he and plaintiff both signed the agreement during the first week of January 2007 (*id.*, ¶ 9), he testified at his deposition that he signed the agreement in January 2007 and plaintiff signed it in 2009. Russell Dep., Moriarty Aff., Ex. H,

at 17.

Like Russell, plaintiff testified that Hoffman drafted the employment agreement, as well as the profit sharing agreement. Bradley Dep., Hoffman Aff., Ex. A, at 23, 44. Notably absent, however, is an affidavit from Hoffman, or any other evidence showing what agreement or agreements he drafted, and when. Instead, evidence submitted by defendants indicates that, in December 2010, Hoffman advised plaintiff in an email that there was no written employment agreement (*see* Hoffman Aff., ¶ 5, Ex. D), although defendants do not now deny that there was an employment agreement in place at that time.

Russell testified that, after the employment agreement was signed in January 2007, he placed it in plaintiff's personnel file, which he kept in a drawer in his desk. Russell Dep., Moriarty Aff., Ex. H, at 61. He claims that the original employment agreement disappeared from plaintiff's personnel file at about the time that plaintiff resigned from Pride, and he believes plaintiff took it. *Id.* at 18-19. He also claims that sometime in 2012 he received a package from plaintiff's ex-wife, which purportedly included a copy of the employment agreement, and three draft versions of the profit sharing agreement. Russell Aff., ¶¶ 24-27.

Defendants submit an affidavit from plaintiff's ex-wife, in which she attests that sometime in 2011 or 2012, after she and

plaintiff had separated, she found an envelope in her apartment containing some documents which "appeared to be the property of Pride." Affidavit of Chih-Chih Sun, Hoffman Aff., Ex. B, ¶¶ 2-3. She provides no further description or information about what she found, does not say how many documents were in the envelope, does not identify the employment agreement as one of the documents she found, and expressly states that she did not read the documents and does not know what they were other than that they "referenced" Pride. *Id.*, ¶ 3. Plaintiff denies that he left any documents in the apartment, and attests that he took all of his possessions from the apartment when he and his ex-wife separated in 2009. Bradley Aff., ¶ 20.

Plaintiff testified that Russell put the original signed documents in plaintiff's personnel file, and he got copies sometime later, but lost them when a flood occurred in his apartment. Bradley Dep., Hoffman Aff., Ex. A, at 24-25; Baier Aff., Ex. D, at 53-54. In January 2008, plaintiff stated, he made copies of his personnel file, including the employment agreement and the profit sharing agreement, and those are the copies he has produced and are the only copies he had of the agreements. *Id.*, Hoffman Aff., Ex. A at 30-31, 44-45.

Plaintiff testified that he saw Russell sign both agreements in January 2007. *Id.* at 33, 46. He does not address the similarities of the signatures on both documents, and submits no

expert affidavit of his own. He contends, however, that two colleagues were with him and witnessed the signing (*id.* at 34-35, 45-46), and submits affidavits in support from John Paulino (Paulino) and Tom DeAngelis (DeAngelis). Neither attests that he witnessed the actual signing of the agreements, but both attest that they reviewed and discussed with plaintiff the employment agreement and the profit sharing agreement after they were signed by plaintiff and Russell, and that the copies plaintiff has submitted reflect true copies of the agreements they reviewed. *See* DeAngelis Aff., ¶¶ 6-7, 8; Paolino Aff., ¶¶ 6-7, 8. Plaintiff also submits an affidavit from Christopher Philpott (Philpott), who was, at times relevant to the complaint, employed as a Managing Director in Pride's Ohio office. Philpott Aff., ¶¶ 2, 4. Philpott attests that, in January 2007, he executed an executive employment agreement and a profit sharing agreement with Pride; and that, during the time he was negotiatng the agreements with Russell and Hoffman, he had conversations with plaintiff which caused him to believe that plaintiff was negotiating similar contracts with defendants. *Id.*, ¶¶ 7, 9. He also attests that he believed plaintiff had an EEA and a PSUA with defendants because Russell insisted that his managing directors have such agreements. *Id.*, ¶ 8.

Russell denies that he ever agreed to a profit sharing agreement with plaintiff, and asserts that the only reference to

such agreement, in Article 2 of the employment agreement, was simply a drafting error, "a remnant from a prior draft . . . left in by mistake." Russell Aff., ¶ 11.[1] All versions of the employment agreement include two other references, however, in Article 5, concerning termination of employment, and in Article 7, which states that plaintiff has agreed to certain provisions of the agreement "in return for the various forms of compensation to be paid to Executive including his right to profits of the Company pursuant to the Profit Sharing Unit Agreement entered into between the Company and Executive on January __, 2007."

There also is some evidence that the parties took action consistent with the alleged profit sharing agreement. It is not disputed that defendants paid plaintiff two bonuses, at plaintiff's request. Russell claims that these payments were discretionary, made to plaintiff only because he had been "pestering" him. Russell Aff., ¶¶ 14-17. Plaintiff, however, submits email correspondence showing that the payments were made after plaintiff submitted a request based on his calculation of profits owed to him, to which there was no apparent objection. *See* Bradley Aff., ¶¶ 14-15; Emails, Moriarty Aff., Ex. E.

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[1]Article 2 ("Term") provides that plaintiff is an at-will employee, and that either party can terminate plaintiff's employment at any time with or without cause, "[s]ubject to the provisions of Article 5 herein and to the terms of the Profit Sharing Agreement between the Company and the Executive dated January 1, 2007."

In view of the above, and considering the evidence in a light most favorable to plaintiff, as the court must on this motion, questions of fact and issues of credibility precluding summary judgment remain related to the existence and terms of the EEA and the PSUA. The motion to dismiss the third and fourth causes of action is, therefore, denied.

The fifth cause of action, alleging a breach of the employment agreement in connection with defendants' failure to pay for accrued but unused vacation days, does not, however, survive summary judgment.

Generally, "[t]he determination as to whether a former employee is entitled to be paid for accrued vacation time is governed by the contract between the parties." *Steinmetz v Attentive Care, Inc.*, 39 Misc 3d 148(A), 972 NYS2d 147, 2013 NY Slip Op 50905(U) (App Term 2d Dept 2013) (citations omitted); *see Gennes v Yellow Book of NY, Inc.*, 23 AD3d 520, 521-522 (2d Dept 2005). Thus, "'an employee has no inherent right to paid vacation and sick days, or payment for unused vacation and sick days, in the absence of an agreement, either express or implied.'" *Crawford v Coram Fire Dist.*, 2015 WL 10044273, 2015 US Dist LEXIS 57997, *14-15 (ED NY 2015) (citation omitted); *see Litras v PVM Intl. Corp.*, 2013 WL 4118482, *10, 2013 US Dist LEXIS 116236, *32 (ED NY 2013); *Garrigan v Incorporated Vil. of Malverne*, 12 AD3d 400, 401 (2nd Dept 2004); *Eisen v Washington*

Natl. Life Ins. Co. of N.Y., 228 AD2d 293, 294 (1st Dept 1996). "A former employee may also be entitled to recover if she can establish that she reasonably relied on express verbal assurances that she would be paid for unused vacation time, or if she can establish that the defendant employer had a regular practice of paying its employees upon their termination for accumulated and unused vacation time and that the employee relied upon such practice in accepting or continuing her employment." *Steinmetz*, 39 Misc 3d 148(A) (citations omitted); *see Garrigan*, 12 AD3d at 401; *Spencer v Christ Church Day Care Ctr.*, 280 AD2d 817, 817-818 (3d Dept 2001).

Here, under either plaintiff's or defendants' version of the employment agreement, the terms do not provide that plaintiff will be paid for unused vacation. Plaintiff also does not allege that he received express verbal assurances that he would be paid for unused vacation, and presents no evidence that Pride had a regular practice of paying its employees upon termination of employment for unused vacation. Plaintiff's argument that he is entitled to be paid because the employment agreement contained no provision requiring forfeiture of accrued vacation upon separation from employment (Bradley Aff., ¶ 24) is unavailing. *See Romanello v Intesa Sanpaolo S.p.A.*, 48 Misc 3d 1215(A), 2015 NY Slip Op 51125(U), **13 (Sup Ct, NY County 2015) (plaintiff not entitled to pay for unused vacation where handbook provided

vacation time could carry over but did not provide for payment).

Labor Law Claims

Plaintiff's claim under Labor Law, Article 6 for payment for unused vacation time similarly is dismissed. Labor Law § 198-c (1) requires "any employer who is a party to an agreement to pay or provide benefits or wage supplements to employees" in a timely matter. "'This section codifies the general understanding that vacation and sick pay are purely matters of contract between an employer and employee.'" *Crawford*, 2015 US Dist LEXIS 57997, at *15, quoting *Litras*, 2013 US Dist LEXIS 116236, at *32; *see also Gennes*, 23 AD3d at 522. Plaintiff has not demonstrated the existence of an agreement entitling him to such payment upon termination of his employment. Nor does plaintiff dispute that he was an executive or professional earning more than $900 a week. The statute, by its terms, does "not apply to any person in a bona fide executive, administrative, or professional capacity whose earings are in excess of nine hundred dollars a week" (§ 198-c [3]). *See Romanello v Intesa Sanpaolo S.p.A.*, 97 AD3d 449, 455-456 (1st Dept 2012), *affd as modified* 22 NY3d 881 (2013); *Fraiberg v 4Kids Entertainment, Inc.*, 75 AD3d 580, 583 (2nd Dept. 2010).

Turning to plaintiff's claim under Labor Law § 198 for unpaid wages earned under the PSUA, "wages," as defined in the statute, do not include "certain forms of 'incentive

compensation' that are more in the nature of a profit-sharing arrangement and are both contingent and dependent, at least in part, on the financial success of the business enterprise." *Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220, 223-224 (2000); *see Gunthel v Deutsche Bank AG*, 32 AD3d 335, 337 (1st Dept 2006) (bonus awards under profit-sharing plans did not constitute "wages" under Labor Law § 190 [1]). "When the value of the compensation depends on the firm's overall financial success, not simply on the employee's personal productivity, it does not constitute a 'wage' protected by the Labor Law." *Englehardt v Abraham*, 2011 WL 11077203, 2011 NY Misc LEXIS 6952, 2011 NY Slip Op 33907(U), **10 (Sup Ct, NY County 2011), citing *Guiry v Goldman, Sachs & Co.*, 31 AD3d 70, 72 (1st Dept 2006); *see also Eagle v Emigrant Capital Corp.*, 2016 WL 410072, *6, 2016 NY Misc LEXIS 335, 2016 NY Slip Op 30195(U), **12-13 (Sup Ct, NY County 2016), *affd* __ AD3d __, 49 NYS3d 124 (1st Dept 2017). The PSUA compensation at issue in this case is based solely on the financial success of Pride. It provides that plaintiff will receive a "credit" or a debit" based on the profits of the company, which is not tied to his individual performance.

Unjust Enrichment / Conversion

As neither defendants nor plaintiff address the causes of action for unjust enrichment and conversion, the court does not reach them.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted in part and denied in part and it is further

ORDERED that the first, second, and fifth causes of action are dismissed; and it is further

ORDERED that the remaining causes of action are severed and shall continue.

Dated: 4/20/17

ENTER:

HON. ANIL SINGH, J.S.C.