

**Hughes v Sonnicks Partners, LLC**

2020 NY Slip Op 33278(U)

October 5, 2020

Supreme Court, New York County

Docket Number: 657014/2019

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

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RYAN HUGHES

Plaintiff,

- v -

SONNICK PARTNERS, LLC,

Defendant.

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INDEX NO. 657014/2019
MOTION DATE 9/24/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 15, 16, 17

were read on this motion to/for DISMISS

Upon the foregoing documents, it is

ORDERED that defendant Sonnick's motion to dismiss plaintiff Hughes' causes of action for breach of contract, promissory estoppel, equitable estoppel, unjust enrichment and conversion is granted; and it is further

ORDERED that Sonnick's motion to dismiss Hughes' cause of action for breach of the implied covenant of good faith and fair dealing is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for defendant Sonnick shall serve a copy of this order along with

Notice of Entry of all parties within twenty (20) days.

### Memorandum Decision

In motion sequence number 001, defendant Sonnick Partners, LLC, d/b/a Silverline (Sonnick) moves to dismiss the complaint of plaintiff Ryan Hughes (Hughes), pursuant to CPLR 3211 (a) (1) and (a) (7). Hughes opposes Sonnick's motion.

### Background

In his verified complaint, dated November 25, 2019 (complaint [NYSCEF Doc No. 1]), Hughes alleges that Sonnick, his former employer, breached their employment contract by terminating his employment in bad faith, in order to avoid paying him significant amounts of commission earnings to which he is entitled (*id.* ¶ 44). Hughes asserts causes of action for (i) breach of contract, including breach of the implied covenant of good faith and fair dealing, (ii) promissory estoppel, (iii) unjust enrichment, and (iv) conversion.

At all times relevant, Hughes was a resident of Hamilton County, Indiana (complaint ¶ 1). Sonnick is a New York limited liability company which maintains its principal place of business in New York, New York (*id.* ¶ 2). Sonnick provides software and cloud platforms for computer systems, and consulting and support for those services (*id.* ¶ 4).

On or about September 17, 2018, Sonnick hired Hughes as a "Marketing Cloud Executive, Financial Services" (*id.* ¶5), at an annual base salary of \$150,000 (*id.* 6). Hughes was also entitled to receive commissions as then calculated under the 2018 Silverline Sales Compensation Plan (2018 Plan), a copy of which Hughes signed before his start date (*id.*).

In or about February 2019, Sonnick named Hughes to the position of "Account Executive," which Hughes describes as being more demanding and imposing responsibilities greater than his prior position (*id.* ¶7). Hughes' compensation for this new position also included

commissions. Hughes signed the 2019 Silverline Sales Compensation Plan in March 2019 (2019 Plan) (*id.* ¶¶ 6-7).

Under each of these Sales Compensation Plans, Hughes was entitled to commissions upon meeting certain sales quota targets, and would receive higher commission rates for higher amounts invoiced and paid by his clients. Hughes was entitled to be paid commissions one month after the particular client was invoiced, which were distributed to him in installments, based on the amount the client was billed (*id.* ¶¶ 8-16).

Sonnick terminated Hughes' employment without cause on August 19, 2019 (*id.* ¶ 22). Hughes alleges that, at the time of his termination, he had deals with four potential clients certain to close, including Domestic & General, which promised to be the most lucrative (*id.* ¶¶ 25-26).<sup>1</sup>

On or about August 12, 2019, Domestic & General executives verbally informed Hughes and another Sonnick executive, John Halliday, that they were committed to enter a contract with Sonnick and were willing to sign a letter of intent to close the transaction by October 31, 2019 (*id.* ¶¶ 28-29).

Immediately thereafter, Hughes and Halliday called Sonnick to inform it about the deal and Domestic & General's intent to close by October 31. Hughes alleges that at least 20 Sonnick employees were present for the call and that Sonnick recorded the call. Also, Sonnick employee Angie Lingk emailed other Sonnick employees to inform them that Domestic & General had agreed to sign a letter of intent and close their deal by October 31, 2019 (*id.* ¶¶ 30-32). Hughes further alleges that, about a week before his termination, Sonnick held a staff meeting, attended by about 30 employees, at which Sonnick management praised Hughes for his performance in arranging the Domestic & General deal (*id.* ¶¶ 34-35).

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<sup>1</sup> The other deals then pending were with INTL FCStone, MBFS and Taiki (*id.* ¶ 25).

Under the deal struck with Domestic & General, Sonnick was to be paid \$3.3 million (*id.* ¶36). Hughes claims that, under the 2019 Plan, Sonnick owed him \$165,000 in commissions one month after this project was invoiced (*id.* ¶ 37). Hughes further alleges that, had it not been for his termination, he would have been able to close the three other pending deals before the expiration of the 2019 Plan, thereby exceeding Sonnick’s quota target for that sales year (*id.* ¶¶ 38-40).

Upon Hughes’ termination, Sonnick offered him three weeks’ severance pay, plus commissions on invoices to his clients accruing for the two months following his termination (*id.* ¶¶41). Later, Sonnick offered Hughes the same severance pay, plus commissions on invoices to his clients accruing through December 31, 2019, in exchange for his execution of a settlement agreement. Hughes declined this offer and refused to sign the severance agreement (*id.* ¶¶ 42-43).

In its moving papers, filed on January 21, 2020, Sonnick prays that the court dismiss the complaint in its entirety, pursuant to CPLR 3211 (a)(1) and (a) (7). It argues that Hughes fails to state claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and for conversion. Sonnick further contends that Hughes’ cause of action for promissory estoppel and unjust enrichment are barred. Hughes opposes this motion.

### Discussion

Under subsection (a) of CPLR 3211 “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded upon documentary evidence; or . . . 7. the pleading fails to state a cause of action. . . .”

“On a CPLR 3211 motion to dismiss,” the court “must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of

every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory” (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012], quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]).

“However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence” (*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 626-27 [1st Dept 2017] [citation omitted]). A motion to dismiss under CPLR 3211 (a)(1) “may be granted if documentary evidence utterly refutes the plaintiff’s factual allegations, thereby conclusively establishing a defense as a matter of law. One example of such proof is an unambiguous contract that indisputably undermines the asserted causes of action” (*Whitebox Concentrated Convertible Arbitrage Partners, L.P.*, 20 NY3d at 63 [internal quotation marks, alteration and citations omitted]).

On a motion to dismiss under CPLR 3211 (a)(7), “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

#### **Breach of Contract and the Implied Covenant of Good Faith and Fair Dealing**

“The elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff’s performance under the contract, (3) the defendant’s breach of the contract, and (4) resulting damages” (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806 [2d Dept 2011] [citations omitted]).

Sonnick argues that Hughes cannot point to any term in the 2019 Plan that was breached and so his cause of action for breach of contract must be dismissed under 3211 (a) (1) and (a) (7). Sonnick asserts that, if Hughes were terminated without cause, he would be entitled under the 2019 Plan to commissions “based on [the] amount billed for two months after your last day of employment” (2019 Plan at 3 [Wohlstadter affirmation [NYSCEF Doc No. 5], exhibit B [NYSCEF Doc No. 7]). Sonnick concludes that, as this is what he received, Hughes cannot maintain a claim for breach of contract.

Hughes concedes this point and instead focuses his argument on his cause of action for breach of the implied warranty of good faith and fair dealing. Sonnick asserts that his breach of implied covenant claim must also be dismissed, arguing that it is duplicative of his breach of contract claim. In light of Hughes’ abandonment of his breach of contract claim, this argument fails.

“In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance. This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002] [internal quotation marks and citations omitted]). “While the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship, they do encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included” (*id.* [internal quotation marks and citations omitted]).

Sonnick argues that allowing Hughes to proceed on his implied covenant claim would render the 2019 Compensation Plan a nullity. This is not so. “The implied covenant of good faith does not give rise to a contract action for the wrongful discharge of an at-will employee”

(*Arbeeny v Kennedy Exec. Search, Inc.*, 71 AD3d 177, 183 [1st Dept 2010], citing *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304-05 [1983]). “While an at-will employee cannot recover for termination per se, an employee’s contract for payment of commissions creates rights distinct from the employment relation, and . . . obligations derived from the covenant of good faith implicit in the commission contract may survive the termination of the employment relationship” (*id.* 71AD3d at 183-84 [internal quotation marks and citations omitted]).

“Although an at-will employee such as plaintiff would not be able to sue for wrongful termination of the contract, he should nonetheless be able to state a claim that the employer’s termination action was specifically designed to cut off commissions that were coming due to the employee” (*id.* 71 AD3d at 184). This is Hughes’ contention and so he has stated a cause of action for breach of the implied covenant of good faith.

Sonnick makes a factual argument against its alleged breach of covenant but fails to present any cognizable evidence for its position. In footnote 4 to its memorandum of law (NYSCEF Doc No 4), Sonnick alludes to evidence it “will present in this case,” but fails to produce on this motion, which would purportedly show that the D&G deal had still not closed as of its January 21, 2020 motion filing. Sonnick contends that this fact disproves Hughes’ allegation that Sonnick fired him to avoid paying his commissions for that transaction. This argument is not convincing. Sonnick may well have fired Hughes in August 2019 to deprive him of commissions, believing that the D&G deal would close at the end of October 2019, as expected. Just because the deal may have been delayed for unforeseen reasons does not prove that Sonnick acted in good faith in August 2019.<sup>2</sup> Accordingly, Sonnick’s motion to dismiss

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<sup>2</sup> Sonnick does not mention that it lists INTL FC Stone, one of the four prospective clients Hughes described as “certain to close” (complaint ¶ 25), as a client on its website (*see* <https://silverlinecrm.com/clients/>).

Hughes' cause of action for breach of the implied covenant of good faith and fair dealing must be denied.

### **Promissory Estoppel and Equitable Estoppel**

The elements of promissory estoppel are “(1) a promise that is sufficiently clear and unambiguous, (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance” (*Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409, 411 [1st Dept 2017] [internal quotation marks and citation omitted]). Again, Hughes concedes this point and argues instead that equitable estoppel provides a viable cause of action.

Although equitable estoppel is generally considered a defense, it may be asserted as cause of action, sounding in misrepresentation (*De Angelis v American Capital Access*, 280 AD2d 409, 409 [1st Dept 2001]). “The elements of [equitable] estoppel are, with respect to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estoppel must show with respect to [itself]: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in [its] position” (*Wallace v BSD-M Realty, LLC*, 142 AD3d 701, 703 [2d Dept 2016][internal quotation marks and citations omitted]).

Two claims are duplicative of one another if they “arise from the same facts ... and do not allege distinct damages” (*Sitar v Sitar*, 50 AD3d 667, 670 [2d Dept 2008]). The false representation Hughes alleges here is Sonnicks' implied promise not to deprive him of the commissions he would have otherwise received by firing him. This claim is duplicative of his cause of action for breach of implied covenant of good faith and fair dealing inasmuch as it is

based on the same facts and apparently seek the same relief (*see* complaint ¶¶ 50 and 68), and so must be dismissed.

### **Unjust Enrichment**

“The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in equity and good conscience should be paid to the plaintiff” (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012] [internal quotation marks and citations omitted]). “In a broad sense, this may be true in many cases, but unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations . . . . An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim” (*id.* 18 NY3d at 790-91 [citations omitted]). Here, Hughes’ claim fits squarely into the elements of a cause of action for breach of the implied covenant of good faith and fair dealing and so he has no need for recourse to unjust enrichment.

### **Conversion**

“Conversion is an unauthorized assumption and exercise of ownership over good belong to another to the exclusion of the owner’s rights (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 883 [1st Dept 1982] [citation omitted]). “Money, if specifically identifiable, may be the subject of a conversion action” (*id.* 88 AD2d at 883-84 [citations omitted]).

Here, as in *Peter Griffin Woodward, Inc.*, Hughes seeks to recover sales commissions which he alleges were wrongfully denied to him. Where a plaintiff “has never had ownership, possession or control of the money constituting” the property at issue, however, “no action in conversion may be brought” (*id.* 88 AD2d at 884). Accordingly, Hughes’ cause of action for conversion must also be dismissed.

## **CONCLUSION**

For the foregoing reasons, it is hereby

**ORDERED** that defendant Sonnicks motion to dismiss plaintiff Hughes causes of action for breach of contract, promissory estoppel, equitable estoppel, unjust enrichment and conversion is granted; and it is further

**ORDERED** that Sonnicks motion to dismiss Hughes cause of action for breach of the implied covenant of good faith and fair dealing is denied; and it is further

**ORDERED** that the Clerk of the Court shall enter judgment accordingly; and it is further

**ORDERED** that counsel for defendant Sonnicks shall serve a copy of this order along with Notice of Entry of all parties within twenty (20) days.



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10/5/2020  
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CAROL R. EDMED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
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