

**Pradhan v Art Works, Inc.**

2022 NY Slip Op 30224(U)

January 25, 2022

Supreme Court, New York County

Docket Number: Index No. 651241/2020

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LOUIS L. NOCK** **PART 38M**

*Justice*

-----X

SERRAH PRADHAN,

Plaintiff,

- v -

ART WORKS, INC. D/B/A MARIANNE BOESKY and  
MARIANNE BOESKY,

Defendants.

-----X

INDEX NO. 651241/2020

MOTION DATE 05/15/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 9, 10, 11

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is hereby ordered

Defendants' motion to dismiss the third and fourth causes of action pursuant to CPLR 3211(a)(7) is granted in part and denied in part, based upon the following memorandum decision.

**Background**

In this action to recover unpaid commissions pursuant to the Labor Law, plaintiff Serrah Pradhan ("plaintiff") alleges four causes of action: (1) failure to pay commissions pursuant to Labor Law §§ 191(1)(c)(3) and 198; (2) unjust enrichment; (3) violation of the Wage Theft Prevention Act ("WTPA"), Labor Law § 195; and (4) conversion. Defendants Art Works, Inc. d/b/a Marianne Boesky ("Art Works") and Marianne Boesky ("Boesky," and collectively "defendants") move to dismiss the third and fourth causes of action pursuant to CPLR 3211(a)(7) for failure to state a cause of action. Plaintiff has withdrawn her fourth cause of action for conversion, and it is, thus, severed and dismissed.

Plaintiff was employed by Art Works from August 1, 2009 to April 7, 2018, in which capacity she was paid an annual salary, discretionary bonus, and a 10% commission of Art Works' net profit for sales of artwork that plaintiff generated (NYSCEF Doc. No. 1, ¶¶ 11-13). Plaintiff earned commissions upon Art Works' receipt of payment and were usually paid annually, though plaintiff alleges that Art Works would occasionally pay commissions on request for individual sales that had closed (*id.*, ¶ 14). From 2017 through 2018, plaintiff earned a total of \$61,596.55 in commissions; plaintiff now alleges that Art Works has refused to pay her these commissions (*id.*, ¶¶ 15-16).

Plaintiff commenced this action by filing a summons and complaint on February 25, 2020 (NYSCEF Doc. No. 1). Defendant was served with process and filed the instant pre-answer motion to dismiss the third cause of action for violation for breach of the WTPA and the fourth cause of action for conversion.

#### Standard of Review

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*Id.* at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly

contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

### Discussion

Plaintiff having withdrawn the fourth cause of action for conversion, the remaining issue for decision concerns the third cause of action for violations of the WTPA. Specifically, plaintiff claims that Art Works failed to provide her with written wage statements as required whenever she received compensation. The statute provides that

“[e]very employer shall provide his or her employees, in writing . . . with a statement with every payment of wages, listing the following: the dates of work covered by that payment of wages . . . rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; deductions . . . and net wages.”

(Labor Law § 195[3]). An employee not provided with such statements may recover damages in a civil action up to \$5,000, costs, reasonable attorney’s fees, and injunctive relief as may be necessary (Labor Law § 195[3]). Here, plaintiff alleges that she is owed commissions earned during 2017 and 2018, and that Art Works failed to provide her with statements of pay as required under the WTPA (NYSCEF Doc. No. 1, ¶¶ 13-16, 31-32). Thus, plaintiff has stated a claim under the WTPA.

Defendants argue that the WTPA has no retroactive effect, and therefore does not apply to plaintiff, who was hired prior to the effective date of the WTPA. Defendants’ reliance on *Trujillo v Transperfect Glob., Inc.* (164 AD3d 1161, 1162 [1st Dept 2018]) in support of this point is unavailing. In *Trujillo*, the plaintiff specifically relied on Labor Law § 195(1), which requires a notice of the rate of pay be given to new employees when they are hired. Plainly, the statutory requirement to provide a statement upon payment of wages under Labor Law § 195(3) is a continuing obligation rather than solely at the time of hiring, and there is no language in the

statute stating that this requirement applies only to those employees who were hired after the WTPA's effective date. To the extent that defendants argue that plaintiff was required to request an accounting from Art Works, the statute requires an employer to provide wage statements anytime it pays wages, regardless of whether the employee in question has requested such information (Labor Law § 195[3]). Upon request, an employee may obtain a further written explanation of their wages (*id.*), but plaintiff alleges that she did not receive even the more basic statements required.

Defendants also submit several pay stubs for plaintiff covering a six-week period from January 2018 through February 2018 (NYSCEF Doc. No. 11). Defendants assert that plaintiff regularly received such statements when paid, thus satisfying the statutory requirement. The complaint, however, alleges a failure to provide statements for commissions earned over a sixteen-month period from January 2017 through April 2018. When documentary evidence is submitted in support of a motion to dismiss, "such motion may be appropriately granted only where 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 [2002]). Wage statements covering only a fraction of the time during which plaintiff alleges Art Works failed to provide statements are insufficient to utterly refute the complaint.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted and the fourth cause of action of the complaint is denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a virtual preliminary conference on Microsoft Teams, on February 23, 2022, at 10 AM.

This constitutes the Decision and Order of the Court.

1/25/2022  
 \_\_\_\_\_  
 DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  SETTLER ORDER  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

*Louis L. Nock*  
 \_\_\_\_\_  
 LOUIS L. NOCK, J.S.C.