SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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PRICE & PIERCE INTERNATIONAL, INC.,

Plaintiff,

- v -

WALL STREET TRADING, INC.,RAYMOND WALL

Defendants.

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INDEX NO. 650360/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28

were read on this motion to/for SUMMARY JUDGMENT.

Defendants' motion for summary judgment is granted.

Background

In this breach of contract case, plaintiff alleges that its business is selling container board and other packaging products. It claims that it entered into a contract with defendants (individual defendant Wall is the sole shareholder and employee of the corporate defendant). This agreement appointed defendant Wall Street Trading, Inc. ("WST") as plaintiff's non-exclusive representative to solicit orders for container board and packaging products in North America for a four-year period ending on December 31, 2021.

Plaintiff argues that its key purpose in was to get the services of Mr. Wall, an experienced salesperson in this field. It maintains that the agreement compensated WST by commissions equal to 50% of the net gross profit—a defined term in the agreement—on orders placed by defendants with plaintiff. Defendants requested, a few months after the agreement began, to be

compensated in advance on future commissions in the amount of $6,000 per month. Plaintiff agreed and paid WST $6,000 per month from August 2018 through December 2018.

In January 2019, plaintiff contends that defendants increased their request for these advances to $12,000 per month and plaintiff agreed, making these payments from January 2019 to October 2019. Plaintiff alleges that all parties agreed in October 2019 that the relationship was no longer fruitful and they agreed to terminate the agreement as of October 31, 2019. It maintains that its advances to defendants exceed the commissions earned by $169,113. They bring three causes of action for, basically, the return of this money.

Defendants move for summary judgment and contend that the services agreement did not provide a way for plaintiff to recoup the advances. They contend that New York law does not permit employers to seek repayment of advanced commissions in the absence of an agreement.

In opposition, plaintiff emphasizes that there can be an implied agreement for the return of excess monies paid to an employee from a drawing account. It contends that there is an issue of fact concerning whether defendants agreed to such a repayment. Plaintiff emphasizes that defendants had previously received compensation via a base salary and commissions from March 2015 until the parties entered the subject agreement (a commissions-based arrangement) at the beginning of 2018.

Plaintiff insists that defendants unilaterally walked away from the agreement and suggests that defendant Wall attempted to get a job with one of plaintiff's important clients. Plaintiff contends that defendants tried to insert themselves into this exclusive distributorship relationship between plaintiff and this company and was rebuffed.

Plaintiff argues that there is an issue of fact regarding whether or not there was an implied agreement to repay the money and points to an affidavit from its president and various emails sent by defendant Wall.

In reply, defendants emphasize that the subject contract between the parties contained a merger clause stating it constituted the full agreement of the parties and barred any amendment absent a writing. They also emphasize that plaintiff prevented defendants from getting the commissions as it was responsible for terminating the contract.

Discussion

Preliminarily, the Court must acknowledge that this motion has been pending for far too long. Even though it was only assigned to this part a few days ago, this motion was fully briefed in October 2020 and then seemingly lost or forgotten by the prior judge. That is simply unacceptable. On behalf of the court system, this Court profusely apologizes.

Turning to the merits, the Court begins with the applicable caselaw regarding advances. It has long been the law that advances need not be repaid absent an express acknowledgement of indebtedness (*Northwestern Mut. Life Ins. Co. v Mooney*, 108 NY 118, 121 [1888]). A more recent appellate case observes that "It is well settled that an action to recover excess monies paid to an employee from a drawing account is viable where an agreement exists by which the employee agreed to repay the excess drawn out of the account above the commissions earned, but without such an agreement, express or implied, the employer cannot recover such excess from the employee" (*Centerbank Mortg. Co. v Shapiro*, 237 AD2d 477, 477, 655 N.Y.S.2d 596 [2d Dept 1997] [internal quotations and citations omitted]).

Many cases have held, even for a commission-based salesman, that a company cannot recover advances even where the advances exceed the commission earned (*see Royal*

Distributors Co. v Friedman, 141 NYS2d 786, 788 [Sup Ct, NY County 1955]; *Louis Auerbach, Inc., v Ramer*, 80 Misc 645, 648, 141 NYS 848 [App Term, First Dept 1913]).

Therefore, the question here is whether plaintiff raised an issue of fact that there was an agreement, express or implied, that defendants would pay plaintiff back should they receive advances that exceeded commissions at the time the parties' relationship ended. The contract between the parties is silent as to the payment of advances—in fact, it contains a merger clause that states that "This Agreement contains the entire agreement between the parties and may not be changed, altered or amended except by a writing signed by all parties" (NYSCEF Doc. No. 16, ¶ 15). Of course, it is undisputed that the parties agreed to these advances without first generating a writing. However, that is not the end of the Court's assessment as there may be an implied agreement for salesperson to pay back advances.

Unfortunately for plaintiff, it did not point to anything in this record that raises a material issue of fact to suggest an implied agreement that defendants would pay back any advances received in excess of commissions earned when the parties' agreement terminated. The closest that plaintiff gets is an email from Mr. Wall in which he asks for an extra $3,000 in September 2018 and states that "I'm good for it" (NYSCEF Doc. No. 19). That single turn of phrase is not enough, in this Court's view, to find a material issue of fact as it is susceptible to many interpretations and is not enough, standing alone, to constitute an agreement. More importantly, there is no indication that defendants were agreeing to be indebted should the contract end. There's nothing else in the more than a year in which defendants received these advances in which it was clear defendants had an obligation to potentially pay back some amount should they not successfully earn enough commissions before the relationship ended.

In his affidavit in opposition, plaintiff's president says that "It is the long-standing custom in the industry that if advances against commissions are owing at the time a sales representative leaves his company, those excess advances must be paid back" (NYSCEF Doc. No. 14, ¶ 11). No citation is provided for this assertion and, given the clear, long standing New York law discussed above, plaintiff was required to do more than rely on a self-serving statement of practice in an industry.

Plaintiff's reliance on an email from early 2019 in which defendants acknowledged that a shortfall would be "repaid" before additional commissions were paid does not create an issue of fact either (NYSCEF Doc. No. 20). There is no dispute that defendants agreed to pay back the advances in the form of subtracting from any commissions earned. The problem is that there was no agreement as to what would happen if defendants no longer were part of an agreement with plaintiff. And nothing on this record creates an issue of fact that defendants were on the hook if the contract ended (or was terminated) with the advances exceeding the earned commissions.

In addition to seeking summary judgment dismissing the complaint, defendants also seek legal fees. This demand is denied as all parties admit that the payment of the advances was not made under the terms of the parties' agreement. That is, the advances were made as part of some side oral agreement and so, in this Court's view, it is not a proceeding to enforce the terms of the agreement. Without a statute or agreement between the parties regarding recovery of attorney fees, there is no basis to award them.

Summary

For some reason, plaintiff (a highly sophisticated party) decided to forward advances to defendants despite the fact that the relevant agreement between plaintiff and WST specifically

stated that any modifications had to be committed to a writing. And then it never made clear, and certainly never got defendants to acknowledge, that defendants might be required to pay back money should defendants leave before earning enough in commissions.

That it was the custom to repay in the industry, even if true, is not sufficient under the long-standing caselaw in this State. In New York, there is a difference between a loan to be repaid periodically by commissions earned and advances on commissions; loans have to repaid if the salesperson leaves and advances do not have to be repaid.

Nor is plaintiff's insistence that there is outstanding discovery from defendants sufficient to defeat summary judgment. Plaintiff would obviously be in possession of all relevant documents, including emails in which it expressed its understanding that defendants had to pay back advances earned in excess of commissions at the end of the parties' relationship. Moreover because of the above-discussed case law, plaintiff's other causes of action for unjust enrichment and money had and received are without merit.

The principle is clear that absent an implied or express agreement, plaintiff was not permitted to try and claw back the "excess advances" paid to defendants. And plaintiff evidently never made clear in a writing or in any emails that it expected to repaid at the end of the parties' agreement. For that reason, the Court grants defendants' motion.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and plaintiff's complaint is dismissed.

The Court observes that the only remaining claim is defendants' counterclaim for breach of contract. As it is unclear what has happened in the last five years, the Court will set a control date of February 24, 2026. By February 17, 2026, the parties shall upload a case status update (i.e. whether or not the parties wish to proceed with the case). Should the parties want to proceed, then please upload a proposed discovery schedule by February 17, 2026. If nothing is uploaded, the Court may assume the case is abandoned and mark the case disposed.

12/29/2025
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE