SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ABRAHAM NIYAZOV,

Index No.: 156476/2013

Plaintiff,

DECISION & ORDER

-against-

PARK FRAGRANCE, LLC, SHALBAF, LLC, (a/k/a PARKTELUSA), ALEX SHALBAF, and DAVID SHALBAF,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Park Fragrance, LLC (PF), Shalbaf, LLC (Shalbaf), Alex Shalbaf (Alex), and David Shalbaf (David) move to dismiss the Complaint pursuant to CPLR 3211. Plaintiff Abraham Niyazov opposes and cross-moves for leave to file a proposed First Amended Complaint (the FAC). The motions are granted in part and denied in part for the reasons that follow.

I. Factual Background & Procedural History

On July 16, 2013, Niyazov commenced this action by filing the Complaint, which asserted claims for breach of oral commission agreements through contract, quasi-contract, tort, and labor law causes of action. In short, the alleged oral commission agreements were for the perpetual right to receive residuals on sales so long as certain clients continued to do business with defendants. Defendants filed the instant motion to dismiss on November 8, 2013, arguing that the alleged perpetual commission agreements are unenforceable under the statute of frauds

and that the remaining claims suffered from other myriad defects.[1] On November 26, 2013, Niyazov filed opposition papers along with the FAC, which reframed the oral commission agreements to be compliant with the statute of frauds and also dropped claims for certain commissions. At oral argument on February 4, 2014, Niyazov withdrew more of his claims. *See* Dkt. 24 (Transcript). Consequently, the facts recited are taken from the FAC and are limited to the claims Niyazov has not withdrawn.

In May 2006, Niyazov began working for Shalbaf, a company that sells cell phones and related accessories. FAC ¶¶ 18, 20. Shalbaf is owned by Alex and David. ¶ 19. Between May 2006 and February 2009, Niyazov received a salary and commissions for the sale of cell phone products. ¶ 20. In February 2009, Alex offered Niyazov the opportunity to work on a new business selling perfume in addition to selling cell phone products. ¶¶ 22-24. Alex and Niyazov orally agreed that Niyazov would receive an "on the buy" commission of $0.30 per unit. ¶ 27. That is, for every unit of perfume the company purchased from vendors contacted by Niyazov, Niyazov would receive $0.30. *Id.* Niyazov received commissions at this rate between March 2009 and September 2009. *Id.* At that time, however, Niyazov did not have an agreement in place for "on the sell" commissions, which covers units sold to other vendors. ¶ 28.

[1] "[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 (2d Dept 2010) (citation omitted).

In June 2009, Niyazov introduced defendants to non-party-Bogart Group (Bogart), a French perfume company. ¶ 30. Bogart sought an exclusive distributor to sell its products in the United States. *Id.* In August 2009, Bogart and defendants entered into an exclusivity contract.[2] Niyazov alleges, upon information and belief, that defendants purchased approximately 300,000 units of perfume from Bogart in September and October 2009. ¶ 32. Under the parties' alleged $0.30 per unit commission agreement, Niyazov would be entitled to $90,000. However, instead of paying Niyazov this amount, in November 2009, Alex and David told Niyazov they were changing the deal such that (1) Niyazov would be paid a $10,000 annual bonus in lieu of an "on the buy" commission; and (2) Niyazov would start receiving a $0.05 per unit "on the sell" commission. ¶ 35. Niyazov objected, but was told he would be fired if he did not accept this new agreement. Niyazov, who was an at-will employee, stayed with the company. *Id.*[3]

In December 2009, Shalbaf, which had been conducting its cell phone and perfume businesses under one company, formed PF and transferred all of its perfume business, including its contract with Bogart, to PF. ¶ 36. Prior to the formation of PF, all of Niyazov's compensation, including cell phone and perfume commissions, came from Shalbaf. ¶ 37. Once PF was formed, Niyazov received his perfume commissions from PF. *Id.*

In August 2011, defendants once again changed Niyazov's compensation structure as follows: Niyazov was to receive a $2,000 per month payment (i.e. $24,000 annually instead of

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[2] The FAC is unclear about the terms of this exclusivity contract. For instance, the identity of the contracting parties is unclear; the FAC states that the contract was "between [Shalbaf] and/or [Alex] and/or [David] and [Bogart]". ¶ 30.

[3] Additionally, in April 2009, defendants hired a secretary for Niyazov and deducted her salary of approximately $15,000 from Niyazov's paycheck between April 2009 and April 2010. ¶¶ 44-51. Defendants do not move to dismiss Niyazov's claim for this money.

$10,000), but no longer would receive "on the sell" commissions. ¶ 42. Niyazov was told that he "would be paid perpetually so long as the vendors [he] obtained for the company continued to do business with PF", even after Niyazov left the company. *Id.*

Niyazov was fired from Shalbaf in May 2012. ¶ 41. Niyazov asked to continue to work for PF; Alex said no. ¶ 53. Niyazov continued receiving his $2,000 monthly payments until September 2012. *Id.*

In this action, Niyazov seeks to recover unpaid "on the buy" commissions at the original $0.30 rate, particularly for the Bogart purchases. The FAC lists five causes of action: (1) breach of contract against Shalbaf; (2) unjust enrichment against Shalbaf; (3) breach of contract against PF; (4) unjust enrichment against PF; and (5) violations of Article 6 of the New York Labor Law.

II. Discussion

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 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). 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 (1977). 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 (1st Dept 1994). 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 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

Defendants do not seek dismissal of the secretary deduction claim or the unpaid commissions from September and October 2009. Rather, defendants challenge Niazov's alleged entitlement to the originally agreed-to $0.30 rate. Niyazov seeks to be paid the difference between the lower commissions he received under the two amended oral agreements and the amount he would be entitled to if the $0.30 rate were applied. The $0.30 rate was agreed-to and actually paid until Niazov procured the Bogart exclusivity contract, which turned out to be immensely lucrative for PF. Defendants then unilaterally decided to pay Niyazov less. Niyazov now maintains that he is entitled to hold defendants to their original $0.30 rate for the period he was employed. Defendants' argument in opposition is that the at-will doctrine permits them to change Niyazov's oral commission rate. Defendants further argue that the Labor Law, which might entitle Niyazov to "double damages," in inapplicable.

A. The At-Will Doctrine

It is well settled that "[w]hen there is an at-will employment relationship, the employer may unilaterally alter the terms of employment, and the employee may end the employment if the new terms are unacceptable." *Minovici v Belkin BV*, 109 AD3d 520, 523 (2d Dept 2013), accord *Hanlon v Macfadden Publs.*, 302 NY 502, 505 (1951); *Ciullo v Yellow Book, USA, Inc.*,

2012 WL 2676080, at *14 (EDNY 2012), quoting *Gen. Elec. Tech. Servs. Co. v Clinton*, 173 AD2d 86, 88 (3d Dept 1991) ("when parties have an employment contract terminable at will, the contract can be modified and different compensation rates fixed without approval of the other party since the dissatisfied party has a right to leave his employment."). "By remaining in the defendant's employ under the new compensation terms, the plaintiff is deemed to have accepted them." *Kronick v L.P. Thebault Co.*, 70 AD3d 648, 649 (2d Dept 2010); *Shah v Wilco Sys., Inc.*, 27 AD3d 169, 174 (1st Dept 2005) ("an employer can change any term in an at-will employment and the employee's continued employment is deemed to be a consent thereto"). Where, as here, an employer made a "take it or leave it" offer, such that the employee's rejection of the lower commission rate would have led to his termination, the employee's "acceptance of the new scale of compensation amounted to an assent on his part." *Waldman v Englishtown Sportswear, Ltd.*, 92 AD2d 833, 835 (1st Dept 1983).

Nonetheless, "an employer ... cannot retroactively change the terms of the employment agreement he entered into with that employee. Rather, the employer is 'entitled to change the terms of the employment agreement only prospectively, subject to [the employee's] right to leave the employment if the new terms [are] unacceptable.'" *Dreyfuss v eTelecare Global Solutions-US, Inc.*, 2010 WL 4058143, at *4 (SDNY 2010), quoting *Gebhardt v Time Warner Entm't-Advance/Newhouse*, 284 AD2d 978 (4th Dept 2001). This rule, Niyazov contends, mandates that his $0.30 rate for all future Bogart purchases was locked in – or "vested" – in August 2009, when the exclusivity contract was signed, but before his compensation structure was changed. Niyazov is wrong.

Niyazov is correct that any commissions earned before the $0.30 rate was changed cannot be reduced by defendants. However, Niyazov's understanding of which commissions

were earned before the rate change is erroneous. To explain, when Niyazov procures a vendor for defendants, he gets a cut of all purchases from that vendor. But, Niyazov does not get paid until such purchases are made and, critically, once Niyazov is terminated, he forfeits all future rights to commissions from that vendor since, as his agreement was oral, the statute of frauds precludes his entitlement to perpetual commissions. Thus, if defendants believed they would be doing substantial future business with Bogart which would entitle Niyazov to more money than they wished to pay him, they could fire him and owe him no more money. This is undisputed. Alternatively, defendants could give Niyzov the option of staying, but at a lower rate. This is what occurred. Nizazov's contention that his prospective commission rate cannot be lowered while employed is incompatible with defendants' absolute right to terminate him and cut off all future commissions.

To be sure, Niyazov could have protected himself when defendants refused to sign a written contract by offering the Bogart business to a competitor. Niyazov was not bound by a non-compete. The lack of a written contract had benefits for both sides since, just as defendants can fire Niyazov or change his commission rate at any time, Nizazov could have quit or sought a competing offer to either make more from another employer or used such offer as leverage to increase the compensation received from defendants. Niyazov, however, failed to avail himself of these options and, therefore, cannot appeal to principles of equity to evade the legal rules governing his situation.

Likewise, Niyazov cannot alter the parties' contractual obligations or eschew the at-will doctrine through an unjust enrichment claim. Aside from the fact that the existence of a contract ordinarily precludes an unjust enrichment claim [*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 (2005)], if the court was permitted to deem his lower compensation unjust, the at-will

doctrine would be eviscerated since every at-will employee would assert an unjust enrichment claim, effectively nullifying the at-will doctrine, which is well settled law. The principle that quasi-contract or equitable claims cannot be used as an end-run around legal claims is also well settled. *See Mark Bruce Int'l, Inc. v Blank Rome LLP*, 19 Misc3d 1140(A), at *7 (Sup Ct, NY County 2008), *aff'd* 60 AD3d 550 (1st Dept 2009) (unjust enrichment claim not viable when claim merely seeks the enforcement of unenforceable contract itself); *The Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 324 (1st Dept 2004) (existence of a valid contract claim bars quantum meruit claim); *see also Tierney v Capricorn Investors, L.P.*, 189 AD2d 629, 632 (1st Dept 1993) (quasi-contract claims may not be used by employee to seek compensation above amount contracted for); *Tallini v Bus. Air, Inc.*, 148 AD2d 828, 830-31 (3d Dept 1989) ("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").[4]

That being said, Niyazov is correct that he is entitled to the original commission rate for September and October 2009, since the rate was not changed until November 2009. Nonetheless, there is a question of fact about whether that rate was $0.30 per unit. The court is merely assuming, as it must, that this is true for the purposes of the instant motion to dismiss.

Finally, it should be noted that, while not argued in their briefs, the parties submitted post-argument letters [Dkt. 22 & 23], in which they dispute whether GOL § 5-701(a)(10) – the

[4] The federal courts in this state also recognize that allowing "an unjust enrichment claim in these circumstances would undermine the purpose of the Statute of Frauds." *Levine v Zadro Prods., Inc.*, 2003 WL 21344550, at *5 (SDNY 2003)

statute of frauds covering sales commissions – also warrants dismissal of the claims otherwise precluded by the at-will doctrine. Defendants cite to a First Department case with similar facts:

> The action, in which plaintiff alleges that defendants, her former employers in a jewelry business, breached an oral agreement to pay her a 20% commission on sales to customers that she referred to them, should be dismissed since the alleged agreement is subject to [GOL § 5-701(a)(10)]. The doctrine of part performance does not avail plaintiff. Plaintiff's conduct, which included acceptance of commissions on completed transactions substantially less than 20%, is as referable to the series of individually negotiated ad hoc agreements asserted by defendants as with the fixed agreement asserted by plaintiff.

Ghaffari v Rima Invs. Corp., 266 AD2d 111 (1st Dept 1999).

Niyazov argues that *Ghaffari* is inapposite since another case, *Festa v Gilston*, 183 AD2d 525, 526 (1st Dept 1992), holds that § 5-701(a)(10) does not apply to an employer-employee relationship. *Festa*, however, merely notes that § 5-701(a)(10) states that it does "not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman." Niyazov is none of these.

Niyazov further avers that he is exempt from § 5-701(a)(10) because, in addition to making business referrals, he "render[ed] a wide variety of services." *See Super v Abdelazim*, 108 AD2d 1040, 1041-42 (3d Dept 1985). Since the FAC raises a question of fact about the scope of Niyazov's employment duties, the court will not grant dismissal under § 5-701(a)(10). *See Iorio v Northern Building Prods., Inc.*, 2008 WL 549166 (Sup Ct, NY County 2008) (Friedman, J.); *Riley v N.F.S. Servs., Inc.*, 819 FSupp 972, 978 (SDNY 1995). Regardless, since the at-will doctrine applies, Niyazov's breach of contract claim is limited to the unpaid commissions for September and October 2009 and the secretary claim.

B. Labor Law Claims

Niyazov contends that his claims for being underpaid are violations of Article 6 of the Labor Law and that he is entitled to enhanced statutory damages. Those claims are limited to his viable breach of contract claims. *See Tierney*, 189 AD2d at 632 ("plaintiff cannot assert a statutory claim for wages under the Labor Law if he has no enforceable contractual right to those wages").

Niyazov asserts claims under Labor Law §§ 191, 191-c, and 193. Niyazov's primary purpose in asserting otherwise duplicative Labor Law claims is to avail himself of "double damages", which an employee is entitled to under § 191-c when commissions are not paid on time. The parties dispute whether § 191-c applies to oral commission agreements. Though the First Department has never ruled on this question, it is well settled in other New York courts that § 191-c does not apply to oral agreements. *See Clifford v Remco Maintenance, LLC*, 95 AD3d 923, 924 (2d Dept 2012); *Posner v Advanced Markets, LLC*, 2012 WL 2353735 (Sup Ct, Nassau County 2012); *DeLuca v AccessIT Group, Inc.*, 695 FSupp2d 54, 61 (SDNY 2012); *Gould Paper Corp. v Madisen Corp.*, 614 FSupp2d 485, 491 (SDNY 2009). Unless the First Department holds otherwise, Niyazov cannot recover double damages under § 191-c.

Niyazov asserts his two remaining Labor Law claims to recover costs and attorneys' fees pursuant to § 198. First, he asserts a claim under § 193, which prohibits unauthorized wage deductions. Defendants concede that the secretary deductions fall under the ambit of § 193. However, Niyazov's remaining deduction claims (i.e. commissions paid below the $0.30 rate) have been dismissed. His surviving commission claims are merely for two months where he was not paid at all. This is mere nonpayment, not a deduction.

Next, Niyazov asserts a claim under § 191, which "governs frequency, rather than amount, of payments of wages." *Jara v Strong Steel Doors, Inc.*, 16 Misc3d 1139(A), at *11

(Sup Ct, Kings County 2007) (Demarest, J.), *aff'd* 58 AD3d 600 (2d Dept 2009), citing *Wysocki v Kel-Tech Construction, Inc.*, Index No. 603591/2003 (Sup Ct, NY County Apr. 8, 2005) ("the dispute here is over the amount to be paid, and not whether it was paid periodically as required by [§ 191]"), *aff'd on other grounds*, 33 AD3d 375 (1st Dept 2006). Again, Niyazov's complaint is that he was not paid the proper amount in September and October 2009,[5] not that he was not otherwise paid on time, a claim he does not assert. Accordingly, it is

ORDERED that the motion to dismiss by defendants Park Fragrance, LLC, Shalbaf, LLC, Alex Shalbaf, and David Shalbaf and the cross-motion for leave to amend by plaintiff Abraham Niyazov are decided as follows: (1) plaintiff has leave to file his proposed First Amended Complaint (the FAC), which shall be e-filed within 2 days of the entry of this order on the NYSECF system; (2) the court deems defendants' motion a motion to dismiss the FAC; (3) the second and fourth causes of action for unjust enrichment are dismissed; (4) the first and third causes of action for breach of contract are limited to unpaid commissions from September and October 2009 (and possibly part of November 2009) and the secretary deduction claim; (5) the fifth causes of action for violation of the Labor Law is limited to a § 193 claim for the secretary deductions; and (6) defendants shall e-file their answer by March 31, 2014.

Dated: March 7, 2014

ENTER:

J.S.C.

[5] It should be noted that the precise dates when Niyazov was not paid is unclear. In fact, it may be the case that there are unpaid commissions in November 2009, before Niyazov's rate was lowered. This can be resolved in discovery.