

Response Personell, Inc. v Aschenbrenner
2014 NY Slip Op 31948(U)
July 17, 2014
Sup Ct, New York County
Docket Number: 106509/2008
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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RESPONSE PERSONNEL, INC. d/b/a Response
Companies,

Plaintiff,

-against-

Index No. 106509/2008
Motion Seq. No. 006
Motion Date: 4/7/2014

ERIK ASCHENBRENNER a/k/a ERIK D.
ASCHENBRENNER, GAYLE ASCHENBRENNER
and JEFFERY ASCHENBRENNER,

Defendants.

-----X

BRANSTEN, J.:

This matter comes before the Court on Plaintiff Response Personnel, Inc.'s ("Response") motion for partial summary judgment on counts one, two, four, and five of its Complaint, as well as Defendants' two counterclaims.¹ Defendants Erik Aschenbrenner, Gayle Aschenbrenner, and Jeffery Aschenbrenner filed a cross-motion, seeking summary judgment on their counterclaim for breach of contract, as well as dismissal of the fourth and fifth causes of action in Response's complaint.

¹ The Court notes that Plaintiff's notice of motion states that it is seeking summary judgment "pursuant to CPLR 3212 dismissing the claims set forth in the Answer." After review of Plaintiff's papers, it is clear that Response is seeking more wide-ranging relief, extending to summary judgment on several counts of its own complaint. Defendants' opposition papers addressed Response's motion for summary judgment as it pertained to the complaint; therefore, it does not appear that Plaintiff's drafting error caused any prejudice. However, the Court flags this error here to encourage Plaintiff – as well as Defendants – to draft their papers more precisely and with more care in the future.

For the reasons that follow, both the motion and the cross-motion are granted in part and denied in part.

I. Background

This action stems from certain loans made by Plaintiff Response, a temporary personnel staffing and direct hire placement firm, to its former employee, Defendant Erik Aschenbrenner. Response claims that the loans have not been repaid and that Erik Aschenbrenner made certain misrepresentations to induce Response to make the loans. In addition to seeking relief from Erik Aschenbrenner, Response likewise brings unjust enrichment claims against his wife, Gayle, and his son, Jeffery.

The facts relevant to the instant action begin on May 21, 2002, when Response offered Erik Aschenbrenner the position of Managing Director of Compliance and Regulatory Services. *See* Answer Ex. A; Affidavit of Allen Gutterman ("Gutterman Aff.") ¶ 2. In its offer letter, Response stated that Erik Aschenbrenner's compensation "shall include a base salary of \$100,000 annually, paid bi-weekly," and "[i]n addition you will be eligible for all other benefits offered to employees of Response in general." *See* Answer Ex. A. Response's Employee Handbook states that while "support /operations team members are paid strictly on salary, . . . Account Executives are paid a base salary and may also receive additional income through a bonus program." (Response's Rule 19-

a Statement of Undisputed Material Facts ("Response's Rule 19-a") Ex. 7 at 15.) In addition, the Handbook provides that account executives may be eligible to receive a bonus check quarterly based on productivity and payments made by clients. *Id.* at 15-16.

Erik Aschenbrenner was employed by Response from May 28, 2002 until his resignation on December 31, 2007. (Defendants' Statement of Undisputed Material Facts ¶ 3.) According to his W-2, his reported W-2 wages for 2005 were \$117,962.22, and, for 2006, were \$107,271.74. *See* Response's Rule 19-a Ex. 11.

A. *Promissory Notes*

On November 2, 2005, Erik Aschenbrenner obtained a loan from Response and signed a promissory note in the amount of \$25,000 ("First Note"), which provided that "Response will recover the loan through commission earnings beginning in 2006 and 2007 until payment is made in full." *Id.* Ex. 10. This note was signed by Edward Caliguiri, a partner at Response. *Id.* On February 3, 2006, Erik Aschenbrenner obtained another loan in the amount of \$18,000 ("Second Note"). The Second Note also was signed by Caliguiri and Mary Wenze, the CFO of Response and again stated that "[p]ayment will be recovered through commission earnings until paid in full." *Id.* On June 6, 2006, Erik Aschenbrenner then signed a third note in the principal amount of \$15,000 ("Third Note") on June 6, 2006, and a fourth note in the amount of \$50,000

("Fourth Note") on November 1, 2006, both of which contained the identical statement about payment recovery through commission earnings and were signed by Caliguiri and Wenze. *Id.* On January 8, 2007, Erik Aschenbrenner signed a fifth note in the principal amount of \$25,000 ("Fifth Note"). This Fifth Note provides that:

Erik has made a verbal representation that he is currently in legal action against his banks, Bank of New York and Apple Bank, to recover money from an Identity Theft against him. He has made a commitment to use \$75,000 of the proceeds immediately upon recovery to pay back this loan and another loan of \$50,000 from November 2006. If he does not recover monies from the banks, this promissory note will remain in effect as a personal loan agreement between the two parties and will be enforceable for recovery purposes as per New York State contract law.

Id. Ex. 10. This note was signed by Allen Gutterman, a Response partner, and Wenze.

Id.

Together, these five notes amount to \$133,000. The Fourth and Fifth Notes were distributed to Erik Aschenbrenner by three wire transfers: the first, in the amount of \$15,000, on November 1, 2006, to the bank account of Jeffery Aschenbrenner, his adult son; the second, in the amount of \$35,000, also on November 1, 2006, to the bank account of Gayle Aschenbrenner, his wife (totaling the \$50,000 of the Fourth Note); and the third, on January 9, 2007, in the amount of \$25,000, to Jeffery's bank account (Fifth Note). *See* Response's Rule 19-a Ex. 19.

B. *The Instant Action*

On May 9, 2009, Response commenced this action, claiming that Erik Aschenbrenner failed to repay the loans evidenced by the promissory notes. Response's first claim alleges that Erik Aschenbrenner breached the parties' contract and seeks recovery of \$133,000. Next, Response seeks recovery for fraudulent inducement, alleging that each of the five loans was made to Erik Aschenbrenner in reliance upon his misrepresentations that he was a victim of identity theft, which placed him in financial straits, and that he was pursuing legal action against his banks. (Compl. ¶¶ 12-17.) Response alleges that it was thereby induced to make the loans and that it has suffered damages in the amount of the loans of \$133,000. *Id.* ¶ 20. In its third claim, Response seeks to have Erik Aschenbrenner return certain compensation received during the last two months of 2007. *Id.* ¶¶ 23-27. In the fourth and fifth claims, Response claims that Gayle and Jeffery were unjustly enriched by the loan amounts that were wire transferred into their accounts. *Id.* ¶¶ 28-39.

Defendants' answer denies the material allegations and contends that any monies received by Erik Aschenbrenner were part payment of, or an advance against, commissions due. Erik Aschenbrenner further maintains that he is due additional commissions earned during the course of his employment. (Answer ¶¶ 1-4.) Defendants also allege that Gayle and Jeffery became the nominal recipients of the wired funds at

Response's request. *Id.* ¶¶ 10-13. Accordingly, Defendants assert two counterclaims – the first alleging that Response breached Erik Aschenbrenner's employment agreement by refusing to pay him the additional commissions and the second asserting that Response's fourth and fifth causes of action are frivolous because the wire transfers were made at Response's insistence and because of the identity theft suffered by Erik Aschenbrenner. *Id.* ¶¶ 20-45.

C. *Prior Proceedings*

Shortly after issue was joined, Response filed a motion for partial summary judgment, which was denied on February 23, 2009. This Court concluded that, contrary to Response's contentions, the promissory notes were not necessarily given as a result of Erik Aschenbrenner's claims of identity theft. This determination was based on the notes' provisions stating that they were to be repaid by commission earnings until repaid in full. This Court also concluded that the documentary evidence and affidavits submitted failed to demonstrate conclusively whether some, any, or all of the first four notes were repaid as a result of commissions earned, and if so, how much was repaid. *Id.* at 2. The Court determined that there were a number of factual issues unresolved by the papers, including whether Erik Aschenbrenner was paid by salary alone or by salary and commissions; if he was paid commissions, the amount received; and the amounts actually repaid under the

notes as a result of Erik Aschenbrenner's earned commissions. *Id.* Response's motion was denied with leave to renew after discovery.

D. *The Instant Motions*

Response now moves again for partial summary judgment. In its brief, Response contends that it is entitled to summary judgment on its first claim for breach of contract, alleging that the notes have not been repaid. Response also seeks judgment on its fraud claim (count two), as well as the unjust enrichment claims against Gayle and Jeffrey (counts four and five).² Response likewise seeks dismissal of Defendants' two counterclaims, contending that Erik Aschenbrenner was not entitled to commissions, only a bonus in the event that his division was profitable.

Defendants' cross-motion seeks summary judgment on their first counterclaim for commissions due Erik Aschenbrenner, as well as dismissal of the unjust enrichment claims asserted against Gayle and Jeffrey in the complaint.

² Response does not seek summary judgment as to Count Three of its complaint, which seeks the return of compensation paid to Erik Aschenbrenner while he purportedly was employed elsewhere. Accordingly, this opinion does not address this claim.

II. Discussion

“‘[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.’” *Smalls v. AJI Indus., Inc.*, 10 N.Y.3d 733, 735 (2008) (citation and quotation omitted). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *see also* *Lesocovich v. 180 Madison Ave. Corp.*, 81 N.Y.2d 982, 985 (1993). The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *CitiFinancial Co. [DE] v. McKinney*, 27 A.D.3d 224, 226 (1st Dep’t 2006).

A. *Response's Motion for Summary Judgment*

1. Breach of Contract (Count One of the Complaint and Counterclaim One)

While Response has tendered evidence that the five notes were loans, the same triable issues of fact identified by the Court in its decision on Response's previous summary judgment motion remain. These questions include whether or not commissions were due, and if so, the amount of the commissions earned and the amount paid to Erik Aschenbrenner.

The first four promissory notes clearly provide that Response "will recover the loan through commission earnings . . . until payment is made in full" or that "[p]ayment will be recovered through commission earnings until paid in full." *See* Response's Rule 19-a Ex. 10. This language unambiguously states that Erik Aschenbrenner was to repay these loans through commissions earned with Response. Contrary to Response's contentions, there is no evidence in the record demonstrating that these four notes were given as a result of Erik Aschenbrenner's purported identity theft, despite the assertions to the contrary by Response's president Allen Gutterman. *See* Gutterman Aff. ¶ 4.

Moreover, while Response submits Erik Aschenbrenner's W-2 statements, indicating that the First through Third Notes were reported to the IRS as loans for 2005 and 2006, and copies of the loan checks for those three notes, with the attached earnings statement issued by Response noting that the earnings were a loan, this proof does not resolve the issue of whether and how much Erik Aschenbrenner earned in commissions. *See* Response's Rule 19-a, Exs. 11 & 12. Similarly, with respect to the Fourth and Fifth Notes, Response's proof does not resolve the issues with regard to repayment through commissions. Response emphasizes that both notes were unreported as income to the IRS, that the money was wire transferred into the bank accounts of Gayle (\$35,000) and Jeffery (\$15,000), and that the Fifth Note provided that if Erik Aschenbrenner did not recover monies from his banks, "this Promissory Note will remain in effect as a personal

loan agreement between the two parties." *Id.* Ex. 10. However, the fact that the amounts were designated as loans on the earnings statements, or indicated on the W-2s as "Misc Non Taxable Comp" does not demonstrate as a matter of law that there were no commissions earned thereafter which could be used to repay the amounts loaned.

Response's submission of the Gutterman's affidavit and deposition testimony likewise fails to resolve the issue of whether commissions were earned. Response points to statements that Erik Aschenbrenner was only entitled to earn a bonus based on the profitability of his division, that his division failed to show a profit, and, thus, he was never paid a commission. *See* Gutterman Aff. ¶¶ 2, 13, 16, 18; Response's Rule 19-a Ex. 1 (Gutterman Deposition at 87; 115.) However, Response fails to submit documentary proof which clearly shows that there was no such profit. The Summary Bonus Reports it submits with its reply papers, in fact, contradict Response's contentions that he did not earn commissions, by indicating that Erik Aschenbrenner was to earn, for example, 40% commissions on a certain amount of permanent placements, and 33% on temporary placements. *See* Response's Reply Affirm.³ Exs. 6, 7, and 8. While Response cites to the

³ The Court notes that both Plaintiff and Defendants submitted affirmations to the Court in lieu of memoranda of law. *See* Pl.'s Reply Affirm.; Affirm. of Joel S. Kaplan in Support of Defs.' Cross-Motion for Summary Judgment. As the attorneys for both Plaintiff and Defendants are no doubt aware, argument is to be presented in a memorandum of law. The affirmation is neither a replacement for a memorandum of law nor a place to submit additional argument. *See, e.g., Tripp & Co. v. Bank of New York, Inc.*, 28 Misc.3d 1211(A) at *6 (Sup. Ct. N.Y. Cnty. 2010) ("Affirmations, like affidavits, are reserved for a statement of the relevant facts; a statement of the relevant law and arguments belongs in a brief (i.e., a memorandum of law).")

reports, it fails to explain where the reports came from or how the figures in the reports for commissions earned were calculated by Response so to be deemed shortfalls larger than Erik Aschenbrenner's salary. *Id.* ¶¶ 11-13. In addition, Response urges that because Erik Aschenbrenner held an "executive permission [sic]" he would not receive commissions; however, the Response Employee Handbook states that "Account Executives may be eligible to receive a bonus check on a quarterly basis according to the Account Executive's productivity and payments made by clients." *See id.* ¶ 11; *see also* Response's Rule 19-a Ex. 7 at 16; *see also* Notice of Cross-Motion Ex. F (referring to Erik Aschenbrenner as A/E or account executive).

In opposition, Erik Aschenbrenner asserts that the monies he received from Response were not loans but, rather, were monies paid "on account" for the commissions and overrides he earned. *See* December 10, 2008 Affidavit of Erik Aschenbrenner ¶¶ 6-9, 13. Erik Aschenbrenner asserts that, despite his repeated requests, Response failed and was unable to provide an accurate and complete account of the billings generated by his efforts, so that he received the monies "on account" until they could do so. *Id.* ¶¶ 7-8, 13. Moreover, Response's proof is refuted by Edward Caliguri's deposition testimony, as well as Erik Aschenbrenner's salesperson bonus reports for 2005, 2006, and 2007. *Id.* Exs. B,

(citing 22 NYCRR § 202.8(c)). Both attorneys are directed to refrain from the submission of argumentative affirmations in the future.

G, H, and I. Caliguiri, Response's former Chief Operating Officer, was Erik Aschenbrenner's boss from the time he was hired until Caliguiri left Response four months before Erik resigned. *See* Affidavit of Erik Aschenbrenner in Opp. to Response's Motion ¶ 7 & Ex. B.⁴ Caliguiri testified that he entered into negotiations with Erik Aschenbrenner with regard to his employment by Response, and pursuant to these negotiations, he would earn commissions for securities industry regulatory compliance work he performed for clients or if he procured temporary personnel or permanent staffing for clients. *Id.* Ex. B (Caliguiri Deposition Tr. at 14-15.) His commissions were "accrued for any amount that exceeded the cost to the company," and his salary was not based solely upon the profit and loss of his division. *Id.* at 15-16. Caliguiri further attested that he negotiated and drafted the loan advances made by Response to Erik Aschenbrenner with regard to the first four notes, and that the terms "through commission earnings" meant that any commissions that accrued to him would be used to offset or pay back the loan. *Id.* at 9-14.

⁴Mr. Caliguiri appeared by non-party deposition subpoena from defendants. By letter dated August 1, 2013, Response objected to the deposition and refused to participate, because it was scheduled after discovery was closed on June 7, 2013. *See* November 6, 2013 Aschenbrenner Aff. Exs. C&D. Defendants went forward with the deposition and submit it in support of their cross-motion and opposition. Rather than make a motion, at oral argument of this motion and cross-motion, Response objected to defendants' use of the deposition. This Court rejected Response's challenge. *See* Mar. 31, 2014 Oral Arg. Tr. at 36. The deposition will be considered.

Caliguiri also testified that, from 2005, Erik Aschenbrenner was assigned as the person to oversee a project for Response's client, Citigroup Global Markets. Citigroup failed to pay over \$1 million for the services rendered by Response, Response sued it, and obtained a judgment in the amount of \$1,023,646.14 plus interest. *Id.* Ex. V. Citigroup eventually paid Response over \$750,000 to settle the claims. (Caliguiri Deposition Tr. at 18-26.) According to Caliguiri, Erik Aschenbrenner "would have been owed, at a minimum, twenty-five percent of the total profits on that particular job [of \$1.6 million]," which "would have been approximately \$550 to \$600,000," and that he was entitled to a commission. *Id.* at 26-27. This evidence clearly raises a triable issue of fact as to whether Erik Aschenbrenner earned commissions, and the amount thereof.

Further, the detailed salesperson bonus reports for Erik Aschenbrenner for 2005, 2006, and 2007 indicate various invoices and commission percentages earned, with a total amount of sales (both for temporary and permanent placements) earned by him for 2005 as \$278,928.97; for 2006, as \$207,296.95; and, for 2007, as \$191,078.22. *See* Notice of Cross-Motion Exs. P, Q, and R. While neither party sufficiently explains the numbers on these reports, including how they do or do not result in commissions earned, at the least, these reports show that Erik Aschenbrenner could have earned commissions during that time period, and that the amount of those commissions is clearly in dispute. Therefore,

there are triable issue of fact on both Response's first claim and Erik Aschenbrenner's first counterclaim for breach of contract, and summary judgment is denied to both parties.

2. Fraudulent Inducement (Count Two of the Complaint)

Response's motion for summary judgment as to its fraudulent inducement claim is likewise denied. On a claim for fraudulent inducement, the plaintiff must establish a material misrepresentation, which was false and known to be false by the defendant, in order to induce the plaintiff to rely thereon, justifiable reliance by the plaintiff, and injury. *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 421 (1996).

In support of its claim, Response points to the deposition testimony and affidavit of Response partner, Allen Gutterman. Gutterman attests that Response made the loans to Erik Aschenbrenner because he claimed that he was the victim of identity theft and was pursuing legal action against the banks. *See* Gutterman Aff. ¶¶ 4-6. Response then submits Erik Aschenbrenner's deposition testimony, in which he states that he did not file a proof of loss or commence an action against the banks for the identity theft and that he did not believe the money compromised was more that \$50,000. *See* Response's Rule 19-a Ex. 5 at 122 (June 7, 2013 Erik Aschenbrenner Deposition Tr.); *Id.* Ex. 2 at 91 (March 29, 2013 Erik Aschenbrenner Deposition Tr.). Erik Aschenbrenner also testified that to the extent that "money was taken from my account, I believe it was redeposited into the

account by the Bank of New York," but that he did not recall the amount. *See* June 7, 2013 Eric Aschenbrenner Deposition Tr. at 122. Response urges that, because Erik Aschenbrenner could not provide an approximation of the amount of monies compromised, this "leads one to believe his story is misleading and may be fabricated." (Pl.'s Br. at 20.)

This proof is clearly insufficient to warrant summary judgment to Response on its fraud claim. Whether Erik Aschenbrenner misrepresented that he was the victim of identity theft, or that he was pursuing action against the banks, involves credibility determinations not appropriate on summary judgment. Moreover, the Court notes that it was only the Fifth Note which actually makes any reference to identity theft; therefore, Plaintiff's attempt to secure summary judgment as to the remaining four notes is plainly unwarranted based on the evidence in the record as to this claim.

3. "Frivolous" Cause of Action (Counterclaim Two)

While Plaintiff failed to demonstrate its entitlement to summary judgment on the claims in its complaint, it nonetheless is entitled to summary judgment as to Defendants' second counterclaim. In this counterclaim, defendants Gayle and Jeffery allege that the monies they received from Response were nominally received on behalf of Erik Aschenbrenner, at Response's insistence, and that the claims against them are frivolous.

These allegations fail to provide a basis for an independent claim for relief and are dismissed.

B. *Defendant's Cross-Motion for Summary Judgment*

1. Unjust Enrichment (Counts Four and Five of the Complaint)

In their cross-motion, Defendants seek summary judgment dismissing the fourth and fifth causes of action for unjust enrichment against defendants Gayle and Jeffery. On a claim for unjust enrichment, the plaintiff must demonstrate that it conferred a benefit upon the defendant, and that the defendant obtained such benefit without adequately compensating the plaintiff for it. *Sergeants Benevolent Assn. Annuity Fund v. Renck*, 19 A.D.3d 107, 111-112 (1st Dep't 2005). A claim for unjust enrichment is one of quasi contract, and the existence of a valid and enforceable written agreement covering the same subject matter will preclude recovery in quasi contract for events arising out of that same subject matter. *Melcher v. Apollo Med. Fund Mgmt. L.L.C.*, 105 A.D.3d 15, 27-28 (1st Dep't 2013), citing *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987).

Here, the notes are written enforceable agreements covering the loans from which the wire transfers to Gayle and Jeffery arise. Response concedes that there is a contract governing the subject matter of this claim but contends that its unjust enrichment claims

are not barred since Gayle and Jeffery are not parties to those contracts. This argument has been repeatedly rejected by the First Department. *See, e.g., Melcher*, 105 A.D.3d at 27-28 (citing cases that reject quasi-contract claims against a third-party nonsignatory to a contract that covers the same subject matter). Thus, the fourth and fifth claims in Response's complaint are dismissed.

The court has considered the parties' remaining arguments and finds them to be without merit.

III. Conclusion

Accordingly, it is

ORDERED that the plaintiff's motion for partial summary judgment is granted only to the extent of dismissing the second counterclaim, and is otherwise denied; and it is further

ORDERED that the defendants' cross motion for partial summary judgment is granted only to the extent that the fourth and fifth claims against defendant Gayle Aschenbrenner and Jeffery Aschenbrenner are dismissed, and the complaint is dismissed in its entirety as against Gayle and Jeffery Aschenbrenner, with costs and disbursements to these two defendants as taxed by the Clerk of the Court, and the Clerk is directed to

enter judgment accordingly in favor of two said defendants, and the defendants' cross motion is otherwise denied, and it is further

ORDERED that the action is severed and continued against the remaining defendant Erik Aschenbrenner; and it is further

ORDERED that the caption be amended to reflect the dismissal of Defendants Gayle Aschenbrenner and Jeffrey Aschenbrenner and that all future papers filed with this court bear the amended caption; and it is further

ORDERED that counsel for Defendants shall serve a copy of this order with notice of entry, upon the County Clerk (Room 141B), the Clerk of the Trial Support Office (Room 158) and the Clerk of the E-filing Support Office (Room 119), who are directed to mark the Court's records to reflect the amended caption; and it is further

ORDERED that counsel are directed to appear for a pretrial conference in Room 442 on September 16, 2014, at 2:15 PM.

Dated: New York, New York
July 17, 2014

ENTER:


Hon. Eileen Bransten, J.S.C.