SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART** **12M**

Justice

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ERIC ROSENTHAL, NICHOLAS CASCIO,

Plaintiff,

- v -

DEOGENE MEZA, MELODY MEZA, THE FUTURES GROUP IT LLC, FUTURES GROUP HOLDINGS INC., FUTURES GROUP STAFFING SOLUTIONS INC., L.M. COHEN & CO. LLP CERTIFIED PUBLIC ACCOUNTANTS,

Defendant.

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INDEX NO. 656351/2017

MOTION DATE N/A

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER) .

Plaintiffs were employed by defendant The Futures Group IT, LLC, (Futures Group), a recruiting firm owned by defendants Deogene Meza and Melody Meza (the Mezas), formerly friends of plaintiffs. Plaintiffs contend that they were to be paid under a commission structure based on plaintiffs' candidate placements, supervision of junior recruiters, and company overrides. Plaintiffs allege that the commissions owed to them had exceeded the payments made by Futures Group and that Deogene Meza promised to pay them their earned commissions.

Defendants claim that the financial situation of the company did not allow them to pay plaintiffs. However, plaintiffs allege that the Mezas had spent millions of dollars from Futures Group's assets for personal expenses and that this was the reason for missed or delayed bi-

weekly payrolls. Defendant LM Cohen & Co., LLP Certified Public Accounts (LM Cohen) is an accounting firm that prepared financial statements for Futures Group. Plaintiffs claim that LM Cohen was aware of the commingling of personal and business expenses made by the Mezas and their excessive withdrawal of Futures Group funds.

Plaintiffs move here on various grounds for summary judgment against defendants in favor of plaintiff Rosenthal in the amount of at least $997,738.83 and in favor of plaintiff Cascio in the amount of at least of $846,766.67, together with statutory pre-judgment interest, as well as attorneys' fees, costs and disbursements.

Defendant LM Cohen cross moves for summary judgment and dismissal of the complaint against LM Cohen in its entirety, arguing that its accounting services were performed exclusively for Futures Group and that plaintiffs were not clients of and/or in privity of contract with LM Cohen.

The Meza defendants and Futures Group also cross-move for summary judgment, claiming, *inter alia*, that plaintiffs were managerial employees, thus not entitled to commissions, and that documents show personal expenses made by plaintiffs, and that plaintiffs fell short of their goals in the year 2016.

* * *

It is well-established that the "function of summary judgment is issue finding, not issue determination" (*Assaf v Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dept 1989) (quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v New York University Medical Center*, 64 N.Y.2d 851 (1985)).

Once a party has submitted competent proof demonstrating that there is no substance to its opponent's claims and no disputed issues of fact, the opponent, in turn, is required to "lay bare [its] proof and come forward with some admissible proof that would require a trial of the material questions of fact on which [its] claims rest" (*Ferber v Sterndent Corp.*, 51 N.Y.2d 782, 783 (1980)). The party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted (*See Dauman Displays, Inc. v Masturzo*, 168 A.D.2d 204 (1st Dept 1990)).

A. Declaratory Judgment of Alter Ego Liability/Piercing Corporate Veil:

Plaintiff and the Meza defendants and Futures Group move for summary judgment on the cause of action for a declaratory judgment of alter ego/piercing the corporate veil. "Generally, a plaintiff seeking to pierce the corporate veil must show that complete domination was exercised over a corporation with respect to the transaction attacked, and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. Additionally, the corporate veil will be pierced to achieve equity, even absent fraud, [w]hen a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego" (*Williams v. Lovell Safety Mgmt. Co., LLC*, 71 A.D.3d 671 (2nd Dept 2010)).

"Factors to be considered in determining whether the owner has abused the privilege of doing business in the corporate form include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (*DePetris v. Traina*, 211 A.D.3d 939 (2nd Dept 2022)).

Plaintiffs rely upon the "Expenses by Vendor Summary" (January through December 2008), as well as deposition testimony from both of the Meza defendants to argue that the Mezas

used funds from defendant Futures Group for personal use, such as vacations, homes, and tuition (Exhs H, J, & V). The Court finds that issues of fact exist as to whether the expenses were personal or business-related and whether there is sufficient proof of alter ego liability or to pierce the corporate veil. In addition, plaintiffs fail to demonstrate how any such expenses caused any injury to plaintiff, or why they are entitled to any of the aforesaid funds. Thus, plaintiffs' motion for summary judgment based on their cause of action for declaratory judgment of alter ego liability/piercing the corporate veil is denied. Defendants' motion for summary judgment and dismissal of this cause of action is similarly denied.

B. Employer Related Misrepresentation, Negligent Misrepresentation & Negligence:

All parties in this action move for summary judgment on employer related misrepresentation, negligent misrepresentation, and negligence.

Employer Related Misrepresentation: The Court grants defendants' motion for summary judgment on employer-related misrepresentation, as it finds that this is not a legally cognizable cause of action and that the cases upon which plaintiff relies are inapposite, as they pertain to negligent misrepresentation. As such, this cause of action is dismissed.

Negligent Misrepresentation: "In order for the plaintiffs to recover on a cause of action sounding in negligent misrepresentation, they must demonstrate the existence of (1) a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information. [A] duty to speak with care exists when the relationship of the parties, arising out of contract or otherwise, [is] such that in morals and good conscience one has the right to rely upon the other for information. [L]iability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of

confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Feldman v. Byrne*, 210 A.D.3d 646 (2nd Dept 2022)). Plaintiffs argue that not only did they have a close and confidential friendship with the Meza defendants, but they also had a business relationship, which arguably could have created "a heightened or fiduciary duty" (see *Jin Chai-Chen v. Metro. Life Ins. Co.*, 190 A.D.3d 635 (1st Dept 2021)). As the parties here dispute what kind of role the plaintiffs had in the Futures Group, and what duty was owed to them, there remain unresolved issues of fact. Thus, summary judgment is denied on the ground of negligent misrepresentation as to plaintiffs and as to defendants the Mezas and the Future Group.

As to defendant LM Cohen's summary judgment motion on the above grounds, this motion is also denied. "In order to impose negligence liability on an accountant for injury to a non-contracting third party resulting from the accountant's advice or services, the third party must establish each prong of the Credit Alliance test, that is: [1] the accountant's awareness that the financial reports were to be used for a particular purpose or purposes, [2] reliance on the reports by a known party or parties, and [3] some linking conduct on the part of the accountant which evinced the accountant's understanding regarding the third party's reliance" (*LaSalle Nat. Bank v. Ernst & Young LLP*, 285 A.D.2d 101 (1st Dept 2001)).

Plaintiffs cite to AR-C Section 80.14, which states "If, in the course of the engagement, the accountant becomes aware that the records, documents, explanations, or other information, including significant judgments, provided by management are incomplete, inaccurate, or otherwise unsatisfactory, the accountant should bring that to the attention of management and request additional or corrected information". Plaintiffs argue that LM Cohen knew plaintiffs were upper management, must have seen the Mezas' exorbitant spending on personal items out

of Futures Group's funds, were aware that plaintiffs were owed commissions, and were obligated to disclose any wrongdoing by the Meza defendants to plaintiffs. In support, plaintiffs point to the deposition of Thomas Procida, CPA of LM Cohen, who testified that he considered plaintiffs to be "higher-up manager[s]" (Exh M, p 22).

However, defendant LM Cohen produce the Affidavit of Lee Cohen, a managing partner and founder of LM Cohen, which states:

> 14. LM Cohen employees and principals knew plaintiffs to be ordinary employees of Futures Group, with no ownership interest or equity in the company. In this capacity, plaintiffs held no executive responsibility for the conduct of Futures Group's operations. Plaintiffs did not oversee the strategic direction of Futures Group and had no obligations relating to the legal or financial accountability of the company.
>
> 15. LM Cohen has never presented any financial statements to plaintiffs, nor was LM Cohen ever made aware that Futures Group financial statements would be shared with plaintiffs.
>
> 16. LM Cohen has never known, nor been apprised, that the financial statements that LM Cohen prepared for Futures Group would be disclosed by the company or its principals to plaintiffs for any reason whatsoever, including to induce plaintiffs to continue their employment. (Exh A).

Given Thomas Procida's acknowledgment that he considered plaintiffs to be "higher-up manager[s]s," who would be entitled to the information outlined in AR-C Section 80.14, and plaintiffs' allegation that LM Cohen was aware of the particular purpose for which management used their financial reports and understood plaintiffs reliance on the reports, compared with the Affidavit of Lee Cohen, it is clear that there are issues of fact that preclude granting of LM Cohen's summary judgment motion based on negligent misrepresentation. Considering the disputed issues of fact, summary judgment for defendant LM Cohen is not appropriate, and the motion is denied.

Negligence: The Court grants all of the defendants' motions for summary judgment as to negligence, which plaintiffs fail to address in their opposition, and which is duplicative of the

cause of action for negligent misrepresentation since both are based on the same allegations and injuries (See *Sands Harbor Marina Corp. v. Wells Fargo Ins. Servs. of Oregon, Inc.*, 156 F. Supp. 3d 348 [E.D.N.Y. 2016]).

C. Constructive Discharge:

All parties move for summary judgment on plaintiffs' cause of action for constructive discharge. "Constructive discharge occurs when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. In order to meet this threshold, the trier of fact must be satisfied that the ... working conditions [were] so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. Under the constructive discharge test, the actions of the employer in creating the intolerable workplace condition must be deliberate and intentional" (*Morris v. Schroder Cap. Mgmt. Int'l*, 7 N.Y.3d 616 (2006)).

Plaintiffs rely solely upon the fact that defendants delayed payroll, and fail to provide any case law that supports the proposition that the inability to meet payroll amounts to an intolerable workplace condition. Nonetheless, this Court finds issues of fact exist whether defendants' failure to make commissions, if perceived as such condition, was deliberate or intentional, and a result from plaintiffs' failure to accomplish internal revenue targets and defendants' inability to satisfy payroll obligations. Thus, the summary judgment motions by plaintiffs, the Meza defendants, and Futures Group are all denied as to constructive discharge. As to LM Cohen, it was not an employer of plaintiffs. Thus, defendant LM Cohen is granted summary judgment and dismissal of the plaintiff's constructive discharge cause of action against it.

D) Breach of Contract, Unjust Enrichment, and Conversion:

Breach of Contract: Plaintiffs and defendants Futures Group and the Mezas move for summary judgment based on plaintiffs' breach of contract cause of action. "The essential elements for pleading a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach (*Dee v. Rakower*, 112 A.D.3d 204 (2nd Dept 2013)).

Plaintiffs argue that the Meza defendants' agreement to pay plaintiffs under a commission structure displayed in plaintiffs' commission reports reflects an agreement between the parties on the commissions owed, and that at their resignations, plaintiffs were due $997,738.83 and $846,766.67 in commissions (Exhs Q and S). Defendants claim that plaintiffs did not have offer letters or employment contracts that established a commission structure, and that they were instead paid based on salary as executives.

However, the Court notes, that plaintiffs produced an email by defendant Deogene Meza stating, "I have Kristen separating Eric's personal production commissions from profit sharing overrides" (Exh Q, p 1). The document attached to this correspondence contains commissions to be provided to plaintiffs from various dates, with percentages, as well as the parties' signatures. Defendants claim that "[a]fter almost a decade working for Future Group, Mr. Meza only signed Mr. Rosenthal's report because he thought he was helping a friend with estate planning, and he never would have signed it for any other reason because he knew it was inaccurate" (NYSCEF doc 216, p 26). Thus, the Court is denying summary judgment to plaintiffs and defendants Futures Group and the Mezas, as it is unable to determine whether the referenced documentation,

on its face, suffices to establish that an employment agreement existed between the parties (See also Exh S).

Unjust enrichment: Plaintiffs and defendants Futures Group and the Mezas move for summary judgment on plaintiffs' cause of action for unjust enrichment. "The basis of a claim for unjust enrichment is that the defendant has obtained a benefit that in equity and good conscience should be paid to the plaintiff. It is available only in unusual situations when the defendant has not breached a contract nor committed a recognized tort, but circumstances create an equitable obligation running from the defendant to the plaintiff" (*Maya NY, LLC v. Hagler*, 106 A.D.3d 583 (1st Dept 2013)). The Court is not inclined to grant summary judgment on unjust enrichment in favor of either party as it finds that genuine issues of fact exist on whether any of the commissions allegedly owed to plaintiffs as provided in the reports were used for the personal benefits of defendants (See Exhs Q and S).

Conversion: Plaintiff and defendants Futures Group and the Mezas move for summary judgment on plaintiff's cause of action for conversion. "Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. Money, if specifically identifiable, may be the subject of a conversion action. However, an action for conversion cannot be validly maintained where damages are merely being sought for breach of contract" (*Peters Griffin Woodward, Inc. v. WCSC, Inc.*, 88 A.D.2d 883 (1st Dept 1982)). The Court is granting summary judgment in favor of defendants on conversion since it is not only duplicative of plaintiffs' cause of action for breach of contract, but also plaintiffs fail to state how their "causes of action alleging breach of contract and conversion each rest on a separate duty owed by the defendants to the plaintiff"

(*Connecticut New York Lighting Co. v. Manos Bus. Mgmt. Co., Inc.*, 171 A.D.3d 698 (2nd Dept 2019)).

E) Violations of Labor Law Article 6, Section 191-C:

Plaintiff and defendants Futures Group and the Mezas move for summary judgment on plaintiff's cause of action for violation of Labor Law Article 6, Section 191-C. Defendants argue that plaintiffs, who performed principal activities that were supervisory, managerial, and executive in nature, were not considered "commission salesperson[s]" under Labor Law Article 6, Section 190, to allege violation of Section 191, which provides that "1. When a contract between a principal and a sales representative is terminated, all earned commissions shall be paid within five business days after termination or within five business days after they become due in the case of earned commissions not due when the contract is terminated" (N.Y. Lab. Law § 191-C (McKinney)).

Plaintiffs argue that they did not run or own the business, specifically supervise or control employee schedules, maintain employment records, or determine compensation, but instead sourced and placed candidates, developed junior employees, and performed account management and training. The Court notes that the "economic reality' test plaintiffs rely upon applies to the "question of employer status" (See *Lauria v. Heffernan*, 607 F. Supp. 2d 403, 409 (E.D.N.Y. 2009)). In fact, although plaintiffs state that they were commissioned employees, Mr. Rosenthal testified to his capacity as recruiter/managing partner and director of business operations (Exh J, p 77-81), and Mr. Cascio also testified to being a managing partner and performing supervisory functions (Exh L, p 16-18).

Nonetheless, the Court denies the parties' summary judgment motions that rely on plaintiffs' claim for violation of Labor Law Article 6, Section 191. "Section 190(6) defines a

'commissioned salesperson' as any 'employee whose principal activity is the selling of any goods, wares, merchandise, services, real estate, securities, insurance or any article or thing and whose earnings are based in whole or in part on commissions.' N.Y. Labor Law 190(6). The statutory definition also expressly excludes any 'employee whose principal activity is of a supervisory, managerial, executive or administrative nature'" (*Lauria v. Heffernan*, 607 F. Supp. 2d at 407).

Given the competing claims and evidence here, the Court is unable to ascertain whether an agreement was entered into between the parties on plaintiffs' commissions to determine violation of the subject labor law and whether commissions were based on plaintiffs' non-executive functions (Cf *Pachter v Bernard Hodes Group, Inc.*, 10 N.Y.3d 609 (2008)). Thus, summary judgment is denied to plaintiffs and defendants, and plaintiffs' cause of action for violation of Labor Law Article 6, Section 191 shall remain in this case to be determined by a trier of fact.

F) Breach of Fiduciary Duty:

Plaintiff and defendants Futures Group and the Mezas move for summary judgment on the cause of action for breach of fiduciary duty. "The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Armentano v. Paraco Gas Corp.*, 90 A.D.3d 683 (2nd Dept 2011)). "[I]t is well settled in New York that no fiduciary obligation is owed by an employer to an at-will employee" (*Weintraub v. Phillips, Nizer, Benjamin, Krim, & Ballon*, 172 A.D.2d 254 (1st Dept 1991); see also *Angel v. Bank of Tokyo-Mitsubishi, Ltd.*, 39 A.D.3d 368 (1st Dept 2007)). Here, plaintiffs claim that they were employees and also that defendants owed them a fiduciary duty based on their close and

confidential relationship as well as their business relationship. However, as the Court indicated earlier when addressing the cause of action for negligent misrepresentation, issues of fact exist as to the role plaintiffs had in Futures Group. Thus, the parties are denied summary judgment on plaintiffs' cause of action for breach of fiduciary duty.

G) Constructive Trust:

Defendant LM Cohen moved for summary judgment on plaintiff's claim for a constructive trust. "[A] party claiming entitlement to a constructive trust must establish: "(1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment" (*Wachovia Sec., LLC v. Joseph*, 56 A.D.3d 269 (1st Dept 2008)). Plaintiffs failed to address the subject claim in their opposition or establish any of these factors as they relate to LM Cohen. Thus, LM Cohen is granted summary judgment and dismissal on constructive trust.

D) Fraud, Aiding and Abetting Fraud, & Civil Conspiracy in Furtherance of Fraud:

All parties move for summary judgment on the causes of action for fraud, aiding and abetting fraud, and civil conspiracy in furtherance of fraud. "The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages…[C]orporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, even if they did not stand to gain personally" (*High Tides, LLC v. DeMichele*, 88 A.D.3d 954 (2nd Dept 2011)). "In order to plead properly a claim for aiding and abetting fraud, the complaint must allege: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial

assistance by the aider and abettor in achievement of the fraud" (*Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co.*, 64 A.D.3d 472 (1st Dept 2009)).

"New York does not recognize civil conspiracy to commit a tort as an independent cause of action. However, a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort, and establish that those actions were part of a common scheme. Under New York law, [i]n order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement" (*McSpedon v. Levine*, 158 A.D.3d 618 (2nd Dept 2018)).

Based on the testimony provided and the financial reports prepared by all defendants, the Court finds that questions of fact exist as to whether there were any material misrepresentations, whether defendants had knowledge of the falsity, and whether there was any intent by defendants to induce reliance, as plaintiffs allege, in defendants' failure to pay plaintiffs' outstanding commissions allegedly owed to plaintiffs when the Meza defendants allegedly used Futures Group's business revenues for their personal use. In addition, according to plaintiff Rosenthal, "Having full access to both the Mezas and Futures Group's financial records by virtue of preparing their corporate and personal tax returns and financial statements, LM Cohen similarly represented to me that Futures Group did not have the financial wherewithal to pay my commissions at that time, and instead tried to convince me to exchange the commissions I was owed for equity in the company, which would have been at a considerable loss" (Rosenthal Aff, . ¶17-18). Given the issues of fact herein, all parties are denied summary judgment for Fraud, Aiding and Abetting Fraud, and Civil Conspiracy in Furtherance of Fraud.

* * *

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment is denied in its entirety, including for attorneys' fees and costs and disbursements; and it is further

ORDERED that defendant LM Cohen & Co. LLP Certified Public Accountants' motion for summary judgment is granted in part and denied in part. The Court grants LM Cohen's motion for summary judgment and dismissal as to employer related misrepresentation, negligence, constructive discharge, and constructive trust; and denies their motion as to negligent misrepresentation, fraud, aiding and abetting fraud, and civil conspiracy in furtherance of fraud; and it is further

ORDERED that the Meza defendants' and Futures Group's motion for summary judgment is granted in part and denied in part. The Court grants the Meza defendants' and Futures Group's motion for summary judgment and dismissal as to employer related misrepresentation, negligence, and conversion; and denies their motion as to declaratory judgment as to alter ego liability/piercing of the corporate veil, negligent misrepresentation, constructive discharge, breach of contract, unjust enrichment, violation of Labor Law Article 6, Section 191-C, breach of fiduciary duty, fraud, aiding and abetting fraud, and civil conspiracy in furtherance of fraud.

The foregoing constitutes the Decision and Order of the Court.

11/15/2024
DATE

HON. LESLEE A. STROTH J.S.C.

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