

SHORT FORM ORDER

INDEX NUMBER: 20894-2005

SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

**Present:**

HON. EMILY PINES  
J. S. C.

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HARVEY FISHBEIN, X

Plaintiff,

-against-

ABRAHAM CHAIMOVITZ, IRA BITNER,  
MUNCHICK FOODS, LLC and GLOBEX  
KOSHER FOODS, INC.,

Defendants.

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Attorney for Plaintiff

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Attorney for Defendant

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**DECISION AFTER TRIAL**

Plaintiff, Harvey Fishbein, commenced this action against the corporate defendants and Abraham Chaimovitz, for breach of the parties' written contract dated April 5, 2002. According to Plaintiff, the above mentioned Defendants never compensated him in accordance with the salary package set forth in the agreement. As a result of the breach, Plaintiff asserts that he is also entitled to damages and attorney's fees for violation of the Labor Law. Plaintiff also sued individual Defendant, Ira Bitner, for conversion, asserting that Defendant Bitner actually took cash from envelopes containing portions of the Plaintiff's income.

The Defendants deny the allegations, essentially stating that the April 2002 agreement was never performed by Plaintiff. While such agreement has certain salary and commission terms, according to Defendants, it required the Plaintiff to act as production manager at Defendants' Manhattan plant, where Plaintiff never appeared to work. Defendant Chaimovitz asserts further that neither he nor Defendant Globex Foods, Inc. are reachable, since the so-called agreement was to be paid by Munchick Foods, Inc. and the Plaintiff has not demonstrated cause to pierce the corporate veil. Defendant Bitner denies the

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allegations of the conversion cause of action and states, rather, that he delivered all envelopes addressed from his employer, Munchick Foods, LLC to Plaintiff and that he never opened the same nor removed their contents. In addition, Defendants assert that the amounts paid to Plaintiff were overpayments for which he did not perform and that they are entitled, as per their Counterclaim, to repayment of the same.

This matter was tried before the Court without a jury over two days in August, 2008. During this time, the Court heard testimony from five witnesses and had ample opportunity to adjudge the credibility of the witnesses.

The essential gravamen of Plaintiff's case is as follows. In April, 2002, the Plaintiff and his co-shareholder, Ira Bitner, operating a wholesale and retail fish selling business in Brooklyn, entered into a "Contract" with Chaimovitz and Globex Kosher Foods, Inc. ("agreement or contract"). Such contract provided, in pertinent part, as follows:

"IRA and HARVEY are all of the shareholders, officers and directors of Munchick Fish Co., Inc. (Hereinafter referred to as "MUNCHICK") . . . .

The parties hereto desire that CHAIMOVITZ form an entity known as MUNCHICK FOODS, LLC ( hereinafter referred to as "NEWCO") . . . for the purpose of conducting the business formerly conducted by MUNCHICK. . . . .

CHAIMOVITZ will serve as President of NEWCO and will be responsible for finance, administration and management of NEWCO. IRA and HARVEY will serve as Vice Presidents of NEWCO. IRA will be responsible for sales, marketing and product development of NEWCO. HARVEY will be responsible for the management of production and inventory for NEWCO. . . .

IRA and HARVEY shall each receive a compensation package for as long as they work for NEWCO. The package will include salary, medical insurance, life insurance and an expense account. Each entire package, shall be determined in accordance with the percentages of sales as set forth in Schedule "A" hereto divided by two (IRA and HARVEY). Annual distributions to IRA and HARVEY shall be a minimum of \$ 100,000.00 each and shall be capped at \$ 150,000.00 each and the balance will be distributed by agreement of the parties.

Should NEWCO be merged into Globex Kosher Foods, Inc, a company with offices located at 5600 First Avenue, . . . . ( hereinafter referred to as "GLOBEX"), then all sales to NEWCO customers so transferred will become the basis for IRA and HARVEY's compensation package calculated identically as calculated previously by NEWCO and GLOBEX will assume NEWCO's contractual agreement with IRA and HARVEY. . . .

This agreement shall become effective on April 15, 2002 and shall have a term of five (5) years which shall automatically renew for successive terms of one (1) year unless cancelled by either party by ninety days written notice to the other, which notice shall be delivered at least ninety (90) days prior to the anniversary of this agreement. . . ."

The agreement is signed by Bitner, Fishbein, Chaimovitz and Globex Kosher Foods, Inc. Schedule "A", annexed to the agreement, lists types of food (such as meat, fish, and poultry) products

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and a certain percentage attributable to each.

According to Plaintiff, although he remained at his retail establishment and continued the business of Munchick Fish Co, Inc., he and his employees also took numerous orders from Globex and Munchick Foods, LLC, which he would fill by purchasing the fish and getting it ready for sale to wholesale customers (Plaintiff's 5). Plaintiff would sell the product from Munchick Fish to Munchick Foods, for cost. In 2002 and throughout his relationship with the Defendants, Plaintiff continued the retail business in Brooklyn of Munchick Fish. He states that although he was aware that the First Avenue facility was large, that neither Globex nor Munchick Foods ever directed or even asked him to relocate.

Plaintiff averred that from the time of commencement of the agreement until May 31, 2003, he continued to process all fish orders that he was given by the Defendants but that they failed to pay him in accordance with the contract. Thus, although Plaintiff signed tax returns and filed W-2 forms for those two years in the amounts of \$49,000 (Plaintiff 2) and \$ 32,200.00 ( Plaintiff's 3) respectively, he never received either a base salary of between \$100,000 and \$150,000, nor did he ever receive any monies toward a commission as set forth in the Schedule A to the agreement. In addition, he testified that although he signed tax returns acknowledging receipt of \$1400 per week in W-2's representing his gross salary during this period, there allegedly was \$2,000 in cash to be delivered to him by Bitner and such Defendant stopped giving him the cash after the first several weeks. He asserts that he complained to Chaimovitz and his comptroller as well as to Bitner but that nothing was ever done. Then, after May 31, 2003, Plaintiff complains that Defendants unilaterally changed the above course of dealing and stopped paying his salary altogether. Thereafter, until Munchick Fish went out of business, Plaintiff was paid \$.30 per pound over his asserted cost for fish orders from Munchick Foods and Globex. Any benefits they had been providing him prior to that period, such as medical insurance and car payments were stopped. Plaintiff explained that his reason for "accepting" this new arrangement was that Munchick Foods owed Munchick Fish over \$300,000 and that he felt he was in too precarious a financial situation to protest. Plaintiff testified that no person from Munchick Foods or Globex ever directed him to relocate to the First Avenue location and that he never received a termination notice nor was he ever sent one in accordance with the terms of the contract.

Plaintiff also produced a CPA, as an expert witness, who used the total sales of Munchick Foods from 2002 until 2006 to calculate commissions Plaintiff asserts he is due under Schedule A. He testified that Plaintiff was owed one half of \$885,907.00, the witness' calculations deriving from the files of Munchick Foods setting forth what he believed to be sales of food stuffs during the period in question.

Abraham Chaimovitz testified on behalf of himself and the corporate Defendants. According to Chaimovitz, the contract speaks for itself. He formed a new corporation with Fishbein and Bitner and Fishbein's role was clearly laid out as the manager of production for wholesale fish. He stated that it was understood that this was a full time position for which Fishbein, like Bitner, would be earning approximately what they earned in salary while running their business at Munchick Fish. However, according to Chaimovitz and the other Defendants' witnesses, Fishbein never complied with essential terms of the agreement. Instead, he remained at his existing retail establishment despite the fact that the First Avenue location had ample room for him and he continued to run his separate business. According to Chaimovitz, he more or less assented to this change and indeed paid the salaries of the Munchick Fish employees for a period of time, but that he never received the benefit of his bargain. He asserts that Plaintiff received the entirety of any commission to which he would have been entitled under the agreement had it been complied with by virtue of his comptroller's calculations, due to the benefits conferred on Fishbein and the payment of the salaries of the employees of Munchick Fish (Plaintiff's 10). Chaimovitz believes that Munchick Foods is entitled to a return of much of the monies paid since it never received the benefit of its bargain.

According to Chaimovitz, Fishbein was shown the space at First Avenue before the agreement was signed and it was understood that he was to manage production out of that roomy space. He believes based on conversations with Fishbein and Bitner, that, at first, Fishbein intended that to happen and only remained in the old space in an attempt to sell his retail store. When that did not occur, according to Chaimovitz, Fishbein attempted to have his cake and eat it too, collecting salary and benefits from Munchick Foods, running Munchick Fish and allowing Munchick Foods to pay the salary of Munchick Fish's separate employees.

Chaimovitz asserts that although the parties operated under this "deal" by virtue of their actions, that it became financially intolerable for his corporation and that in May 2003, the parties agreed together to change it so that Chaimovitz and Munchick Foods would no longer employ Fishbein or Munchick Fish's employees. Thereafter for over two years the parties acted as independent corporations in which Munchick Fish sold products to Munchick Foods for a profit. The original written agreement, according to Chaimovitz, was no longer in existence.

#### CONTRACTS

The parties have far differing views on both the meaning of the contract in question as well as

to whether it can be enforced. The issue of whether the terms of a contract are clear or ambiguous is, in the first instance, one for the Court to determine as a matter of law. *see, Fetner v Fetner*, 293 AD 2d 645, 741 NYS 2d 256 ( 2d Dep't 2002) . In construing an agreement, the document must be read in order to determine the parties' purpose and intent and, so that, by giving practicable interpretation to the terms employed, the parties reasonable expectations can be met. *see, Snug v Harbor Square Venture v Never Home Laundry, Inc.*, 252 AD 2d 520, 675 NYS 2d 365 ( 2d Dep't 1998) .

Applying such principles to the case at bar and having considered the testimony of the parties, the Court makes the following findings. While the contract is not, itself a model of clarity, it provides that Chaimovitz will provide the funding and Bitner and Fishbein the labor for a new venture, incorporated under the name of Munchick Foods, Inc. Plaintiff's role is clearly spelled out. He is to be in charge of production, which he himself testified involves the supervision of the labor necessary to provide the product to the new company's customers. The agreement does not state that the Plaintiff shall provide the services through a corporation, which has its own separate business. Under such circumstances, there would be no salary; but, rather, an agreement between two separate corporations. That is not what the contract says. Rather, it states that Munchick Foods will perform the business previously performed by Munchick Fish and that Fishbein shall be an employee of Munchick Foods. The Plaintiff was to be paid a salary for his services, which included both salary and commissions, which were in addition to the wages. On the other hand, if the salary were to be capped at \$ 150,000 as Chaimovitz asserts, then there would have been no need to place the words:

“(a)nd the balance shall be calculated . . . .” after the numerical figure.

A Plaintiff seeking to collect damages for another's breach of an agreement must first demonstrate that he himself tendered performance or that the necessity for such tender was obviated by the acts of the other party amounting essentially to anticipatory breach. #1 *Funding Center v H & G Heating Corp*, 48 Ad 3d 908, 853 NYS 2d 178 (3d Dep't 2008); *Travis v Fallani and Cohn*, 292 AD 2d 242, 739 NYS 2d 675 (1<sup>st</sup> Dep't 2002); *First Frontier Pro Rodeo Circuit Finals LLC v PRCA First Frontier Circuit*, 291 AD 2d 645, 737 NYS 2d 694 (3d Dep't 2002) . Based on the Court's interpretation of the agreement in question, the Plaintiff herein never tendered performance and there was no evidence presented that Defendants' action or behavior gave him the right to do so. Instead, for perhaps his own good reasons (such as a desire to sell the original business), Fishbein remained on the premises of his existing retail fish store in Brooklyn. While he did provide

fish for Munchick Foods, Inc, he did not do so as an individual; but rather through his existing corporation. While the Defendants may not have paid him in accordance with the written agreement, he never performed under the agreement. Instead, the parties, through their mutual performance, substantially altered their conduct from the written words and performed a totally different contract.

Under the circumstances set forth at trial, the parties demonstrated a mutual departure from the written agreement and part performance, unequivocally referable to the oral modification; accordingly, any requirement of notification as set forth in the original written agreement relied upon by Plaintiff is considered waived. *see, B. Reitman Blacktop, Inc. v Missrlan, 52 AD 3d 752, 860 NYS 2d 211 (2d Dep't 2008)*.

The same rules apply in consideration of Defendants' Counterclaim. In this case, the parties, through their performance, allowed Plaintiff to continue to operate his retail establishment and paid both him and his employees from April 2002 thorough May 31, 2003, while Plaintiff's corporation provided Munchick Foods and Globex wholesale fish at the cost to Munchick, Fish, Inc. Thereafter, the parties, again through their mutual performance, changed their relationship so that Defendant corporation would purchase fish from Plaintiff corporation at an agreed upon cost over and above the cost to Munchick Fish, Inc. This was performed through the end of 2005.

While Chaimovitz claims now, as a basis for his Counterclaim, he did not like the original arrangement in 2002 and 2003 because his company was overpaying for the employees of Munchick Fish and Fishbein was not acting as production manager of Munchick Foods, there is no writing expressing such disagreement, only performance. The same can be said for the performance of the yet new agreement from June 2003 through 2005, where the entities performed as totally separate corporations and did business with each other as both obviously agreed. Accordingly, neither party, corporate nor individual, has proved a claim of breach of an agreement between the parties, nor of unjust enrichment accruing to either.

Indeed, this Court finds that the parties performed as if the agreement were essentially among three corporations; to wit, Munchick Fish, Inc which provided the fish as ordered; Munchick Foods, Inc which was the newly formed corporation which generally ordered the fish; and Globex, Inc., which provided the original funding for Munchick Foods and, from time to time, was the entity doing the ordering of fish, although the original written agreement did not give it such role.

Since this Court finds that Fishbein has not prevailed on his claim to any wages or commissions to which he claims entitlement, the predicate for sustaining his causes of action for damages and

attorneys' fees under Labor Law §§ 191 and 198 have not been met and the claims are likewise denied.

### QUANTUM MERUIT

In order to make out a claim in quantum meruit, the claimant must establish 1) the performance of services in good faith; 2) the acceptance of the services by the person to whom they are rendered, 3) an expectation of compensation therefor, and 4) the reasonable value of the services. *Ross v DeLorenzo*, 28 AD 3d 631, 813 NYS 2d 756 (2d Dep't 2006). While the same case holds that a party may not recover in quantum meruit where a valid and enforceable contract governs the relationship between the parties with respect to the subject matter for which the party seeks to recover, this Court has already determined that such contract was essentially abandoned by mutual performance by the parties of two different agreements over the years that they conducted business.

In this case, while the Plaintiff, through Munchick Fish, Inc, clearly performed services for Munchick Foods, Inc and for Globex, Inc, he and his corporations received payments over the years. Indeed in 2002 and 2003, Munchick Foods, Inc paid Plaintiff \$49,000 and \$32,200 according to his filed tax returns and paid for outside benefits, as well as the salaries of the employees of Munchick Fish, Inc. From June 2003 through 2005, the parties had a corporate arrangement, and even Plaintiff testified that he participated in a meeting where the price per pound paid for his corporation's services was formulated. The Court found no evidence that Plaintiff was unpaid for any services performed or that he was somehow underpaid therefor.

### CONVERSION

In order to sustain a claim for conversion, a party must demonstrate both entitlement to the payment and unauthorized dominion and control by the parties being sued. *see, Sellinger Enterprises, Inc. v Cassuto*, 50 AD 3d 766, 860 NYS 2d 533 (2d Dep't 2008). Plaintiff's claims against Bitner or indeed all Defendants on such cause of action must fail, as it has not been demonstrated that he was entitled to any payments, which may or may not have been tendered to him in cash. During the period from April, 2002 through May, 2003, Fishbein, according to his tax returns and other evidence presented, received \$1400 per week, plus fringe benefits including health insurance and an automobile, and payment of his own corporate employees' salaries for the work they did in filling the orders of Munchick Foods. Moreover, the fact that Fishbein did nothing to change the manner in which he was receiving payment (through Bitner) belies his claim that certain cash

payments due him were somehow disappearing.

### CONCLUSION

For the reasons set forth above, the Plaintiff, Harvey Fishbein has failed to demonstrate, at trial, entitlement to Judgment on his claims against the corporate and individual Defendants for breach of contract, quantum meruit and conversion. Since he has not prevailed on his claim for unpaid wages, the purported sections of the Labor Law on which he relies do not apply to this case. Defendants Munchick Foods and Globex, having also consented by their own performance to a modified agreement, have likewise failed to prove a claim for breach of contract or unjust enrichment against the Plaintiff.

Accordingly, following trial of this matter, the Plaintiffs' claims and the Defendants' Counterclaim are hereby dismissed. This constitutes the *DECISION* and *ORDER* of the Court.

Submit Judgment.

Dated: 10/30/08  
Riverhead, New York

Emily Pines  
EMILY PINES  
J. S. C.