

# **AHA Sales, Inc. v. Creative Bath Prods., Inc.**

Supreme Court of New York, Appellate Division, Second Department

November 12, 2008, Decided

2007-04491

## **Reporter**

58 A.D.3d 6 \*; 867 N.Y.S.2d 169 \*\*; 2008 N.Y. App. Div. LEXIS 8447 \*\*\*; 2008 NY Slip Op 8684 \*\*\*\*

[\*\*\*\*1] AHA Sales, Inc., Appellant, v Creative Bath Products, Inc., et al., Respondents.  
(Index No. 06-13487)

**Subsequent History:** As Revised November 11, 2008.

Subsequent appeal at Aha Sales, Inc. v. Creative Bath Prods., Inc., 2013 N.Y. App. Div. LEXIS 6950 (N.Y. App. Div. 2d Dep't, Oct. 30, 2013)

Subsequent appeal at Aha Sales, Inc. v. Creative Bath Prods., Inc., 2013 N.Y. App. Div. LEXIS 6951 (N.Y. App. Div. 2d Dep't, Oct. 30, 2013)

**Prior History:** Appeal from an order of the Supreme Court, Suffolk County (Jeffrey Arlen Spinner, J.), dated March 13, 2007. The order, insofar as appealed from, granted defendants' motion pursuant to CPLR 3211 (a) (7) to

dismiss the ninth and tenth causes of action asserted against defendant Mathias Meinzingler and the first, second, fifth, sixth, seventh and eighth causes of action asserted against defendant Creative Bath Products, Inc.

*AHA Sales, Inc. v Creative Bath Products, Inc.*, 2007 NY Slip Op 30394(U), modified.

**Counsel:** [\*\*\*1] *Robert L. Folks & Associates, LLP*, Melville (*Schoonover, Andrews & Rosenthal, LLC* [*Douglas A. Andrew*] of counsel), for appellant.

*Lazer, Aptheker, Rosella & Yedid, P.C.*, Melville (*Menaker & Herrmann LLP* [*Richard G. Menaker and Nicholas F. Gaffney*] of counsel), for respondent.

**Judges:** ROBERT A. SPOLZINO, J.P., JOSEPH COVELLO, THOMAS A. DICKERSON, RANDALL T. ENG, JJ.

SPOLZINO, J.P., COVELLO and ENG, JJ.,  
concur.

**Opinion by: DICKERSON**

## **Opinion**

[\*9] Dickerson, J.

[\*\*173] This appeal requires us to determine, inter alia, whether we should recognize that a sales representative has an implied private right of action to enforce [\*\*\*2] the terms of Labor Law § 191-b, as well as whether a sales representative may rely on both breach of contract and quasi-contractual theories of recovery under the circumstances of this case. We hold, as a matter of first impression, that a sales representative has an implied private right of action to enforce Labor Law § 191-b against a corporation to which it provides services and that, under the circumstances of this case, the plaintiff sales representative also adequately stated a cause of action under Labor Law § 191-c. We further conclude that the plaintiff may prosecute its claims against that corporation sounding in breach of fiduciary duty, quantum meruit, and unjust enrichment, but does not have a cause of action based upon promissory estoppel. Moreover, although

the plaintiff has a cause of action against the corporation for an accounting, it has no cause of action against the corporation's president and majority shareholder, in his personal capacity, for that or any other relief.

### [\*10] [\*\*\*2] Factual Background

AHA Sales, Inc. (hereinafter the plaintiff) is in the business of acting as a sales representative for manufacturers, and the defendant Creative Bath Products, Inc. (hereinafter [\*\*\*3] Creative) is in the business of manufacturing and importing bath products for sale to retail stores. The defendant Mathias Meinzingher owns and exercises a controlling interest in Creative, and is Creative's president. Creative and the plaintiff had a relationship dating back to approximately 1984, when Creative appointed the plaintiff as one of its sales representatives. Subsequently, as a sales representative for Creative, the plaintiff increased the revenue from Creative's existing accounts, which included Linens & Things, Bed Bath & Beyond and Luxury Linens, and introduced new accounts, which included Barnes & Noble and Macy's. The plaintiff more than doubled the number of accounts it worked on for Creative from 1997 through 2004, and, in 2004, the plaintiff's

efforts generated more than \$26 million in sales revenue for Creative. Creative was the plaintiff's largest manufacturing customer and represented approximately one half of the plaintiff's revenues. From 2000 through 2004, the plaintiff earned the sum of approximately \$425,000 in commissions on its sales of Creative's products, and the plaintiff accounted for approximately 30% of Creative's total sales of products. [\*\*\*4] Since the plaintiff did not contract with or service other businesses whose products competed with Creative's products, it was substantially dependent upon Creative.

According to the allegations in the complaint, the plaintiff's relationship with Creative was one of trust and confidence, in that it entrusted its future to Creative, based on statements and promises made to it by Creative and Meinzinger, as well as the conduct of Creative and Meinzinger. Had it not done so, the plaintiff claims it would have been an independent business entity because it would have elected to represent businesses other than Creative. The plaintiff claimed that Creative and Meinzinger exercised substantial control over its business, and argued that Creative required that it invest time, resources,

and money servicing Creative, to the exclusion of other businesses and product lines that were available to it. For instance, the plaintiff alleges that Creative and Meinzinger determined the commissions to be [\*\*174] paid and the deductions to be charged to the plaintiff, they demanded that the plaintiff perform services for Creative other than the services of an independent sales representative, and allocated overhead, [\*\*\*5] operational, and marketing costs to the plaintiff.

[\*11] The plaintiff alleges that Creative and Meinzinger refused to provide it with a single, written contract covering all of its accounts with Creative as a sales representative, and refused to provide individual, written accounts for each of the plaintiff's accounts with Creative as a sales representative. However, the plaintiff claims that Creative and Meinzinger orally entered into a binding sales representative agreement with it, under which the parties operated after the plaintiff assumed its corporate form in 1993. The plaintiff contends that Creative represented to it that a written agreement was unnecessary because the plaintiff could trust Meinzinger and Creative. The plaintiff asserts that it received

oral assurances from Creative and Meinzinger that it would continue to be Creative's sales representative as long as Meinzinger owned Creative and did not sell it to a third party, provided that Creative still operated "in the territory" that it historically covered. Despite the absence of a formal written omnibus agreement, on several occasions, the parties nonetheless reduced terms and conditions of their agreement to writing. [\*\*\*6] For instance, in a memorandum dated March 14, 2005, and addressed to all of its sales representatives, Creative, after confirming that it had previously been required to pay commissions within 15 days from the end of the month in which its products had shipped, unilaterally changed the timing of payments to 45 days from the end of the month of shipment.

According to the plaintiff, Meinzinger and Creative induced it to continue to serve as a sales representative for Creative by providing it with the assurances and promises that formed the basis of the sales representative agreement and by concealing Creative's undisclosed intention [\*\*\*\*3] to terminate its relationship with the plaintiff. The plaintiff alleges, in the complaint, that it reasonably and detrimentally relied on Meinzinger's and

Creative's representations in this regard.

The plaintiff further contends, in the complaint, that Creative and Meinzinger also failed to timely pay all commissions it earned before terminating both the sales representative agreement and Creative's relationship with it. Additionally, the plaintiff claims that, while its relationship with Creative was still ongoing, Creative and Meinzinger requested that it [\*\*\*7] perform nonsales representative services, and that they accepted the benefit of those services, but that they then refused to pay it the reasonable value of those services.

In the summer of 2004, after hiring a consultant to review its business, Creative decided to terminate the plaintiff's services. [\*12] The plaintiff alleges that Creative and Meinzinger affirmatively concealed that determination from it for approximately four months, in order to induce it to provide all of the substantial preorder services for existing accounts and to finalize those programs that would be used to obtain and replenish orders. The plaintiff claims that, once it received confirmations from customers that preorder services were completed, Creative and Meinzinger terminated its services before the

orders were received, and thereafter refused to pay it any commissions for that work for the very reason that the orders had not yet been received. Creative terminated the plaintiff's services, purportedly without notice, at a meeting held on or about April 13, 2005.

[\*\*175] The plaintiff alleges that Creative conditioned payment of commissions on the return of certain property in the plaintiff's possession, and declared [\*\*\*8] that it would withhold 25% of the commissions owed to the plaintiff as security against a final reconciliation for returns, allowances, and other adjustments to commissionable sales. The plaintiff contended that, although it returned all property in its possession that belonged to Creative, Creative did not pay it all of the commissions and other compensation that it was owed. Although the plaintiff demanded that Creative pay all commissions wrongfully withheld from it, it nonetheless offered to accept less than all of the compensation it was owed if it received immediate payment from Creative. When Creative did not pay as demanded, the plaintiff revoked its compromise offer and demanded a full accounting of all commissions and compensation owed, paid, or payable to it.

### The Plaintiff's Causes of Action

In the complaint, the plaintiff asserted 10 causes of action against the defendants. In the first and second causes of action, the plaintiff alleged that Creative violated Labor Law §§ 191-b and 191-c. In the third cause of action, the plaintiff claimed that Creative breached the parties' oral sales representative agreement, alleging that Creative unilaterally changed commission rates, [\*\*\*9] converted accounts procured by the plaintiff to "house" accounts, transferred accounts procured by the plaintiff to other sales representatives, and took charge-backs and deductions against the plaintiff's earned commissions to which it was not entitled. The plaintiff asserted the fourth cause of action against Creative, alleging breach of the covenant of good faith and fair dealing. In the fifth cause of action, the plaintiff sought to recover in quantum meruit and for unjust enrichment, alleging [\*13] that the defendants accepted, retained, and used the benefit of the services it rendered without paying it the reasonable value of those services or reimbursing it for expenses incurred in providing such services. In the sixth cause of action, the plaintiff alleged that

Creative is subject to promissory estoppel, based on promises made by Creative which induced it to perform services for Creative, and which it reasonably relied upon to its detriment. The seventh cause of action is asserted against Creative, and sought to recover damages for breach of fiduciary duty. In the eighth cause of action, the plaintiff sought an accounting, from Creative, for all material information, the commissions [\*\*\*10] and compensations Creative owes the plaintiff, and the profits Creative has made as a result of its alleged breaches of fiduciary duty to the plaintiff. In the ninth cause of action, the plaintiff alleged that Meinzinger was personally liable for inducing Creative to breach the sales representative agreement [\*\*\*\*4] and its fiduciary obligations to the plaintiff. Pursuant to the tenth cause of action, the plaintiff sought to pierce the corporate veil and hold Meinzinger personally liable for the damages sustained by the plaintiff "at the hands of Creative."

#### The Defendants' Motion to Dismiss

By notice of motion dated July 5, 2006, the defendants moved pursuant to CPLR 3211 (a)

(7) to dismiss the first, second, fifth, sixth, seventh, eighth, ninth, and tenth causes of action, but did not move to dismiss the third and fourth causes of action. The defendants argued that the first cause of action, alleging a violation of Labor Law § 191-b, failed to state a cause of action because the statute did not expressly provide for a direct private right of action by a sales representative against its principal. They argued that the second cause of action, alleging a violation of Labor Law § 191-c, also failed [\*\*\*11] to state a cause of action because it failed to allege, as required [\*\*176] by the statute, that a point had been reached after the plaintiff was terminated when its final commissions were deemed "earned." The defendants argued that fifth and sixth causes of action, sounding in quantum meruit, unjust enrichment, and promissory estoppel, were subject to dismissal because those claims were barred by the plaintiff's breach of contract claims. As to the seventh, eighth, and ninth causes of action, alleging a breach of fiduciary duty and seeking an accounting, the defendants argued that those claims failed because the complaint alleged no facts on which a fiduciary relationship could be premised. The

defendants argued that the ninth cause of action, asserted against [\*14] Meinzinger, should be dismissed because it failed to allege that he committed any acts outside of his corporate capacity. The defendants further contend that the ninth and tenth causes of action provided no basis for the imposition of personal liability upon Meinzinger, and that the complaint purported to turn a straightforward dispute over the calculation of sales commissions into a personal action against Creative's president [\*\*\*12] and majority shareholder and a purported challenge to Creative's proper discharge of its fiduciary duty.

The court granted the defendants' motion in all respects, and thus directed the dismissal of the ninth and tenth causes of action, which were asserted against Meinzinger, and the first, second, fifth, sixth, seventh, and eighth causes of action, which were asserted against Creative.

### Discussion

#### Labor Law § 191-b

[1, 2] The court granted that branch of the defendants' motion which was to dismiss the first cause of action against Creative, upon finding that no private right of action may be implied under Labor Law § 191-b. This constituted error. We recognize an implied private right of action under that statutory provision, and the plaintiff adequately stated such a cause of action here.

Labor Law § 191-b provides as follows:

"1. When a principal contracts with a sales representative to solicit wholesale orders within this state, the contract shall be in writing and shall set forth the method by which the commission is to be computed and paid.

"2. The principal shall provide each sales representative with a signed copy of the contract. The principal shall obtain a signed receipt for the contract [\*\*\*13] from each sales representative.

"3. A sales representative during the course of the contract, shall be paid the earned commission and all other monies earned or payable in accordance with the agreed terms of the contract, but not later than five business days after the

commission has become earned."

[\*\*\*5] Labor Law § 191-b was enacted in 1987, along with Labor Law §§ 191-a and 191-c, as part of article 6 of the Labor Law, [\*15] governing payment of wages (see L 1987, ch 451, § 1). Labor Law § 191-a defines "[s]ales representatives" as independent contractors, in contrast to "commission" salespersons, who are classified as employees under Labor Law § 190 (6) and § 191 (1) (c) (see Labor Law § 191-a [d]). As the Appellate Division, First Department wrote in *Deutschman v First Mfg. Co.* (7 AD3d 363, 364, 775 NYS2d 855 [2004]), "[n]o serious argument can be made that plaintiff, [a] salaried employee, was [an] independent contractor" (see *Goldberg v Select Indus.*, 202 AD2d 312, 315, 609 NYS2d 202 [1994]).

While it is clear that Labor Law § 191-b does not expressly authorize a private right of action, one may be implied when (1) the plaintiff is one of the class for whose particular benefit the statute was [\*\*177] enacted; (2) recognition of a private right [\*\*\*14] of action would promote the legislative purpose of the statute; and (3) to do so would be consistent with the legislative scheme (see *Sheehy v Big*

*Flats Community Day*, 73 NY2d 629, 633, 541 NE2d 18, 543 NYS2d 18 [1989]; see also *People v Grasso*, 11 NY3d 64, 893 NE2d 105, 862 NYS2d 828 [2008]; *Pelaez v Seide*, 2 NY3d 186, 200, 810 NE2d 393, 778 NYS2d 111 [2004]; *Uhr v East Greenbush Cent. School Dist.*, 94 NY2d 32, 38, 720 NE2d 886, 698 NYS2d 609 [1999]; *Bhandari v Isis*, 45 AD3d 619, 621, 846 NYS2d 266 [2007]). As the Court of Appeals explained in *Brian Hoxie's Painting Co. v Cato-Meridian Cent. School Dist.* (76 NY2d 207, 212, 556 NE2d 1087, 557 NYS2d 280 [1990]), "[o]ur decisions have established that the most critical inquiry in determining whether to recognize a private cause of action where one is not expressly provided is whether such action would be consistent with the over-all legislative scheme."

The plaintiff has satisfied the first and second factors here. The statute is intended to benefit sales representatives who are not employees by ensuring that they are provided with written contracts and are paid in accordance therewith. Here, the plaintiff fits the statutory definition of "sales representative" because it is an entity which solicits orders in New York State and is an independent contractor (see



Labor Law § 191-a [d]). Moreover, the legislative purpose is promoted by [\*\*\*15] holding principals accountable by allowing independent contractor sales representatives to commence civil actions to recover unpaid commissions.

The third factor, requiring that a private cause of action under a statute be consistent with the legislative scheme, has also been satisfied. "[A] private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme" (*Sheehy v Big Flats Community Day*, 73 NY2d at 634-635). However, a private right of [\*16] action "may at times further a legislative goal and coalesce smoothly with the existing statutory scheme" (*Uhr v East Greenbush Cent. School Dist.*, 94 NY2d at 40, citing *Doe v Roe*, 190 AD2d 463, 471, 599 NYS2d 350 [1993] [a private cause of action alleging a violation of Public Health Law § 2780 (6) is not inconsistent with the legislative scheme, where it would be consistent with the common law and would merely provide an additional enforcement mechanism]).

Labor Law § 191-b is codified in article 6 of the Labor Law, pertaining to the payment of wages. Pursuant to Labor Law § 21, the Commissioner of Labor (hereinafter the Commissioner) is authorized [\*\*\*16] to "enforce all the provisions of [the Labor Law] and may issue such orders as he [or she] finds necessary directing compliance with any provision of this chapter, except as in this chapter otherwise provided." Moreover, Labor Law § 196 vests the Commissioner with specific authority under Labor Law article 6, among other things, to sue employers on wage claims assigned to him or her and to "institute proceedings on account of any criminal violation of any provision of [Labor Law article 6]" (Labor Law § 196 [1] [c]). Thus, Labor Law article 6 expressly provides for an official enforcement mechanism.

Where, as here, the Legislature clearly contemplated administrative enforcement of the statute, "[t]he question then becomes whether, in addition to administrative enforcement, an implied private right of action would be consistent with the legislative scheme" (*Uhr v East Greenbush Cent. School Dist.*, 94 NY2d at 40). [\*\*178] A private right of action under Labor Law § 191-b would not be

inconsistent with the legislative scheme of Labor Law article 6. The article contains language indicating that wage claims asserted by individuals, as well as by the Commissioner, are permissible. [\*\*\*\*6] For instance, Labor Law § 198, [\*\*\*17] pertaining to costs and remedies, provides for the recovery of costs and an attorney's fee "[i]n any action instituted upon a wage claim by an employee or the commissioner" (Labor Law § 198 [1], [1-a]). Moreover, the statute allows retroactive recovery of wages "whether such action is instituted by the employee or by the commissioner" (Labor Law § 198 [3]). Further, as discussed above, Labor Law § 196 refers to "assignment[] of claims for wages as defined in this article from employees" (Labor Law § 196 [1] [b]). Finally, the courts have permitted individual employees to recover on wage claims prosecuted under Labor Law article 6, specifically pursuant to Labor Law § 191 (1) (c) and [\*17] (d) (see e.g. *Dwyer v Burlington Broadcasters*, 295 AD2d 745, 745-746, 744 NYS2d 55 [2002]; *Slotnick v RBL Agency*, 271 AD2d 365, 365-366, 706 NYS2d 431 [2000]; *Epelbaum v Nefesh Achath B'Yisrael*, 237 AD2d 327, 654 NYS2d 812 [1997]; *Kazakias v Bistricher*, 180 AD2d 666, 666-667, 580 NYS2d

879 [1992]), and nothing in the statutory scheme of Labor Law article 6 suggests that a private cause of action should be available to commissioned salespersons who are employees for purposes of Labor Law § 191 (1) (c), but not available under Labor Law § 191-b to independent contractor sales representatives. Accordingly, the [\*\*\*18] third factor of the *Sheehy* test has been satisfied and, accordingly, a private right of action under Labor Law § 191-b is permissible.

**[3]** The plaintiff's allegations that Creative breached its duty to pay commissions earned under the parties' oral and written agreements, <sup>1</sup> prior to Creative's termination of the parties' relationship, are sufficient to state a cause of action under Labor Law § 191-b (cf. *Phil Kriegel Assoc. v Lahm Knitting Mill*, 179 AD2d 539, 579 NYS2d 44 [1992]). To the extent *Matter of Carrube v New York City Tr. Auth.* (291 AD2d 558, 558, 738 NYS2d 67 [2002])

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<sup>1</sup> The defendants' reliance on *Guterman v RGA Accessories* (196 AD2d 785, 602 NYS2d 116 [1993]) is misplaced. In *Guterman*, the Appellate Division, First Department held that the defendant's failure to provide the plaintiff with a written contract in violation of Labor Law § 191-b [\*\*\*19] did not "render[] enforceable an oral contract otherwise void" (*id.* at 785). Here, on the other hand, in addition to an oral agreement, the plaintiff alleges that various terms and conditions of the parties' agreement were in writing, and the defendants concede the existence of an agreement between the parties.

holds that there is no private cause of action under a statute whenever the body of law has a potent official enforcement mechanism, we decline to follow it, and it should not be followed in the future. Accordingly, the Supreme Court should not have granted that branch of the defendants' motion which was to dismiss the first cause of action, asserted against Creative, and alleging a violation of Labor Law § 191-b.

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Spolzino, J.P., Covello and Eng, JJ., concur.

Ordered that the order is modified, on the law, by deleting the provisions thereof granting those branches of the defendants' motion which were pursuant to CPLR 3211 (a) (7) to dismiss the first, second, fifth, seventh, and eighth causes of action asserted against the defendant Creative Bath Products, Inc. and substituting therefor provisions denying those branches of the motion; as so modified, the order is affirmed insofar as appealed from, with costs to the appellant.