IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEPHEN J. GIANNETTI	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
vs.	:	**NO. 04-313**
	:	
CONSOLIDATED GRAPHICS, INC., PICCARI PRESS, INC., JOSEPH J. TREFALLER, ROBERT M. HESSE, and CARL PICCARI, JR.	:	
Defendants.	:	

DuBOIS, J. **JANUARY 10, 2006**

MEMORANDUM

I. INTRODUCTION

Plaintiff Stephen J. Giannetti's Complaint alleges breach of contract and violations of the Pennsylvania Wage Payment and Collection Law, 43 Pa. Cons. Stat. Ann. § 260.1 et. seq., arising out of unpaid commission owed from his employer, Piccari Press, Inc. ("Piccari"), its parent company, Consolidated Graphics, Inc. ("CGX"),[1] and several officers of Piccari.[2] Plaintiff and defendants each filed a motion for summary judgment. For the reasons set forth below, Defendants' Motion for Summary Judgment is granted with respect to plaintiff's breach of contract claim based on constructive discharge, granted with respect to plaintiff's breach of contract claim based on concealed margin improvement on the Habitrol account; and denied in

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[1] Plaintiff refers to his employment with CGX/Piccari notwithstanding the fact that plaintiff's compensation agreement was with Piccari. (Compare Pl. Mot. at 3 with Compensation Agreement, Ex. A. to Pl. Mot.)

[2] Plaintiff also alleges that defendants failed to deposit the full amount of plaintiff's contribution into CGX's 401(k) plan in violation of 29 U.S.C. § 1132(a)(1)(b). (Pl.'s Compl. ¶¶ 29-33, 54-56). The instant motions for summary judgment do not pertain to this allegation.

all other respects. Plaintiff's Motion for Summary Judgment is denied in its entirety.

II. BACKGROUND

Piccari hired plaintiff in September of 1999. (Pl.'s Mot. at 4; Def.'s Mot. at 2-3.) At all relevant times, defendant Joseph Trefaller ("Trefaller") was President of Piccari, defendant Robert Hesse ("Hesse") was Vice President of Sales of Piccari, and defendant Carl Piccari, Jr. was Vice President of Operations of Piccari. (Pl.'s Mot. at 6; Def.'s Mot at 2; Pl.'s Compl. ¶ 6) CGX and Piccari are large-scale commercial printing companies. (Pl.'s Mot. at 4; Def.'s Mot. at 2-3.) Plaintiff worked as a salesperson at Piccari, selling products primarily to Novartis Consumer Health ("Novartis"). (Pl.'s Mot. at 5; see Def.'s Mot. at 6.)

A. The Novartis Supply Agreement

As of November 1, 2000, CGX had a Supply Agreement with Novartis ("Supply Agreement"), which provided that CGX subsidiaries would "deliver exclusively to [Novartis] the commercial printing set forth in any Direct Order . . . or purchase order issued to CGX by a Buyer . . . in quantities sufficient to meet the total requirements, consistent with the forecasting and purchase order mechanism . . . of [Novartis]." (Supply Agreement, Ex. 6. to Def.'s Mot. § 1.1.) The initial term of the Supply Agreement was four years, after which the Supply Agreement would "automatically renew for an unlimited number of one (1) year terms." (Id. § 11.1.) The Supply Agreement provided that "[e]ither party may terminate [the] agreement at no cost effective at the end of the Initial Term or at the conclusion of any renewal term, by giving the other at least one hundred and eighty (180) days prior written notice of such termination." (Id.)

B. Plaintiff's Compensation Agreement with Piccari

As of January 1, 2001, plaintiff had a compensation agreement with Piccari ("Compensation Agreement") that provided for payment of a 50% commission on plaintiff's sales to Novartis based on margin improvement. (Compensation Agreement, Ex. A to Pl.'s Mot. at 1.) "Margin improvement is a term used to describe the difference between what [CGX's] regular price would like to be and what [CGX] could ultimately sell it for." (Trefaller Dep., Ex. 2 to Def.'s Mot. at 33.) In other words, margin improvement describes the amount of revenue received in excess of CGX's sale price estimates. Following a meeting in August of 2001 between plaintiff, Hesse, and Trefaller, plaintiff's compensation was changed from a 50% margin improvement commission to a 40% margin improvement commission. (See Pl.'s Mot. at 6; Def.'s Mot. at 9.) Defendants argue that the reduction in compensation was a valid contract modification, while plaintiff argues that the modification lacked consideration. (Def.'s Mot. at 35-40; Pl.'s Mot. at 12-13.)

The Compensation Agreement also provided that Piccari would pay plaintiff "1% on total monthly Novartis billings from original bid, payable monthly. Includes work from companies directed to purchase from Piccari. 1% commission on all work for Novartis companies not included in original bid. Additional commission to be negotiated based upon pricing level obtained." (Compensation Agreement, Ex. A to Pl.'s Mot. at 1.) Plaintiff argues that Piccari should have paid him 1% commission on total billings to Novartis (i.e., commission on both sale price estimates and margin improvement). Defendants argue that plaintiff was entitled only to a 1% commission on "Novartis original bids" (i.e., sale price estimates), and not to a 1% commission on margin improvement. (Compare Def.'s Opp. at 25-26 with Pl.'s Mot. at 15-16.)

Plaintiff also alleges that defendants improperly increased sale price estimates for one client, Habitrol, in order to "steal" plaintiff's margin improvement commission. (Pl.'s Opp. at 4.) Defendants dispute plaintiff's assertion that price estimates were improperly increased, and argue that plaintiff has failed to produce documents necessary to support this claim. (Def.'s Mot. at 31.) Documents that allegedly substantiate plaintiff's claim and prove damages are currently missing. (Def.'s Mot. at 31-33; see Pl.'s Mot. at 6.)

C. Plaintiff's Employment at Phoenix Lithographic, Inc.

In the fall of 2002, plaintiff began discussing a potential new sales position with representatives of Phoenix Lithographic, Inc. ("Phoenix"), a printing company. (Green Dep., Ex. 15 to Def.'s Mot. at 33-34.) Phoenix sent plaintiff a draft employment agreement dated October 18, 2002 ("Draft Agreement"). The Draft Agreement provided $1.54 million in compensation to plaintiff for his first two years of employment with Phoenix, predicated upon plaintiff generating $8 million in sales; if plaintiff failed to meet this benchmark, his compensation would be adjusted downwards. (Draft Agreement, Ex. 17 to Def.'s Mot. at 3.) Plaintiff's attorney informed Phoenix's attorney that the Draft Agreement "would not provide the necessary incentive for Mr. Giannetti to modify his current career direction." (Letter from Gary R. Backinoff, Esq., Ex. 18 to Def.'s Mot.)

On December 23, 2002, plaintiff and Phoenix executed a final version of an agreement ("Final Agreement"), which included a guaranteed $1.25 million bonus, monthly payments of $100,000, ten percent of Phoenix stock, monthly expense compensation of $5,750, and a $2.2 million life insurance policy. (Ex. 21 to Def.'s Mot. at 1.) The Final Agreement provided that plaintiff was to "devote his full-time and exclusive efforts" to Phoenix." (Id.) According to Barry

Green, the President of Phoenix, Phoenix hired plaintiff and provided him the non-refundable bonus because plaintiff represented that he could bring to Phoenix all of the Novartis work then going to CGX. (Green Dep., Ex. 15 to Def.'s Mot. at 39-40, 79-80.)

On December 16, 2004, plaintiff and Phoenix rescinded the Final Agreement through a termination agreement. According to Barry Green, from the time plaintiff was hired by Phoenix in January of 2003 until he left Phoenix in December of 2004, Phoenix paid plaintiff a total of $3,110,590.84. (Green Dep., Ex. 15 to Def.'s Mot. at 54.) Plaintiff acknowledges receiving the $1.25 million bonus, $1.2 million in salary during his first year at Phoenix, and approximately $500,000 in salary during his second year at Phoenix.[3] (Gianetti Dep. III, Ex. 14 to Def.'s Mot. at 12-13, 23-24.) Additionally, plaintiff acknowledges receiving approximately $115,000 for expenses, regardless of what his actual expenses were.[4] (Id. at 41-42). In total, plaintiff acknowledges receiving more than $3 million in compensation from Phoenix.

D. Plaintiff's Resignation from Piccari

On January 3, 2003, following execution of the Final Agreement and payment of the $1.25 million bonus, plaintiff submitted a letter of resignation to Piccari. (Ex. 25 to Def.'s Mot. at 1.) In his letter of resignation, plaintiff explained that he believed that he had "not been treated fairly and entirely in accordance with the Compensation Agreement." Specifically, plaintiff stated that Piccari "unilaterally changed the calculation of payments of Margin Improvement without [his]

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[3] As to plaintiff's second year at Phoenix, plaintiff states that "from some time in January of 2004 to approximately August of 2004, I received payments based on $750,000 per year." Thus, plaintiff acknowledges payment of $62,500 per month for approximately eight months.

[4] Plaintiff states that he received $5,750 per month for approximately 20 months ("Up through August 2004"). (Id.)

approval or consent" and that "[e]arned [Margin Improvement] in conjunction with . . . Habitrol was willfully hidden . . . ." (Id.) Plaintiff also stated in deposition that he resigned from Piccari because of "[f]alse promises" and "illegal practices with Navartus's [sic] money." (Gianetti Dep., Def.'s Ex. 7 at 124-125.) Defendants argue that plaintiff resigned from Piccari to enter into a more lucrative agreement with Phoenix. (Def.'s Opp. at 13.)

III. STANDARD OF REVIEW

A court should grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A "genuine" issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" when it "might affect the outcome of the suit under the governing law." Id. In considering a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). The party opposing the motion, however, cannot rely merely upon bare assertions, conclusory allegations, or suspicions to support its claim. Fireman's Ins. Co. v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982).

IV. DISCUSSION

Plaintiff alleges breach of contract and violations of the Pennsylvania Wage Payment and Collection Law ("WPCL"), 43 Pa. Cons. Stat. Ann. § 260.1 et. seq. The "WPCL does not create a right to compensation. Rather, it provides a statutory remedy when the employer breaches a

contractual obligation to pay earned wages. The contract between the parties governs in determining whether specific wages are earned." Weldon v. Kraft, Inc., 896 F.2d 793, 801 (3d Cir. 1990); see also De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 309 (3d Cir. 2003). Plaintiff alleges that defendants violated the Compensation Agreement by: (1) unilaterally reducing plaintiff's margin improvement commission from 50% to 40%; (2) failing to pay plaintiff a portion of a 1% commission on Novartis bids; (3) inflating sale price estimates to "steal" margin improvement commission from plaintiff with respect to one client, Habitrol; and constructively discharging plaintiff. The Court addresses the motions for summary judgment by examining plaintiff's underlying breach of contract claims in turn.

A. Plaintiff's and Defendants' Motions for Summary Judgment as to Reduction in Margin Improvement Commission

Plaintiff alleges that defendants breached the Compensation Agreement by unilaterally reducing his margin improvement commission from 50% to 40%. (Def.'s Mot. at 35-40.) Defendants argue that the reduction in compensation was a valid contract modification, while Plaintiff argues that the modification was not a bargained-for exchange. (Id.; Pl.'s Mot. at 12-13.) Both parties have moved for summary judgment with respect to this issue. The Court concludes that there is a genuine issue of material fact with respect to whether plaintiff received consideration for the reduction in margin improvement commission. Thus, both parties' motions for summary judgment are denied with respect to this issue.

1. Legal Standard

"It is well settled under Pennsylvania law that the parties may subsequently modify a written agreement, either by words or conduct." National Ass'n For Stock Car Auto Racing, Inc.,

v. Scharle, 356 F.Supp.2d 515, 525 (E.D. Pa. 2005) (citing First Nat'l Bank of Pennsylvania v. Lincoln Nat'l Life Ins. Co., 824 F.2d 277, 280 (3d Cir. 1987) (noting "that a written contract may be modified by a subsequent oral agreement") (citing Pennsylvania state court cases)). "It is fundamental that a contract be modified only by the assent of both parties, and only if the modification is founded upon valid consideration." Corson v. Corson's, Inc., 434 A.2d 1269, 1271 (Pa. Super. 1981); see also Apgar v. State Employes' Retirement System 655 A.2d 185, 188 (Pa. Cmwlth. 1994) (noting that "[o]nce a contractual obligation vests . . . the same cannot be altered, amended or changed by unilateral action").

"While it is true that the performance of an act which one party is legally bound to render to the other party is not legal consideration . . . this rule is subject to an exception where the very existence of the duty is the subject of honest and reasonable dispute." Ciavarro v. Cost Control Marketing and Management, Inc., 603 A.2d 214, 217 (Pa. Super. 1992) (cited in Arcadia Petroleum Ltd. v. Sun Intern. Ltd., 192 Fed.App'x 164, 170 (3d Cir. 2006) ("In Pennsylvania, parties need only have a 'bona fide,' 'legitimate,' 'honest,' or 'good faith' disagreement before compromise of their position will be considered valid consideration."). Conversely, "[f]orbearance to assert an invalid claim, or to interpose an invalid defense to a valid claim, by one who does not have an honest and reasonable belief in its possible validity is not considered sufficient consideration." Crown v. Cole, 236 A.2d 532, 534 (Pa. Super. 1967) (cited in Peoples Mortg. Co., Inc. v. Federal Nat. Mortg. Ass'n, 856 F.Supp. 910, 924 (E.D. Pa. 1994)).

2. Analysis

In an August 17, 2001 email to Trefaller and Hesse, plaintiff wrote: "Change the split for

MI [margin improvement] . . . I understand this is going forward for new business, as our other changes to reducing my income have been . . . . Going forward, the split will now be 60/40 instead of the 50/50." (Ex. 9 to Def.'s Mot. at 2.) Later, in a September 10, 2001 email to Trefaller and Hesse, plaintiff wrote: "I fully understand the MI position and will support you in any way that I can . . . We made some changes on Aug. 16th to both MI (going forward) and expenses and hopefully this will help. I will now offer that we apply the 60/40 to all MI . . . ." (Ex. 12 to Def.'s Mot. at 1.)[5]

First, defendants argue that its continuation of the Novartis Supply Agreement constituted consideration for the reduction in margin improvement commission; discontinuing the Novartis Supply Agreement or accepting fewer printing job requests would have decreased plaintiff's margin improvement commission. (See Def.'s Mot. at 37.) Whether plaintiff received consideration turns in part upon whether Piccari could have refused to accept printing job requests under the Supply Agreement. Defendants argue that Piccari did not have a contractual obligation to accept all Novartis printing job requests or continue the contract, while plaintiff argues that Piccari could not have refused to accept printing job requests or discontinue the contract and did not believe that it could. (Id.; Pl.'s Opp. at 3.)

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[5] Plaintiff asserts that he agreed to the modification partly because he felt his job was threatened. (See Giannetti Dep., Ex. 3 to Def.'s Mot. at 247-252). Plaintiff's allegations do not support a finding of duress, however. "A threatened breach of contract ordinarily is not in itself coercive . . . . To constitute duress . . . there must be more than a mere threat which might possibly result in injury at some future time . . . ." Tri-State Roofing Co. of Uniontown v. Simon, 142 A.2d 333, 335 (Pa. Super. 1958) (noting "a threat of serious financial loss is sufficient to constitute duress . . . where an ordinary suit at law" is not an adequate remedy) (cited in Corporate Aviation Concepts, Inc. v. Multi-Service Aviation Corp., 2005 WL 1693931, *5 (E.D. Pa. July 19, 2005)). Assuming *arguendo* that plaintiff's job was threatened, a suit at law could remedy any breach of the Compensation Agreement.

Defendants fail to point to any provision of the Supply Agreement that would have permitted Piccari to immediately refuse printing job requests or immediately discontinue the Supply Agreement. The Supply Agreement provides, however, that "[e]ither party may terminate [the] agreement at no cost effective at the end of the Initial Term or at the conclusion of any renewal term, by giving the other at least one hundred and eighty (180) days prior written notice of such termination." (Supply Agreement, Ex. 6. to Def.'s Mot. § 1.1.) The Initial Term of the Supply Agreement was four years, after which the Supply Agreement would "automatically renew for an unlimited number of one (1) year terms." (Id. § 11.1.) Accordingly, Piccari could not have terminated the Supply Agreement under its terms until November 1, 2004, at the end of the Initial Term. Although Piccari's promise not to terminate the Supply Agreement at the end of the Initial Term pursuant to the termination clause might have constituted consideration for the reduction in plaintiff's margin improvement commission,[6] it is uncertain whether Piccari made such a promise. Trefaller stated in deposition that he "did not tell [plaintiff] specifically I would terminate the Novartis contract." (Trefaller Dep., Ex. E to Pl.'s Mot. at 47.) Moreover, Trefaller stated that "legally speaking" he did not think that Piccari "had the right to terminate the Novartis contract" but that he believed that Piccari "did not necessarily have to accept every job." (Id. at 48.) Based on this evidence, the Court concludes that there is a genuine issue of material fact as to whether Piccari's continuation of the Novartis Supply Agreement constituted consideration for the contract

[6] Although Piccari would have to wait until the conclusion of the Initial Term to terminate the contract, termination could still affect plaintiff negatively because the term of plaintiff's Compensation Agreement "correspond[ed] to the length of the original Novartis [Supply Agreement] and *any extended term* . . . ." (Compensation Agreement, Ex. 8 to Def. Mot. at 1 (emphasis added).)

modification.

Second, defendants argue that, in exchange for the reduction in margin improvement commission, Piccari agreed to "shift certain costs, attempt to secure different types of leads on project work, and changing [*sic*] the procedure for printing job requests." (Def. Mot. at 38.) Specifically, in an August 17, 2001 e-mail from plaintiff to Trefaller and Hesse, plaintiff mentions "a rebate to be paid directly to Novartis." (Ex. 9 to Def. Mot. at 10.) According to plaintiff, the rebate would be "very important for [Piccari] to break into the Pharma side . . . it shows that we are listening to Novartis and working in their best interest." (Ex. 9 to Def. Mot. at 2.) While the "additional obligations" noted by defendants (Def. Mot. at 38) may have benefitted plaintiff, the Court concludes that there is a genuine issue of material fact as to whether Piccari incurred these obligations in exchange for the contract modification.

Third, defendants argue that consideration is implied from the mutual assent of the parties to the reduction in margin improvement. In rare instances, Pennsylvania courts have found consideration to be "implied from the mutual assent of the parties to the modification." Empire Properties, Inc. v. Equireal, Inc., 449 Pa. Super. 476, 487, 674 A.2d 297, 302-303 (Pa. Super. 1996) (citing Pennsylvania state court cases from 1936 and 1939.) Although the apparent assent of plaintiff further militates in favor of denying Plaintiff's Motion for Summary Judgment on this issue, the Court concludes that it is an insufficient basis for granting Defendants' Motion for Summary Judgment because it does not resolve the crucial issues of material fact regarding defendants' relationship with Novartis.

Fourth, defendants argue that the modification should be enforced through estoppel

because "Piccari expressly relied upon the modification in deciding to continue accepting Novartis orders at the then current level . . . ." (Def.'s Mot. at 40.) Defendants' argument is unavailing because defendants have failed to point to any provision of the Supply Agreement that would have permitted Piccari to immediately refuse printing job requests.

Fifth, defendants argue that the modification should be enforced pursuant to Section 89 of the Restatement (Second) of Contracts, which provides that "[a] promise modifying a duty under a contract not fully performed on either side is binding [] if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made . . . ." (Def. Mot. at 39-40.) The Court rejects this argument. The fact that the Supply Agreement was "not turning out as expected for Piccari" does not imply unanticipated circumstances within the meaning of Section 89. (Id. at 40.) Rather, the Supply Agreement was simply not working out as well for Piccari as it had hoped. See Colonial Penn Ins. Co. v. Bauso, 1989 WL 18831, *6 (E.D. Pa. March 3, 1989) (holding "contract law does not permit plaintiff to unilaterally modify the agreement" and noting that "the reason for modification must rest in circumstances not 'anticipated' as part of the context in which the contract was made").

Lastly, defendants argue that, "[e]ven assuming that there was some contractual obligation . . . to accept all printing requests from Novartis . . . Piccari (and CGX) could have determined that it was [in] their economic interest to breach the supply Agreement . . . [F]orbearance from doing so is in and of itself consideration for the modification." The Court disagrees. Defendants' "forbearance" from breaching the Supply Agreement can be nothing more than performance of an existing legal obligation. See Elliot & Frantz, Inc. v. Ingersoll-Rand Co., 2005 WL774930, at *1 (E.D. Pa. Apr. 5, 2005) (concluding that forbearance from exploring deals with other entities was

not valid consideration because such dealings would have constituted a breach of contract), aff'd in part and rev'd in part on other grounds, 457 F.3d 312 (3d Cir. 2006).

None of defendants' theories of consideration and contract enforceability constitute a sufficient basis for the Court to grant defendants' Motion for Summary Judgment with respect to the reduction in margin improvement issue; accordingly, that part of defendants' motion is denied. Because defendants raise genuine issues of material fact regarding the margin improvement claim, plaintiff's Motion for Summary Judgment on that issue is also denied.

B. Plaintiff's Motion for Summary Judgment as to One Percent Commission on Total Monthly Billings to Novartis

Plaintiff alleges that, under the Compensation Agreement, he was entitled to a 1% commission on total monthly Novartis billings. (Pl.'s Mot. at 26). Defendants argue that plaintiff was entitled only to a 1% commission on total monthly Novartis billings from the original bid. (Def.'s Opp. at 24.) The Court concludes that there is a genuine issue of material fact based on ambiguity in the Compensation Agreement. Thus, summary judgment is denied with respect to this issue.

1. Legal Standard

"Under Pennsylvania law, it is appropriate for a court to grant summary judgment in a contract case when the language of a contract is unambiguous." General Ins. Co. of America v. Eastern Consol. Utilities, Inc., 1995 WL 428685, *4 (E.D. Pa. July 18, 1995). "The fact that parties to a contract disagree as to its interpretation does not necessarily render a contract provision ambiguous." Id. (citing Halpin v. LaSalle University, 639 A.2d 37 (Pa. Super. 1994)). "Generally, a contract provision is ambiguous under Pennsylvania law if it is susceptible to two or

more reasonable alternative interpretations." Id. (citing In re Stendardo, 991 F.2d 1089 (3d Cir. 1993); Hutchison v. Sunbeam Coal Corp., 519 A.2d 385 (Pa. 1986)). Furthermore, "[t]he Pennsylvania Supreme Court [has] stated that . . . 'course of performance is always relevant in interpreting a writing.'" Langer v. Monarch Life Ins. Co., 879 F.2d 75, 81 (3d Cir. 1989) (noting "even if the contract was not patently ambiguous, we would consider the parties' course of performance, and in light of that evidence conclude that it is latently ambiguous") (quoting Pennsylvania Engineering Corp. v. McGraw-Edison Co., 459 A.2d 329 (Pa. 1983)).

2. Analysis

According to the Compensation Agreement, plaintiff was entitled to "1% on total monthly Novartis billings from original bid, payable monthly" and "1% commission on all work for Novartis companies not included in original bid." (Compensation Agreement, Ex. A to Pl.'s Mot. at 1.) If the Compensation Agreement contained only the former provision--"1% on total monthly Novartis billings from original bid"-- defendants' interpretation would prevail. However, the latter provision--"1% commission on all work for Novartis companies not included in original bid"-- supports plaintiff's interpretation that he was entitled to a one percent commission on total monthly Novartis billings. Defendants argue that plaintiff's interpretation cannot be correct because it implies that plaintiff would be paid a 51 percent margin improvement commission, when the Compensation Agreement explicitly provided plaintiff would be paid only a 50 percent margin improvement commission. Defendants further argue that the parties' two-year course of performance demonstrates that defendants' interpretation is correct. (Def.'s Opp. at 25-26.) Based on the evidence presented and the arguments of the parties, the Court concludes that there is a genuine issue of material fact as to the meaning of this part of the Compensation Agreement.

C. Defendants' Motion For Summary Judgment as to Concealed Margin Improvement on Habitrol Account

Plaintiff alleges that defendants improperly increased sale price estimates for one client, Habitrol, thereby reducing his margin improvement commission. (Pl.'s Opp. at 4.) According to plaintiff, he is owed approximately $87,000 in lost margin improvement related to three Novartis printing projects for Habitrol. (Def.'s Opp. at 4-8.) The $87,000 figure is allegedly based upon plaintiff's review of copies of Habitrol files that plaintiff once had in his possession but later lost. (Def.'s Opp. at 4-8.) According to defendants, the originals of the "Habitrol files remain missing at Piccari and, although [plaintiff] admitted at least having copies upon leaving Piccari, [plaintiff] did not provide them in support of the Habitrol damage claim." (Def.'s Mot. at 32.) Plaintiff argues that defendants may have lost the originals. (See Pl.'s Opp. at 4-5.)

On the present state of the record, the Court concludes that there is no evidence to support plaintiff's claim that defendants concealed margin improvement on the Habitrol account. Plaintiff's lawyer conceded "that the $87,000 [was] not supported by" any documents that either plaintiff or defendants currently had, and represented that "[t]here's no additional documents that will be introduced at trial that support" the $87,000 in allegedly concealed margin improvement. Furthermore, plaintiff's lawyer stated that plaintiff "explained to [defense counsel] there's nothing that [plaintiff] can think of that supports" his claim of $87,000 in concealed margin improvement. (Ex. 13 to Def. Mot. at 79-82, 108-110.) Accordingly, the Court grants Defendants' Motion for Summary Judgment with respect to the allegedly concealed margin improvement on the Habitrol account. However, the Court grants plaintiff leave to file a motion for reconsideration if the Habitrol documents are found.

D. Defendants' Motion For Summary Judgment as to Constructive Discharge

Plaintiff alleges that defendants constructively discharged him in violation of his Compensation Agreement, the term of which corresponded to the length of the Novartis Supply Agreement. According to plaintiff, "CGX/Piccari's double-billing of the Novartis Account and receipt of duplicate payments from Novartis, its quality control problems with the Novartis account, and its refusal and failure to pay [him] the commissions and margin improvement he was owed, amounted to a constructive discharge." (Compl. ¶ 40.) Defendants moved for summary judgment on this issue, arguing that plaintiff resigned from Piccari to enter into a more lucrative agreement with Phoenix. (Def.'s Mot. at 28-29.) The Court concludes that there is no genuine issue of material fact as to the absence of any damages resulting from a constructive discharge, an essential element of such a contract claim. Thus, summary judgment is granted with respect to plaintiff's breach of contract claim based on constructive discharge.

1. Legal Standard

The Third Circuit applies "an objective test in determining whether an employee was constructively discharged from employment . . . ." Gray v. York Newspapers, Inc., 957 F.2d 1070, 1079 (3d Cir. 1992) (citing Goss v. Exxon Office Systems Co., 747 F.2d 885, 887-88 (3d Cir. 1984). "Specifically, a court must determine 'whether a reasonable jury could find that the [employer] permitted conditions so unpleasant or difficult that a reasonable person would have felt compelled to resign.'" Duffy v. Paper Magic Group, Inc., 265 F.3d 163, 167 (3d Cir. 2001) (quoting Spangle v. Valley Forge Sewer Authority, 839 F.2d 171, 173 (3d Cir. 1988)). "'Intolerability' is not established by showing merely that a reasonable person, confronted with the same choices as the employee, would have viewed resignation as the wisest or best decision,

or even that the employee subjectively felt compelled to resign; presumably every resignation occurs because the employee believes that it is in his best interest to resign." Connors v. Chrysler Financial Corp., 160 F.3d 971, 976 (3d Cir. 1998).

Under Pennsylvania law, to prevail in a breach of contract claim based upon constructive discharge, a plaintiff must not only establish that constructive discharge occurred, but also demonstrate damages. The court in Knepp v. Colonial Metals Co., Inc., 73 Pa. D. & C. 4th 1, 7 (Pa. Com. 2005) stated that "[e]ven assuming that Plaintiff can establish a constructive discharge through the conditions of employment imposed upon him . . . , he has failed to produce evidence of facts essential to his breach of contract" claim. "To succeed on his breach of contract claim, Plaintiff must establish that . . . Plaintiff suffered damages from that breach." Id. ("Assuming, arguendo, that Plaintiff was constructively discharged, he still . . . cannot make out a cause of action for a breach of that contract.")

"In an employment case, the measure of damages is the wages which were to be paid less any amount actually earned or which might have been earned through the exercise of reasonable diligence in seeking other similar employment." Delliponti v. DeAngelis, 681 A.2d 1261, 1265 (Pa. 1996) (noting that "it is well established that one who suffers a loss due to breach of contract has a duty to make reasonable effort to mitigate her damages"). As the Third Circuit explained in Carden v. Westinghouse Elec. Corp., 850 F.2d 996, 1005 (3d Cir. 1988), the purpose of "the doctrine of mitigation of damages . . . is to prevent the wage earner . . . from obtaining a windfall, i.e. a double recovery." "Such a double recovery would occur unless legitimate post-discharge earnings were offset against the back pay damages claimed. Where the post-discharge employment is evidenced by another salary, mitigation is readily determined." Id.

2. Analysis

While the circumstances in which plaintiff began his lucrative arrangement with Phoenix raise significant questions about whether plaintiff's resignation from Piccari constituted constructive discharge, the Court need not address this issue because there is no genuine issue of material fact as to plaintiff's lack of damages. According to Phoenix, from the time plaintiff was hired in January of 2003 until he left in December of 2004, Phoenix paid plaintiff a total of $3,110,590.84. (Green Dep., Ex. 15 to Def.'s Mot. at 54.) Plaintiff acknowledges receiving a $1.25 million bonus, $1.2 million in salary during his first year at Phoenix, and approximately $500,000 in salary during his second year at Phoenix. (Gianetti Dep. III, Ex. 14 to Def.'s Mot. at 12-13, 23-24.) Additionally, plaintiff acknowledges receiving approximately $115,000 for expenses, regardless of what his actual expenses were. (Id. at 41-42). In total, plaintiff acknowledges receiving more than $3 million in compensation from Phoenix.

Pursuant to the Compensation Agreement, plaintiff's compensation at Piccari was tied to Novartis printing sales. (See Compensation Agreement, Ex. A to Pl.'s Mot. at 1.) Piccari paid plaintiff $560,363.71 in 2001 and $898,553.84 in 2002. (Hesse Dec., Ex. 6 to Def.'s Mot. ¶8.) In 2003, Novartis printing sales remained at approximately the same level as in 2001-2002. (Id.) Based on the 2003 Novartis sales, plaintiff would have been paid approximately $800,000 to $900,00 in that year. (Hesse Dec., Ex. 5 to Def.'s Mot. ¶ 8.) Assuming *arguendo* the full amount of compensation to which Plaintiff claims he was entitled under the Compensation Agreement, plaintiff's compensation from Phoenix far exceeds the amount that he would have earned had he remained at Piccari.[7]

[7] Plaintiff asserts that, in 2001 and 2002, he was under-compensated by a total of $131,235 with respect to the margin improvement commission reduction from fifty percent to forty percent, and $23,566 with respect to the disputed one percent commission. (Pl.'s Mot. at

V. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment is granted with respect to plaintiff's breach of contract claim based on constructive discharge; granted with respect to plaintiff's breach of contract claim based on concealed margin improvement on the Habitrol account; and denied in all other respects. Plaintiff's Motion for Summary Judgment is denied in its entirety.

22.) Even assuming that plaintiff was entitled to a fifty percent margin improvement commission and to the additional one percent commission on total Novartis sales in 2003 and 2004, plaintiff would have earned far less at Piccari than he earned at Phoenix.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEPHEN J. GIANNETTI **Plaintiff,** **vs.** **CONSOLIDATED GRAPHICS, INC., PICCARI PRESS, INC., JOSEPH J. TREFALLER, ROBERT M. HESSE, and CARL PICCARI, JR.** **Defendants.**	:	**CIVIL ACTION** **NO. 04-313**

ORDER

AND NOW, this 10th day of January, 2006, upon consideration of Defendants' Motion for Summary Judgment (Document No. 24, filed Feb. 23, 2006); Plaintiff's Motion for Summary Judgment (Document No. 25, filed Feb. 23, 2006); Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment (Document No. 29, filed Mar. 21, 2006); and Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment (Document No. 30, filed Mar. 21, 2006), for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that Plaintiff's Motion for Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. Defendants' Motion for Summary Judgment is **GRANTED** with respect to plaintiff's breach of contract claim based on constructive discharge;

2. Defendants' Motion for Summary Judgment is **GRANTED** with respect to plaintiff's breach of contract claim based on concealed margin improvement on the Habitrol account; and

2. Defendants' Motion for Summary Judgment is **DENIED** in all other respects.

BY THE COURT:

/s/ Honorable Jan E. DuBois
JAN E. DUBOIS, J.