Schweiger v Wind
2014 NY Slip Op 30079(U)
January 15, 2014
Sup Ct, New York County
Docket Number: 154211/2012
Judge: George J. Silver

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver PART 10
Justice

JARED SCHWEIGER and GEORDAN REISNER and CARNEGIE ABSTRACT AND SETTLEMENT, LLC,

- v -

DAVID WIND and SOUND TITLE ABSTRACT, LTD.

INDEX NO. 154211-2012

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to 4, were read on this motion for

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits---------- No(s). 1, 2

Answering Affirmation(s)— Affidavit(s) —Exhibits---------- No(s). 3

Replying Affirmation(s)— Affidavit(s) —Exhibits---------- No(s). 4

Upon the foregoing papers, it is ordered that the motion is

In this action for violations of Article 6 of the Labor Laws and breach of contract, Defendants David Wind ("Wind") and Sound Title Abstract, Ltd. ("Sound") (collectively "Defendants") move pursuant to CPLR §3211(a)(1) and (a)(7) to dismiss Plaintiffs' Jared Schweiger ("Schweiger"), Geordan Reisner ("Reisner"), and Carnegie Abstract and Settlement, LLC's ("Carnegie") (collectively "Plaintiffs") amended complaint. Plaintiffs oppose Defendants' motion.

Plaintiffs allege in their amended complaint that Schweiger and Reisner were approached by Kerry Lutz ("Lutz") who, as the owner of Sound, asked Schweiger and Reisner to enter into a joint venture to sell title insurance policies. Schweiger, Reisner, and Lutz entered into a "Letter of Intent" where they agreed to work together on a trial basis for 90 days leading up to the creation of the new company. Schweiger and Reisner created Carnegie in order to facilitate the proposed venture. In November 2011, Lutz informed Schweiger and Reisner that he was transferring his shares in Sound to Wind. Schweiger and Reisner allege that Defendants stopped paying them their earned commission on or about January 1, 2012 and the unpaid commission totals approximately $120,000.00. In their first cause of action, Plaintiffs allege Defendants owe Schweiger and Reisner the full amount of unpaid commission under Article 6 of the New York Labor laws. In their second cause of action, Plaintiffs allege that Defendants breached their contract with Carnegie and owe Carnegie $120,000.000 in damages.

In support of their motion, Defendants argue that Plaintiffs failed to state a cause of action under Article 6 of the Labor Laws, where Plaintiffs failed to cite to or refer to a violation of a specific provision of the New York State Labor Laws. As such, Defendants are left to assume that Plaintiff's are claiming to recover under Labor Law §198. If Plaintiffs intended to plead violations of Labor Laws §191 and §193, Defendants argue that those claims fail. In order for Schweiger and Reisner individually to claim entitlement to the allegedly earned commission under the Labor laws, they must first be considered employees of Defendants. Defendants argue that Schweiger and Reisner cannot be considered employees of Defendants where, if anything, they were employed by Carnegie, who was the

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ■ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

only entity doing direct business with Defendants. Where the Plaintiffs cannot be considered employees of Defendants, the payments made cannot be considered wages under the meaning of Labor Law §190(1) and thus, they cannot recover under the New York Labor laws. In addition to being employed as commission salesmen by Defendants, of which Defendants disagree, Plaintiffs also have to prove a contractual right to the alleged earned wages. Defendants argue that Schweiger and Reisner failed to allege their individual contractual right to the wages, where there is no enforceable agreement between the parties for wages. Defendants argue that the only "agreement" referred to in the Amended Complaint is the Letter of Intent which states, "Wind and Sound agreed to pay Carnegie Abstract all net proceeds from the sale of title policies." Defendants argue that Schweiger and Reisner cannot allege an enforceable agreement where they are not even mentioned personally in the Letter of Intent. Thus, Defendants argue that Plaintiffs have not plead any facts giving rise to their statutory protection under any of the alleged Labor Law violations.

Defendants further argue that Plaintiffs' second cause of action must also be dismissed, where they have failed to allege a breach of contract against both Wind and Sound. Defendants argue that Plaintiffs failed to identify an actual contract between Carnegie and Wind and Sound, other than alleging in the complaint that "Wind and Sound agreed to pay to Carnegie all net proceeds from the sale of title policies generated [by] Geordan and Jared." Even further, Defendants argue that no specific provisions of the agreement were breached and the Amended complaint is silent as to any contract or provision between Carnegie and Wind personally. Defendants argue that Plaintiffs cannot pierce the corporate veil and hold Wind personally liable where Wind is not an owner of Sound, as stated in Stacy Geller's affidavit (President of Sound). Even if Wind is an owner of Sound, which Defendants argue he is not, Plaintiffs failed to allege the material elements required to pierce the corporate veil and hold him personally liable. Defendants aver that there are no allegations that Wind abused the privilege of doing business in the corporate form and as such, the second cause of action must be dismissed against Wind personally.

In opposition to the motion to dismiss, Plaintiffs argue that Defendants are liable to Schweiger and Reisner as their employer. Courts look at a variety of factors in determining whether an employee/employer relationship exists, including, but not limited to, degree of supervision over Plaintiff's work, whether Plaintiff works exclusively for Defendant, and whether Plaintiff's job is integral to Defendant's work and such factors indicate the level of functional control the Defendant has over the Plaintiff. Plaintiffs argue that Defendants have an enormous amount of control over Schweiger and Reisner, as they worked on Defendants' premises, they used Defendants' computers, they were integral to Defendants' operations, and they worked almost exclusively for Defendants. Plaintiffs argue that Defendants, as their employer, violated Labor Laws §191, §193 and §195, when Defendants failed to pay Schweiger and Reisner the commission they earned on a weekly basis and attempted to justify their failure to pay their commission by claiming that they were using the commission as offsets for the money Plaintiffs owed Defendants. Further, Plaintiffs argue that Defendants' statute of fraud arguments are misplaced where Labor Law §191(c) provides that the agreed upon terms of employment for commission salespersons must be in writing, signed by the employer and commission salesperson, and kept in employers file. Even though there may not be a formal contract and the parties did not move forward with the formation of the company, the terms for the commissions were confirmed by Wind in his emails with Plaintiffs and through the course of dealing between the parties which Plaintiffs argue is enough to satisfy the requirements under the State of Frauds.

Plaintiffs further argue that the second cause of action meets the pleading requirements, where Wind is liable as Plaintiffs' employer as he exercised sufficient control over the Plaintiffs and a corporate officer who acts as an employer is subject to liability for violating New York's Labor Laws. Plaintiffs argue that when Wind took over for Lutz in November 2011, he held himself out as President of Sound by signing his emails as President treating Schweiger and Reisner as his employees. Further, Plaintiffs allege that Wind acted on behalf of his ownership interest in his company, Guaranteed Home Mortgage Company, Inc. ("Guaranteed"). Plaintiffs argue that Winds actions on behalf of Guaranteed

adversely affected Sound and their lack of payment to Plaintiffs, making him personally liable.

Analysis

Pursuant to CPLR §3211, the "pleading is to be afforded a liberal construction (*see,* CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v. Martinez,* 84 N.Y.2d 83, 87-88, 638 N.E.2d 511, 513 (1994))

1) First Cause of Action

Pursuant to Labor Laws §191 and §193, Plaintiffs sufficiently allege that they are employees of Defendants and should be considered "Commission salesmen," which is defined under Labor Law §190 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). The Appellate Division, First Department held that a particular party "came squarely within that definition, as part of his earnings were based on a percentage of the commissions received by his employer." (*Goldberg v. Select Indus., Inc.*, 202 A.D.2d 312, 315, 609 N.Y.S.2d 202, 204 (N.Y. App. Div. 1994) In their affidavits, Schweiger and Reisner stated that they received commission, were provided with an office, computers, and email accounts and Defendants controlled Plaintiffs' work. "The determination of whether an employer-employee relationship exists rests upon evidence that the employer exercises either control over the results produced or over the means used to achieve the results." (*Bhanti v. Brookhaven Mem'l Hosp. Med. Ctr., Inc.,* 260 A.D.2d 334, 335, 687 N.Y.S.2d 667, 669 (1999) *citing Matter of 12 Cornelia Street,* 56 N.Y.2d 895, 897, 453 N.Y.S.2d 402, 438 N.E.2d 1117; *Matter of Sullivan Co.,* 289 N.Y. 110, 112, 44 N.E.2d 387) Even though the parties disagree about the existence of the employee-employer relationship, Plaintiffs have sufficiently plead that they are commission salesmen employed by Defendants under Article 6 of the Labor laws. As such, Plaintiffs have sufficiently plead their entitlement to wages, under Labor Law §198, assuming that a contractual right to those wages existed (*see generally, Gallegos v. Brandeis School*, 189 F.R.D. 256 (E.D.N.Y. 1999)).

Here, no formal contract exists between Schweiger and Reisner and Sound/Wind and where no formal contract exists, Plaintiffs have plead that the agreement falls outside of the Statute of Fraud requirements.[1] Plaintiffs argue that they have an enforceable contractual right to their wages, where the agreement was not one which could not be completed within a year and where they have writings sufficient to satisfy the Statute of Frauds requirements including the Letter of Intent and the attached chain of emails between the parties.

In order for emails to satisfy the Statute of Frauds, they must include the essential terms of the contract, including information about the duration of work, the compensation, consideration, and an offer/acceptance of the terms. (*See generally, Naldi v. Grunberg*, 80 A.D.3d 1, 6-7, 908 N.Y.S.2d 639, 642-43 (2010) *citing Rosenfeld v. Zerneck,* 4 Misc.3d 193, 776 N.Y.S.2d 458 (Sup. Ct., Kings County 2004)). The essential terms of the "contract" were absent from the emails that Plaintiffs provided and as such, the emails do not satisfy the Statute of Frauds requirements. Further, the Letter of Intent was written in order to memorialize the formation of a business that was never formed, and the terms for the commission earned from selling the policies that were written in the Letter of Intent were only applicable through November 30, 2011, whereas Plaintiffs claims for commissions are from January - March 2012. Additionally, Section 11 of the Letter of Intent specifically states, "The parties will enter into a more formal agreement once they unanimously agree to continue the relationship." There is no evidence of an agreement in existence that came after the Letter of Intent dated August 11, 2011.

However, despite Plaintiffs not being able to provide a sufficient written agreement, "under New York common law, in the absence of a written agreement, a commission is deemed to be earned upon a

[1]The Statute of Frauds is defined under New York General Obligation Laws § 5-701

sale. Evidence that an employee has received commissions in the past may be deemed sufficient to support a finding that such employee is to be paid on a commission basis." (52 N.Y. Jur. 2d Employment Relations §124) The New York Court of Appeals held that "in the absence of a governing written instrument, when a commission is 'earned' and becomes a 'wage' for purposes of Labor Law article 6... if no agreement exists... the default common-law rule [applies] that ties the earning of a commission to the employee's production of a ready, willing and able purchaser of the services." (*Pachter v. Bernard Hodes Grp., Inc.*, 10 N.Y.3d 609, 891 N.E.2d 279 (2008)). Schweiger and Reisner began selling title insurance policies from the date which the Letter of Intent was signed and in doing so, earned their commission for those sold policies. "Once the commission is earned, it cannot be forfeited (*see Davidson v. Regan Fund Mgt. Ltd.*, 13 A.D.3d 117, 786 N.Y.S.2d 47 [2004]; *Yudell,* 248 A.D.2d 189, 669 N.Y.S.2d 580, *supra*). There is a long-standing policy against the forfeiture of earned wages, and this applies to earned, uncollected commissions as well." (*Arbeeny v. Kennedy Executive Search, Inc.*, 71 A.D.3d 177, 182, 893 N.Y.S.2d 39, 42-43 (2010)) Thus, at the pleading stage, Plaintiffs have sufficiently plead that they are commission salesmen employed by Defendants and that even without a written agreement, they have sufficiently plead their entitlement to their earned commission.

Additionally, Plaintiffs sufficiently plead that Wind should be held personally liable, where he held himself out as President of Sound, as stated in Schweiger's Affidavit attached to Plaintiffs' opposition. Even if Wind is not a shareholder or owner of Sound, as Gellar argues, he may be found individually liable as an Officer of Sound under the allegations made in Schweiger's Affidavit. Specifically, Schweiger makes allegations in his affirmation that Wind was an interested Officer and that he could have been misusing the funds to pay his employees from Guaranteed. The Appellate Division, First Department has held that "The affidavit of plaintiff... suffices to raise an issue of fact as to whether those defendants may be held liable for the alleged violations as employers within the definition of Labor Law § 190(3)" (*Wing Wong v. King Sun Yee*, 262 A.D.2d 254, 255, 693 N.Y.S.2d 536, 538 (1999))

2) Second Cause of Action

Plaintiff failed to sufficiently plead its second cause of action. "[T]he essential elements to pleading a breach of contract cause of action under New York law are: (1) that plaintiff and defendant made a contract; (2) that consideration existed; (3) that the plaintiff performed; (4) that the defendant breached the contract; and (5) that the plaintiff suffered damages as a consequence." (Internal citations omitted)(*Brown v. Noble, Inc.*, 29 Misc. 3d 1230(A), 920 N.Y.S.2d 239 (Sup. Ct. 2010)). There is no written agreement between Plaintiff Carnegie and Defendants. The Letter of Intent is between Schweiger, Reisner, and Lutz, making no mention of Plaintiff Carnegie. The emails and exchanges between the parties are between Schweiger, Reisner, and Wind and do not include any of the essential terms of the agreement, nor do they even allude to the existence of a formal agreement.

This cause of action differs from Plaintiffs' first cause of action, where the first claim, seeking recovery under Article 6 of the Labor Laws, allows for employees to recover for commissions once they are earned, regardless of the existence of a written agreement. (*Pachter, supra*) LLC's, such as Carnegie, may not recover as employees under Labor Law §198. Therefore, when the sole remedy for Carnegie is recovery under common law breach of contract, the lack of a written agreement and a failure to properly plead any essential elements of a breach of contract claim causes Plaintiffs' second cause of action to fail. Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is denied as to the first cause of action; and it is further

ORDERED that Defendants' motion for summary judgment is granted as to the second cause of action and Plaintiff's cause of action for breach of contract is dismissed; and it is further

ORDERED that the movant shall serve a copy of this order, with Notice of Entry, upon all

parties, as well as upon the Clerk of the Trial Support Office (60 Centre Street, Room 158) within thirty (30) days of entry; and it is further

ORDERED that the parties are to appear for a status conference on March 4, 2014 @ 9:30am at 60 Centre Street, Room 422, New York, New York 10007.

George J. Silver, J.S.C.

Dated: JAN 15 2014
New York County