

Konsker v Cushman & Wakefield, Inc.

2016 NY Slip Op 30901(U)

May 16, 2016

Supreme Court, New York County

Docket Number: 651493/2012

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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MITCHELL KONSKER, PAUL N. GLICKMAN,
MATTHEW R. ASTRACHAN, A. MITTI
LIEBERSOHN, and ALEXANDER CHUDNOFF

Plaintiffs,

-against-

CUSHMAN & WAKEFIELD, INC.,

Defendant.

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DECISION AND ORDER

Factual Background

Plaintiffs, Matthew Astrachan, Alexander Chudnoff, Paul N. Glickman, A. Mitti Liebersohn, and Mitchell Konsker are commercial real estate brokers (Compl., ¶ 1). Plaintiffs became employees of defendant Cushman & Wakefield ("C&W") on or about March 19, 1997 pursuant to separate written contracts (the "Employment Agreements") (Employment Agreements, Robb Affirm. In Opp., Exs. C-H). The Employment Agreements are identical in all respects relevant to this action.

Plaintiffs' compensation was set by a Schedule of Compensation attached to the Employment Agreements (the "Original Compensation Schedule") (Original Compensation Schedule, Robb Affirm. In Opp., Exs. C-H). The Original Compensation Schedule set plaintiffs' compensation as 50% of gross commissions collected by C&W on transactions in which plaintiffs rendered

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services (the "base commission") (Id. at § I.A.1). Plaintiffs' share of gross commissions would increase beyond the base commission, however, if gross commissions exceeded certain thresholds (the "additional commissions"). In that regard, plaintiffs would earn an additional 5% of gross commissions between \$300,000 and \$450,000, an additional 10% of gross commissions between \$450,000 and \$800,000, and an additional 15% of gross commissions over \$800,000 (Original Compensation Schedules, § V.1[a]-[c]).

The Employment Agreements provided that plaintiffs were entitled to "share in any commissions or fees collected by C&W subsequent to the termination of Employee's employment" for sales that were "consummated prior to the termination of Employee's employment [in which] the commission or fee [was] not collected or due, until after the termination," subject to "all the other applicable terms and conditions of this [Employment Agreement]" (Employment Agreement at §§ 9[b][i], 9[b][iii][z]).

Significantly, one of the conditions of the Employment Agreements was that C&W could, at its discretion, amend or modify the terms and conditions of the Schedule of Compensation, including altering the percentages of commissions and fees due to

plaintiffs for any transactions that had not been consummated by the date of the amendment or modification (Id. at § 3[a]).

Finally, the Employment Agreements provided that "[i]n the event any legal action or proceeding is commenced to interpret or enforce the terms of or obligations arising out of this Agreement, or to recover damages for the breach thereof, the party prevailing in any such action or proceeding shall be entitled to recover from the non-prevailing party all reasonable legal fees, costs and expenses incurred by the prevailing party" (Id. at § 10).

2005 Letter Agreements

On or about May 31, 2015, all of the plaintiffs except Chudnoff (the "Letter Agreement Plaintiffs") executed letter agreements with C&W amending the Employment Agreement (the "Letter Agreements") (Letter Agreements, Robb Affirm., Exs. K-N). The Letter Agreements extended the Employment Agreements through December 31, 2008, but provided that the Employment Agreements would remain in effect indefinitely after that date, until terminated by either party (Id. at § 1). The Letter Agreements also, inter alia: (1) raised the Letter Agreement plaintiffs' base commission to 60% of gross commissions; (2) replaced section V.1[a]-[c] of the Original Compensation Schedule, which set the

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thresholds at which additional commissions would be earned, with identical language; and (3) provided that "[i]n the event of a conflict or inconsistency between the terms of this letter and the Employment Agreement or rules, policies or regulations of C&W, this letter shall control" (Id. at §§ 2, 3[a]-[b]).

Revisions to the Compensation Schedule

On February 6, 2006, C&W issued a new Compensation Schedule, superseding the Original Compensation Schedule ("2006 Compensation Schedule") (2006 Compensation Schedule, Robb Affirm., Ex. O). The 2006 Compensation Schedule raised the levels at which brokers would receive additional commission (namely, an additional 5% of gross commissions between \$300,000 and \$450,000, an additional 10% of gross commissions between \$450,000 and \$900,000, and an additional 15% of gross commissions over \$900,000) (Id. at § V-1[a]-[c]). Significantly, the 2006 Compensation Schedule provided that: "[n]otwithstanding anything to the contrary contained in this schedule, broker shall not, subsequent to the termination of broker's employment, be entitled pursuant to section V-1 [which set forth the levels of additional commissions] or otherwise, to any additional share of gross commissions received by C&W" except in one limited instance not relevant here (Id. at § IX[2]).

C&W issued another Schedule of Compensation in 2009 (the "2009 Compensation Schedule") (2009 Compensation Schedule, Robb Affirm., Ex. P). The 2009 Compensation Schedule affirmed the removal of brokers' right to collect additional commissions post-termination set forth in the 2006 Compensation Schedule (Id. at § IX). It also once again raised the levels at which brokers would receive the additional commissions (an additional 5% of gross commissions between \$500,000 and \$700,000, an additional 10% of gross commissions between \$700,000 and \$900,000, and an additional 15% of gross commissions over \$900,000) (Id. at § V).

The 2006 and 2009 Compensation Schedules set forth numerous grounds upon which gross commissions would be excluded from the calculation of brokers' additional commissions (See e.g., 2006 Compensation Schedule at §§ I.A.3, I.B.2, Robb Affirm., Ex. O; 2009 Compensation Schedule at §§ I.A.3, I.A.5, I.B.2, II.B, X, Robb Affirm., Ex. P).

Plaintiffs resigned from their positions with C&W on January 5, 2011 (Astrachan Aff. at ¶ 15; Chudnoff Aff. at ¶ 14; Glickman Aff. at ¶ 17; Liebersohn Aff. at ¶ 17; Konsker Aff. at ¶ 17). On May 2, 2012, plaintiffs commenced this action, asserting claims for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) unpaid wages; (4) accounting;

and (5) declaratory judgment, seeking inter alia, unpaid base commission and additional commissions from 2010-2012 (Compl., ¶¶ 43-48).

On February 14, 2013, this Court dismissed plaintiffs' second, fourth, and fifth causes of action. In or around November 17, 2014, the parties entered into a partial settlement agreement that resolved plaintiffs' claims for base commissions, but explicitly did not resolve plaintiffs' claims for additional commissions (Settlement Agreement, Liebersohn Aff., Ex. G).

Plaintiffs now move, pursuant to CPLR 3212, for summary judgment on the remaining causes of action in their complaint: (1) breach of contract as to the unpaid additional commissions from 2010-2012; and (2) statutory liquidated damages, attorney's fees, costs and prejudgment interest under Labor Law § 198 based on C&W's failure to pay additional commissions.

C&W cross moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Discussion

Plaintiffs allege that at the time of their resignations on January 5, 2011 they were owed additional commissions on payments that C&W had already received (Konsker Aff., ¶¶ 17-18; Astrachan Aff., ¶¶ 15-16; Glickman Aff., ¶¶ 17-18; Liebersohn Aff., ¶¶ 17-

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18; Chudnoff Aff., ¶¶ 14, 16). While plaintiffs concede that C&W historically paid additional commissions periodically during a given calendar year (Plaintiffs' Memo. in Supp. at p. 18), they point to a discrepancy in the base commission they earned and the lower base commission figure that C&W used to calculate additional commissions in their Bonus Eligibility Report (Meister Supp. Affirm., ¶ 6) as evidence that additional commissions are owed for 2010.

C&W has not established that this claim fails as a matter of law. C&W relies on section IX[2] of the 2006 and 2009 Compensation Schedules, but this provision does not release C&W from its obligation to pay plaintiffs additional commissions on gross commissions C&W received prior to plaintiffs' departure in January 2011.

Accordingly, defendant's motion for summary judgment is denied as to this aspect of plaintiffs' claim. Further, summary judgment for plaintiff would be inappropriate because a question of fact exists as to whether any such additional commissions are owed, particularly in light of the numerous exclusions in calculating additional commissions set forth in the 2006 and 2009 Compensation Schedules (Kovacik v New York State Dept. of Mental Hygiene, 67 AD2d 625, 626 [1st Dept 1979] [where proof of debt

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owed and primary issue of liability are intertwined, granting summary judgment would be illusory since no time or effort of the court or litigants would be spared)).

Plaintiffs also allege that in 2011 and 2012, after they were no longer employed by defendant, C&W received gross commissions on transactions that plaintiffs originated or were otherwise involved in but did not pay the Letter Agreement Plaintiffs additional commissions based on these transactions (Konsker Aff., ¶ 21; Astrachan Aff., ¶ 19; Glickman Aff., ¶ 21; Liebersohn Aff., ¶ 21; Chudnoff Aff., ¶ 19).

This claim fails as a matter of law. Section IX[2] of the 2009 Compensation Schedule explicitly removed plaintiffs' entitlement to such additional commissions and such a modification of plaintiffs' commissions was expressly contemplated by section 3 of the Employment Agreement.

Plaintiffs, nonetheless, argue that section IX[2] of the 2009 Compensation Schedule is invalid because it modified section 9(b) of the Employment Agreement without a writing signed by plaintiffs in contravention of section 13 of the Employment Agreement, which required any modification of the Employment Agreements to be in writing. This argument is unavailing.

While plaintiffs are entitled under section 9(b) of the Employment Agreement to "share" in commissions collected by C&W subsequent to the termination of their employment, section 9(b) does not state how this share of commissions will be calculated. As C&W did not remove plaintiffs' right to all commissions post-termination, but only removed plaintiffs' right to additional commissions, it did not modify or alter section 9(b).

Contrary to plaintiffs' claims, the Letter Agreements do not obligate C&W to pay additional commissions on money received after plaintiffs' employment ended. Plaintiffs argue that C&W was required by section 3(b) of the Letter Agreements to pay additional commissions received after plaintiffs left C&W. In fact, this provision -- which raised the base commission for the Letter Agreement Plaintiffs to 60% and set the levels at which they would earn additional commissions -- does not guarantee their entitlement to these additional commissions. Notably, the Letter Agreements failed to modify the prefatory language of section V.1 of the Original Compensation Schedule, which acknowledged that plaintiffs' eligibility to receive additional commissions was subject to the terms and conditions of the Schedule of Compensation, which, as discussed supra, C&W was entitled to unilaterally amend.

Plaintiffs make much of the fact that prior to their resignation C&W paid the Letter Agreement Plaintiffs additional commissions based on the thresholds set forth in the Letter Agreements even after the 2009 Compensation Schedule raised these thresholds for other brokers. This is of no moment, however, as the Letter Agreement set the additional commission levels for the Letter Agreement Plaintiffs, stated that "[i]n the event of a conflict or inconsistency between the terms of this letter and the Employment Agreement or rules, policies or regulations of C&W, this letter shall control," and further provided that the Employment Agreement -- and the revised additional commission thresholds contained therein -- would remain in effect indefinitely (Letter Agreements at §§ 1, 2, Robb Affirm., Exs. K-N). By contrast, neither the Employment Agreements nor Letter Agreements guaranteed plaintiffs' entitlement to additional commissions in the face of subsequent revisions to the Employment Agreement or Compensation Schedule.

Finally, plaintiffs argue that the language of section 14 of the Letter Agreement (which states that "[n]otwithstanding anything to the contrary contained herein, if, during the term of the Contract, Employee ceases to be employed by C&W for any reason, then, in such event only, the provisions of sections 7

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and 10 of this letter amendment shall automatically terminate immediately") implies that all of the sections of the Letter Agreements other than sections 7 and 10 survive termination, including section 3 (which sets forth the levels for the additional commissions). This argument misconstrues the purpose of section 14.

Sections 7 and 10 require C&W to provide the Letter Amendment Plaintiffs with allowances for business development and charitable donations until the expiration date of the Employment Agreement, December 31, 2008 (Letter Amendments at §§ 7, 10). Section 14 is unrelated to defendant's ability to remove brokers' entitlement to additional commissions, but instead ensured that C&W would provide these allowances to the Letter Agreement Plaintiffs for the duration of their employment with C&W, despite this expiration date (Plaintiffs' Memo. of Law at pg. 37). Although issues of fact preclude summary judgment as to plaintiffs' claim for additional commissions on gross commissions received by C&W prior to their departure on January 5, 2011, no such issues exist regarding defendant's motion for summary judgment dismissing plaintiffs' claim for additional commissions on money received by C&W after their departure. As this latter claim is a "major portion of the cause of action asserted" and

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can be easily severed from the viable portion of plaintiffs' complaint, defendant's motion for summary judgment is granted as to this aspect of plaintiffs' first cause of action pursuant to CPLR 3212(e) (See Tow v Moore, 24 AD2d 648, 649 [2d Dept 1965]).

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that defendant's cross motion for summary judgment dismissing the complaint is granted to the extent of dismissing plaintiffs' claim for additional commissions from gross commissions C&W received in 2011 and 2012, and attendant liquidated damages, attorney's fees, costs and prejudgment interest pursuant to Labor Law § 198, and it otherwise denied; and it is further

ORDERED that this matter is respectfully referred to a Judicial Hearing Officer or Special Referee to hear and report -- or, if the parties so-agree, to hear and determine -- whether any additional commissions are owed to plaintiffs from gross commissions received by C&W in 2010 and: (1) if such additional commissions are owed, attendant liquidated damages, pre-judgment interest, and attorney's fees pursuant to Labor Law § 198; or (2)

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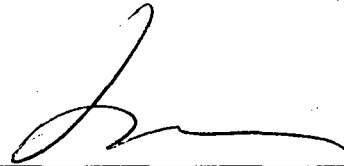
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if no such additional commissions are owed, defendant's reasonable attorney's fees; and it is further

ORDERED that plaintiff is directed, within fourteen days from the date hereof, to serve a copy of this order with notice of entry, together with a completed Information Sheet upon the Special Referee Clerk in the General Clerk's Office, who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/16/16



HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.