Scarpinato v East Hampton Point Mgt. Corp.
2015 NY Slip Op 31633(U)
August 14, 2015
Supreme Court, Suffolk County
Docket Number: 13-26511
Judge: W. Gerald Asher

[* 1]

SHORT FORM ORDER

INDEX No. 13-26511

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 11-7-13
ADJ. DATE 2-4-14
Mot. Seq. # 001 - MotD

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CAROLINE SCARPINATO,

Plaintiff,

- against -

EAST HAMPTON POINT MANAGEMENT CORP. d/b/a EAST HAMPTON POINT, BERNARD KRUPINSKI and LAWRENCE DUNST,

Defendants.

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Upon the following papers numbered 1 to 27 read on this motion to dismiss/summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers __; Replying Affidavits and supporting papers __; Other memoranda of law 22- 23, 24 - 25, 26 - 27; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the defendants' motion for an order pursuant to CPLR 3211 (a) (1), (5), and (7) dismissing the complaint or, in the alternative, for an order pursuant to CPLR 3212 granting them summary judgment dismissing the plaintiff's complaint, is granted to the extent that the plaintiff's second cause of action is dismissed, and is otherwise denied.

This is an action involving a dispute whether the plaintiff is entitled to certain commissions allegedly earned before she voluntarily left her employment. In her complaint, the plaintiff sets forth two causes of action alleging respectively that the defendants violated New York State Labor Law §§ 190 et seq. and § 195.[1] As a result of those alleged violations, the plaintiff seeks damages "including, but not limited to, statutory costs, attorneys' fees, and liquidated damages in the amount of one hundred percent (100%) of the total amount of wages to be due."

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[1] The plaintiff alleges that the the individual defendants are also her employers under the New York State Labor Law. The Court does not intend to make any determination regarding that issue by the use of the term "defendants" herein.

It is undisputed that the plaintiff was employed by the defendant East Hampton Point Management Corp. d/b/a East Hampton Point beginning in or about 1993, that she was paid a salary plus commissions for events that she "booked" and "managed," and that she resigned her position in early October 2011. On October 8, 2011, the plaintiff e-mailed her request to be paid the sum of $8,462 for commissions on all the special events that she had booked for the 2011 and 2012 seasons. When the defendants failed to pay those commissions, she commenced an action against them in the United States District Court, Eastern District of New York (EDNY) on July 12, 2012 alleging, among other things, violations of the Fair Labor Standards Act and the New York State Labor Law (Labor Law). By order dated September 13, 2013, the Hon. Joseph F. Bianco, dismissed the plaintiff's complaint in the EDNY action and adopted the report and recommendation from Magistrate Judge Gary R. Brown which found, among other things, that the plaintiff's work was "directly related to management policies or general business operations." Despite the plaintiff's contention that booking events was a primary responsibility of her employment, Magistrate Judge Brown found that the plaintiff's "primary duty include[d] the exercise of discretion and independent judgment with respect to matters of significance," and that the plaintiff was "employed in a bona fide executive, administrative, or professional capacity." District Judge Bianco's order adopted those findings as well as Magistrate Judge Brown's recommendation that the Court decline to exercise supplemental jurisdiction over the plaintiff's claim for unpaid commissions under the Labor Law. The plaintiff commenced the instant action by the filing of a summons and complaint on October 1, 2013.

The defendants now move for an order pursuant to CPLR 3211 (a) (1), (5), and (7) dismissing the complaint against them on the grounds that, because she was employed in a managerial or executive capacity, the plaintiff cannot maintain an action under Article 6 of the Labor Law. Article 6 of the Labor Law sets forth a comprehensive set of statutory provisions enacted to strengthen and clarify the rights of employees to payment of wages, and an employer who violates the requirements of Article 6 is subject to civil and, in some cases, criminal penalties (***Truelove v Northeast Capital & Advisory***, 95 NY2d 220, 715 NYS2d 366 [2000]; Labor Law §§ 191-c [3], 198). Under the latter section of the Labor Law, liquidated damages and attorney's fees generally available to a successful litigant are not available to employees who are employed in a managerial or executive capacity (***Gottlieb v Kenneth D. Laub & Co.***, 82 NY2d 457, 605 NYS2d 213 [1993]; ***Davidson v Regan Fund Mgmt. Ltd.***, 13 AD3d 117, 786 NYS2d 47 [1st Dept 2004]). They are also not available to employees whose principal activity is of a supervisory, managerial, executive or administrative nature (*see* Labor Law §§ 190 [5], [6], [7]).

The defendants argue that, as the plaintiff has been found to be a manager in the EDNY action, she cannot be found to "ever fall within any section of the definition of 'employees' under the [Labor Law]," citing to ***Fraiberg v 4Kids Entertainment, Inc.***, 75 AD3d 580, 906 NYS2d 64 [2d Dept 2010]. Pursuant to CPLR 3211 (a) (1), a cause of action will be dismissed when documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law (***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d 314, 746 NYS2d 858 [2002]; ***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]; ***Vitarelle v Vitarelle***, 65 AD3d 1034, 885 NYS2d 320 [2d Dept 2009]; ***Peter Williams Enterprises, Inc. v New York State Urban Dev. Corp.***, 90 AD3d 1007, 935 NYS2d 624 [2d Dept 2011]; ***Francis v Vornado Realty Trust/Kings Plaza Mall***, 89 AD3d 680, 931 NYS2d 888 [2d Dept 2011]). In support of their motion, the defendants submit, among other things, the affirmation of their attorney, and copies of the judgment and the report and recommendation in the

EDNY action.

Here, the defendants have failed to establish that the documentary evidence submitted resolves all factual issues and establishes a defense as a matter of law. It is well settled that executives are "employees" within the meaning of the Labor Law provisions governing payment of wages by employers, except where expressly excluded (***Pachter v Bernard Hodes Group, Inc.***, 10 NY3d 609, 861 NYS2d 246 [2008]). Although the documentary evidence establishes that the plaintiff is a managerial employee, it does not establish that her claim is one expressly excluded under the Labor Law, giving the defendants a defense as a matter of law herein. This issue is highlighted by the order of District Judge Bianco which declined to exercise supplemental jurisdiction over the plaintiff's claim for "earned commissions," for the reason that said claim "involves factual and legal issues" separate from those decided therein. In addition, the documentary evidence does not resolve the factual issues herein including, but not limited to, whether the commissions claimed by the plaintiff were earned before she resigned her position.[2]

The second branch of the defendants' motion seeks an order pursuant to CPLR 3211 (a) (5) dismissing the petition on the ground that the claims made pursuant to Labor Law Article 6 are barred by the doctrine of collateral estoppel. Collateral estoppel, a corollary to the doctrine of res judicata, "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (***Ryan v New York Tel. Co.***, 62 NY2d 494, 500, 478 NYS2d 823 [1984]). The two basic requirements of the doctrine are that the party seeking to invoke collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action, and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (***D'Arata v New York Cent. Mut. Fire Ins. Co.***, 76 NY2d 659, 664, 563 NYS2d 24 [1990]; ***New York State Site Dev. Corp. v New York State Dept. of Envtl. Conservation,*** 217 AD2d 699, 630 NYS2d 335 [2d Dept 1995]). Here, a review of the record reveals that the issue of the plaintiff's status as a managerial employee has been determined and that all parties had a full and fair opportunity to contest the matter. However, as noted above, said determination does not entitle the defendants to a dismissal of the plaintiff's complaint.

The third branch the defendants' motion seeks an order dismissing the complaint on the ground that the plaintiff has failed to state a cause of action. Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (***Leon v Martinez***, *supra*). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is

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[2] The significance of this issue of fact will become clear in the discussion below.

evidentiary support for the complaint (***Leon v Martinez***, *supra*; ***Thomas v Lasalle Bank N. A.***, 79 AD3d 1015, 1017, 913 NYS2d 742 [2d Dept 2010]; ***Scoyni v Chabowski***, 72 AD3d 792, 793, 898 NYS2d 482 [2d Dept 2010]; ***Lucia v Goldman***, 68 AD3d 1064, 1066, 893 NYS2d 90 [2d Dept 2009]; ***International Oil Field Supply Services Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***Chan Ming v Chui Pak Hoi***, 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

Here, construing the first cause of action in the complaint liberally, the defendants have failed to conclusively establish that no cause of action exists. It is well settled that "earned commissions" are wages pursuant to the Labor Law (Labor Law 190 [1]; *see also* ***Arbeeny v Kennedy Exec. Search, Inc.***,71 AD3d 177, 893 NYS2d 39 [1st Dept 2010]; ***Gennes v Yellow Book of N.Y., Inc.***, 23 AD3d 520, 806 NYS2d 646 [2d Dept 2005]). An employee seeking wages does not have a cause of action under the Labor Law absent an allegation that the employer violated a substantive provision of Article 6 (***Gottlieb v Kenneth D. Laub & Co.***, *supra*; *see* ***Pachter v Bernard Hodes Group, Inc.***, 10 NY3d at 616, 861 NYS2d at 250). Labor Law § 193 provides that no employer shall make any deduction from the wages of an employee, except those authorized therein. It has been held that the failure to pay wages due is deemed a deduction under the statute (***Ryan v Kellogg Partners Inst. Servs.***, 19 NY3d 1, 945 NYS2d 593 [2012]; ***Esmilla v Cosmopolitan Club***, 936 F Supp 2d 229 [SDNY 2013]; ***Bari v Morellato & Sector USA, Inc.***, 2012 NY Slip Op. 32122[U] [Sup Ct, New York County 2012]). In addition, the Court of Appeals has held that an executive employee "falls within the ambit of the protections afforded to 'employees' under sections 190 and 193 of the Labor Law" (***Pachter v Bernard Hodes Group, Inc.***, *supra*). A review of the papers submitted reveals that, while perhaps pled generally as a cause of action pursuant to "Labor Law §§ 190 et seq.," the defendants have addressed the issue of the applicability of Labor Law § 193, and the complaint can be read to include such a claim. Accordingly, that branch of the defendants' motion which seeks to dismiss the plaintiff's first cause of action for failure to state a cause of action is denied.

The defendants have established that the plaintiff does not have a cause of action pursuant to Labor Law § 195. In her second cause of action, the plaintiff alleges that the defendants failed to provide her with a wage notice in accordance with said statute. The undersigned takes judicial notice that said statute was amended effective April 9, 2011, and provides that employers provide the requisite notice to current, as opposed to newly hired, employees starting on February 1, 2012. It is undisputed that the plaintiff was a current employee of the defendants at the time of the amendment to the statute, and that she resigned her employment prior to February 1, 2012. Without deciding whether the plaintiff as an employee in a managerial position was entitled to receive said notice, it is determined that there can be no violation of the statute under these circumstances. Accordingly, the plaintiff's second cause of action is dismissed.

Finally, that branch of the defendants' motion which seeks summary judgment is denied. Said motion was made prior to the service of an answer by the defendants. Pursuant to CPLR 3212 (a), a motion for summary judgment may not be made before issue is joined, and the requirement is strictly enforced (***City of Rochester v Chiarella***, 65 NY2d 92, 490 NYS2d 174 [1985]; *see also* ***Union Turnpike Assocs., LLC v Getty Realty Corp.***, 27 AD3d 725, 812 NYS2d 628 [2d Dept 2006]; ***Miller v***

Nationwide Mut. Fire Ins. Co., 92 AD2d 723, 461 NYS2d 128 [4th Dept 1983]). To the extent that the motion seeks to have the Court treat the motion as one for summary judgment pursuant to CPLR 3211 (c) it is likewise denied. Whenever a court elects to treat an erroneously labeled motion as one for summary judgment, it must provide "adequate notice" to the parties (CPLR 3211 [c]) unless it appears from the parties' papers that they deliberately are charting a summary judgment course by laying bare their proof (*see* ***Rich v Lefkovits***, 56 NY2d 276, 452 NYS2d 1 [1982]; ***Hopper v McCollum***, 65 AD3d 669, 885 NYS2d 304 [2d Dept 2009]; ***Myers v BMR Bldg. Inspections, Inc.***, 29 AD3d 546, 814 NYS2d 686 [2d Dept 2006]; ***Schultz v Estate of Sloan***, 20 AD3d 520, 799 NYS2d 246 [2d Dept 2005]; ***Singer v Boychuk***, 194 AD2d 1049, 599 NYS2d 680 [3d Dept], *lv denied* 82 NY2d 657, 604 NYS2d 556 [1993]). Here, upon review of the papers, it cannot be said that the parties have deliberately charted such a course.

Most notably, prior to the completion of discovery there is an issue of fact which is not fully addressed in the parties' submissions whether the subject commissions were earned prior to the plaintiff's resignation from her employment. It appears from the record that the plaintiff did not have a written contract of employment with the defendants. Whether an executive employee's commission was "earned" for purposes of Labor Law § 193 barring deductions from wages, is regulated by the parties' express or implied agreement (***Pachter v Bernard Hodes Group, Inc.***, *supra*). The terms of that agreement, express or implied, have not been established herein.

Dated: AUGUST 14, 2015

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**