Gold v New York Life Ins. Co.
2015 NY Slip Op 31699(U)
September 4, 2015
Supreme Court, New York County
Docket Number: 653923/2012
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : COMMERCIAL DIVISION PART 49

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AVRAHAM GOLD and BRIAN CHENENSKY, individually, and on behalf of all others similarly situated,

Plaintiffs,

-against-

NEW YORK LIFE INSURANCE CO., NEW YORK LIFE INSURANCE AND ANNUITY CORP., NYLIFE INSURANCE CO. OF ARIZONA, NYLIFE SECURITIES LLC (f/k/a NYLIFE SECURITIES INC.), JOHN DOES 1-50 (said names being fictitious individuals), and ABC CORPORATIONS 1-50 (said names being fictitious companies, partnerships, joint ventures and/or corporations),

Defendants.

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DECISION AND ORDER

Index No.: 653923/2012
Mot. Seq. No.: 004

O. PETER SHERWOOD, J.:

In motion sequence 004, defendants New York Life Insurance Co., New York Life Insurance and Annuity Corp., NYLIFE Securities LLC, and NYLIFE Insurance Co. of Arizona (collectively, "NY Life") originally moved (1) to dismiss counts 2, 3, and 4 of plaintiffs' consolidated and amended class action complaint (the "Complaint"); (2) to strike paragraphs 69-86 of the Complaint as irrelevant and prejudicial; and (3) to compel arbitration of plaintiff Melek Kartal's claims. At oral argument held on March 16, 2015, the Court converted the motion into one for summary judgment on counts 2, 3, and 4 (*see* Hrg. Tr., NYSCEF Doc. No. 119, at 97:13-22; 99:26-100:9) under CPLR 3211 (c). Additionally, the court granted that portion of the motion seeking to compel arbitration of Kartal's claims (*see id.*, at 94:7-9), as well as that portion of the motion seeking to strike paragraphs 69-86 of the Complaint (*see id.*, at 32:15-16). Accordingly, now pending before the Court is NY Life's motion for summary judgment dismissing counts 2, 3 and 4 of the Complaint.

I. Background

The instant case, styled as a putative class action, seeks to redress alleged violations of New York State's overtime and minimum wage laws, among other things. NY Life is a mutual insurance company that sells life insurance, annuities, and other financial products. Plaintiffs were formerly

employed by NY Life as insurance agents.[1] They purport to bring this suit on their own behalf, and on behalf of a class that consists of all insurance agents employed by NY Life in the State of New York at any time between December 21, 2001, and the date when judgment is entered in this action.

A. Plaintiffs' Contracts with NY Life, Compensation, and Duties

NY Life employed plaintiffs pursuant to standardized contracts, including two comprehensive agreements that agents were required to sign at the beginning of their NY Life careers, which contracts defined their earnings. The first contract, called the Agent's Contract, provided, among other things, that the agent would be paid commissions on the premiums that NY Life received from its customers on any business written by the agent. Individuals who joined NY Life as trainees (i.e., TAS Agents) also signed an addendum to the Agent's Contract called the Training Allowance Subsidy Plan Agreement ("TAS Agreement").

For each agent, NY Life maintained an internal company account called the "agent's ledger." On this ledger NY Life credited each commission and training allowance that became payable to the agent, doing so on a rolling basis as individual commissions and training allowances were earned. The company routinely offset two types of charges against the agent's earnings. First, from time to time, it required each agent to enter into other separate agreements relating to the agent's use of work-related services and facilities that NY Life provided. Such agreements were required for (among other things) the agent's use of cubicle space in a NY Life office, office telephone service, internet and computer support, and mandatory professional liability insurance. These agreements purported to authorize NY Life to charge an agent for each of these facilities, by periodically debiting the cost to the agent's ledger (the "Business Expense Debits").

Second, the Company reversed advanced/annualized commissions previously fronted to the agent in many circumstances when the business written by the agent did not generate the revenue that NY Life expected (for instance, when the customer cancelled the policy) (the "Annualized/Advanced

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[1] Plaintiff Brian Chenensky was employed by NY Life as an insurance agent from May 2003 until September 2006. Plaintiff Avraham Gold was employed by NY Life as an insurance agent and registered representative from December 2001 until August 2004. Plaintiff Sheree N. Johnson was employed by NY Life as an insurance agent from August 2009 until December 31, 2012. Plaintiff Melek Kartal was employed by NY Life as an insurance agent and registered representative from June 2012 until March 2014. As noted above, the Court compelled arbitration of plaintiff Melek Kartal's claims from the bench at the hearing on March 16, 2015.

Commissions Reversals"). Under this formula, commissions for the entire year of premiums would be advanced to the agent upon the customer purchasing a product from defendants, but would be reversed to the extent the customer failed to pay the premiums.

With regard to their job duties and responsibilities as NY Life insurance agents, plaintiffs allege that their

> principal responsibility as agents was not to sell whatever products they could push onto New York Life's clients, but to service New York Life's business by advising its current and prospective clients on available insurance and other financial products, taking into account each client's individualized needs, goals and circumstances, as well as the agent's own knowledge and experience of the insurance industry and market, before recommending any appropriate products for purchase.

(Am. Compl., NYSCEF Doc. No. 41, ¶ 46). Accordingly, plaintiffs allege that "[t]hese predominantly advisory obligations starkly contrast with the duties of a sales person, such as a car dealer or a store clerk, who sells available inventory regardless of the needs of the purchaser" (*id.* at ¶ 50). Accordingly, plaintiffs allege that their responsibilities exceeded and differentiated from those traditionally associated with an insurance salesman.

Defendants, on the other hand, contend that New York Life recruited, hired and trained plaintiffs to sell insurance. Their compensation and continued affiliation with New York Life depended upon them making sales. They maintained their own client list and worked outside of the office selling insurance policies. They worked the hours of their own choosing. They generated commissions only if they sold insurance policies to customers. All of their duties revolved around New York Life's six-stage sales cycle.

B. Procedural History

On December 21, 2007, Chenensky commenced a class and collective action (the "Chenensky Action") in the United States District Court for the Southern District of New York (the "District Court"). Gold commenced a related class action (the "Gold Action") in the same court on April 9, 2009. Both asserted the same state law claims that are presented herein. Chenensky also asserted collective claims for unpaid overtime under the Fair Labor Standards Act, 29 USC §§ 201 et seq. ("FLSA") (*see Chenensky v New York Life Ins. Co.*, Case No. 07-CIV-11504 [SD NY]; *Gold v New York Life Ins. Co.*, Case No. 09-3210 [SD NY]).

In December 2009, District Court Judge William H. Pauley III granted summary judgment dismissing Chenensky's FLSA and state overtime claims, holding that Chenensky was an exempt outside salesperson. Judge Pauley denied summary judgment as to Chenensky's wage deduction claim arising from Business Expense Debits (*see Chenensky v. N.Y. Life Ins. Co.*, 2009 WL 4975237 [SD NY Dec. 22, 2009]). A motion for reconsideration was denied in June 2010 (*see Chenensky v. N.Y. Life Ins. Co.*, 2010 WL 2710586 [SD NY June 24, 2010]).

In May 2011, Judge Pauley granted summary judgment to New York Life on Gold's overtime claims finding that, like Chenensky, Gold was an exempt outside salesperson (*Gold v. New York Life*, 2011 WL 2421281 [SD NY May 19, 2011]). On May 15, 2012, the District Court dismissed the remaining claims in the Gold Action on jurisdictional grounds. A year later, the District Court held *sua sponte* that supplemental federal jurisdiction over the Chenensky Action was no longer warranted, and dismissed that action. Gold appealed to the Second Circuit. Chenensky also appealed, but later withdrew his appeal. The Second Circuit affirmed, upholding the jurisdiction and summary judgment holdings (*see Gold v New York Life Ins. Co.*, 730 F3d 137, 141 [2d Cir 2013], *rehr'g en banc denied* [Dec. 2013]).

Plaintiff Johnson who was hired effective October 28, 2009, commenced her class action against Defendants on June 6, 2013, only a few months after her work for NY Life terminated on December 31, 2012. Her action was filed in New York Supreme Court, Bronx County, the county of her residence, and asserted overtime, minimum wage and wage deduction claims. Pursuant to CPLR § 205, Chenensky and Gold also commenced Supreme Court actions, in New York County, pursuing their remaining state law claims for unlawful wage deductions. All three actions along with Kartal's claims are consolidated before this Court.

The amended complaint now before the Court asserts claims for unlawful wage deductions based on the allegedly illegal Business Expense Debits (Count 1) and the Annualized/Advanced Commissions Reversals (Count 2); failure to pay overtime (Count 3); and failure to pay minium wages (Count 4). Gold and Chenensky do not join in Counts 3 and 4, their claims for overtime and minimum wages having been dismissed in the Gold and Chenensky Actions.

On October 29, 2014, NY Life moved to dismiss counts 2 through 4, to strike certain allegations from the complaint, and to compel arbitration of Kartal's claims. As noted above, the

Court converted the motion into one for summary judgment (*see* Hrg. Tr., NYSCEF Doc. No. 119, 97:13-22; 99:26-100:9). Additionally, the Court granted those portions of the motion seeking to compel arbitration of Kartal's claims (*see id.*, at 94:7-9), and to strike paragraphs 69-86 of the complaint (*see id.*, at 32:15-16). Only that portion of the motion seeking to dismiss counts 2 (asserted by Chenensky, Gold and Johnson), 3 (asserted by Johnson alone) and 4 (asserted by Johnson alone) of the Complaint remain.

II. Discussion

A. Summary Judgment Standard

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez*, 68 NY2d 329; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see Zuckerman*, 49 NY2d 557; *Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]).

B. Count 2 - Unlawful Commission Payment Reversals

(i) Arguments

Count 2 asserts a claim for violation of Labor Law § 193 based on NY Life's Advanced/Annualized Commissions Reversals practice. Defendants assert that the claim is barred by the plaintiffs' contracts with NY Life and the Court of Appeals decision in *Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609 [2008]. Defendants contend that Advanced/Annualized Commissions Reversals are an expressly bargained for and agreed upon aspect of plaintiffs' employment contracts with NY Life. Moreover, reversals such as these were expressly approved by the Court of Appeals in *Pachter*.

Plaintiffs counter that the provisions in their contracts with NY Life approving and providing for Advanced/Annualized Commissions Reversals are void under New York Labor Law, and were not agreed upon aspects of the computation of their wages. Moreover, plaintiffs contend that summary judgment should be denied because plaintiffs' commission reversal claims raise the same material factual issues that the District Court previously held precluded summary judgment on plaintiffs' Business Expense Debit claims. Plaintiffs add that, *Pachter* is both legally and factually inapposite to this case. Lastly, plaintiffs argue that summary judgment on this claim is premature because deposition testimony is needed to further explore NY Life's commissions reversal policies and practices. Specifically, plaintiffs assert their entitlement to complete two "previously scheduled depositions that were intended to explore the declaration testimony on which Defendants relied in federal court to describe NY Life's pertinent policies" (*see* Pls. Suppl. Opp. Br., NYSCEF Doc. No. 111, p. 13), and certain other document discovery.

(ii) Analysis

New York Labor Law § 193 prohibits "deductions from the wages of an employee" except in specific situations explicitly enumerated in the statute (*see* Labor L. § 193). The Advanced/Annualized Commissions Reversals indisputably do not fall within the exceptions enumerated in the statute. However, the legality of the Annualized/Advanced Commissions Reversals "depends on when [plaintiffs'] commission [were] 'earned' and became a 'wage' that was subject to the restrictions of section 193" (*Pachter*, 10 NY3d at 617). *Pachter* makes clear that an employer and employee can agree on the point in time when a commission is earned, and therefore is a wage (*see id.*). Specifically, "they may provide that the computation of a commission will

include certain downward adjustments from gross sales, billings or receivables. In that event, the commission will not be deemed 'earned' or vested until computation of the agreed-upon formula" (*id.*).[2]

Despite plaintiffs' protestations to the contrary, such an agreement was made here. The TAS Agreements provide that:

> When any policy referred to above terminates prior to its first anniversary, the commissions previously allowed with respect to such policy will be debited to the Agent's ledger and the amount of the commissions applicable with respect to the premium actually received by the Company will be credited to the Agent's ledger . . . .

(Lynch aff, Exs. B-E [TAS Agreements], NYSCEF Doc. Nos. 67-73, ¶ 7). In such circumstances, a commission is "earned" only at the conclusion of that computation (*see Pachter*, 10 NY3d at 617). Accordingly, the commissions at issue here are not deemed earned upon their initial entry onto the plaintiffs' ledgers, but rather only *after* computation of the Advanced/Annualized Commissions Reversals (*see id.*). To the extent that the plaintiffs argue that these provisions are void as violating the Labor Law, *Pachter* expressly provides otherwise (*see id.* at 617). [3]

Plaintiffs' argument that the employment agreements are ambiguous and therefore present issues of facts is also unpersuasive. Plaintiffs assert that the District Court found plaintiffs' employment agreements to be ambiguous in both the Gold and Chenensky Actions. On this basis they argue that there are material issues of fact requiring denial of the motion for summary judgment. However, Chenensky never made a claim based on Advanced/Annualized Commissions Reversals

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[2]Assuming that plaintiffs were viewed as outside salespersons as to which Labor Law §191-a(b) applies, the analysis would be the same even though this section provides that commissions are "earned" when it is "due" because, as the Court of Appeals explained in *Pachter*, "the statue does not otherwise explain how to determine when the commission is 'due' ", 10 NY3d at 618, n. 4.

[3]At oral argument on the motion plaintiffs' counsel argued for the first time that the commission reversal policy applies not just to life insurance policies that terminate in the first year. Counsel cite §8 of the TAS Agreements which contains a similar reversals clause. TAS Agreements §8 has no bearing on the issue. Counsel are mistaken. That provision relates to credits for the number of "Net Eligible Weighted Life Cases" earned and affect the amount of the Life Case Rate Training Allowance an agent is eligible to receive *during the first year* of the three year TAS Agreement (*see* Lynch aff. Exs. B-E, §10).

in the *Chenensky* Action (*see Chenensky*, Case No. 07-CIV-11504, 2009 WL 4975237). In the Gold Action, Gold specifically conceded that he was not challenging Advanced/Annualized Commission Reversals (see Lynch reply aff, Ex. A [Gold's Summary Judgment Brief], NYSCEF Doc. No. 92, p. 31). In both cases, the District Court was dealing with claims that Business Expense Debits (*i.e.* debits charged to plaintiffs' ledgers for business expenses such as use of defendants' office space and telephone service), rather than Advanced/Annualized Commissions Reversals, were unlawful wage deductions (*see Gold*, Case No. 09-3210, 2011 WL 2421281).[4] The District Court found that because the Business Expense Debits agreements were contained in a "patchwork" of extrinsic agreements separate and apart from plaintiffs' Agent's Contracts and TAS Agreements, the interplay among the various documents created an ambiguity with regard to whether Business Expense Debits were an agreed upon part of the compensation formula (*see, e.g., id.*, at *6 ["In *Chenensky*, this Court held that the patchwork of written agreements between New York Life and its agents was ambiguous on this point. Both parties in the present action appear to accept this ambiguity as a starting point. Because the contracts in this action are substantially the same as those in *Chenensky*, this Court concludes they are ambiguous"]).

Annualized/Advanced Commissions Reversals are addressed in the TAS Agreements. There is no need to examine any other documents to decipher the meaning of that provision. The TAS Agreements provide that Annualized/Advanced Commissions Reversals would be a part of the compensation formula. The Court of Appeals in *Pachter* recognized the right of parties to so agree. *Pachter* also stands for the proposition that to the extent parties so agree, the point at which commissions are earned is at the end of the final computation of the formula. As a result, plaintiffs commissions were not earned until after accounting for the Annualized/Advanced Commissions Reversals. Thus, the Annualized/Advanced Commissions Reversals were not unlawful wage deductions as a matter of law.

Plaintiffs nonetheless argue that the Annualized/Advanced Commissions Reversals were not part of the wage computation, but instead "were independent, out-of-pocket debts putatively owed

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[4] Johnson and Kartal have asserted a claim based on Business Expense Debits which defendants do not seek to dismiss on this motion (*see* Am. Compl., NYSCEF Doc. No. 41, ¶¶ 92-111).

New York Life that the company illegally secured by liens against an agent's wages (Pls. Suppl. Br., NYSCEF Doc. No. 111, pp. 14-15). As noted above, the TAS Agreements plainly provide otherwise at paragraph 7. Paragraph 17 to which plaintiffs cite, gives the company a paramount lien in the event of an agent's indebtedness to NY Life. This general provision does not affect paragraph 7. Even if the Court were to perceive a possible conflict between the two clauses, the well-settled principal of contract interpretation that a specific contractual provision (*i.e.* paragraph 7) governs a general provision (*i.e.* paragraph 17) in the event of an inconsistency between the two would require the Court to give effect to the provisions of paragraph 7 (*see Brady v Williams Cap. Grp., LP*, 64 AD3d 127, 141 [1st Dept 2009]).

Plaintiffs' attempt to distinguish *Pachter* is also unpersuasive. Plaintiffs argue that in *Pachter*, the parties did not have an explicit written contract, but rather the court inferred the existence of an implied contract based on the course of dealings between the parties. Plaintiffs contend that the course of dealings between the parties in *Pachter* included the defendant-employer providing the plaintiff with monthly statements with final calculations of what plaintiff's earnings were for the month. Here, conversely, there is a written contract between the parties, and there has never been at any point a final statement of plaintiffs' earnings for any period. These arguments miss the mark. In fact, the existence of a written contract between the parties in this case specifically providing a formulaic computation scheme for calculation of plaintiffs' commissions is more compelling evidence than that which the *Pachter* Court had before it. Other purported factual differences between *Pachter* and this case are simply not differences at all. For example, plaintiffs contend that in *Pachter*, "[t]he employer reported the amount actually received by Pachter as her taxable income, not her gross commissions undiminished by deductions", whereas NY Life "reported all the commissions and training allowances that it credited to an agent's ledger as the agent's taxable income, undiminished by debits" (*see* Pls. Suppl. Br., NYSCEF Doc. No. 111, p. 18). A review of plaintiffs' tax documents for the years of their employment at NY Life (*see, e.g.*, Ferguson aff, NYSCEF Doc. No. 130, ¶¶ 3-7, Exs. A-B, NYSCEF Doc. Nos. 131-32; Lynch reply aff, Exs. A-E, NYSCEF Doc. Nos., 124-28) reveal that NY Life did in fact report agents' taxable income on a year-to-date basis, net of commissions reversals, just as in *Pachter*.

Lastly, plaintiffs' argument that summary judgment on this claim is premature because

further discovery is needed also lacks merit. The Annualized/Advanced Commissions Reversal claim hinges solely on the plaintiffs' contracts with New York Life and the Court of Appeals decision in *Pachter*. Plaintiffs' Agent's Contracts and TAS Agreements with New York Life are in the record. These agreements are clear and unambiguous. No further discovery is needed regarding "facts essential" to opposing summary judgment (*see* CPLR 3212[f]). Plaintiffs contend that they have yet to conduct two further depositions that were contemplated in the federal suits - one concerning "chargebacks"[5] and one to clarify the types of reversals appearing on their ledgers. There is no dispute that chargebacks are not at issue in this motion (*see* Def. Suppl. Reply Br., NYSCEF Doc. No. 122, p. 4), and therefore discovery into chargebacks is not "essential" to plaintiff's opposition to it (CPLR 3212[f]). Indeed, unlike Gold and Chenensky, Johnson expressly *admits* that chargebacks were an agreed upon aspect of her computation formula as expressed in her Agent Contract (*see* Pls. Suppl. Br., NYSCEF Doc. No. 111, p. 5 fn. 5; Lynch aff., Ex. H [Johnson Agent Contract], NYSCEF Doc. No. 73, ¶ 30). Accordingly, no further discovery is essential to disposition of the motion on count 2. For the same reasons, plaintiffs' contentions that they need additional document discovery on this claim (*see* Pls. Second Suppl. Opp. Br., NYSCEF Doc. No. 134, pp. 2-5) are meritless.

C. Counts 3 and 4- Failure to Pay Overtime and Minimum Wage

(i) Arguments

In counts 3 and 4 of the Complaint, Johnson asserts claims for unpaid overtime and minimum wage pursuant to 12 NYCRR § 142-2.2 and New York Labor Law § 652. Defendants move to

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[5]"[A] commission chargeback is different from a reversal of advanced or annualized commissions under New York Life's commission rules" (Mayes aff., Ex. 1 [Poole decl.], NYSCEF Doc. No. 113, ¶ 3). "A commission chargeback . . . is the reversal of commissions associated with a product where a customer initially purchases the product by paying a sum of money and the customer elects to withdraw money from that policy or surrender that policy or allow that policy to lapse a short time later" (*id.*, ¶ 4). "In a true chargeback, the Company may retain a portion of the underlying premiums even though it reverses the corresponding commissions from the agent's ledger" (Defs. Suppl. Reply Br., NYSCEF Doc. No. 122, p. 6). Conversely, in an Advanced/Annualized Commission Reversal, which is the subject of this motion, NY Life either never receives the underlying premium from the customer, or the underlying premium is returned in full to the customer (Mayes aff., Ex. 1 [Poole decl.], NYSCEF Doc. No. 113, ¶ 3).

dismiss these claims on the grounds that they are barred by the "outside sales exemption" to such claims and by Second Circuit precedent. Specifically, defendants contend that, in their separate federal actions, plaintiffs Gold and Chenensky asserted overtime and minimum wage claims based on the same factual allegations as are made here with regard to Johnson's claims (*see Gold*, Case No. 09-CIV-3210, 2011 WL 2421281; *Chenensky*, Case No. 07-CIV-11504, 2009 WL 4975237). Both the District Court and Second Circuit Court held that these allegations were insufficient to sustain overtime and minimum wage claims under New York law since the allegations established that Gold fell within the outside sales exemption. Defendants argue that the reasoning applied in those decisions, should apply to in the claims asserted by Johnson.

Plaintiffs respond to these arguments in a number of ways. First, they point out that the *Gold* and *Chenensky* decisions rendered by the District Court and Second Circuit are not binding on this Court, and are not *res judicata* with respect to Johnson. Second, they contend that these decisions notwithstanding, Second Circuit precedent, including *Davis v J.P. Morgan Chase & Co.* (587 F3d 529, 530 [2d Cir 2009]), supports upholding their minium wage and overtime claims. Plaintiffs implore the Court to follow *Davis*, which discussed a different Department of Labor regulation that identified a set of common advisory duties which exclude a primary duty of sales (*see Davis*, 587 F3d at 533 [discussing 29 CFR § 541.203(b)]). Plaintiffs contend that their job duties as alleged in the complaint are akin to the job duties as outlined by *Davis* as being advisory in nature, and therefore cannot have been sales. Lastly, plaintiffs note Johnson has not had any discovery. She is asserting individual claims in this action for the first time, and took no part in either the Gold or Chenensky Actions. For this reason, Johnson contends that she is entitled to discovery before her claims are adjudicated on the merits.

(ii) Analysis

New York's Labor Law as it relates to overtime and minimum wage claims is modeled on the FLSA. "Congress enacted the FLSA in 1938 with the goal of protecting all covered workers from substandard wages and oppressive working hours" (*Christopher v SmithKline Beecham Corp.*, 132 S Ct 2156, 2162 [2012] [quotation omitted]). Among various other provisions, the FLSA sets a minium wage for most jobs, and establishes a general rule that employers must "compensate employees for hours in excess of 40 per week at a rate of 1 ½ times the employees' regular wages"

(*id.*; *see also* 29 USC § 207). However, the FLSA specifically exempts certain classes of employees from the overtime and minimum wage requirements, including "outside salesman" (*see* 29 USC § 213[a][1]). Congress did not specifically define the term "outside salesman", but left it to the Department of Labor ("DOL") to do so. The current DOL regulation defining the term appears at title 29, § 541.500 of the Code of Federal Regulations. There, the DOL defines an outside salesman as an employee:

> (1) Whose primary duty is: (i) making sales within the meaning of section 3(k) of the Act, or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> (2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

(29 CFR 541.500[a]). Work that is "incidental to and in conjunction with" the employee's own sales or solicitations and "work that furthers [his or her] sales efforts" is exempt work (29 CFR § 541.500[b]). Following suit, New York has adopted these provisions of the FLSA, including the outside salesman exemption (*see* 12 NYCRR § 142-2.2). Minimum wage claims are similarly subject to the outside salesman exemption in New York (*see* Labor L. § 651[5][d]).

Thus, the focused issue for consideration on this motion concerns whether the plaintiffs' "primary duty", as that term is defined in the section 541.700 of title 29 of the Code of Federal Regulations, was selling or advisory. That section provides that:

> The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(29 CFR § 541.700[a]). Because the evidentiary record conclusively establishes that the "principal, main, major or most important duty that" Johnson performed was that of sales, counts 3 and 4 must be dismissed as barred by the outside sales exception.

Johnson makes the same overtime and minimum wage claims as did Gold in the Gold

Action. In that case, the District Court concluded that there was no genuine issue of material fact that Gold's primary duty was to sell insurance, and that therefore he was properly classified as an outside salesman subject to the outside salesman exemption (*see Gold*, 2011 WL 2421281, at *6 ["Accordingly, there is no genuine dispute that Gold's primary duty was sales, and New York Life's motion for summary judgment is granted on Gold's claim"]). The Second Circuit affirmed, holding that:

> Our review of the record before the district court confirms that Gold's primary duty was selling insurance. He was hired and trained by New York Life to sell insurance. Joint Appx. 879, ¶ 29, 902–09, ¶¶ 59–72. His compensation as well as his continued affiliation with the company was tied exclusively to his sales. Joint Appx. 866–67, ¶¶ 7–8, 914–15, ¶¶ 80–83. He was responsible for maintaining his own client lists, and he conceded that he was regularly engaged away from his employer's place of business as his responsibilities were to "go out, meet people" and "close deals." Joint Appx. 901–02, ¶¶ 57–58.

(*Gold*, 730 F3d at 145).[6] Johnson's overtime and minimum wage claims in the Complaint, and in large part upon her opposition papers in response to this motion, make the same allegations that Gold made in the Gold Action. She specifically relies on the same record as developed in the Gold Action. Moreover, the facts essential to justify Johnson's opposition to this motion are readily available to all parties (*see* CPLR 3212[f]).

Johnson was an insurance agent who held an insurance license that authorized her to sell insurance only (*see* Lynch suppl. aff, Ex. A [3/16/15 Hrg. Tr.], NYSCEF Doc. No. 102, at 51:4-13; 79:18-20). New York Life recruited, hired and trained Johnson to sell insurance (Complaint, NYSCEF Doc. No. 66, ¶¶ 3; 48, 49, 53; Lynch aff, Ex. H, [Johnson's Agent Contract], NYSCEF Doc. No. 73, Intro ¶). Johnson's compensation and her continued affiliation with New York Life depended upon her making sales (Lynch aff, Ex. H, [Johnson's Agent Contract], NYSCEF Doc. No. 73, ¶ 7[b] [Dkt. Nos. 71]; Ex. D, NYSCEF Doc. No. 69 [Johnson's TAS Agreement], ¶ 6-9).

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[6] Plaintiffs contend that the Second Circuit essentially overstepped its boundaries in making such determinations. They contend that the District Court's grant of partial summary judgment was not before the Circuit on appeal - instead, only the District Court's decision to dismiss the action for want of jurisdiction had been appealed. However, as the Second Circuit noted, "[u]pon appeal from a final judgment concluding the action, earlier summary dispositions merge in the judgment and are reviewable" (*Gold*, 730 F3d at 144). In any event, the Second Circuit's analysis is persuasive authority in this Court.

Johnson maintained her own client list and worked outside of the office selling insurance policies. She worked the hours of her choosing (Lynch aff, Ex. H, [Johnson's Agent Contract], NYSCEF Doc. No. 73, ¶ 7[d]-[e][noting that agents can work hours that they choose, out of their own office, home or a New York Life office]; Lynch suppl. aff, Ex. F, NYSCEF Doc. No. 108 [video where Johnson explains how she works away from the office and sets her own hours]). Johnson generated commissions only if she sold an insurance policy to a customer (Lynch suppl. aff, Ex. A [3/16/15 Hrg. Tr.], NYSCEF Doc. No. 102, at 78:11-20). Her duties revolved around New York Life's six-stage sales cycle, just as did Gold's (and Chenensky's) (Complaint, ¶ 49 [describing the six stages of the sales cycle]; *id.*, ¶ 48 [describing how Plaintiffs are to engage in "selling situations"]).

While it is true that the Gold and Chenensky Actions are not *res judicata* as to Johnson, she concedes her role at New York Life, as alleged in the complaint, was identical to those of Gold and Chenensky (*see* Lynch suppl. aff, Ex. A [3/16/15 Hrg. Tr.], NYSCEF Doc. No. 102, at 38:22-43:21), and that the factual record developed in those cases are equally applicable to hers (Pls. Opp. Br., NYSCEF Doc. No. 86, p. 16 [acknowledging that Johnson's overtime and minimum wage claims are "[b]ased substantially on prior federal discovery"]; *see also* Defs. Rule 19-a Stmt., NYSCEF Doc. No. 100, ¶ 47 [chart comparing Johnson's allegations in the instant action with the record relied upon by Gold in the Gold Action]). There is no allegation that Johnson had any different duties than those alleged by Gold and Chenensky. Because the substantive allegations advanced by Johnson and the evidence she cites (recruiting materials, training materials, etc.) are the same as were presented to the District Court and Second Circuit in the Gold Action, this Court concludes that the District Court and Second Circuit opinions are persuasive authority as to Johnson's overtime and minimum wage claims.

Nonetheless, Johnson contends (as did Gold in the Gold Action) that her primary duties were that of advising clients of the most appropriate product for their individualized needs, rather than sales. However, as the Second Circuit also concluded, "even in the light most favorable to [Johnson], these duties were merely components of New York Life's six-step process for selling insurance" (*Gold*, 730 F3d at 145). Ethical selling is selling nonetheless. To conclude otherwise would defy the language and purpose of the outside sales exemption, the Second Circuit opinion in the Gold Action, and common sense (*see Baum v AstraZeneca LP*, 605 F Supp 2d 669, 687 [WD Pa 2009] *affd on other grounds*, 372 Fed Appx 246 [3d Cir 2010] [reviewing authority, and concluding

that, by determining that employees fell within the outside sales exemption, "[t]he district judges in [those] cases exhibit[ed] the wisdom and common sense to acknowledge that sometimes, society is better off when a duck, walking and talking so, can simply be treated as one"]). Indeed, Johnson, unlike Gold, was not a registered representative (Lynch suppl. aff, Ex. A [3/16/15 Hrg. Tr.], NYSCEF Doc. No. 102, at 37:19-25). Thus, she could not have engaged in those financial advisory services requiring a license to do so. She could not lawfully sell anything but traditional insurance.

Johnson's resort to *Davis* (587 F3d at 530), discussing 29 CFR § 541.203(b) (the administrative exemption to overtime and minimum wage claims), does not save her claims. As plaintiffs admitted at oral argument upon the motion to dismiss, this is a regulation that simply does not apply here (Lynch suppl. aff, Ex. A [3/16/15 Hrg. Tr.], NYSCEF Doc. No. 102, at 47:23-49:6). *Davis* is inapposite. It addresses entirely different facts and a different governing regulation. *Gold*, addresses identical facts and the same regulation. Moreover, to the extent Johnson argues that a material issue of fact exists concerning whether her job duties more closely resemble the administrative primary duty discussed in that regulation rather than the sales primary duty, the Second Circuit rejected it on Gold's motion for a rehearing *en banc* (*see* Lynch reply aff, Ex. E, NYSCEF Doc. No. 96). Accordingly, Johnson's argument that the District Court and Second Circuit must have overlooked *Davis* because neither Court had the benefit of briefing on the case is without merit.

Lastly, Johnson contends that summary judgment is premature because the discovery conducted in the Gold and Chenensky actions is stale and does not include the time period that Johnson was employed as a NY Life insurance agent. This argument misses the mark - Johnson does not allege that her duties were any different than those of Gold and Chenensky. Indeed, she alleges that her duties were identical (*see* Lynch suppl. aff, Ex. A [3/16/15 Hrg. Tr.], NYSCEF Doc. No. 102, at 38:22-43:21; Defs. Rule 19-a Stmt., NYSCEF Doc. No. 100, ¶ 47). Nor does Johnson contend that the job duties of a NY Life insurance agent changed between the time Gold and Chenensky were employed with NY Life (December 2001 to September 2006) and the period of her employment (August 2009 to December 2012). Accordingly, Counts 3 and 4 must be dismissed.

Accordingly, it is hereby

ORDERED that the motion of defendants as converted to a motion for summary judgment is GRANTED in its entirety and the Second (Annualized/Advanced Commissions Reversal), Third (failure to pay overtime) and Fourth (failure to pay minimum wages) Causes of Action are DISMISSED; and it is further

ORDERED that the portion of the motion which sought to strike paragraphs 69-86 of the Complaint is GRANTED for the reasons set forth on the record of the hearing held on March 16, 2015, and said paragraphs are hereby stricken from the Complaint; and it is further

ORDERED that the portion of the motion which sought to compel Kartal to arbitrate her remaining claims on an individual basis is GRANTED for the reasons set forth on the record of the hearing held on March 16, 2015; and it is further

ORDERED that Kartal is directed to proceed to arbitration promptly; and it is further

ORDERED that this action is STAYED as to Kartal pending resolution of the arbitration and any party may apply to have this stay vacated upon a showing that the arbitration proceeding has been concluded; and it is further

ORDERED that counsel for the parties shall appear at a preliminary conference on Tuesday, September 15, 2015 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: September 4, 2015

E N T E R,

O. PETER SHERWOOD
J.S.C.