Leeds v Best Styles, Inc.
2016 NY Slip Op 31783(U)
September 27, 2016
Supreme Court, New York County
Docket Number: 150882/2013
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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ANDREA LEEDS,

Plaintiff,

-against- Index No. 150882/2013

BEST STYLES, INC.,

Defendant.
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NANCY BANNON, J.:

I. INTRODUCTION

In this action, inter alia, to recover unpaid sales commissions and damages for tortious interference with contract and defamation, defendant, Best Styles, Inc. (Best Styles), moves for summary judgment dismissing the complaint

II. BACKGROUND

In December 2009, Best Styles, a wholesale jewelry supplier, engaged plaintiff, Andrea Leeds, as an independent representative to facilitate retailers' purchases of Best Styles' jewelry. The terms offered to Leeds to compensate her for her work are set forth in an email sent to Leeds from Jien Tien, the manager of Best Styles, dated November 13, 2009. Pursuant to the offer, commissions to be paid to Leeds varied from 12% to 20%. Leeds asserts that, in an email message from Tien to her dated February 25, 2011, Best Styles unilaterally and retroactively reduced commissions to a range of 3% to 10%, over her objections. The

complaint alleges that, beginning in early 2011, Best Styles began to pay Leeds commissions at rates even lower than those stated in that email, and that the payment checks failed to specify the percentage rate on which they were based, in one case failing to specify which order the commission was for. According to the complaint, in 2011, Best Styles also "began substantially interfering with Plaintiff's relationships with her retail accounts, and embarked on a course of conduct clearly intended to drive her out," imposing the requirements that Leeds work with junior employees rather than with Best Styles' owner and manager, assume additional responsibilities, including taking orders from retailers and arranging for shipping, and regularly work inside the office. Moreover, the complaint asserts that, although Best Styles demanded that Leeds be present at customer meetings, it also prohibited her from speaking thereat. On September 27, 2011, Best Styles allegedly informed Leeds that if she required assistance of the company's personnel during customer meetings, she would be required to pay those personnel 2% of her commission from any orders for which she obtained their assistance.

The complaint further asserts that the changes to the business relationship between Leeds and Best Styles were designed to force Leeds to end her affiliation with Best Styles, and that Leeds thus concluded in late 2011 that she could no longer work with Best Styles. Leeds alleges that, on or about November 28,

2011, she gave notice that she would end her relationship with the company, effective December 30, 2011. The complaint alleges that Leeds introduced Dillards Department Store (Dillards) to Best Styles, and that when she gave notice that she would no longer work with Best Styles, negotiations were still under way between Dillards and Best Styles, but that, on December 6, 2011, Dillards nonetheless placed an order with Best Styles to purchase approximately $500,000 in jewelry, and that she was never paid a commission for that order. Leeds further alleges that there were other orders for which she was never paid a commission, or was not paid the full amount that she was owed.

The complaint alleges that Kevin Tian, the owner of Best Styles, defamed plaintiff by telling Melissa Galit of Henry Doneger Associates, an apparel and fashion merchandising service, that "[p]laintiff was not acting professionally and hardly spent time at Best Styles' offices." The complaint alleges, on information and belief, that Tian "similarly defamed Plaintiff to other fashion industry members."

The complaint asserts six causes of action: (1) breach of contract for failing to pay commissions of 10-12% on each order placed; (2) tortious interference with contract by interfering with her ability to obtain the benefit of her agreement with Best Styles; (3) constructive termination of her relationship with Best Styles by interfering with her relationships with her

accounts, and imposing new and contradictory conditions upon her activities; (4) a right to recover in quantum meruit in connection with the orders she arranged; (5) defamation in connection with the representations made by Tian to Galit as to Leeds's allegedly unprofessional conduct; and (6) defamation per se in connection with those alleged representations.

Best Styles moves for summary judgment dismissing the complaint. In support of its motion, Best Styles submits affidavits of both Tian and Tien. They both aver that Leeds approached Best Styles, proposing that the company hire her as an independent contractor. Tian and Tien confirm that the commission structure originally agreed to in November 2009 was changed by Best Styles in February 2011. Tian further states that, from late 2010 to early 2011, Best Styles began to experience problems with Leeds's work, and that his "main goal has always been the [sic] facilitate Leeds in obtaining the most business as possible because if Leeds sold more product, Best Styles would benefit." He avers that he told Leeds to spend more time in the office so that she could be a more effective worker, but denies that he has ever "spoken about Leeds in a negative manner to Melissa Galit."

In her affidavit, Tien states that when Leeds was paid, "she was provided with an account statement including the invoice date, client name [as well as] the purchase order number and

amount paid by the client as well as a copy of the purchase orders that the account statement referenced." According to Tien, "with each account statement, a calculation of Leeds' commission was included to let Leeds know the reason for the commission percentage on a particular order." In its submission, Best Styles included copies of commission checks it paid to Leeds, as well as account statements.

III. DISCUSSION

A. Standards for Summary Judgment

In moving for summary judgment, the movant has the initial burden of establishing its prima facie entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ostrov v Rozbruch, 91 AD3d 147, 152 (1st Dept 2012), citing Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See Smalls v AJI Indus., Inc. 10 NY3d 733, 735 (2008). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v Citibank Corp., 100 NY2d 72,

81 (2003), citing Alvarez v Prospect Hosp., supra, at 324. "The burden upon a party opposing a motion for summary judgment is not met merely by a repetition or incorporation by reference of the allegations contained in pleadings or bills of particulars." Indig v Finkelstein, 23 NY2d 728, 729 (1968).

When deciding a summary judgment motion, the court's role is limited to determining if any triable issues of fact exist, not to determine the merits of any such issues. Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 (1957). The court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. See Negri v Stop & Shop, 65 NY2d 625, 626 (1985). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied. See Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978).

B. Breach of Contract

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." Flomenbaum v New York Univ., 71 AD3d 80, 91 (1st Dept 2009). The agreement between Leeds and Best Styles, however, contains no fixed duration and, therefore, to the extent that Leeds was an employee

of Best Styles, she was an at-will employee. "The employer of an at-will employee is entitled to change the terms of the employment agreement . . . prospectively, subject to [the employee's] right to leave the employment if the new terms [are] unacceptable." JCS Controls, Inc. v Stacey, 57 AD3d 1372, 1373 (4th Dept 2008)(internal quotation marks and citation omitted). Where the employee remains at the place of employment, he or she is deemed to have assented to the modified terms. See Bottini v Lewis & Judge Co., 211 AD2d 1006, 1008 (3rd Dept 1995); see generally Labor Law § 191(1)(c). Therefore, to the extent that Leeds was an employee, she has no cause of action to recover commissions on retailer's payments made to Best Styles prior to the termination of her employment, even if Best Styles unilaterally reduced the percentage payable as a commission.

Best Styles, however, did not establish that Leeds was actually its employee, as opposed to an independent contractor. Leeds characterized herself as an independent contractor, and Best Styles submitted no evidence to support any contention that she was an employee. A "sales representative" is "a person or entity who solicits orders in New York state and is not covered by [§ 190(6) and § 191(1)(c), which protect employees who earn commissions as part of their salary] because he or she is an independent contractor." Labor Law § 191-a(d). Indicia of whether a person is an employee include whether he or she

receives a base salary and benefits, such as a 401K plan and health insurance, paid leave, sick leave, and vacation pay (see Deutschman v. First Mfg. Co., 7 A.D.3d 363, 364 (1st Dept 2004); Derven v PH Consulting, Inc., 427 F Supp 2d 360, 369-370 [SD NY 2006] [construing New York law]), and is subject to employer's day-to-day control over the results produced or the means used to achieve the results of the employer (see Matter of Empire State Towing & Recovery Assn., Inc. v Commissioner of Labor, 15 NY3d 433, 437 [2010]), with control over the means used as the more important factor to be considered. See Matter of Ted Is Back Corp. [Roberts], 64 NY2d 725, 726 (1984). Since Best Styles did not establish, prima facie, that it exercised such control over Leeds, it did not demonstrate that Leeds was its employee, regardless of whether she was obligated to attend meetings (see id. at 438; Matter of Hertz Corp. v Commissioner of Labor, 2 NY3d 733, 735 [2004]). In any event, Leeds's allegations that she was an independent contractor who worked on commission for four other wholesalers raises a triable issue of fact in this regard.

Labor Law § 191-b, which creates a private right of action on behalf of independent contractors to recover unpaid sales commissions (see AHA Sales, Inc. v Creative Bath Prods., Inc., 58 A.D.3d 6, 15-17 [2nd Dept 2008]), provides that:

> "1. When a principal contracts with a sales representative to solicit wholesale orders within this state, the contract shall be in writing and shall set forth the method by which the commission is to be

> computed and paid.
>
> "2. The principal shall provide each sales representative with a signed copy of the contract. The principal shall obtain a signed receipt for the contract from each sales representative.
>
> "3. A sales representative during the course of the contract, shall be paid the earned commission and all other monies earned or payable in accordance with the agreed terms of the contract, but not later than five business days after the commission has become earned."

The contract at issue here was in force and effect from November 13, 2009, until December 30, 2011. Accordingly, during that period, Leeds was entitled to be paid commissions she earned "in accordance with the agreed terms of the contract." Since the commissions at issue here were "earned" when a retailer solicited by Leeds paid Best Styles for the subject merchandise (see Linder v Innovative Commercial Sys., LLC, 41 Misc 3d 1214[A], 2013 NY Slip Op 51695[U], *3 [Sup Ct, NY County 2013], affd 127 AD3d 670 [1st Dept 2015]), any sales proceeds collected by Best Styles from such a retailer between November 13, 2009, and December 30, 2011, are subject to commissions at the agreed-upon rate, that is, 12% to 20%, as applicable.

Thus, that branch of the motion which is for summary judgment dismissing so much of the breach of contract cause of action as sought to recover for unilaterally reduced commissions on sales solicited by Leeds, where the retailer paid Best Styles between November 13, 2009, and December 30, 2011, must be denied.

Regardless of whether Leeds was an employee or independent contractor, Best Styles established its entitlement to judgment as a matter of law dismissing so much of the breach of contract cause of action as sought to recover commissions on sales where the retailer paid Best Styles after December 31, 2011. For example, in the affidavit she submitted in opposition to the motion, Leeds asserts that she introduced a number of retail establishments to Best Styles, and avers that she is entitled to commissions for orders placed with Best Styles by Gordmans, Fox, Century, and Dillards until December 2013, two years after she ceased working for Best Styles. If Leeds were an employee, her claim to those commissions fails because "a sales representative, hired at will, is not entitled to commissions after the termination of employment." Mackie v La Salle Indus., 92 AD2d 821, 822 (1st Dept 1983). This is true even if the sales representative originated the customer relationship. See Linder v Innovative Commercial Sys., LLC, 41 Misc 3d 1214(A), 2013 NY Slip Op 51695(U), *3 (Sup Ct, NY County 2013). Here, as in Linder, it is clear that, under the agreement, the commission was to be paid to Leeds only when and if the customer paid for its order. See Linder v Innovative Commercial Sys., LLC, 127 AD3d 670. "Thus, absent an agreement expressly providing for post-termination commissions, plaintiff, an at-will commissions salesman, was not entitled to commissions for payments made by customers after [ ]

termination." Id. at 670-671. Even if Leeds were an independent contractor, however, she is only entitled to commissions in accordance with the agreement, which entitles her to payment of commissions "during the course of the contract." Labor Law § 191-b(3). Since commissions were only "earned" upon a retailer's payment of the purchase price to Best Styles, commissions could not be earned on payments made by retailers after December 30, 2011, as the contract had by then run its course.

Therefore, that branch of the motion which is for summary judgment dismissing so much of the breach of contract cause of action as alleged that Leeds is entitled to commissions on sales, where a retailer's payment was made after December 30, 2011, must be granted.

In her affidavit, Leeds states that "[w]hen I was paid, I never received invoices or explanations and I believe that even when I was paid, I was underpaid. My experience is that I would ordinarily receive invoices and could see if I was being properly paid. Further, the commission was not clear." Tien states in her affidavit, however, that "[w]hen Leeds was paid, she was provided with an account statement which included the invoice date, client name, purchase order number and amount paid by the client." According to Tien, those account statements also included a calculation of the commission so that Leeds would know the reason for the percentage on a particular order. Copies of

commission checks paid to Leeds during the period of her employment, along with the invoices on which the checks are based and the percentage of the commission, have been submitted by Best Styles. Leeds has not disputed the accuracy of those documents, and has merely offered the general statement that she never received invoices or explanations when she was paid. That statement is inadequate to raise a triable issue of fact to defeat summary judgment. Indig v Finkelstein, supra, at 729.

Since Best Styles established its prima facie entitlement to judgment as a matter of law dismissing so much of the breach of contract cause of action as alleged that Best Styles failed to provide commission statements, and Leeds failed to raise a triable issue of fact in opposition, that branch of the motion which is for summary judgment dismissing that portion of the cause of action must be granted.

C. Tortious Interference with Contract

To establish a cause of action to recover damages for tortious interference with a contract, plaintiff must show "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff." Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 (1993). By alleging

that Best Styles "tortiously interfered with Plaintiff's ability to obtain the benefit of her agreement with Best Styles," Leeds suggests that Best Styles itself was the third party with which she has a contract, and that it is interfering with its own contract. It is well established, however, that "asserting a defendant tortiously interfered with its own contract quite clearly does not state a legally sufficient cause of action." Ahead Realty LLC v India House, Inc., 92 AD3d 424, 425 (1st Dept 2012)(internal quotation marks and citation omitted).

That branch of the motion which is for summary judgment dismissing the second cause of action must thus be granted.

D. Constructive Termination

The complaint alleges that, by materially interfering with her relationships with various retailers, harassing her, and imposing new and contradictory conditions upon her, Best Styles constructively terminated her relationship with it, depriving her of at least one year of additional income.

To establish constructive discharge or termination, the plaintiff must show that an employer "made working conditions so difficult that a reasonable person would feel forced to resign." Romano v Basicnet, Inc., 238 AD2d 910, 911 (4th Dept 1997) (internal quotation marks and citations omitted). However, an at-will employee does not have a viable cause of action sounding

in constructive termination. See Braddock v Braddock, 60 AD3d 84, 96 (1st Dept 2009). As the court explained in Ferraro v Seamen's Church Inst. of N.Y. & N.J. (18 Misc 3d 1108[A]), 2007 NY Slip Op 52470[U], *1 [Sup Ct, NY County 2007])(citations omitted), "[c]onstructive discharge occurs when an employer intentionally creates a work environment that is so difficult or intolerable that a reasonable person would feel forced to resign. Clearly, if the defendant had the right to terminate the plaintiff for any reason, it also had the right to constructively discharge him." Of course, the employer may not create intolerable working conditions based upon the employee's race, religion, gender, nationality, age, or sexual preference (see id.), but that is not alleged here. In any event, Leeds contends that she is an independent contractor, rather than an employee; the employment of an independent contractor cannot be terminated, and such a person cannot be discharged from employment.

No matter how Leeds's relationship with Best Style is characterized, that branch of the motion which is for summary judgment dismissing the third cause of action must be granted.

E. Quantum Meruit

Leeds alleges that she provided services as an independent representative to Best Styles, and obtained orders for it for which she was not compensated. She contends that the value of

those services is no less than $80,000, and is entitled to recover that sum in quantum meruit.

Quantum meruit, however, is a quasi contract cause of action.

> "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment."

Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 (1987)(citations omitted). Here Leeds's quantum meruit cause of action seeks recovery for the same damages as her cause of action alleging breach of contract. It is, therefore, duplicative of that claim, and must be dismissed. See Sebastian Holdings, Inc. v Deutsche Bank, AG., 108 AD3d 433, 433 (1st Dept 2013). Summary judgment dismissing that cause of action must thus be granted.

F. Defamation

In her fifth cause of action, Leeds alleges that Tian defamed her by stating to Galit that Leeds "was not acting professionally and hardly ever spent time at Best Styles' offices." Tian counters that he has "never spoken about Leeds in a negative manner to Melissa Galit." Leeds did not submit a sworn statement by Galit countering the statement made by Tian in his affidavit, but rather, in her own affidavit, restates the

allegation in the complaint claiming that Tien had told Galit that she was "unprofessional." In her affidavit, Leeds slightly changes the wording of the alleged statement regarding her time at the office, claiming that Tian "told Melissa Galit that I . . . failed to show up at work." Leeds's statement is, of course, hearsay. In any event,

> "Defamation is the making of a false statement about a person that tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society. The elements are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se. A statement is defamatory on its face when it suggests improper performance of one's professional duties or unprofessional conduct."

Frechtman v Gutterman, 115 AD3d 102, 104 (1st 2014)(internal quotation marks and citations omitted). The plaintiff must allege "the precise words allegedly giving rise to defamation [as well as the] time, place and manner of publication." Khan v Duane Reade, 7 AD3d 311, 312 (1st Dept 2004).

Only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue. See Thomas H. v Paul B., 18 NY3d 580, 584 (2012); Martin v Daily News L.P., 121 AD3d 90, 100 (1st Dept 2014). "Allegations [in a] letter communicated to third parties that 'in sum and substance [plaintiff was]

unprofessional and cavalier' are conclusory rather than accusatory." Dillon v City of New York, 261 AD2d 34, 40 (1st Dept 1999)(citation omitted). Moreover, "a general accusation of 'unprofessional conduct' was a protected statement of opinion [and] not sufficiently factual to be actionable." Chiavarelli v Williams, 256 AD2d 111, 114 (1st Dept 1998). Thus, the alleged statement that Leeds was "unprofessional" is a nonactionable opinion.

Leeds also premises her defamation cause of action on statements that she failed to show up for work and that she hardly ever spent time at the office. Although these are statements of fact, Leeds has not alleged the precise words allegedly giving rise to the defamation, nor has she articulated the time, place, and manner of the statements beyond saying that they were made in a telephone call Tian allegedly made to Galit. Even if those statements were made, they would not expose Leeds to the "public contempt, ridicule, aversion or disgrace, or induce an evil opinion of [her] in the minds of right-thinking persons, and to deprive [her] of their friendly intercourse in society" necessary to constitute defamation. Frechtman v Gutterman, supra, at 104. This is particularly true since, according to Leeds, she worked for multiple clients and for that reason objected to being required to spend more time at Best Styles' office. Thus, in opposition to Best Styles' prima facie

showing that it did not make defamatory statements, Leeds failed to raise a triable issue of fact.

Furthermore, Leeds failed to raise a triable issue of fact as to whether she sustained "special damages consisting of the loss of something having economic or pecuniary value" (Cioffi v Habberstad, 22 Misc 3d 839, 841 [Sup Ct, Nassau County 2008]) that were "fully and accurately identified with sufficient particularity to identify actual losses," by enumerating "persons who ceased to be customers" and itemizing losses. Matherson v Marchello, 100 AD2d 233, 235 (2nd Dept 1984)(citations and internal quotation marks omitted). Leeds testified at her deposition that her relationship with Galit was "great," that she still did business with her, and that she did not lose any business from her or her other four clients as a result of the alleged defamatory statements.

Accordingly, that branch of the motion which is for summary judgment dismissing the fifth cause of action must be granted.

G. Defamation Per Se

In the sixth cause of action, Leeds contends that Tian's alleged statement to Galit falsely accused her of professional misconduct, and therefore constituted defamation per se. For the same reasons as apply to the cause of action alleging defamation, that branch of Best Styles' motion which is for summary judgment

dismissing sixth cause of action must be granted. See Chiavarelli v Williams, supra, at 114.

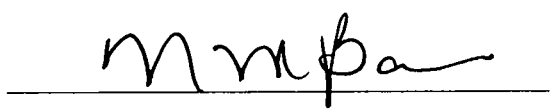
IV. CONCLUSION

Accordingly, for the reasons stated above, it is hereby

ORDERED that those branches of defendant's motion which are for summary judgment dismissing the second, third, fourth, fifth, and sixth causes of action, and so much of the first cause of action as seeks to recover damages for breach of contract by virtue of its failure to pay commissions on sales where a retailer solicited by plaintiff paid for the subject merchandise after December 30, 2011, are granted, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

Dated: September 27, 2016



HON. NANCY M. BANNON J.S.C.