SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

JONATHAN WEINSTEIN,

TRIAL/IAS, PART 1
NASSAU COUNTY

Plaintiff,

INDEX No. 023396/2010

MOTION DATE: 11/29/17
Motion Sequence 007

-against-

KLOCKE OF AMERICA, INC. and KLOCKE VERPACKUNGS SERVICE, GMBH,

Defendants.

The following papers read on this motion:

Notice of Motion.....X
Affirmation in Support.....X
Memorandum of Law in Support.....X
Memorandum of Law in Opposition.....X

Motion by defendant Klocke of America, Inc. to set aside the jury verdict is **denied**.

This is an action for unpaid wages, unpaid sales commissions, and alleged retaliatory discharge pursuant to Labor Law §§ 191, 191-c, and 215. Following modification of this court's October 15, 2015 order on summary judgment by the Appellate Division, **Weinstein v Klocke of America**, 151 AD3d 1110 [2d Dept. 2017]), the matter was tried before the undersigned and a jury on October 10-18, 2017.

Defendant Klocke of America, Inc. is engaged in the packaging business. Plaintiff Jonathan Weinstein was hired by Klocke of America as salesperson in July 1999.

On March 17, 2004, Klocke issued an inter-office memorandum to Weinstein and three other employees. The memo provides that the salary of employees who had been employed for 18 months would be reduced in the amount of 10% effective July 1, 2004, if

the employee did not achieve $2 million in sales in either 2003 or 2004. However, if the employee achieved $ 2 million in sales in the "current year," their base salary would be reinstated. Finally, the memo provides that if 3% of sales exceeds the employee's base salary, "the higher of the two will be paid." The memo provides that Klocke reserves the right to "alter the program at any time, with or without notice."

With respect to plaintiff's Labor Law §§ 191 and 191-c claims for unpaid wages and sales commissions, the jury unanimously found that the March 17, 2004 inter-office memo constituted an enforceable contract. The jury further unanimously found that the inter-office memo applied to plaintiff and, prior April 12, 2010, plaintiff was a commission salesperson pursuant to the memo. Finally, the jury unanimously found that the total amount of unpaid wages and unpaid sales commissions to which plaintiff was entitled for the years 2004, 2005, 2007, and 2008 was $119,939. The court found for defendant with respect to plaintiff's Labor Law § 215 retaliation claim.

By notice of motion dated November 14, 2017, defendant moves to set aside the jury's verdict and grant judgment for defendant with respect to plaintiff's unpaid wages and unpaid sales commissions claims. Defendant argues that the 2004 inter-office memo lacks any "duration of employment." Defendant further argues that the memo is unenforceable because Klocke reserved the right to alter it without notice.

In opposition, plaintiff argues that the verdict is entitled to "great deference." Plaintiff further argues that Klocke never altered the terms of the inter-office memo.

CPLR 4404(a) provides that, after a trial of a cause of action, triable of right by a jury, upon the motion of any party, the court may set aside a verdict, and direct that judgment be entered in favor of the other party as a matter of law, or it may order a new trial, where the verdict is contrary to the weight of the evidence or in the interest of justice. Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a "discretionary balancing" of many factors (**Nicastro v Park**, 113 AD2d 129, 133 [2d Dept. 1985]). This discretionary balancing is the product of the judge's experience, first as a lawyer and then as a judge (McKinney's practice commentary C4404:3).

Where the term of employment is for an indefinite period of time, it is presumed to be a hiring at will that may be freely terminated by either party at any time for any reason or even no reason " (**Lobosco v NYNEX**, 96 NY2d 312, 316 [2001]). "Routinely issued employee manuals, handbooks, and policy statements should not be lightly converted into binding employment agreements" (**Lobosco v NYNEX**, 96 NY2d 312, 317 [2001]).

There was no evidence that Klocke routinely issued policy statements concerning commissions to its employees. Thus, the jury's finding that the March 17, 2004 inter-office memo constituted a binding contract is not against the weight of the evidence. As the Appellate Division noted, "Nothing in the memo indicated that it applied only to the three other salespeople, and not to the plaintiff" (**Weinstein v Klocke of America**, supra, 151 AD3d at 1113).

On Weinstein's October 10, 2008, "performance appraisal," he was rated good or very good in quality, job knowledge, reliability, attendance, independence, and creativity, but "improvement needed" in productivity (deft's ex 25). Nevertheless, Klocke did not make any changes in the terms of plaintiff's compensation until April 12, 2010. Thus, the jury's finding that the commission terms of the inter-office memo remained in effect through the end of 2008 was not against the weight of the evidence. Defendant's motion to set aside the verdict is in all respects denied.

Labor Law § 198(1-a) provides that, "In any action instituted in the courts upon a wage claim by an employee...in which the employee prevails, the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney fees, prejudgment interest...and, unless the employer proves a good faith basis to believe that the underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to 100% of the total amount of the wages found to be due."

Plaintiff seeks liquidated damages in the amount of the unpaid wages and commissions found by the jury, $119,939, plus attorney's fees in the amount of $476,678. 97, and prejudgment interest. In opposition, defendant argues that plaintiff cannot recover liquidated damages or attorney's fees because plaintiff's claim was in the nature of breach of contract, rather than a violation of the Labor Law.

The additional remedies of attorney's fees and liquidated damages which are available in an action for unpaid wages under the Labor Law are not available in a common law breach of contract action (**Gottlieb v Laub & Co.**, 82 NY2d 457 1993]). Employees serving in an "executive, managerial, or administrative capacity" do not fall under Labor Law § 191 and, as a result, are not entitled to statutory attorney fees, or liquidated damages, under Labor Law§198(1-a) (**Pachter v Bernard Hodes Group**, 10 NY3d 609, 616[2008]).

Although nominally a "sales manager," there was no evidence that plaintiff Weinstein served Klocke in an executive, managerial, or administrative capacity. Therefore, plaintiff is entitled to the protection of Labor Law §198(1-a).

In determining the reasonableness of an attorney fee in a Labor Law action, the court should consider the time and labor required, the novelty and difficulty of the questions, the skill required to perform the legal service properly, the preclusion of other employment, the customary rate per hour, the experience and reputation of the attorney, and the amount involved and the result obtained (**Kahil v Original Old Homestead**, 657 F. Sup.2d 470 [SDNY 2009]).

The questions involved in the present case were not particularly difficult or novel. As noted, the result obtained was $119,939. The court notes that plaintiff did not prevail with respect to his retaliation claim, or his claim as to plaintiff's German parent company which the court determined was not his employer under the Labor Law. Thus, attorney's fees may not be awarded for the hours devoted to those aspects of the case. The court concludes that a reasonable number of hours is 250 and a reasonably hourly rate is $400 per hour. Accordingly, the court grants plaintiff an attorney fee in the amount of $100,000.

An employee seeking to rely on a provision in the employer's policy statement, arguably creating a promise, must also be held to reliance on a "conspicuous disclaimer" in the manual or policy statement (**Lobosco v NYNEX**, supra, 96 NY2d at 317). The March 17, 2004 inter-office memo contained a conspicuous disclaimer that Klocke reserved the right to "alter the program at any time." In view of the conspicuous disclaimer in the memo, Klocke had a good faith basis to believe that its underpayment of wages and commissions to plaintiff was in compliance with law. Plaintiff's request for liquidated damages is **denied**.

Plaintiff may settle a judgment in the amount of $119,939, with interest from the date of plaintiff's termination, October 31, 2011, plus attorney's fees of $100,000, with interest from the date of this order.

So ordered.

Date: 1 December, 2017

J.S.C.

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