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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

JONATHAN WEINSTEIN,

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 023396/2010

Plaintiff,

MOTION DATE: 3/9/18
Motion Sequence 008

-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
Affirmation in Opposition.....X
Reply Memorandum in Support.....X

Motion by plaintiff Jonathan Weinstein for leave to renew and reargue plaintiff's motion for attorneys' fees, liquidated damages, damages as to plaintiff's first cause of action, and plaintiff's request for interest on 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 order dated December 11, 2017, defendant's motion to set aside the jury's verdict and grant judgment for defendant with respect to plaintiff's unpaid wages and unpaid sales commissions claims was denied. "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]). Nevertheless, 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). Thus, the jury's finding that the March 17, 2004 inter-office memo constituted a binding contract was not against the weight of the evidence.

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.

In the December 11, 2017 order, the court denied plaintiff's request for liquidated damages under Labor Law § 198(1-a). Labor Law § 198(1-a) provides that, "In any action ...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."

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 (**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 was not precluded from recovering liquidated damages by reason of his title as "sales manager."

However, the March 17, 2004 inter-office memo contained a "conspicuous disclaimer" that Klocke reserved the right to "alter the program at any time" (**Lobosco v NYNEX**, supra, 96 NY2d at 317)" In view of the conspicuous disclaimer in the memo, Klocke had a good faith basis to believe that its underpayment of wages and commissions was in compliance with law. Therefore, plaintiff was not entitled to liquidated damages on his Labor Law § 198 claim. To the extent that plaintiff's claim was based on common law breach of contract, liquidated damages were not available (**Gottlieb v Laub & Co.**, 82 NY2d 457 1993]).

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]).

In determining plaintiff's attorney's fee, the court noted that the questions involved in the present case were not particularly difficult or novel. Plaintiff did not prevail with respect to his retaliation claim, or with respect to his claim against defendant's German parent company, which the court determined was not plaintiff's employer. Thus, attorney's fees were not be awarded for the hours devoted to those aspects of the case. Since the result obtained was $119,939, the court concluded that a reasonable number of hours was 250 and a reasonably hourly rate was $400 per hour. Thus, the court granted plaintiff an attorney fee in the amount of $100,000. Plaintiff was directed to 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 the order.

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By notice of motion dated January 16, 2018, plaintiff moves for leave to renew and reargue his requests for attorney's fees, liquidated damages, damages with respect to his first cause of action, and pre-judgment interest. Plaintiff asserts that the court overlooked the parties' November 15, 2017 stipulation, in which they are agreed that reasonable rates for senior partners in plaintiff's attorney's firm were $500 per hour, junior partners were $400 per hour, senior associates were $350 per hour, and junior associates were $325 per hour.

CPLR 4111(b) provides, "If the court omits any issue of fact raised by the pleadings or evidence, each party waives his right to trial by jury of the issue so omitted, unless before the jury retires he demands its submission to the jury."

Plaintiff's first cause of action for unpaid salary was submitted to the jury as part of plaintiff's breach of contract claim. Since plaintiff did not object to the special verdict sheet which was submitted to the jury, and indeed the verdict sheet was in the form requested by plaintiff, he has no basis to argue that his first cause of action was overlooked at this stage.

In granting plaintiff an attorney fee based upon an average rate of $400 per hour, the court blended the rates which were agreed to in the parties' stipulation. Plaintiff has not established that there court overlooked or misapprehended any matter of fact or law in connection with the attorney fee award, particularly in light of the result obtained.

Plaintiff's motion for leave to renew and reargue is **denied**.

So ordered.

Date: APR 0 3 2018

J.S.C.

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