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SHORT FORM ORDER

INDEX NO.: 17304-11

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 2-21-13; 3-14-13
SUBMITTED: 3-21-13
MOTION NO.: 001-MOT D
002-XMD

ALKEN INDUSTRIES, INC.,

Plaintiff,

-against-

TOXEY LEONARD & ASSOCIATES, INC.,

Defendant.

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Upon the following papers numbered 1-38 read on this motion and cross-motion for partial summary judgment ; Notice of Motion and supporting papers 1-15 ; Notice of Cross Motion and supporting papers 16-29 ; Answering Affidavits and supporting papers 30-32 ; Replying Affidavits and supporting papers 33-38 ; it is,

ORDERED that the motion by the plaintiff for partial summary judgment is granted to the extent of dismissing the third counterclaim; and it is further

ORDERED that the motion by the plaintiff is otherwise denied; and it is further

ORDERED that the cross motion by the defendant for partial summary judgment is denied.

The plaintiff, Alken Industries, Inc. ("Alken") is engaged in the business of manufacturing machine parts for the aerospace industry. The defendant, Toxey Leonard & Associates, Inc. ("Leonard") is a sales representative who represents manufacturers and procures contracts on their behalf. On September 1, 1994, Alken and Leonard entered into an agreement in which Leonard agreed to represent Alken and to procure manufacturing contracts for it as an independent contractor, and Alken agreed to pay Leonard a 5% commission. The initial term of

the agreement was for a period of one year. The agreement provided that it would be automatically renewed for successive one-year terms unless cancelled by either party upon 30 days' written notice. The agreement also provided, in pertinent part, as follows:

> If any dispute arises concerning any portion of commissions or other sums owing to [Leonard], [Alken] agrees to pay promptly to [Leonard] all sums not in dispute. **Acceptance of any portion of such sums owed to [Leonard] shall not constitute a waiver or release of the claims of [Leonard] to other sums claimed due from [Alken] to [Leonard]** (emphasis added).
>
> * * *
>
> No modification or waiver of any of the terms of this Agreement shall be valid unless in writing and executed with the same formality as this Agreement.

In 2003, Alken advised Leonard that it could not afford to continue to pay a 5% commission and that, if Leonard did not accept a reduced commission, Alken would terminate the agreement. The parties dispute whether Leonard agreed to accept a reduced commission, and the parties never executed a written modification of the agreement reflecting a commission of less than 5%. However, it is undisputed that Leonard continued to represent Alken and that Alken paid Leonard less than 5% until 2009, when Alken terminated the agreement. In 2011, Leonard demanded payment of all outstanding commissions at the 5% rate, which Alken refused. Alken subsequently commenced this action.

Alken's first cause of action alleges that Leonard beached its duty of loyalty to Alken by representing another manufacturer, i.e. Fort Walton Machining. Alken's second cause of action is for a judgment declaring that the agreement was orally modified and that the commissions paid to Leonard were consistent with the modification. Leonard asserts four counterclaims against Alken. The first three allege violations of the Labor Law, breach of contract, and conversion for failing to pay Leonard the full 5% commission. The fourth alleges that Alken tortiously interfered with Leonard's contract with Fort Walton Machining. Alken moves for partial summary judgment dismissing Leonard's counterclaims. Leonard cross moves for partial summary judgment on the issue of liability on the first, second, and third counterclaims.

The First Counterclaim

The first counterclaim alleges that Alken violated the Labor Law by failing to pay Leonard the full 5% commission within five business days after the agreement was terminated.

Labor Law § 191-b provides that, when a principal contracts with a sales

representative to solicit wholesale orders within the state, the contract shall be in writing and shall set forth the method by which the commission is to be computed and paid. Labor Law § 191-a defines a "principal" as a person or company engaged in the business of manufacturing who (1) manufacturers, produces, imports, or distributes a product for wholesale, (2) contracts with a sales representative to solicit orders for the product, and (3) compensates the sales representative in whole or in part by commissions (Labor Law § 191-a [c]). Labor Law § 191-a defines a "sales representative" as a person or entity who solicits orders in New York State and is an independent contractor, but not someone who places orders for his own account for resale (Labor Law § 191-a [d]). Labor Law § 191-c provides that, when a contract between a principal and a sales representative is terminated, all earned commissions shall be paid within five business days after such termination or within five business days after they become due.

The defendant contends that Alken was a "principal" and that Leonard was a "sales representative" within the meaning of Labor Law §§ 191-a (c) and (d), respectively. Therefore, any modification of the method by which Leonard's commission was computed and paid had to be in writing. The defendant contends that, in the absence of a writing reducing Leonard's commission, Leonard is entitled to recover the full 5%, plus double damages and attorney's fees under the Labor Law. The plaintiff contends that Leonard was not a "sales representative" within the meaning of Labor Law § 191-a (d) because Leonard, who was located in Georgia, was not engaged to solicit customers in New York and none of his accounts were located in New York. The defendant contends that Leonard frequently traveled to New York and worked out of Alken's Ronkonkoma facility. The plaintiff acknowledges that Leonard traveled to Alken's Ronkonkoma facility, but denies that he solicited business there.

In interpreting the definition of "sales representative" found in Labor Law § 191-a (d), emphasis is placed on whether the purported sales representative solicited orders from New York and not the location of the customers (**Kay v Artmatic Corp.**, 214 AD2d 473, 474). The court finds that there is a question of fact regarding whether Leonard solicited orders from New York. Accordingly, the motion and cross motion are denied as to the first counterclaim.

The Second Counterclaim

The second counterclaim alleges that Alken breached the parties' agreement by failing to pay Leonard the full 5% commission. The plaintiff contends that the parties' agreement was modified orally to reduce the commission to less than 5% and that Leonard is equitably estopped from denying the oral modification because he consented to it and induced Alken's reliance thereon. The defendant contends that the statute of frauds bars enforcement of the alleged oral modification and that equitable estoppel does not apply because the parties' agreement contains a no-oral-modification clause. The plaintiff contends that the statute of frauds is inapplicable when, as here, the modification has been fully performed.

Parties to a written agreement who include a proscription against oral modification are protected by General Obligations Law § 15-301 (1), which provides that any

contract containing such a clause cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement is sought (**Rose v Spa Realty Assoc.**, 42 NY2d 338, 343). Put otherwise, if the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls. Thus, the authenticity of any amendment is ensured (**Id.**). On the other hand, when the oral agreement to modify has been acted upon to completion, the same need to protect the integrity of the written agreement from false claims of modification does not arise (**Id.**). In such a case, not only may past oral discussions be relied upon to test the alleged modification, but the actions taken may demonstrate objectively the nature and extent of the modification (**Id.**). Moreover, a contractual prohibition against oral modification may itself be waived (**Id.**). Thus, § 15-301 nullifies only executory oral modifications. Once executed, the oral modification may be proved (**Id.**)

Here, the alleged oral modification has been acted upon to completion and is no longer executory. It is undisputed that Alken paid Leonard a commission of less than 5% until 2009, when Alken terminated their agreement. Thus, General Obligations Law § 15-301 does not bar enforcement of the alleged oral modification.

Having determined that General Obligations Law § 15-301 does not apply, it is not necessary to reach the plaintiff's estoppel argument since equitable estoppel is an exception to § 15-301 (**Id.** at 344).

The defendant also relies on General Obligations Law § 5-701 (a) (1), which provides that an agreement, promise, or undertaking is void unless embodied in a writing or writings and signed by the party to be charged if, by its terms, it is not to be performed within one year from the making thereof. The defendant's arguments in support of General Obligations Law § 5-701 (a) (1) ignore the fact that the parties had a written agreement. The written agreement continued to govern the parties' relationship even after the purported modification. In fact, when Alken terminated the agreement in 2009, it gave Leonard 30 days' written notice in accordance with the written agreement. Accordingly, General Obligations Law § 5-701 (a) (1) does not apply.

Likewise, the defendant's reliance on General Obligations Law § 5-701 (a) (10) is misplaced. General Obligations Law § 5-701 (a) (10) provides that an agreement is void unless evidenced by a writing signed by the party to be charged if the agreement is one to pay compensation for services rendered in negotiating a business opportunity. Negotiating includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction (**Ostrove v Michaels**, 289 AD2d 211, 212, citing General Obligations Law § 5-701 [a] [10]). The defendant again ignores the fact that the parties had a written agreement, thereby satisfying General Obligations Law § 5-701 (a) (10). The question presented is whether the agreement was modified. The court finds that there are issues of fact as to whether Leonard waived the contractual prohibition against oral modification and agreed to accept the reduced commission proffered by Alken and whether the modification was supported

by mutual consideration. Accordingly, the motion and cross motion are denied as to the second counterclaim.

The Third Counterclaim

The third counterclaim for conversion is duplicative of the second counterclaim for breach of contract. A cause of action alleging conversion cannot be maintained when, as here, damages are being sought merely for breach of contract and no wrong independent of the contract claim has been demonstrated (**Hassett-Belfer Senior Housing, LLC v Town of North Hempstead**, 270 AD2d 306; **Wolf v National Council of Young Israel**, 264 AD2d 416). Accordingly, the plaintiff's motion is granted to the extent of dismissing the third counterclaim.

The Fourth Counterclaim

The fourth counterclaim alleges that Alken tortiously interfered with Leonard's contract with Fort Walton Machining. The plaintiff contends that, because Leonard alleges that the contract with Fort Walton Machining was terminated rather than breached, the fourth counterclaim fails to state a cause of action for tortious interference with contract.

In **Guard-Life Corp. v S. Parker Hardward Mfg.** (50 NY2d 183, 189), the Court of Appeals adopted the definition found in § 766 of the Restatement [Second] of Torts for tortious interference with contract, which is:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Many of the cases that came after **Guard-Life Corp.** state that the elements of a cause of action for tortious interference with contract are the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of the third-party's **breach of the contract** without justification, actual **breach of the contract**, and damages resulting therefrom (*see* e.g., **Lama Holding Co. v Smith Barney, Inc.**, 88 NY2d 413, 424 [emphasis added]). However, New York continues to adhere to the definition of tortious interference with contract found in **Guard-Life Corp.** In **Kronos, Inc. v AVX Corp.** (81 NY2d 90), the Court of Appeals, citing to § 766 of the Restatement [Second] of Torts, states that tortious interference with contract consists of the following four elements: (1) the existence of a contract between the plaintiff and a third party, (2) the defendant's knowledge of the contract, (3) the defendant's intentional inducement of the third party to breach **or otherwise render performance impossible**, and (4) damages to the plaintiff (**Id**. at 94). Thus, the fact that Fort Walton Machining terminated, rather than breached,

its contract with Leonard is not fatal to the plaintiff's claim.

As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its claim or defense (*see*, **Corrigan v Spring Lake Building Corp.**, 23 AD3d 604, 605). The court finds that the plaintiff's reliance on the deficiencies in the defendant's proof and the conclusory denials of Alken's President, Kimberly Senior, are insufficient to establish the plaintiff's entitlement to judgment as a matter of law on the fourth counterclaim. Failure to make a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see*, **Winegrad v New York Univ. Med. Ctr.**, 64 NY2d 851, 853). Accordingly, the plaintiff's motion is denied as to the fourth counterclaim.

HON. ELIZABETH HAZLITT EMERSON

Dated: **August 2, 2013**

J.S.C.