

Zak-Baron Assoc., Inc. v Kiss Products, Inc.

2002 NY Slip Op 30113(U)

April 3, 2002

Supreme Court, New York County

Docket Number: 600501/00

Judge: Jane S. Solomon

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Jane S. Solomon
Justice

PART 55

Zak-Baron Associates

INDEX NO. 600501/00

MOTION DATE 11/19/01

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Kiss Products, Inc

The following papers, numbered 1 to 28 were read on this motion to/for a trial summary judgment

48
2

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1-12</u>
<u>13-20</u>
<u>21-28</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
APR 09 2002
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

N.B. note of issue due 6/30/02 - see last page

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 4/3/02

Jane S. Solomon
JANE S. SOLOMON J.S.C.
 NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

[Handwritten signature]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 55

-----X
ZAK-BARON ASSOCIATES, INC., An Illinois
Corporation, and WODIKA DEVINE, INC.,
A Michigan Corporation,

Plaintiffs,

Index No. 600501/00

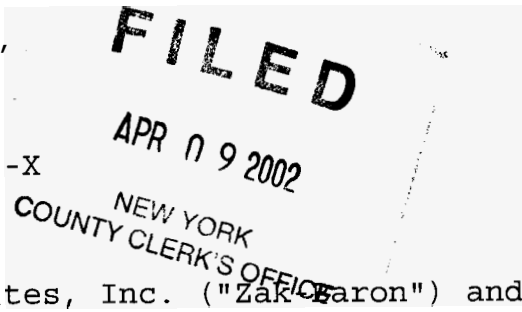
-against-

KISS PRODUCTS, INC., a New York
Corporation, and MANHATTAN NAIL, INC.,
A New York Corporation,

Defendants.

-----X

JUSTICE JANE S. SOLOMON:



Plaintiffs Zak-Baron Associates, Inc. ("Zak-Baron") and
Wodika Devine, Inc., ("WodikaDevine") move for partial summary
judgment against defendant Kiss Products, Inc. ("Kiss") on their
sixth and seventh "counts" of the complaint, for commissions owed
pursuant to New York Labor Law § 191-c, and for commissions owed
pursuant to Illinois statute 820 ILCS 120/3, respectively. Kiss
opposes the motion and cross-moves to amend its answer to assert
counter-claims against Zak-Baron alleging that it aided and
abetted in a breach of fiduciary duty owed to Kiss and it
tortiously interfered with Kiss's contracts. The cross-motion is
opposed by plaintiffs and co-defendant Manhattan Nail Inc.
("MNI").

BACKGROUND

Kiss manufactures nail products that are sold in **drug**
stores and discount chain stores such as Walgreens, Wal-Mart,
Target and K-Mart. Kiss made a contract ("Kiss Contract") with
MNI appointing it as Kiss's exclusive sales representative to

sell the nail products throughout the United States, Canada, Australia, and much of Europe, Asia and Latin America. Section I of the Kiss Contract provides that Kiss appoints MNI as its "sole and exclusive corporate sales agent/representative" to sell Kiss products to the retail trade; and that MNI shall be an independent contractor. Section III provides that MNI shall solicit and secure orders for sales of Kiss products from chain stores, distributors, wholesalers, specialty stores and rack jobbers to the retail trade. All purchase orders are subject to Kiss's approval, and all billing shall be made by Kiss and shall be payable to Kiss.

Section IV sets forth the sales commissions payable to MNI, subject to certain deductions. Section VII sets forth MNI's responsibilities to exert reasonable efforts to market Kiss products, and provides that

MNI may, in its sole discretion, from time to time, employ independent sales representatives ("ISR's") to assist MNI in the performance and execution of its duties hereunder. In such event, any commissions or remuneration to be paid to the ISR's shall be the sole responsibility of MNI. MNI shall indemnify and hold Kiss harmless from any claims . . . arising as a result of any action . . . against Kiss by a representative hired or retained by MNI.

Section X provides that disputes between Kiss and MNI arising from the contract shall be arbitrated.

The Kiss Contract states that it is made on March 1, 1999, although the signature by MNI's principal, Larry G. Kapfer, Jr. ("Kapfer") is dated December 4, 1999. No earlier written

contract is produced in this motion, but it is apparent that MNI marketed Kiss products for several years before 1999. Indeed, the complaint¹ recites that the relationship goes back to 1992. The Kiss Contract also states that Kiss is located in Port Washington, New York, and that MNI is located at an address on West 57th Street in New York City. ¹

MNI made contracts with plaintiffs ("ISRs" under the Kiss Contract) by which MNI appointed Zak-Baron the exclusive sales representative for Illinois, and appointed Wodika Associates, apparently the predecessor entity of Wodika Devine, the exclusive sales representative for Michigan. MNI's contract with Wodika Associates ("WA Contract") is dated April 12, 1993. Apart from appointing Wodika Associates the exclusive sales representative of Kiss products in Michigan, it provides that all purchase orders are subject to Kiss's approval (consistent with the Kiss Contract), that all billing shall be made to Kiss and that all payments shall be made directly to it. The WA Contract also states that Wodika Associates will be paid a ten percent commission by MNI, subject to certain deductions.

Wodika Devine and MNI made a contract in 1995 ("Wodika Devine Contract").² This contract is similar in terms to the WA Contract, but provides for lower commissions on certain sales and

¹ The complaint is nowhere in the submitted papers. See, CPLR 3212(b). In view of the time this motion was sub judice, the County Clerk file was retrieved.

² The Wodika Devine Contract is signed only by Wodika, and not by a representative of MNI. However, MNI does not deny the validity of this contract.

specifies more deductions. Both contracts provide that they shall be construed and enforced in accordance with the laws of New York. Also, both contracts are on MNI letterhead with the West 57th Street address.

MNI's contract with Zak-Baron ("Zak-Baron Contract") is identical in all relevant terms to the Wodika Contract. It was executed in January 1997, although the text of the contract states that it is dated October 21, 1995. It too is made on MNI letterhead with the West 57th Street address.

Zak-Baron and Wodika Devine succeeded in placing Kiss nail products in several desirable retail outlets in Illinois and Michigan. Unfortunately, even though payment was duly made by the retailers to Kiss, plaintiffs received less commissions than expected, and payments were months late. The parties' contentions as to what happened next is not hotly debated, but the legal effect is. In short, plaintiffs brought their complaints directly to Kiss's principals. The principals assured plaintiffs that payments on commissions would be made. On other occasions, Kiss's principals informed plaintiffs that complaints about commissions must be addressed to MNI. Throughout this period, the calculation as to what should be the proper commissions grew extremely complicated due to the deductions and varying commission rates provided for in the contracts.

In December 1998, a Kiss employee wrote directly to Wodika Devine's principal, Dana Wodika, and exhorted him to improve service for the K-Mart account because K-Mart was

refusing to make significant payments due to lapses. The letter referred to Wodika Devine as "our K-Mart sales rep." On another occasion, MNI's Kapfer faxed a memorandum to Wodika, on letterhead with Kiss's name on it and the same West 57th Street address as the contracts and all other correspondence from MNI. In the memorandum, dated March 13, 1998, Kapfer warns Wodika against entering into an agreement with a competing cosmetics company because it would violate Wodika's agreement with Kiss.

Based on these contacts, together with the discussions between plaintiffs' employees and those of Kiss, plaintiffs claim that they are the sales representatives **of** Kiss for the purposes of New York Labor Law § 191-c and Illinois Statute 820 ILCS 120/1, and that the WA, Wodika Devine and Zak-Baron Contracts are enforceable against Kiss based on a theory of actual and implied agency. **In** order to get to this argument, plaintiffs would have to prevail on the third and fourth "counts" of their complaint, relief not sought summarily on their motion. Assuming, however, that they were entitled to relief on the claims there, the claims under the state statutes are herein reviewed.

In opposing the state law claims, Kiss argues that it never had an obligation to pay plaintiffs, and in any event, it paid MNI all it was due under their contract, so it would not be liable to pay any more even if the court determined that plaintiffs were beneficiaries under that contract.

In its cross-motion, Kiss seeks to amend its answer to add counterclaims against Zak-Baron for aiding and abetting

breach of fiduciary duty, and for tortious interference with Kiss's prospective contracts. In essence, Kiss argues that it learned that MNI's principal, Kapfer, created a business called Uptown Nails, LLC ("Uptown") to manufacture and sell products that compete with Kiss. It alleges that Zak-Baron placed orders to sell nail products in Walgreens, a significant outlet for Kiss products, through Kapfer's Uptown business knowing that MNI had an exclusive relationship with Kiss, that Kapfer was MNI's principal, and that by doing business with Uptown it was undermining Kiss. It contends that Kapfer had a fiduciary duty to Kiss to promote its products, and that Zak-Baron worked with Kapfer to breach that duty, and by placing orders through Kapfer's Uptown business, rather than through MNI, it tortiously interfered with the contract between MNI and Kiss. Zak-Baron and MNI oppose Kiss's cross-motion in part because they allege that Uptown had no sales until after MNI and Kiss terminated their agreement in April 2000. Kiss disputes this contention.

DISCUSSION

Plaintiffs made contracts with MNI, and the gist of their motion here is that Kiss should stand in for MNI's failure to pay its obligations, and Kiss's failure to do so makes it liable under New York and Illinois statutes intended to protect salespeople who are paid by commission.

New York's Labor Law § 191-a(d) defines "sales representative" as "a person or entity who solicits orders in New York state and is not covered by [other provisions of the Labor

Law] because he or she is an independent contractor . . ."

(emphasis added). Labor Law § 191-b(1) provides that when a principal contracts with a sales representative to solicit orders within this state, the contract shall be in writing. Labor Law § 191-c(1) 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 termination or after they become due in the case of earned commissions not due when the contract is terminated. Labor Law § 191-c(3) states that a principal who fails to timely pay commissions shall be liable in a civil action for double damages, and the prevailing party in any such action shall be entitled to an award for attorney's fees, costs and disbursements.

Plaintiffs are not sales representatives under § 191-a(d) because they did not solicit orders in New York state, nor are they New York sales representatives who solicited orders elsewhere. In Kave v Artmatic Corp., 214 AD2d 473 (1st Dept 1995), the Appellate Division noted ". . . that the statute **should be interpreted with an emphasis placed on whether the** [plaintiff], if found to be a sales representative, solicited orders from New York and not upon the location of the customers." Here, plaintiffs neither solicited orders from or in New York. The scope of persons the legislature intended to protect clearly does not encompass every salesperson who had a contract with a New York entity, regardless of where the salesperson is located and where orders are solicited. Moreover, even though § 191-a(d)

includes "a person or entity" in the definition of "sales representative", it is not clear that the statute was intended to govern and re-write commercial contracts between corporations nationwide. Although defendants do not cross-move for summary judgment dismissing plaintiffs' sixth cause of action, upon searching the record, the court finds there is no basis for this claim and it is dismissed.

The Illinois statute also is not a basis for relief on this motion. It is similar to Labor Law § 191-a, et sea., in that it addresses the liability of principals that fail to timely pay commissions to sales people. 820 ILCS 120/1(3) defines a "principal" as a business entity, whether or not it has a **permanent or fixed address in Illinois, which (A) manufactures or distributes a product for sale; (B) contracts with a sales representative to solicit orders for the product; and (C) compensates the sales representative, in whole or in part, by commission.** Here, Kiss did not contract with plaintiffs or pay them commissions, so it is not a principal under the statute. Until Kiss's liability under the third or fourth "count" is established, the seventh "count" cannot be considered.

Kiss's cross-motion to amend its answer is denied with respect to the first proposed cause of action against Zak-Baron for aiding and abetting a breach of fiduciary duty by MNI. MNI was Kiss's sales representative pursuant to a contract. Nothing in the contract suggests that MNI undertook a fiduciary duty for the benefit of Kiss. Accordingly, Zak-Baron can not be held

liable for aiding and abetting a breach of a non-existent duty. Moreover, the claim is duplicative of the second proposed cause of action that alleges tortious interference with prospective contract and business relations. The motion is granted with respect to that cause of action because there is some evidence that Zak-Baron secured orders to place competing products in Walgreens through Uptown, and a question of fact exists as to whether this was done to circumvent its obligation to place Kiss's products. However, the alleged conduct is not so egregious as to warrant the imposition of punitive damages, so that part of the proposed amendment is denied. Accordingly, it hereby is

ORDERED that plaintiffs' motion for partial summary is denied; and it is further

ORDERED that the sixth "count" of the complaint, under New York Labor Law § 191-c, is dismissed; and it is further

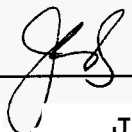
ORDERED that defendant Kiss's cross-motion to amend its answer is granted to the extent that it has leave to amend the answer to assert a counter-claim against Zak-Baron in the form of the proposed second counterclaim except that no claim for punitive damages is permitted, and the cross-motion otherwise is denied; and it is further

ORDERED that Kiss shall serve an amended answer as provided for herein within 15 days of notice of entry of this order, and Zak-Baron shall serve a reply thereto within 20 days thereafter; and it is further

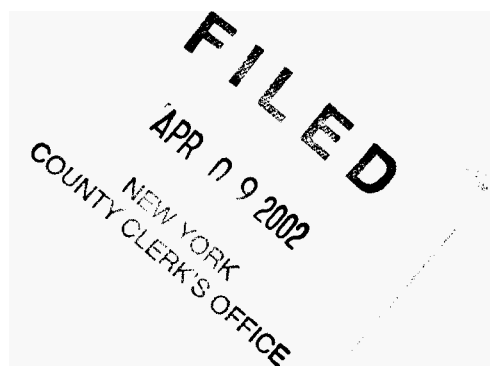
ORDERED that plaintiffs shall file a note of issue by
June 30, 2002.

DATED: April 3, 2002

ENTER :



J.S.C.
JANE S. SOLOMON



FILED
APR 11 9 2002
NEW YORK
COUNTY CLERK'S OFFICE