Soviero v Carroll Group International, Inc.
2005 NY Slip Op 30093(U)
January 5, 2005
Supreme Court, New York County
Docket Number: 0060178/2004
Judge: Emily Jane Goodman
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.

SCANNED ON 1/13/2005

[*1]

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

PRESENT: EMILY JANE GOODMAN Justice

PART 17

0601788/2004

SOVIERO, PATRICIA
vs
CARROLL GROUP INTERNATIONAL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 1

DISMISS ACTION

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Decision and Order.

FILED
JAN 13 2005
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/5/05

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

PATRICIA SOVIERO,

Plaintiff,

Index No. 601788/04

-against-

CARROLL GROUP INTERNATIONAL, INC., SHEILA C. CARROLL, MAUREEN T. CARROLL, and FIONA P. JOHNSON,

Defendants.

----------X

Emily Jane Goodman, J.:

In this action, plaintiff Patricia Soviero seeks certain commissions allegedly owed to her upon the sale of a condominium. Defendants here move to dismiss the complaint, pursuant to CPLR 3211(a)(7).[1]

According to the complaint, plaintiff started working for defendant Carroll Group International, Inc. (the Carroll Group), as a real estate salesperson, on August 13, 2002. The Carroll Group is a licensed real estate brokerage owned by defendant Sheila C. Carroll, who is a licensed real estate broker.

Plaintiff claims that she entered the Carroll Group's employ pursuant to an oral employment agreement, which provided that she would receive a commission of 50% on any transaction "which

[1]The part of the motion seeking a protective order staying a non-party deposition has been disposed of by a stipulation between the parties.

resulted from plaintiff securing for the Carroll Group an "Exclusive Right to Sell" agreement. Complaint, ¶ 11. It was further agreed that "plaintiff would be the prime contact at the Carroll Group for the marketing, promotion and sale of any property which was the subject of an Exclusive Right to Sell agreement obtained by Carroll Group through the efforts of plaintiff." *Id.*, ¶ 12.

In September 2003, plaintiff introduced Sheila Carroll to Werner F. Ebke, the co-executor of the Estate of Leo V. Fromm (the Estate), which was the owner of a condominium (the Condo Unit) it wished to sell. According to plaintiff, she attended the meeting, in which the terms of an Exclusive Right to Sell agreement were discussed and finalized between Sheila Carroll and Werner F. Ebke. Among the terms finalized were the commission to be paid to the Carroll Group (6%), and the commission to be paid to plaintiff, as the person having the prime responsibility to market the property, which was, allegedly, 50% of the commission payable to the Carroll Group. Sheila Carroll allegedly reconfirmed to plaintiff that plaintiff would receive 50% of the Carroll Group's commission during an inspection of the Condo Unit attended by all of the individual defendants. The Exclusive Right to Sell agreement was allegedly executed between the Carroll Group and the Estate on September 26, 2003.

Plaintiff claims that she "diligently proceeded to market"

the Condo Unit. Complaint, ¶ 20. However, on November 5, 2003, plaintiff's employment with the Carroll Group was summarily terminated "without just cause." *Id.*, ¶ 21. About a month later, on December 11, 2003, plaintiff alleges, upon information and belief, that the Estate entered into a contract to sell the Condo Unit through the Carroll Group. After the purchase was complete, the Estate allegedly paid $96,000 in commissions to the Carroll Group.

Plaintiff received no part of the commission paid by the Estate. As a result, she has brought this action, claiming (1) breach of her employment contract; (2) a claim under New York Labor Law (Labor Law) §§ 190 and 191, for the Carroll Group's failure to pay wages, in the form of commissions, to plaintiff; (3) a claim pursuant to Labor Law § 198(1-a) for liquidated damages amounting to 25% of the wages allegedly due plaintiff; (4) statutory attorney's fees, pursuant to Labor Law § 198 (1-a); (5) a claim for conversion and conspiracy against the individual defendants, for their alleged failure to return 50% of the $96,000 commission received by the Carroll Group; and (6) punitive damages.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court's task is to

> determine whether plaintiffs' pleadings state a cause of action. The motion must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of

> action cognizable at law." In furtherance of this task, we liberally construe the complaint, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. We also accord plaintiffs the benefit of every possible favorable inference [internal citations omitted].

511 West 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 (2002).

Breach of Contract

Defendants, relying on case law applicable to real estate brokers, argue that plaintiff cannot claim a commission under either a theory of breach of contract or the Labor Law, because a commission can only be earned "when the seller has accepted a buyer brought to him by the broker, and when the buyer and seller have agreed upon terms and executed an agreement." Defendants' Memorandum of Law, at 4, citing *Gronich & Company, Inc. v 649 Broadway Equities Co.*, 169 AD2d 600 (1st Dept 1991). Thus, defendants maintain that plaintiff cannot establish that she procured the buyer for the Estate, or that the buyer and seller came to terms and executed an agreement of sale, before plaintiff's termination, because the buyer was not located until after plaintiff's termination.

In defense of her cause of action for breach of contract, plaintiff relies on what she alleges was the summary and wrongful termination of her employment agreement, which, allegedly, constituted a "repudiation" of that agreement. Plaintiff's Memorandum of Law, at 7. Plaintiff then claims that this

repudiation was an "anticipatory breach" which discharged her from further performance under the employment agreement. *Id.* This argument is presumably made to allow plaintiff to recover her commission despite that fact that she did not participate in the actual sale of the Condo Unit. Plaintiff insists that her right to a commission on the future sale "became fixed as of the date of her wrongful discharge." *Id.*

Strangely, neither defendants' nor plaintiff's theory of liability relates to the actual allegations made in plaintiff's complaint. In her complaint, plaintiff alleges that it was "agreed that plaintiff would receive fifty percent of the commission on *any transaction which resulted* from plaintiff securing for the Carroll Group an 'Exclusive Right To Sell'[emphasis added]." Complaint, ¶ 11. These allegations are repeated in plaintiff's memorandum of law as the facts upon which the defense of her arguments against dismissal would be based. Plaintiff's Memorandum of Law, at 5-6.

Under such an agreement, it would be unnecessary for the transaction arising from an Exclusive Right To Sell procured by plaintiff to occur prior to plaintiff's termination. Under the facts as alleged in the complaint, as long as a commission arose out of a "transaction" related to an Exclusive Right To Sell which plaintiff obtained for the Carroll Group, plaintiff would have a right to receive 50%. *See Yudell v Ann Israel &*

Associates, Inc., 248 AD2d 189 (1st Dept 1998)(claim for breach of contract to pay commissions on employment placements procured by plaintiff prior to her termination survives where plaintiff cites to contract provisions supporting inference that termination was not intended to extinguish her rights to payment). Since plaintiff claims that she did procure an Exclusive Right To Sell from the Estate, and that a "transaction" resulted from the Exclusive Right To Sell, this court finds that the plaintiff has stated a cause of action for breach of the alleged oral employment agreement with the Carroll Group.

Labor Law Claims

Pursuant to Labor Law § 190(1), "'[w]ages' means the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." Further, as applicable, a "'[c]ommission salesman' means any employee whose principal activity is the selling of ... real estate ... and whose earnings are based in whole or in part on commissions." Labor Law § 190(6). There is no dispute that plaintiff falls under the definition of "commission salesman," or that any commission she earned as a commission salesman is "wages," under the Labor Law.

Defendants' maintain that, under Labor Law § 191(1)(c), plaintiff cannot make a claim for commissions derived from the sale of the Condo Unit, because she was an at-will employee whose

employment had been terminated before commissions had become "earned and payable" under that section.

Labor Law § 190(2) defines "employee" as "any person employed for hire by an employer in any employment." As previously set forth, Labor Law § 190(6) defines "commission salesman" as an "employee." Labor Law § 191(1)(c) provides that a commission salesman (i.e., an employee under Labor Law §190[2] and [6]), "shall be paid the wages, salary, drawing account, commissions and all other monies earned or payable in accordance with the agreed terms of employment ... ," and then proceeds to provide for the frequency of such payments.

Plaintiff's employment contract did not provide for a specific period of employment, nor a provision that the plaintiff could only be terminated "for cause." Therefore, her employment was "at-will," and could be terminated at any time. *Marino v Oakwood Care Center*, 5 AD3d 740 (2d Dept 2004). Under the facts alleged, plaintiff cannot claim that she was wrongfully terminated under her alleged oral contract with the Carroll Group.

While plaintiff has successfully alleged that she was contractually entitled to receive a commission even after her employment was terminated, she has failed to show her entitlement to rely on the Labor Law to recover her commission, because she cannot claim to have been an "employee" of the Carroll Group

after her termination, pursuant to Labor Law § 190(2) or (6). As of that date, no transaction had occurred which would entitle plaintiff to receive a commission. Therefore, no commission was "earned or payable" under Labor Law § 191(1)(c) as of the date on which plaintiff ceased to be an employee of the Carroll Group. *See Epelbaum v Nefesh Achath B'Yisrael, Inc.*, 237 AD2d 327, 330 (2d Dept 1997)(plaintiff entitled to wages earned prior to conclusion of her employment "in accordance with the agreed terms of employment").

It is this court's determination that there is nothing in the phrase "earned and payable in accordance with the agreed terms of employment" (Labor Law § 191[1][c]), which would serve to allow for the payments of commissions after plaintiff ceased to be an "employee" within the meaning of the Labor Law, where no commission was yet "earned and payable." *See Giuntoli v Garvin Guybutler Corporation*, 726 FSupp 494 (SD NY 1989)(unearned, future payments cannot be considered wages under the Labor Law). Consequently, plaintiff's second cause of action, and the claims made in her third and fourth causes of action which are reliant upon the viability of the second cause of action, must be dismissed.

Conversion and Conspiracy

Plaintiff's fifth cause of action, for conversion and conspiracy, is aimed solely at the individual defendants.

Plaintiff alleges that plaintiff had a right to possession of 50% of the total commission received from the sale of the Condo Unit, and that the individual defendants "jointly deprived plaintiff of her share of the commission," and "converted said share to themselves." Complaint, ¶ 47.

Conversion is "an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." *Peters Griffin Woodward, Inc. v WCSC, Incorporated*, 88 AD2d 883, 884 (1st Dept 1982), citing *Employers' Fire Insurance Company v Cotten*, 245 NY 102, 105 (1927); *see also Hoffman v Unterberg*, 9 AD3d 386 (2d Dept 2004). However, while money may be the subject of a claim for conversion, if it can be specifically identified (*id.*), the plaintiff must have had "ownership, possession or control of the money" before a cause of action for conversion will lie. *Peters Griffin Woodward, Inc. v WCSC, Incorporated*, 88 AD2d at 884. However, if the claim is made against an "obligation to pay the plaintiff what it is owed," conversion has not been alleged, despite the fact that a specific fund of money is the subject of the claim. *Stack Electric Inc. v DiNardi Construction Corp.*, 161 AD2d 416, 417 (1st Dept 1990); *Interstate Adjusters, Inc. v First Fidelity Bank, N.A., New Jersey*, 251 AD2d 232, 234 (1st Dept 1998)(conversion cannot be claimed "only on the allegation that a defendant received money and failed to remit payment to the

plaintiff").

Plaintiff does not claim that the individual defendants converted a fund of money over which plaintiff had a right to ownership, possession, or control, but only that they failed to pay her a commission which she believes that she is owed. That is not conversion, and the claim, as well as the claim for conspiracy, must be dismissed.

Further, a cause of action for conversion "cannot be validly maintained where damages are merely being sought for breach of contract" (*Peters Griffin Woodward, Inc. v WCSC, Incorporated*, 88 AD2d at 884; *see also Fesseha v TD Waterhouse Investor Services, Inc.*, 305 AD2d 268 [1st Dept 2003]), which is undoubtedly why this claim is brought against the individual defendants, rather than against the Carroll Group. However, it is apparent from the pleadings that the commission from the sale of the Condo Unit was payable to the Carroll Group, against whom a claim for breach of contract has been stated, and not to the individual defendants. For this reason as well, the cause of action for conversion is dismissed, as redundant of the claim for breach of contract.

There is no separate cause of action for punitive damages. *See Paisley v Coin Device Corporation*, 5 AD3d 748 (2d Dept 2004). In any event, plaintiff has failed to allege that kind of egregious behavior that is necessary to require an award of punitive damages (*see G.D. Searle & Company, Inc. v Pennie &*

Edmonds, LLP, 308 AD2d 404 [1st Dept 2003]), and her sixth cause of action is dismissed.

Accordingly, it is

ORDERED that the motion for summary judgment dismissing the complaint is granted solely to the dismissal of the second, third, fourth, fifth, and sixth causes of action, and is otherwise denied; and it is further

ORDERED that the defendants are directed to serve an answer to the complaint within 10 days of the receipt of this order with notice of entry.

This Constitutes the Decision and Order of the Court

Dated: January 5, 2005

ENTER:

EMILY JANE GOODMAN
U.S.C.

FILED
JAN 13 2005
NEW YORK
COUNTY CLERK'S OFFICE