

**Fieldman v Smart Choice Communications LLC**

2006 NY Slip Op 30191(U)

October 25, 2006

Supreme Court, New York County

Docket Number: 0601320/2006

Judge: Emily Jane Goodman

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

PRESENT: **HON. EMILY JANE GOODMAN**

*Justice*

PART 17

*Feldman, Lance*

INDEX NO.

601320/06

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -

*Smart choice*

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 as attached*

FOR THE FOLLOWING REASON(S):

**FILED**  
OCT 30 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/25/06

J.S.C.

**HON. EMILY JANE GOODMAN**  
 NON-FINAL DISPOSITION

Check one:  FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : I.A.S. PART 17

-----X  
LANCE FIELDMAN,

Plaintiff,

-against-

Index No.: 601320/06

SMART CHOICE COMMUNICATIONS  
LLC, STEVE LASSER, JARRET  
WOLFE, and BRIAN SILVERBERG,

Defendants.

-----X  
EMILY JANE GOODMAN, J.S.C.:

Plaintiff, a former employee of defendant Smart Choice Communications, LLC (Smart Choice) sues to collect unpaid sales commissions allegedly earned by him while in the employ of defendants. Claiming that defendants have wilfully failed to pay him his rightfully-earned commissions, plaintiff also seeks to recover liquidated damages equal to 25% of the amount of the commissions due and his attorneys' fees, as provided for in New York Labor Law § 198(1-a). Defendants move, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss plaintiff's Labor Law claims with prejudice on the ground that the parties' Employment Agreement is governed by New Jersey law. Alternatively, defendants move for dismissal of the third cause of action as against defendant Brian Silverberg on the ground that he is not an "employer" within the meaning of Labor Law § 190.

Smart Choice is in the business of marketing and brokering telecommunications services on behalf of, or as agents for, various telecommunications providers to business entities in the New York metropolitan area. Smart Choice is incorporated as a limited liability company under the laws of the State of New York, and is registered as a foreign limited liability company,

authorized to do business in the State of New Jersey. Smart Choice maintains offices at 16 West 45th Street in Manhattan.

In June of 2003, plaintiff was hired by Smart Choice as a commissioned salesperson. At the time he was hired, plaintiff was a resident of New York; he has been a resident of New Jersey since approximately November 2003. Plaintiff alleges that defendants promised to pay him a non-refundable draw and agreed to pay commissions of certain percentages based on the type of sales he made on Smart Choice's behalf.

Plaintiff also alleges that Smart Choice promised, at the time he was hired, to memorialize the terms of his employment in a written employment agreement. On or about November 4, 2004, Smart Choice and plaintiff entered into a written Employment Agreement. Paragraph 2 provides that plaintiff was being employed as "VP Sales for [Smart Choice's] operations based in New York ... ." Paragraph 12.0 of the Employment Agreement, entitled "Applicable Law," provides that "[t]his Agreement shall be governed in all respects, whether as to validity, construction, capacity, performance or otherwise, by the laws of the State of New Jersey." The Employment Agreement governed the terms of plaintiff's employment with Smart Choice until plaintiff resigned in August 2005, when a dispute arose as to his compensation.

New York recognizes the validity and enforceability of contractual choice-of-law provisions. Boss v American Express Financial Advisors, Inc., 15 AD3d 306, 307 (1st Dept 2005), affd on other grounds 6 NY3d 242 (2006); Marine Midland Bank, N.A. v United Missouri Bank, N.A., 223 AD2d 119, 122-23 (1st Dept 1996); Koob v IDS Financial Services, 213 AD2d 26, 33 (1st Dept 1995). "It is the policy of the courts of New York to enforce choice-of-law clauses, provided that the law chosen has a reasonable relationship to the agreement and does not

violate a fundamental public policy of New York” (Hugh O’Kane Elec. Co., LLC v MasTec North America, Inc., 19 AD3d 126, 127 [1st Dept 2005], citing Finucane v Interior Constr. Corp., 264 AD2d 618, 620 [1st Dept 1999]), and is not invalid due to fraud or overreaching (Boss, 15 AD3d at 307-08).

Plaintiff argues that the parties’ choice of New Jersey law to govern their dispute should not be enforced, because this dispute has no real connection to New Jersey. Plaintiff argues that Smart Choice is a New York limited liability company; its principal and only business address was 16 West 45th Street in Manhattan; plaintiff worked for Smart Choice in New York at all times; and plaintiff paid New York state income taxes. However, while these factors may be relevant to a choice-of-law analysis (see Zurich Ins. Co. v Shearson Lehman Hutton, Inc., 84 NY2d 309, 317 [1994]; Equis Corp. v Mack-Cali Realty Corp., 6 AD3d 264, 266 [1st Dept 2004]), the test is whether New Jersey has a reasonable relationship to the Employment Agreement. Since plaintiff was a resident of New Jersey when the agreement was executed and continues to be a resident of that state, New Jersey can be said to have a reasonable relationship to this dispute. Hugh O’Kane Elec. Co., 19 AD3d at 127; Finucane, 264 AD2d at 620; see also Welsbach Elec. Corp. v MasTec North America, Inc., 23 AD3d 639, 642 (2d Dept 2005).

Although plaintiff avers that the Employment Agreement was drafted by defendants and/or their counsel (Fieldman 6/7/06 Aff. ¶ 7), he makes no claim that it was the result of fraud or overreaching on defendants’ part. Indeed, plaintiff avers in both his complaint and in his affidavit in opposition to this motion, that it was he who insisted that the terms of his employment be memorialized in a written agreement, and the court notes that each and every page is initialed presumably by plaintiff and a representative of Smart Choice.

Plaintiff next argues that application of New Jersey law in this case violates New York's public policy. Plaintiff maintains that through the 1997 amendments to the Labor Law, the legislature of New York expressed a strong public policy of affording the working people of the State of New York greater remedies in enforcing their rights and in protecting themselves from abuse from employers. Thus, plaintiff maintains that the enforcement of a choice of law clause drafted by an employer that would allow a New York company to avoid compliance with the New York Labor Law violates the public policy of the State of New York.

To avoid a contractual choice-of-law provision on public policy grounds, the plaintiff bears a heavy burden to show that the application of foreign law would result in the approval of a transaction "that is inherently vicious, wicked or immoral, and shocking to prevailing moral senses." Boss v American Express Financial Advisors, Inc., 15 AD3d at 308, citing Intercontinental Hotels Corp. v Golden, 15 NY2d 9, 13 (1964); see also Hugh O'Kane Elec. Co., LLC v MasTec North America, 19 AD3d at 127 (foreign law must "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal and be truly obnoxious [internal quotation marks and citations omitted]").

In Boss, the First Department specifically rejected the claim "that because New York's employment law affords greater protection to its workers than Minnesota's, enforcement of the choice-of-law provision would violate [New York's] public policy." Boss, 15 AD3d at 308. Here, the fact that New York's Labor Law provides greater remedies to workers forced to sue their employer to recover unpaid wages than New Jersey is not a sufficient justification for invalidating the choice-of-law provision in the Employment Agreement.

For the foregoing reasons, it is hereby

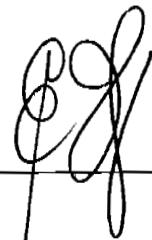
ORDERED that defendants' motion to dismiss the second and third causes of action of the complaint is granted, and those causes of action are hereby dismissed with prejudice; and it is further

ORDERED that defendant Smart Choice Communications, LLC shall serve and file an answer to the remaining cause of action in the complaint within ten days of service of a copy of this order with notice of entry.

**This constitutes the Decision and Order of the Court.**

Dated: October 25, 2006

ENTER:



J.S.C.

**EMILY JANE GOODMAN**

**FILED**  
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