SHORT FORM ORDER

INDEX
NO.: 15245-03

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

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 11-8-06
SUBMITTED: 1-3-07
MOTION NO.: 007-MG
008-XMD

GLENN McNAMARA and LISA TOY CAVALIERE,

Plaintiffs,

-against-

DAVE-EL SERVICES, INC. and LASER LIGHT LIMO, INC.,

Defendants.

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Upon the following papers numbered 1 to 23 read on this motion and cross-motion for partial summary judgment; Notice of Motion and supporting papers 1-8; Notice of Cross Motion and supporting papers 9-15; Answering Affidavits and supporting papers 16-20; Replying Affidavits and supporting papers 21-23; it is,

ORDERED that the motion by the defendants for partial summary judgment in their favor dismissing the plaintiffs' fourth and fifth causes of action is granted; and it is further

ORDERED that the cross motion by the plaintiffs for partial summary judgment in their favor dismissing the defendants' second, fifth, sixth, and eighth counterclaims is denied.

The plaintiffs were employed as the President and Vice-President, respectively of the defendant Laser Light Limo, Inc. (hereinafter Laser Light), a subsidiary of the defendant Dave-El Services, Inc. (hereinafter Dave-El). Both Laser Light and Dave-El were in the business of booking limousine and transportation services for persons and groups in the music and entertainment business in the New York area. The parties' employment relationship was governed by written agreements. Pursuant to those agreements, the plaintiffs reported directly to the Chief Executive Officer of Dave-El and had responsibility for, inter alia, maintaining and increasing the good will of Laser Light and Dave-El, maintaining good relationships with the customers of Laser Light, and increasing the sales of Laser Light. The agreements provided that the plaintiffs be paid a draw against a commission of $1,000 a week and that they be entitled to participate in the same benefit plans in which the senior executive employees of Dave-El participated.

After they plaintiffs left the defendants' employ in 2003, they commenced this action alleging that Laser Light and Dave-El breached their employment agreements and committed unspecified violations of Labor Law article 6. In their fourth and fifth causes of action, the plaintiffs seek to recover liquidated damages and attorney's fees pursuant to Labor Law §198 (1-a), which provides, in pertinent part, as follows:

> In any action instituted upon a wage claim by an employee * * * in which the employee prevails, the court shall allow such employee reasonable attorney's fees and, upon a finding that the employer's failure to pay the wage required by this article was willful, an addition amount as liquidated damages equal to twenty-five percent of the total amount of the wages found to be due.

The defendants move for partial summary judgment dismissing the plaintiff's fourth and fifth causes of action on the ground that, as executives, the plaintiffs were not employees within the meaning of Labor Law article 6. The plaintiffs oppose the motion, arguing that they were merely commissioned salespersons and, therefore, covered by Labor Law article 6.

Summary judgment is warranted when there are no issues of fact to be resolved by the trier of fact (*see*, **Hartford Accident & Indemnity Co. v Wesolowski**, 33 NY2d 169, 172; **Sillman v Twentieth Century Fox Film Corp.**, 3 NY2d 395, 404). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see*, **Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853; **Zuckerman v City of New York**, 49 NY2d 557, 562; **Sillman v Twentieth Century Fox Film Corp.**, *supra* at 404). To defeat the motion, the opponent must present evidentiary facts sufficient to raise a triable issue of fact (*see*, **Freedman v Chemical Constr. Co.**, 43 NY2d 260, 264). Mere conclusions, expressions of hope, or unsupported allegations or assertions are insufficient to defeat a motion for summary judgment (*see*, **Zuckerman v City of New York**, *supra* at 562).

The court finds that the defendants have established, prima facie, their entitlement to judgment as a matter of law on the plaintiff's fourth and fifth causes of action. The plaintiffs' employment agreements establish that they were employed by the defendants as executives of Laser Light. Claims for attorney's fees and liquidated damages predicated on Labor Law § 198 (1-a) are limited to wage claims based on violations of one or more of the substantive provisions of Labor Law article 6, which excludes salary claimed by an executive (*see*, **Gottlieb v Laub & Co.**, 82 NY2d 457; **Taylor v Blaylock & Partners**, 240 AD2d 289, 292; **Cohen v Fox-Knapp**, 226 AD2d 207). The plaintiffs' conclusory and self-serving contention that they were no more than commissioned salespersons with no executive authority, no supervision or control, and no executive benefits is insufficient to defeat the defendants' motion. Moreover, it is inconsistent with their titles and the contracts that they signed (*see*, **Taylor v Blaylock & Partners**, *supra* at 292). Accordingly, the motion is granted.

The plaintiffs cross move for partial summary judgment dismissing the defendants' second, fifth, sixth, and eighth counterclaims sounding in tortious interference with contractual

relations, misappropriation and conversion of trade secrets, and disparagement. 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; **Calderone v Town of Cortlandt**, 15 AD3d 602, 603; **Mennerich v Esposito**, 4 AD3d 399, 400). The plaintiffs have failed to tender any evidence affirmatively showing that the defendants' second, fifth, sixth, and eighth counterclaims lack merit. Rather, they rely on the defendants' failure to produce discovery in support thereof. The court finds that, under these circumstances, the plaintiffs have failed to make a prima facie showing of entitlement to judgment as a matter of law justifying dismissal of the defendants' second, fifth, sixth, and eighth counterclaims. Failure to make a prima facie showing requires denial of the cross motion regardless of the sufficiency of the opposing papers (*see*, **Winegrad v New York Univ. Med. Ctr.**, 64 NY2d 851, 853; **Calderone v Town of Cortlandt**, *supra* at 603; **Mennerich v Esposito**, *supra* at 401). Accordingly, the cross motion is denied.

DATED: April 9, 2007

HON. ELIZABETH HAZLITT EMERSON

J. S.C.