

Ostrin v Weiss

2007 NY Slip Op 32231(U)

July 18, 2007

Supreme Court, New York County

Docket Number: 0118501/2006

Judge: Edward H. Lehner

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

PRESENT: EDWARD H. LEHNER
~~Justice~~
Justice

PART 19

Index Number : 118501/2006
OSTRIN, NORMAN
vs
WEISS, GARY
Sequence Number : 001
VACATE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...
Answering Affidavits -- Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

with accompanying memorandum decision
motion is decided in accordance

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

Dated: 7/18/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

-----X
NORMAN OSTRIN,

Petitioner,

INDEX NO.
118501/06

- against -

GARY WEISS and MARVIN KNITTING
MILLS, INC.,

Respondents.

-----X
EDWARD H. LEHNER, J.;

Before the Court is a motion by petitioner to vacate an arbitration award (the "Award") that dismissed his claim alleging Marvin Knitting Mills, Inc. ("MKM") breached its contractual obligation to pay earned wages, and awarded MKM damages for allegedly improper personal expenses and lost profits.

Petitioner is a former employee of MKM who worked in sales and marketing under an employment agreement dated July 22, 2002 (the "Agreement") (petition ¶ 6). Gary Weiss is President of MKM and petitioner does not seek any relief against him individually (Id ¶ 4).

The Agreement provides:

"4. As compensation for the performance of your duties, (petitioner) shall receive: (a) A base salary at the annual rate of \$130,000 payable in equal weekly installments of \$2,500, subject to normal payroll deductions; (b) An amount equal to one third (1/3) of the pre-tax net profit (the 'Net Profit') of the Division ... for each Fiscal Year ... of (his) employment. If

there is a net loss suffered by the Division for a Fiscal Year, any such loss shall be carried forward and charged against the Net Profits of the following Fiscal Year(s) until the loss is offset in full. ... (d) You will not be entitled to any Additional Compensation if your employment is terminated by the Company for Cause or if you terminate the Agreement."

Petitioner states that: he was terminated by MKM effective October 31, 2003 for allegedly wrongful conduct on July 1, 2003 (petition ¶¶ 15, 16); that under the Agreement, he was entitled to one-third of MKM's net profits; and that the Award's finding that he was not entitled to any Additional Compensation violates New York public policy and therefore the Award should be vacated.

MKM contends that the Agreement provides that petitioner would be paid a base salary and that consequently the Additional Compensation was properly characterized in the Award (p. 17) as "a share of net profit," and that the petitioner was held to be "a faithless servant" forfeiting payment from the date of his disloyal act, and therefore the Award should be confirmed.

The general rules with respect to an attempt to set aside an arbitration award were set forth as follows in *Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 154-155 (1995):

"Under CPLR 7511, an award may be vacated only if (1) the rights of a party were prejudiced by corruption, fraud or misconduct in procuring the award, or by the partiality of the arbitrator; (2) the arbitrator exceeded his or her power or failed to make a final and definite award; or (3) the arbitration suffered from an unwaived procedural defect. Even where the arbitrator makes a mistake of fact or law, or disregards the plain words of

the parties' agreement, the award is not subject to vacatur unless the court concludes that it is totally irrational or violative of a strong public policy and thus in excess of the arbitrator's powers"

"(A) disloyal employee is not entitled to receive compensation, whether commissions or salary" [Bon Temps Agency Ltd. v. Greenfield, 184 AD2d 280, 281 (1st Dept. 1992)]. See also, Maritime Fish Products, Inc. v. World-Wide Fish Products, Inc., 100 AD2d 81 (1st Dept. 1984), appeal dismissed 63 NY2d 675; In re Blumenthal, 32 AD3d 767 (1st Dept. 2006); In re Blumenthal v. Kane Realty Services, Inc., ___ AD3d ___, NYLJ, May 14, 2007, p. 27, c. 6 (1st Dept.). The allegedly contrary public policy is the "longstanding policy against the forfeiture of earned but undistributed wages" [Markby v. Painewebber, Inc., 169 Misc. 2d 173, 179 (Sup. Ct. NYCo., 1996), aff'd 243 AD2d 311 (1st Dept. 1997)].

However, "(d)ffered equity-based compensation (including restricted stock shares and stock options) ... constitutes, as a matter of law 'incentive compensation ... not included in the definition of "wages" under Labor Law § 190 (1)'" [Guiry v. Goldman, Sachs & Co., 31 AD3d 70, 71 (1st Dept. 2006)] "(W)hether unpaid 'incentive compensation' under a defendant's bonus plan constitutes a discretionary 'bonus' or 'earned wages' not subject to forfeiture is an issue of fact" [Mirchel v. RMJ Securities Corp., 205 AD2d 388, 389 (1st Dept. 1994)]. See also, Markby v. Painewebber Inc., *supra*. Since the disputed issue herein turns on a factual finding by the arbitrator that the Additional Compensation did not constitute wages, the court

cannot conclude that the Award violates public policy. Therefore, the motion to vacate the award is denied and the award is confirmed pursuant to CPLR 7511 (e).

Settle judgment.

Dated: July 18, 2007



J.S.C.