

Kane v Waterfront Media, Inc.
2007 NY Slip Op 34370(U)
August 20, 2007
Supreme Court, New York County
Docket Number: 0604007/2007
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Kane

INDEX NO.

604007/07

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -

Water front

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

FILED

AUG 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

Dated: 8/20/08

J. GISCHE
HON. JUDITH J. GISCHE

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

LYNETTE KANE,

Plaintiff,

- against -

WATERFRONT MEDIA, INC., SCOTT WOLF,
and MICHAEL KERIAKOS, individually,

Defendants.

-----X

Decision/Order

Index No. 604007/07
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def's n/m [dismiss]	1
Def's KGL affirm, exhs	2
Pltf's n/x-mot [sj]	3
Pltf's JSS affid, exhs	4
Def's MNK reply affirm, exhs	5
6/12/08 Transcript	6

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NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

In this action to recover damages for, *inter alia*, breach of an employment contract, defendants move , pre-answer, to dismiss plaintiff's implied contract, *quantum meruit*, and unjust enrichment claims, as well as plaintiff's claims under Labor Law §§ 191, 193 and 198. CPLR § 3211 (a) (1), (7). Plaintiff cross moves for partial summary judgment on liability and opposes defendants' motion in its entirety. CPLR § 3212. Defendants oppose plaintiff's motion for partial summary judgment and ask for an award of sanctions and costs against plaintiff. 22 NYCRR § 130-1.1 (a).

Defendants are Waterfront Media Inc., (“Waterfront”), Scott Wolf (“Wolf”) and Michael Keriakos (“Keriakos”). Waterfront is an online publisher of various health-related websites, including EverydayHealth.com. On or about October 18, 2006, plaintiff entered into a written employment contract (the “contract”) with Waterfront, whereby she served as Vice President and Publisher of EverydayHealth.com. Wolf and Keriakos were plaintiff’s supervisors at Waterfront.

On December 5, 2007, plaintiff commenced this action seeking to recover alleged unpaid compensation, under theories of breach of contract (1st cause of action [“COA”]), breach of implied contract (2nd COA) quantum meruit/ unjust enrichment (3rd COA) and promissory estoppel (4th COA), improper deductions for plaintiff’s wages in violation of Labor Law § 193 (9th COA) and violations of Labor Law § 191 based on unpaid commissions (10th COA) and accrued unpaid vacation (11th COA). Plaintiff also claims that defendants discriminated against her based on her gender in violation of the Human Rights Law (Exec. L. § 290 *et seq.*) and the Administrative Code of the City of New York § 8-101 *et seq.* (5th - 8th COA).

Defendants argue that the second and third causes of action should be dismissed because there is an express written contract governing the same subject matter. In seeking dismissal of the fourth cause of action, defendants argue that because plaintiff was an at-will employee, she could not have a reasonable expectation of continued employment. Defendants seek dismissal of the ninth cause of action because plaintiff cannot identify any specific deduction from her wages for which she seeks recovery. Finally, defendants argue that the tenth and eleventh causes of action under Labor Law § 191 should be dismissed because plaintiff is “a bona fide executive

or professional who earned over four thousand dollars a week.”

Plaintiff voluntarily withdraws the fourth cause of action but argues that the law precludes dismissal of the remaining contested causes of action. Specifically, plaintiff contends that Wolf attempted to alter the terms and conditions of the contract. Because of these alleged alterations, plaintiff pleads implied contract and quasi-contract claims in the alternative.

Plaintiff maintains that defendants reduced plaintiff’s commissions from the percentages agreed upon in the contract, and that these claims sufficiently support a Labor Law § 193 violation. Plaintiff also argues that whether she is an executive within the meaning of the Labor Law is a question of fact and not an issue of law.

Finally, plaintiff argues that because defendants have already conceded that plaintiff is owed monies pursuant to the contract, the court should award plaintiff partial summary judgment for monies owed in the amount of \$159,475.25.

Discussion

The cross-motion for summary judgment

At the outset, plaintiff’s cross-motion for summary judgment is denied as premature. Issue has not been joined, and therefore, summary judgment relief is not available. CPLR § 3212. Brill v. City of New York, 2 N.Y.3d 648 (2004).

Plaintiff further asserts that an email offer of settlement from defendants’ counsel dated December 3, 2007 and clearly marked “FOR SETTLEMENT PURPOSES ONLY” amounts to an admission that plaintiff is owed a sum certain for past commissions alleged to be due to her. In this email, defendants’ counsel, Marjorie Kaye, Esq., writes: “[o]ur client has authorized us to make an offer of \$122,000.00 to settle the instant

matter.”

The court rejects plaintiff’s argument that the settlement offer is somehow evidence of an accounting performed by defendants of what amounts plaintiff was owed. CPLR § 4547 prohibits plaintiff from relying on settlement discussions as evidence at trial as an admission, as well as any conduct or statement made during the negotiations.

The motion to dismiss

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (see CPLR 3026; Leon v Martinez, 84 NY2d 83, 87 [1994]). The court accepts the facts as alleged by plaintiff as true, affording them the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly contradicted by evidence submitted in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]).

Under CPLR § 3211 (a) (1), “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law” (Leon, supra). In addition, in asserting a motion under CPLR § 3211 (a) (7), the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (id., quoting Guggenheimer v Ginsburg, 43 NY2d 268 [1977]).

Here, there is no dispute that the contract is was in effect at all relevant times.

Where there is an express contract, the court will not imply another one (see North Star Contracting Corp. and Tern Star, Inc. v. City of New York, 203 AD2d 214, 215 [1st Dept 1994]). The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment (Clark-Fitzpatrick, Inc. v. Long Island Rail Road Company, 70 NY2d 382, 388 [1987], citations omitted; West End Interiors, Ltd. v. Aim Construction & Contracting Corporation, 286 AD2d 250, 252 [1st Dept 2001]). Unjust enrichment is a quasi contract claim barred by this principle (Schuit v. Tree Line Management Corp., 46 AD3d 405 [1st Dept 2007]; Zolotar v. New York Life Insurance Co., 172 AD2d 27, 33 [1st Dept 1991]). Therefore, the court rejects plaintiff's argument that it should be allowed to plead theories alternative to breach of the express contract. The second and third causes of action, for breach of implied contract and quasi-contract/ unjust enrichment, respectively, fail to state a cause of action. Accordingly, these claims are hereby severed and dismissed.

Promissory Estoppel

Although plaintiff voluntarily withdraws the fourth cause of action sounding in promissory estoppel, the court will nonetheless consider the relief requested by defendants inasmuch as they seek dismissal "with prejudice."

Plaintiff alleges that Waterfront made a clear and unambiguous promise to her, upon her agreement to remain employed with Waterfront, that plaintiff would be unconditionally paid. However, the doctrine of promissory estoppel is not available to

an at-will employee. To state a claim for promissory estoppel, a plaintiff must allege: [1] a clear and unambiguous promise; [2] reasonable and foreseeable reliance by the party to whom the promise was made; and [3] injury sustained in reliance on the promise (Fleet Bank v. Pinke Knoll Corp., 290 AD2d 792, 797 [3d Dept 2002]). In addition, an at-will employee is an employee whose term of employment can be freely terminated by either employee or employer at any time, with or without cause. Therefore, an at-will employee cannot establish reasonable reliance, a necessary element of promissory estoppel (see Marino v. Oakwood Care Ctr., 5 AD3d 740 [1st Dept 2004]).

Here, plaintiff was an at-will employee. The contract contained the following provision:

At-Will Employment. This letter does not constitute a guarantee of employment or an employment contract for any specific period of time. You will be an employee-at-will, meaning that either you or the company may terminate your employment relationship at any time, without notice, for any reason or no reason.

Therefore, plaintiff cannot state a cause of action under the doctrine of promissory estoppel. Accordingly, the fourth cause of action is hereby severed and dismissed with prejudice.

The Labor Law § 191 claim

Article 6 of the Labor Law regulates the payment of wages by employers. Defendants argue that plaintiffs have failed to sufficiently allege a violation of Labor Law § 193. NY Labor Law § 193 prohibits an employer from making deductions from an employee's wages, except where the deductions are authorized by law or expressly authorized in writing by the employee. NY Labor Law § 193 states in pertinent part:

1. No employer shall make any deduction from the wages of an employee, except deductions which

a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or

b. are expressly authorized in writing by the employee and are for the benefit of the employee;

2. No employer shall make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages under the provisions of subdivision one of this section.

The court rejects plaintiff's contention that defendants' reduction of the commission percentages to which she was entitled under the contract supports a claim under Labor Law § 193. At most, plaintiff only alleges a failure to pay wages. Such a claim does not constitute a violation of Labor Law § 193. To state a claim for violation of Labor Law § 193, a plaintiff must allege a specific deduction from wages and not merely a failure to pay wages (see i.e. Kletter v. Fleming, 32 AD3d 566 [3d Dept. 2006]). Accordingly, the ninth cause of action is hereby severed and dismissed.

The Labor Law §§ 191 and 198 claims

Defendants argue that the tenth and eleventh causes of action under Labor Law § 191 should be dismissed because plaintiff was an executive and is therefore excluded from the statutes protections. Labor Law § 191 (3) provides: "[i]f employment is terminated, the employer shall pay the wages not later than the regular pay day for the pay period during which the termination occurred, as established in accordance with the provisions of this section." Section 191 (1) only requires employers to pay the four

categories of employees detailed therein, namely: [1] manual workers; [2] railroad workers; [3] commission salespersons; and [4] clerical and other workers (Labor Law § 191 [1]). Employees serving in an executive, managerial, or administrative capacity do not fall under Section 191 of the Labor Law (Pachtler v Bernard Hodes Group, Inc., 2008 WL 2338595 [NY 2008]).

Plaintiff argues that she was not an executive, but rather, was a commissioned salesperson for defendant. Under the Labor Law, a commissioned salesperson is defined as “any employee whose principal activity is the selling of any goods, wares, merchandise, services, real estate, securities, insurance or any article or thing and whose earnings are based in whole or in part on commissions” (Labor Law § 190 [6]). The statute specifically excludes any employee “whose principal activity is of a supervisory, managerial, executive or administrative nature.”

In the complaint, plaintiff claims she was Vice President of Defendant. As Vice President, plaintiff alleges she was responsible for: [1] “[w]orking with the sales team to more effectively sell advertising on EverydayHealth by developing sales strategies, packages, and pricing. ...: [2] [w]orking with the editorial technology and product teams to build out relevant content and integrated advertising partnerships for potential clients/advertisers; [3] selling alongside and above the sales team...; [4] training salespeople...; [and] [5] assisting in hiring a sales staff.” The court cannot discern from this reading whether plaintiff’s primary activity was “sales” or supervisory. The contract specifically provides that plaintiff would receive commissions, in addition to a base salary of \$225,000 and a one-time bonus of \$25,000, at a rate of between 4 and 10% of EverydayHealth.com sales, depending on sales volume.

On this motion, plaintiff has alleged sufficient facts to support her contention that she was a commissioned salesperson within the meaning of the labor law. Since plaintiff's pleading is afforded the benefit of every favorable inference, the courts' inquiry ends here. Whether plaintiff was an employee excluded from the protection of Labor Law § 191 remains a question of fact for trial or on a dispositive motion. Therefore, defendants' motion to dismiss the tenth and eleventh causes of action is denied.

Defendants' request for costs and sanctions

Defendants' request for costs and sanctions is denied in all respects. While plaintiff has not prevailed on the motion and cross-motion, the court does not find the legal arguments made by them to be frivolous within the meaning of the rule permitting sanctions, 22 NYCRR § 130-1.1 (a). Parks v. Leahey & Johnson, P.C., 81 NY2d 161 (1993).

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendants' motion is granted and the second, third, fourth, and ninth causes of action are hereby severed and dismissed; and it is further

ORDERED that defendants' motion is otherwise denied; and it is further

ORDERED that plaintiff's cross-motion is denied in its entirety; and it is further

ORDERED that the defendants shall answer the complaint within 10 days hereof. Plaintiff's reply, if any, shall be as per the CPLR.


The clerk is hereby directed to enter judgment in accordance herewith.

Any requested relief which has not been addressed herein has been considered and is hereby expressly denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
August 20, 2008

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

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