

Peck v Real Estate Strategies, Ltd.

2008 NY Slip Op 30784(U)

March 11, 2008

Supreme Court, Nassau County

Docket Number: 7048-07/

Judge: Daniel Martin

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**SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice**

**TRIAL/IAS, PART 31
NASSAU COUNTY**

MARA PECK.

Plaintiff.

- against -

**Sequence No.: 001
Index No.: 007048/07**

**REAL ESTATE STRATEGIES, LTD. And DAVID
REINER.**

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, defendants' motion for summary judgment dismissing the complaint herein is granted in part and denied in part as set forth below.

The following facts are undisputed. Commencing in September, 2002 plaintiff, a licensed real estate broker commenced working for defendant Real Estate Strategy, Ltd. (hereinafter "RES") as an associate broker. Pursuant to an agreement between RES and plaintiff, plaintiff was to receive 60% of all commissions earned when a lease of real property was signed or a sale of real property closed. In May, 2005 plaintiff's employment with RES came to an end.

Plaintiff alleges that she has yet to be paid for commissions and expenses owed to her by RES. Plaintiff commenced the instant action against both RES and its president and sole shareholder, David Reiner, asserting a cause of action based upon what appears to be Labor Law §190, et. Seq., as well as unjust enrichment and breach of the employment agreement. Plaintiff seeks \$62,135.62 in allegedly outstanding commissions and \$2,270.67 in outstanding expenses. Plaintiff also seeks punitive damages and attorneys fees against defendants pursuant to Labor Law §198. Defendants have answered, asserting counterclaims for 1) a permanent injunction against plaintiff's revealing confidential information of RES' pursuant to a confidentiality agreement between RES and plaintiff; 2) trespass; 3) breach of the confidentiality agreement; and

4) conversion. Defendants now move for summary judgment dismissing the complaint.

In moving for summary judgment defendants must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In order to oppose the motion plaintiff must demonstrate an issue of fact through admissible evidence. Id.

Defendants contend that plaintiff admitted in her reply to defendants' counterclaims that plaintiff was an independent contractor and that as such, her claims pursuant to Labor Law Article 6 are barred. The court notes, however, that plaintiff initially alleges in her complaint to be an employee covered by such portion of the Labor Law. The court shall not dismiss a complaint upon a technicality where plaintiff has made conflicting allegations.

In support of their motion defendants annex the affidavit of Mr. Reiner. In the affidavit Mr. Reiner avers that:

1) pursuant to an employment agreement dated May 27, 2003 plaintiff was expressly employed as an independent contractor "and shall be treated as such for all purposes, including but not limited to Federal and State taxation, withholding, unemployment insurance and workers' compensation...";

2) pursuant to said agreement plaintiff was free to a) work any hours she chose; b) work out of her home or out of RES' offices; and c) engage in outside employment;

3) neither Mr. Reiner nor RES exercised any control over how plaintiff achieved her results and that she used her own resources during working hours of her own choosing;

4) plaintiff would come into RES' offices and work late;

5) plaintiff rarely kept either defendant aware of her whereabouts;

6) plaintiff would not seek approval of defendants while negotiating transactions;

7) defendant RES issued plaintiff IRS form 1099's, each of which reflects earnings realized by plaintiff as "nonemployee compensation"; and

8) Mr. Reiner signed the employment agreement with plaintiff in his capacity as RES' president and that said agreement was between RES and plaintiff.

Defendants first move for summary judgment dismissing the complaint upon the ground that plaintiff does not qualify as an employee of defendant RES, but was instead an independent contractor who may not avail herself of the protection of Labor Law §190, et. seq. Pursuant to Labor Law §191[1][c] a commissioned salesman "shall be paid wages, salary, drawing account, commissions and all other monies earned or payable in accordance with the agreed terms of employment, but not less frequently than once in each month and not later than the last day of the month following the month in which they are earned..." Where the employment is terminated, the employer is obligated to pay the wages no later than the next pay day following termination as set forth above. Labor Law §191(3).

A "commissioned salesman" is defined as an 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). Where it is determined that plaintiff is an independent contractor and not an employee as defined by Labor Law §190(3) which is a person “employed for hire by any employer”, an action pursuant to Labor Law Article 6 is precluded. See, Akgul v. Prime Time Transportation, Inc., 293 A.D.2d 631 (2nd Dep’t 2002). It has also been held that for purposes of application of Labor Law §191[1][c], the term “commissioned salesman” is defined as an “employee” whose earnings are at least partially based upon commissions, and, further, a person who is not an employee, but an independent contractor is “not within the scope of this section [see, e.g. Rivers v. Butterhill Realty, 145 A.D.2d 709, 710-711; Guepet v. International Tao Systems, Inc., 110 Misc.2d 940].” Kirsch v. Fleet Street, Ltd., 148 F.3d 149, 170 (C.A. 2nd Cir. 1998). From this, and it should be noted, there is very little if any helpful case law in this area, the court concludes that a commissioned salesman does not qualify as an employee as required by the statute if he is not hired by the employer, but serves as an independent contractor.

In determining whether plaintiff is an independent contractor who does not qualify for the protections of Labor Law Article 6, the court will consider the following relevant factors: 1) whether plaintiff worked at her own convenience; 2) whether plaintiff was free to engage in other employment; 3) whether plaintiff received fringe benefits; 4) whether plaintiff was on defendant’s payroll; and 5) whether plaintiff was on a fixed schedule. See, Byong v. Cipriani Group, Inc., 1 N.Y.3d 193 (2003); Bhanti v. Brookhaven Memorial Hospital Medical Center, 260 A.D.2d 334 (2nd Dep’t 1999).

Based upon Mr. Reiner’s affidavit set forth above, the court concludes that defendants have *prima facie* demonstrated that plaintiff was not an employee but an independent contractor in that plaintiff worked at her own convenience, was free to engage in other employment, and was not on a fixed schedule. Further evidence of plaintiff’s independent contractor status is the fact that defendant RES issued plaintiff an IRS form 1099 which is issued to a person such as an independent contractor for whom withholding income taxes is inapplicable. Byong v. Cipriani Group, Inc., *supra*.

Defendant Reiner further moves for summary judgment dismissing the complaint as asserted against him individually upon the grounds that any employment relationship was between plaintiff and the corporate defendant. In addition to the above Mr. Reiner avers that all actions taken by him with regard to plaintiff’s employment were done in his capacity as RES’ president. The court therefore finds that defendant Reiner has made a *prima facie* demonstration that he entered into the contract with plaintiff on behalf of RES in his capacity as an officer of the corporate defendant and further, that any services purportedly performed by plaintiff were done for RES and not Mr. Reiner. See, O’Dell v. Ginsberg, 253 A.D.2d 544 (2nd Dep’t 1998).

Although defendants move to dismiss the entire complaint, it appears they have only their *prima facie* burden relative to all of plaintiff’s claims as asserted against defendant Reiner and only as to plaintiff’s Labor Law claims as they apply to defendant RES. Defendants do not

address at all plaintiff's breach of contract and unjust enrichment claims as they are asserted against defendant RES.

Defendant Reiner having met his *prima facie* burden of demonstrating entitlement to summary judgment dismissing the entire complaint as asserted against him and RES having met its *prima facie* burden relative to plaintiff's Labor Law claim, the burden now shifts to plaintiff to demonstrate a triable issue of fact. See, Zuckerman v. City of New York, supra.

At the outset plaintiff has not raised an issue of fact as to whether her employment, if any, was with defendant Reiner. While a corporate officer may be held to be the employer based upon the amount of control he exercised over an employee, plaintiff offers nothing in admissible form from which this court can conclude that an issue of fact exists as to whether Mr. Reiner exercised such control despite the employment agreement with RES. Compare, Herman v. RSR Security Services, Ltd., 172 F.3d 132 (2nd Cir. 1999).

In opposition plaintiff avers that:

- 1) at the conclusion of each transaction plaintiff was required to prepare paperwork from RES, provide RES with information about the deal, fees earned and copies of the lease or contract of sale;
- 2) she was required to attend RES sales meetings at which the brokers, including plaintiff, were required to bring information which was "vital" to the brokers;
- 3) she was required to obtain RES' permission to deal with outside brokers;
- 4) agreements, correspondence, etc. are prepared by RES secretaries and are done on RES letterheads;
- 5) RES/Reiner had the ability to terminate plaintiff's employment at any time;
- 6) work related files were to be maintained at RES' office and RES maintained ownership over said files;
- 7) Plaintiff's business cards identified her as RES' "managing director";
- 8) RES' website held plaintiff out as an employee (having reviewed the exhibit from said website, the court sees no such reference to plaintiff);
- 9) RES provided the instrumentalities to her that plaintiff needed to perform her job including a computer, desk, office supplies, market information, secretarial assistance, a company e-mail address, etc.;
- 10) defendant provided work for plaintiff to perform including the review, evaluation and modification of promotional materials;
- 11) plaintiff was expected, regardless of what the contract says to be a full time employee of RES, that she sought no outside employment and was not permitted to seek said outside employment; and
- 12) all staff used by plaintiff during her tenure with RES were RES employees and she had no employees of her own.

Plaintiff further avers that although she received a form 1099 for tax purposes, the

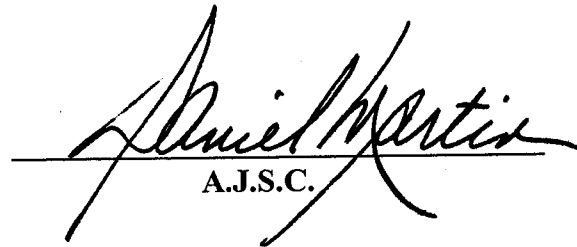
plaintiff's income tax status is only one of the factors that should be considered in determining whether she is an employee or independent contractor without further explanation. In reply defendant annexes plaintiff's tax returns for 2002, 2003, 2004 and 2005 which were produced by plaintiff in discovery herein. Each of these returns reflects that plaintiff is a "sole proprietorship" in the principal business of "real estate sales". Same also included numerous deductions for business purposes including auto expenses, vehicle rental or lease, meals and entertainment and "other expenses."

It is appropriate for the court to disregard plaintiff's self-serving affidavit where her tax returns contained deductions for business purposes and reflects her status as a sole proprietorship as opposed to an employee in conflict with her affidavit and plaintiff fails to explain the conflict. See, e.g., Gagen v. Kipany Productions, Inc., 27 A.D.3d 1042 (3rd Dep't 2006). As plaintiff admits to receiving form 1099's instead of W-2 forms from RES without explanation and defendants also produce the tax returns produced by plaintiff which reflect her status as a sole proprietorship, the court disregards plaintiff's affidavit submitted in opposition to defendants' motion. The court therefore finds that plaintiff has failed to meet her burden of demonstrating a triable issue of fact which precludes summary judgment as to those issues for which defendants have met their initial burdens.

Accordingly, based upon the foregoing, the court grants defendants' motion to the extent that the complaint as asserted against defendant Reiner is dismissed in its entirety and plaintiff's claim pursuant to Labor Law §190, et. seq. is hereby dismissed. The motion is in all other respects denied.

So Ordered.

Dated: March 11, 2008


A.J.S.C.

ENTERED
MAR 14 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE