

Carrizzo v Searchhelp, Inc.

2008 NY Slip Op 31086(U)

April 10, 2008

Supreme Court, Nassau County

Docket Number: 5330-07/

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

JOSEPH CARRIZZO,

Plaintiff,

INDEX NO.: 015330/2007
MOTION DATE: 02/06/2008
MOTION SEQUENCE: 001 and 002

-against-

SEARCHHELP, INC.,

Defendant.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed.....	1
Affidavit of William Bozsnyak, III in Opposition & Exhibits Annexed.....	2
Affidavit of John Caruso.....	3
Affidavit of Brian O'Connor.....	4
Reply Affirmation of David B. Wechsler, Esq. In Further Support of Plaintiff's Motion & Exhibits Annexed.....	5
Reply Affidavit of Joseph Carrizzo in Further Support of Plaintiff's Motion.....	6
Notice of Motion, Affirmation & Exhibits Annexed.....	7
Affidavit in Opposition to Defendant's Motion of Joseph Carrizzo, Affirmation in Opposition to Defendant's Motion of Marc O. Sheridan & Exhibits Annexed.....	8
Reply Affidavit of William Bozsnyak, III	9
Reply Affirmation of Randolph E. White & Exhibit Annexed.....	10
Plaintiff's Rule 19-a Statement of Material Facts on Plaintiff's Motion for Partial Summary Judgment.....	11
Defendant's Rule 19-a Statement of Material Fact on Plaintiff's Motion for Partial Summary judgment and Defendant's Counterclaim.....	12
Memorandum of Law on Behalf of Plaintiff Joseph Carrizzo in Support of Plaintiff's Motion for Partial Summary Judgment and Dismissal of Defendant SearchHelp, Inc.'s Counterclaims.....	13
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Reply Memorandum of Law on Behalf of Plaintiff Joseph Carrizzo in Further Support of Plaintiff's Motion for Partial Summary Judgment and Dismissal of Defendant SearchHelp, Inc.'s Counterclaims	15
Memorandum of Law in Support of the Motion by the Defendant SearchHelp, Inc.	16
Memorandum of Law on Behalf of Plaintiff Joseph Carrizzo in Opposition to Defendant's Motion to Dismiss the Verified Complaint, to Strike Plaintiff's Verified Reply, and Award Judgment on its Counterclaims.....	17
Reply Memorandum of Law of Defendant SearchHelp, Inc.	18

Motion by plaintiff Joseph Carrizzo for partial summary judgment against defendant SearchHelp, Inc. on the First and Second causes of action and dismissing defendant's counterclaims is denied as to the first and second causes of action and reserved as to dismissal of the counterclaims. Motion by defendant SearchHelp, Inc. for an order dismissing the complaint, striking plaintiff's reply and granting summary judgment on the counterclaim on the grounds of spoliation of evidence is reserved for decision after a hearing.

Plaintiff Joseph Carrizzo (Carrizzo) is a former President and Board Member of the defendant corporation SearchHelp, Inc. (SearchHelp or the Company). SearchHelp's business consists principally of the development, sale and distribution of parental control and monitoring software and services and imaging products. Carrizzo entered into a three year written employment agreement with the Company which entitled him to a base salary of \$120,000 subject to an annual 10% increase following the anniversary of his effective date of employment, a \$50,000 cash bonus upon the Company's receipt of a minimum of \$1 million in gross proceeds from equity financing, an automobile allowance up to \$1,000 per month, five weeks paid vacation, health and disability insurance and reimbursement of cell phone charges. Plaintiff also received substantial stock options in the Company. The contract requires all modifications to be in writing.

Plaintiff's first cause of action alleges breach of the employment contract based upon, inter-alia, the Company's failure to pay his salary and bonus. The Company, experiencing liquidity problems in October of 2006, requested senior management to forego salary. Plaintiff agreed to forego salary and does not dispute the oral waiver. Rather, he avers that he agreed to "temporarily suspend payment" of his paycheck for only one or two pay periods following

payment of his October 20, 2006 paycheck. He avers that the waiver was not indefinite, and that he agreed based on an alleged representation from SearchHelp's Chief Executive Officer William Bozsnyak (Bozsnyak) that the temporary suspension would "only last for one or two pay periods" after which he "would . . . receive . . . back pay from financing the company would be 'imminently' receiving." He alleges that on October 28, 2006 Bozsnyak "unilaterally" suspended his pay.

Plaintiff submits several SearchHelp publicly filed documents, i.e., Securities and Exchange Commission 10-QSB forms. He avers that the documents constitute proof that salary and the \$50,000 bonus were owed, and vacation accrued for quarters ending 3/31/07 and 6/30/07.

SearchHelp submits evidence that Chief Executive Officer Bozsnyak, Chief Operating Officer Brian O'Connor and President Joseph Carrizzo all voluntarily agreed to forgo salary on an indefinite basis. Only Chief Financial Officer John Caruso did not agree, saying he could not afford to forgo his salary.

Bozsnyak states, by affidavit dated 1/24/08, that on October 14, 2006 the executive staff received an e-mail from Caruso that the Company's bank account would have only \$30,000 after meeting the upcoming payroll, and that on October 16, 2006 a meeting was convened to discuss this liquidity problem. At the meeting Bozsnyak requested the executive officers to forgo salary until the Company "raised investment money, either from Bradley Kabbash or another investment source, in an amount sufficient to meet the ongoing operating needs of SearchHelp for the foreseeable future or until sales improved markedly . . .". He states that he, Carrizzo and O'Connor agreed to forego salary as they had large "equity stakes" in SearchHelp and had much to gain if it succeeded, making the sacrifice beneficial to their self interest.

Carrizzo received one last paycheck although Bozsnyak avers it was without his approval. He states that Carrizzo needed to show uninterrupted income to secure certain loan arrangements.

John Caruso also offers an affidavit dated 1/23/08. He supports Bozsnyak's contentions, stating: "After a detailed discussion of the finances at SearchHelp, the issue of a voluntary agreement among executives to waive compensation was put on the table. O'Connor, Carrizzo

and Bozsnyak agreed to forgo salary.” He states that Carrizzo received one additional paycheck and thereafter continued as President of SearchHelp “without receiving bi-weekly checks, in accordance with his agreement, until he subsequently resigned his position in February, 2007.” O’Connor’s affidavit dated 1/24/08 is also in accord.

Defendant also points out that the publicly filed documents upon which plaintiff relies were completed by plaintiff himself with regard to owed salary and bonus. The documents set forth a statement that amounts were owed to Carrizzo, Bozsnyak and O’Connor for “unpaid salaries and accrued vacation” and that a \$50,000 bonus was due to Carrizzo as of December 31, 2006 “in connection with certain liquidity milestones being met” (p 11). There is no evidence that the Company reached its equity financing milestones by 12/31/06; the evidence is to the contrary, indicating debt rather than equity financing during this time period.

The documents also state that Carrizzo voluntarily terminated his employment and therefore is “not entitled to any compensation other than accrued and unpaid compensation and benefits through the date of his resignation” (p 13, 14).

Defendants have presented sufficient admissible evidence to create a question of fact with regard to the First cause of action for breach of contract with regard to whether plaintiff voluntarily agreed to forgo salary until certain liquidity milestones were met and whether he left the Company prior to those milestones being met.

Taylor v. Blaylock & Partners, L.P., supra, addresses the precise issue raised in this action concerning oral modification with respect to a contractual requirement for the payment of salary. Taylor v. Blaylock & Partners, L.P., 240 AD2d 289, 290 (1st Dept 1997). “Generally, a party to a written agreement may orally waive enforcement of one of its terms despite a provision to the contrary * * * Waiver may be demonstrated by words or conduct, including full or partial performance and equitable estoppel.” Id. at p 291. Oral modification may be proved, once the modification is executed; if it has only been “partially performed” as a result of defendant’s failure to pay the compensation promised, the question is whether plaintiff’s conduct in working without compensation and defendant’s conduct in “not terminating his employment” may be deemed “acts of part performance which go along with, relate to, and confirm the agreement” and “were clearly done in part execution thereof.” Id. If the only proof of an alleged agreement “to

deviate from a written contract is the oral exchanges between the parties, the writing controls.”

Id.

Here there is evidence of a modification not only in plaintiff’s admissions in this proceeding, but also in his e-mail correspondence with the Company. In an e-mail dated October 21, 2006 to Bill Bozsnyak and Caruso, plaintiff stated with regard to the paycheck he took on October 20, 2006, “I was taking this paycheck as a final one, until we had an answer from Bradley Kabaash, or unless we brought in additional funds before we ran out of money”

Thus, in sum, Carrizzo alleges that he terminated his employment in March of 2007 for cause after SearchHelp was unable to pay his bimonthly salary, and a \$50,000 bonus. SearchHelp avers that plaintiff submitted a resignation letter in February of 2007, and, by his own acknowledgment waived compensation, together with CEO William Bozsnyak and COO Brian O’Connor, until SearchHelp was able to raise sufficient equity capital to meet its ongoing operating expenses. As stated, questions of fact are presented with respect to the claim of defendant’s breach of contract, as Carrizzo acknowledges in this action that he waived payment of his salary due to liquidity problems at SearchHelp. His e-mails support such waiver. The terms of the oral waiver are disputed and raise factual issues. Accordingly, it is unnecessary to address defendant’s second affirmative defense that plaintiff breached his contract by a failure to perform his duties as President, particularly to raise equity financing.

Turning to the Second Cause of Action, the issue of whether New York Labor Law § 198 which govern the wages of an employee extends to executives is currently before the Court of Appeals on a certified question from the Second Circuit Court of Appeals. Pachter v. Bernard Hodes Group, Inc., 505 F.3d 129 (2nd Cir 2007); Pachter v. Bernard Hodes Group, Inc., 9 NY3d 971 (2007). In the interim, and in the absence of contrary authority in the Appellate Division Second Department, this court is bound by the ruling of the First Department that an executive has no cognizable claim under Labor Law § 198. Taylor v. Blaylock & Partners, L.P., 240 AD2d 289 (1st Dept 1997); Schuit v. Tree Line Management Corp., 46 AD3d 405, 405-406 (1st Dept 2007). The First Department decisions are premised upon Gottlieb v. Kenneth D. Laub & Co. (82 NY2d 457, (1993)), where the Court of Appeals held that “categories of employees” entitled to statutory protection under Labor Law § 191 “are limited” by definitional exclusions for


“employees serving in an executive, managerial or administrative capacity.” Supra at p 461). The Second Department has not answered the question directly as it has held only that a commissioned salesman who was selling ads for the Yellow Pages was an employee entitled to recover for withheld wages under § 193 of the statute. Gennes v. Yellow Book of New York, 23 AD3d 520 (2d Dept 2005). Although the salesman had a title of “account executive” the court did not address the issue of whether the plaintiff was an executive or whether executives are covered by the statute.

Turning to the motion for dismissal based upon spoliation, when a party disposes of “essential physical evidence such that its opponents are ‘prejudicially bereft of appropriate means to either present or confront a claim with incisive evidence,’ the spoliator may be sanctioned by the striking of its pleading * * * [and] the sanction of dismissal of a pleading may be imposed even absent willful and contumacious conduct if a party has been so prejudiced that dismissal is necessary as a matter of fundamental fairness.” Friel v. Papa, 36 AD3d 754, 755 (2d Dept 2007).

When claiming spoliation, a claimant bears the burden of showing that “the evidence destroyed was central to [its] case or that [it] w[as] prejudiced by its destruction.” It is evident therefor that disposal of the Treo standing alone is insufficient to sustain defendant’s burden. Nevertheless, the disposal of the Treo and its timing are curious and sufficient under the circumstances to permit “discovery designed to elicit evidence relevant to spoliation.” See, Lamb v. Maloney, 46 AD3d 857, 858 (2d Dept 2007); see also, Ingoglia v. Barnes & Noble College Booksellers, ___ AD3d ___, 852 NYS2d 337, 338 (2d Dept 2008).

Accordingly, a hearing is scheduled for April 23, 2008, at 10:00 A.M., on the issue of whether plaintiff took intellectual property and proprietary information of the corporation by means of his computer or TREO, and on the issue of whether the disposal of plaintiff’s TREO meets the standard for granting an order of spoliation.

Dated: April 10, 2008

ENTERED
 APR 14 2008
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE

 J.S.C.