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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

EUGENE BIEDERMANN,

Plaintiff,

-against-

SKYLINE RESTORATION, INC., JOHN KALAFATIS, Individually, JOHN TSAMPAS, Individually and WILLIAM PIERRAKEAS, Individually,

Defendants.

Motion Sequence # 003
Submitted March 20, 2008

INDEX NO: 12071/05

The following papers were read on this motion:

Notice of Motion/Order to Show Cause.....1
Exhibits in Support of Motion.....2
Affirmation in Opposition.....3
Reply Affirmation.....4

Requested Relief

Motion by defendants, SKYLINE RESTORATION INC., JOHN KALAFATIS, individually, JOHN TSAMPAS, individually, and WILLIAM PEIRRAKEAS, individually, for reargument and renewal of plaintiff's motion to strike defendants' answer or for preclusion is granted. Upon renewal, a more limited penalty for non-disclosure is granted to the extent indicated below.

Background

This is an action for breach of contract, unjust enrichment, and violation of Labor Law § 191-c and § 198. Defendant, SKYLINE RESTORATION, INC. (hereinafter referred to as "SKYLINE") is engaged in the business of performing facade restoration and other construction services for commercial and residential buildings. Defendant, JOHN KALAFATIS, is the President of SKYLINE. Defendants, JOHN TSAMPAS and WILLAIM PEIRRAKEAS, are alleged to be the other officers of the corporation.

Plaintiff, EUGENE BIEDERMANN, was employed by SKYLINE as a "project manager and sales representative" pursuant to a written contract dated March 10, 2003. The contract provided that plaintiff was to supervise those projects which he solicited as well as other projects assigned to him by the company. Part of plaintiff's responsibility as a project manager was to maintain cost records for the projects which he supervised.

The contract provided that plaintiff was to be paid an annual base salary of $78,000. In addition, plaintiff was to be eligible for certain semi-annual bonuses. For those projects which plaintiff solicited, he was to be paid a bonus of 50% of the net profit on the projects. Net profit was defined as the contract price less direct costs, overhead, and "direct management fees." Direct costs included labor, materials, and equipment rental. Although the contract provided that the bonus was "in addition" to base salary, the practice of the parties was to include plaintiff's base salary in direct labor costs.[1] Overhead was fixed at 10% of the contract price. The contract provided that SKYLINE had sole discretion to

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[1]See letter from Eugene Biedermann dated March 9, 2005 and attached statement. The March 9 letter is annexed as an exhibit to the reply affirmation of Michael Maizes in support of defendants' motion.

determine the direct management fees for the projects. For those projects which plaintiff did not solicit, he was to be paid a bonus of 33% of the net profit on the projects. The net profit on a project which plaintiff did not solicit was calculated in the same manner, except without a deduction for a direct management fee on the project. Plaintiff was also to be paid $200 per month as reimbursement for his automobile expense, including fuel, parking, and tolls. Finally, plaintiff was to be reimbursed for automobile insurance premiums, subject to a maximum of $2,000 per year.

The contract was for a period of one year and was to renew automatically unless either party gave written notice of termination. In early March of 2005, the parties were in negotiation for a renewal of plaintiff's contract.[2] While there was clearly no renewal, the parties are in dispute as to how their relationship ended. Plaintiff claims that defendants terminated the contract effective March 10, 2005. Defendants claim that plaintiff quit effective January 7, 2005, in effect abandoning all unfinished projects.

The action was commenced on August 1, 2005. Plaintiff seeks to recover bonuses, referred to in the verified complaint as "net commissions," of $99,099 for 2003, $19,935 for 2004, and $537,565 for 2005. The complaint contains a table which identifies the contracts upon which commissions are sought by job number. The contracts are broken down by year, and the table has columns displaying the contract price, direct costs, overhead, and net profit for the various contracts. Plaintiff has calculated his commissions

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[2]See letter from Eugene Biedermann dated March 9, 2005 which is annexed as an exhibit to the reply affirmation of Michael Maizes in support of defendants' motion.

based on 50% of net profit, as though all of the projects were solicited by plaintiff.[3] Nevertheless, plaintiff has not deducted a direct project management fee from the contract price in calculating the commission for any of the projects. As to those projects which continued after termination of plaintiff's contract, the table shows estimated commissions based on "net profits" without any deduction for direct project costs. In addition to the commissions, plaintiff seeks unpaid salary of $13,500, un-reimbursed automobile expense of $466, and un-reimbursed automobile insurance premiums of $337 for the period January 1-March 10, 2005.

On January 13, 2006, plaintiff served defendants with a notice for discovery and inspection. The documents requested pertained to "plaintiff's compensation," W-2 forms, and other aspects of the employment relationship between plaintiff and SKYLINE.[4] Plaintiff did not specifically request documents containing cost information relating to the various projects.

On May 12, 2006, defendants produced a "spread sheet," showing data on approximately 50 of the projects.[5] The project numbers in the spread sheet correspond to the job #'s listed in the complaint. The spread sheet contained columns showing the contract price, "cost plus overhead," and profit on each project. The spread sheet also contained a column designated as "Gene," which apparently showed the net commissions to be credited to plaintiff, subject to any offsets or defenses on the contract. As would be

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[3]Although job # 1056 shows a net commission of $51,300, the correct figure is apparently $5,130.

[4]Ex. L to defendants' motion for reargument and renewal at 2.

[5]Ex. M to defendants' motion for reargument and renewal.

expected, because of the detailed nature of construction work, there are discrepancies between the spread sheet and plaintiff's figures in many instances. Nonetheless, there is precise agreement as to the net commission earned for several of the projects.[6]

The spread sheet shows data on three of the projects which continued in 2005 and for which no direct cost deduction was made by plaintiff. For project #1126, on which plaintiff seeks an estimated commission of $136,224, the spread sheet shows an $8,071 loss and a "negative commission" of $2,824. For project #1127, on which plaintiff seeks an estimated commission of $211,553, the spread sheet shows an $8,136 loss and a negative commission of $2,847. For project #1169, on which plaintiff seeks an estimated commission of $3,487, the spread sheet shows a commission of $725.[7] The spread sheet does not contain any data on project #1118, on which plaintiff seeks an estimated commission of $186,300.

On September 21, 2006, plaintiff served a second notice for discovery and inspection, requesting the same documents requested in the first notice. The second notice also requested copies of the contract for each job listed in the complaint and the "underlying documentation that substantiates each and every contract."[8] With the second notice, plaintiff served a memorandum identifying the projects as to which plaintiff claimed

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[6]See, e.g. job #'s 1001, 1102, and 1103.

[7]Although project # 1169 and project # 1169.1 both show a location of 37 West 57th Street, the spread sheet contains separate figures for each project. For purposes of the present discussion, the court has aggregated the commissions on the two projects.

[8]Defendants' Ex. O at 3.

there were discrepancies between the spread sheet and plaintiff's figures.[9] The memorandum noted that, for a number of jobs, defendants had calculated plaintiff's commission at 35% rather than 50% of net profit. The memorandum asserted that plaintiff did not have cost figures for the jobs which continued in 2005 and acknowledged that plaintiff needed cost figures in order to compute his commissions on those projects. Finally, the memorandum identified those projects as to which the spread sheet did not contain any data.

On December 19, 2006, the court relieved defendants' counsel based upon defendants' failure to pay attorneys' fees and a breakdown of the attorney-client relationship. The court subsequently extended the discovery deadline until February 12, 2007. After defendants failed to comply with plaintiff's discovery demand, the court extended the deadline for document discovery to March 16 and the deadline for depositions to April 30, 2007. According to defendants, discovery was impeded because SKYLINE utilized a "split check" system. Pursuant to this system, a vendor was issued one (1) check covering materials supplied to several different projects. Moreover, it appears that defendants relied upon plaintiff to maintain cost records on the individual projects.

On June 11, 2007, the court certified the case as ready for trial, subject to a stipulation executed the same date. The stipulation provided that plaintiff was "to have access to boxes of disclosure provided by defendant, to be arranged by counsel," according to individual project. The stipulation further provided that depositions of the parties were to follow plaintiff's inspection of the documents. Finally, the stipulation

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[9]Defendants' Ex. N.

provided that a note of issue would be filed after completion of discovery but, in any event, within 90 days of the date of the stipulation and certification order.

On August 10, 2007, defendants' files for over 50 jobs were made available to plaintiff. The files contained subcontracts, paid invoices, receipts, and payroll records. However, documentation as to payment for costs on individual projects was still not available because of the "split check" system. Moreover, files for two of the jobs which continued after the termination of plaintiff's contract, #1118 and #1127, were not provided by defendants.

In view of the outstanding requests, the court extended the discovery deadline to October 11, 2007. When defendants still failed to comply, plaintiff moved to strike the answer or preclude testimony as to cost. In response to plaintiff's motion, defendants produced "profit and loss" statements pertaining to the various jobs. The profit and loss statements were produced by defendants' present counsel, who were substituted, on October 17, 2007, after the discovery deadline. Defendants assert that the profit and loss statements were generated as an interim measure pending location of back up documents to substantiate the cost data. Nevertheless, plaintiff objected that the profit and loss statements were inconsistent with the spread sheets previously produced by defendants. Although the back up documents had still not been produced, defendants' new counsel offered to reschedule a date for discovery and inspection.

By Short Form Order, dated February 13, 2008, the court granted plaintiff's motion to strike the answer based upon defendants' wilful failure to provide discovery. The court granted plaintiff judgment as to liability and directed an inquest on the issue of damages. Additionally, the court precluded defendants from offering any evidence as to claimed

losses or calculations with respect to project numbers which were not substantiated in discovery.

Defendants now move for reargument and renewal of the court's February 13, 2008 order. In moving to reargue the motion to preclude, defendants assert that the court misapprehended the nature of the services performed by plaintiff as well as plaintiff's access to the information contained in the requested documents. In support of the motion to renew, defendants submit all of the documents which were produced on August 10, 2007. While the documents were not segregated by job on August 10, they have now to some extent been organized according to job number.

In opposing reargument, plaintiff contends that the sanction imposed by the court was appropriate. In opposing renewal, plaintiff asserts that the documents produced on August 10, 2007 are not "new facts." Plaintiff argues that defendants have offered no reasonable justification for failing to produce the material during discovery or, at least, in opposition to the prior motion.

The Law

CPLR § 3126 provides that, if any party refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, the court may make such orders as are just, including an order deeming issues resolved, prohibiting the introduction of evidence, or striking out pleadings. The court has discretion to impose a sanction if a party fails to make a timely response to a disclosure order or fails to make a good faith effort to address discovery requests meaningfully (*Kihl v Pfeffer*, 94 NY2d 118, 700 NYS2d 87, 722 NE2d 55 [C.A.1999]). Nevertheless, there is a strong

public policy in favor of resolving cases on the merits (*Hyde Park Motor Co. v Sucato*, 24 AD3d 724, 808 NYS2d 703 [2nd Dept. 2005]). Thus, absent evidence of an intentional default or a pattern of neglect, and absent prejudice to the party seeking disclosure, a monetary sanction is more appropriate than an order precluding evidence or striking a pleading. In order to assess the potential prejudice to plaintiff caused by defendants' discovery default, the court will begin by considering the nature of plaintiff's claims.

Article 6 of the Labor Law sets forth a comprehensive set of statutory provisions enacted to ensure employees the prompt payment of their wages (*Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220, 715 NYS2d 366, 738 NE2d 770 [C.A. 2000]). The term "wages" means the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis (Labor Law § 190[1]). Thus, the earned commissions of a "sales representative" are wages. Such commissions are required to be paid within five business days after termination of the sales representative's contract, or within five days after the commissions become due, if the commissions become due after termination of the representative's contract (Labor Law § 191-c). "Wages" also includes benefits or wage supplements such as reimbursement for expenses, as well health, welfare, and retirement benefits earned by the employee (Labor Law § 190[1]; § 198-c[2]). Thus, if plaintiff is an "employee" within the meaning of Article 6, plaintiff's wages would include his auto expense and insurance reimbursement.

The term "employee" is defined broadly as "any person employed for hire by an employer in any employment" (Labor Law § 190[2]). However, the term "commission salesman" does not include an employee whose principal activity is of a supervisory,

managerial, executive or administrative nature (Labor Law § 190[6]). To determine whether plaintiff is an independent contractor, as opposed to an employee who is protected by Article 6, the court must consider the degree of control exercised by the purported employer over the results produced or the means used to achieve the results (*Bynog v Cipriani Group*, 1 NY3d 193, 770 NYS2d 692, 802 NE2d 1090 [C.A.2003]). Factors relevant to assessing control include whether the worker 1) worked at his own convenience, 2) was free to engage in other employment, 3) received fringe benefits, 4) was on the employer's payroll, and 5) was on a fixed schedule (Id).

Plaintiff's contract nominally refers to him as a "sales representative," a type of employee protected by Article 6. The contract provided that plaintiff was to render "full time professional services" to the company. However, it also provided that plaintiff was to work "sufficient days necessary for the proper operation and timely progress and completion of the projects under his supervision." Thus, it appears that plaintiff worked at his own convenience and not on a fixed schedule. Although plaintiff was entitled to reimbursement for car expense and auto insurance, he was not eligible to participate in any other fringe benefit plans. The contract provided that plaintiff could not participate in a joint venture as a vendor or customer of SKYLINE without the approval of the company. Nevertheless, this provision did not prohibit plaintiff from engaging in other employment which did not create a "conflict of interest" with his work for the company. Thus, it is far from clear that plaintiff was an employee entitled to maintain an action under Article 6 of the Labor Law.

Furthermore, even if plaintiff were an employee within the meaning of Article 6, his commissions may not constitute wages within the meaning of the Article. A bonus may constitute "wages," if it bears a direct relationship to the employee's performance and is

not a reward given to all employees to share in the success of the business (*Truelove, supra*). Incentive compensation or profit-sharing arrangements are not considered wages if they are partially contingent on the financial success of the employer (Id). Plaintiff's bonus was in part dependent upon his performance in controlling costs. However, the bonus was also related to SKYLINE's profit on the job, a matter not necessarily related to plaintiff's performance as a project manager. Thus, it is far from clear that plaintiff's bonus constitutes wages within the meaning of the Article.

A plaintiff who does not have a wage claim under the Labor Law may still pursue a common law contractual remuneration claim (*Sorrentino v Bohbot Entertainment & Media*, 265 AD2d 245, 697 NYS2d 263 [1st Dep't 1999]). However, an independent contractor who brings a common law action for contractual remuneration is subject to common law defenses on the contract. For example, a party sued for breach of contract may assert an offset, or claim arising from a separate transaction (*In re Midland Ins. Co.*, 79 NY2d 253, 582 NYS2d 58, 590 NE2d 1186 [C.A. 1992]). Thus, projects on which there was a loss may give rise to "negative commissions" which could be offset against plaintiff's other claims. Moreover, a party who has repudiated the contract has committed a total breach and may be prevented from suing on the contract (*Norcon Power Partners v Niagara Mohawk Power Corp.*, 92 NY2d 458, 682 NYS2d 664, 705 NE2d 656 3 C.A. [1998]). For the purpose of assessing potential prejudice to plaintiff from defendants' discovery default, the court will consider plaintiff as having a claim for breach of contract, subject to contract defenses, and an unjust enrichment claim.

The court will now consider the extent to which the requested documents were material and necessary to the prosecution of plaintiff's action (CPLR § 3101[a]). Since plaintiff had his own contract price and cost records for the jobs completed in 2003 and 2004, he did not require any discovery from defendants to establish a *prima facie* case for commissions earned in those years. Nonetheless, plaintiff was entitled to discovery of the documents upon which defendants rely so that plaintiff could rebut their cost and profit figures. Since plaintiff had no cost records for the projects which continued after he left SKYLINE, he had a greater need for discovery of those documents.

CPLR §3120 provides that a party may serve on another party a notice to produce and permit inspection of documents or things which are in the possession, custody, or control of the party served with the notice. A party must make a showing that the documents requested are in the other party's possession, custody, or control in order to obtain an order compelling discovery (CPLR §3124; *Linton v Lehigh Valley Railroad Co.*, 25 AD2d 334, 269 NYS2d 490 [3rd Dept. 1966]).

If it is established that a party has wilfully failed to produce documents in the party's possession or control, the penalties of CPLR § 3126 are available. Thus, CPLR § 3126 is a shield to protect a plaintiff who needs discovery to prosecute an action from wilful failure to disclose by defendant. However, CPLR § 3126 should not be used as "a sword" to impose a penalty upon defendant for failing to produce documents which are not in its control or possession (See *Williams v Roosevelt Hospital*, 66 NY2d 391, 497 NYS2d 348, 489 NE2d 94 [C.A.1985]).

Conclusion

The court does not condone defendants or their predecessor counsel for being derelict in their discovery obligations. Nevertheless, the court concludes that defendants' belated production of the documents, as well as possible defenses to plaintiff's claims, minimize the potential prejudice to the plaintiff. Moreover, because of defendants' method of record keeping and their reliance upon plaintiff to maintain cost data, it is not clear that there was an intentional default or a pattern of neglect with respect to discovery. Finally, defendants had a reasonable excuse for not presenting the discovery material on the prior motion because defendants offered to make it available for inspection.

Accordingly, upon reargument and renewal, and based upon the documents produced on August 10, 2007, it is hereby

ORDERED, that the Short Form Order of the court, dated February 13, 2008, is vacated upon 1) payment by defendants of a sanction in the amount of $2,500 to plaintiff for the necessity of bringing the motion to preclude and defending the motion to renew and reargue, and 2) service upon plaintiff's counsel of a set of bound exhibits identical to that submitted on the present motion. Defendants are precluded from offering any documents relevant to contract price, direct cost, overhead, net profit, or commissions earned, other than documents previously produced or contained in the said exhibits. Defendants may offer testimony concerning the calculation of plaintiff's commissions on specific projects only to the extent necessary to authenticate or explain the said documents. Any common law defenses to plaintiff's claims for breach of contract or unjust enrichment remain open; and it is further

ORDERED, that the stay issued in the initiating Order to Show Cause, on February 27, 2008 is hereby vacated and the parties shall appear for a conference before the undersigned on July 7, 2008 at 9:30 A.M. for certification.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: June 18, 2008

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