

Beaver v Global Document Solutions Corp.

2009 NY Slip Op 31128(U)

May 18, 2009

Supreme Court, New York County

Docket Number: 104735/07

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Index Number : 104735/2007
BEAVER, MARSHALL
vs
GLOBAL DOCUMENT SOLUTIONS
Sequence Number : 001
PARTIAL SUMMARY JUDGMENT

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

was 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
MAY 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 5/18/09

JUDITH J. GISCHE, J.S.C. 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
MARSHALL BEAVER,

Plaintiffs,
-against-

GLOBAL DOCUMENT SOLUTIONS
CORPORATION,

Defendants.

DECISION/ORDER
Index No.: 104735/07
Seq. No.: 001

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

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

Papers	Numbered
Def's n/mot (partial SJ),	1
Pltf's n/x-mot (partial SJ).....	2
Def's reply/opp affirm.....	3
Plaintiff's reply/opp affirm.....	4
3/26/09 Transcript.....	5

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

Defendant Global Document Solutions Corporation ("GDS") moves for partial summary judgment: [1] dismissing plaintiff's first cause of action for breach of contract "to the extent it relates to commissions allegedly due on the Campbell-Ewald Account ("CE Account") for the period commencing October 2005 and; [2] dismissing plaintiff's second cause of action under Labor Law § 191 (1) in its entirety. CPLR § 3212. Plaintiff, a former Account Executive for GDS, opposes the motion and cross-moves for summary judgment on the complaint.

Note of issue has been filed, and these motions were brought within the time provided under the CPLR. Brill v. City of New York, 2 N.Y.3d 648 (2004). The court's

decision follows.

Plaintiff testified at his deposition that on or about March 1991, he entered into an oral employment agreement with Mark Goodstadt, Chief Executive Officer of GDS, on behalf of GDS¹. Under the oral agreement, plaintiff was to provide services to defendant as a commissioned salesman of the defendant's products and/or services. Under this oral agreement, plaintiff stated at his deposition that he was supposed to earn a 10% commission on sales of any account he secured. Mr. Goodstadt corroborated these claims at his own deposition (M. Goodstadt Transcript, 4/29/08, 119:19). There is no dispute that plaintiff was always an at will employee.

Plaintiff began receiving commissions on the CE Account in February 2004. Plaintiff claims commissions for the CE Account were a combination of 5% of some sales and 2.5% of other sales, depending on whether the defendant received batch orders or individual orders. Mr. Goodstadt testified that plaintiff was to receive commissions on the CE Account at rates of 5% or 2.5%, depending upon profitability. According to Mr. Goodstadt, GDS had a policy of reducing commissions based upon the profit margin of the respective account "that goes back as far as [he could] remember with [GDS]" (M. Goodstadt Transcript, 4/29/09, 120:25 - 121: 2). Mr. Goodstadt further testified that, prior to 1997, the reduced-commissions policy was communicated to new account executives orally.

Plaintiff denies that the reduced-commissions policy ever existed. Plaintiff has also

¹ In 1991, plaintiff began working for a company called American Direct Mail ("AMD"). It is undisputed that in approximately 2000, GDS became the holding company for ADM.

provided the affidavit of William Martin, a former Account Executive for GDS, who states that during his tenure with GDS, commissions were never calculated based upon project profitability, but rather, "were a percentage of whatever was sold and the percentage was based upon the agreement with the Account Executive."

According to Mr. Goodstadt, sometime during June or July of 2005, Mary Hilde from Campbell-Ewald met with Mr. Goodstadt and asked that plaintiff be "removed from the [CE Account] (M. Goodstadt Transcript, 4/29/09, 210:22)." Mr. Goodstadt then testified that plaintiff orally resigned from the CE Account on or around September 2005 (M. Goodstadt Transcript, 4/29/09, 212:21). At this point, GDS claims that a new commissions structure was agreed to, whereby plaintiff would received reduced commissions on the CE Account, in exchange for plaintiff's servicing the CE Account during the course of the transition from plaintiff to a new sales representative. GDS maintains that plaintiff never objected to the new commissions structure during the course of his employment with GDS.

Plaintiff, however, contends that he only sought to be "removed from the customer service aspect of the CE Account", because he was not hired to perform customer service on defendant's accounts and was not given adequate support from GDS staff to do so.

Plaintiff states in his affidavit that at the September 2005 meeting with Mr. Goodstadt:

...I told Mark Goodstadt that I was not hired to provide customer service, that the Agreement with Defendant was for sales services, and that I expected to continue to receive my commissions on the CE Account as I originated the account.

At that meeting Mark Goodstadt was extremely hostile towards me, he forcefully stated that I was already paid on the CE Account and then threatened to cut my commissions for the previous quarter if I was not 'careful.'

I ended the conversation, as I was Intimidated by Mark Goodstadt's

threatening tone; at that time Mark Goodstadt informed me that he was going to pay me a declining commission on the CE Account moving forward. I objected to this new unilaterally imposed commission structure citing various other employees that were paid full commission without providing customer service. He told me that he would think over his decision to change the CE Account commission structure moving forward. I asked him to put any changes in writing, which he agreed to do.

To date, I have not received anything in writing concerning a new commission structure for the CE Account.

For the months of October, November and December 2005, GDS paid plaintiff at a rate of one-half of his previous commission rates, for the months of January, February and March 2006, GDS paid plaintiff at a rate of one-fourth of his previous commission rates; and for the months of April, May and June 2006, GDS paid plaintiff at a rate of one-eighth of this previous commission rates. Plaintiff resigned from GDS in or about February or March 2006. After June 2006, plaintiff ceased receiving commissions on the CE Account. GDS maintains that the reduced commission rates were agreed to as a result of plaintiff's transition off of the CE Account. Plaintiff claims that these reduced commissions were not agreed to, but were a unilateral act by GDS, and therefore seeks to recover the balance of the commissions allegedly due.

Arguments of the parties

Plaintiff has asserted three causes of action: [1] breach of the oral agreement by failing to pay plaintiff the agreed upon commissions; [2] violation of Labor Law § 191 (1) (c); and [3] unjust enrichment. Plaintiff argues that because the parties did not enter into a new agreement modifying the commission structure for the CE Account, the defendant then unilaterally adjusted the commissions due to plaintiff which constitutes a breach of the operative agreement. Plaintiff also maintains that, as a commissioned salesman, the

defendant's failure to pay commissions for at least the months after June 2006 through his resignation from GDS in or about February or March 2007 constitutes a breach of Labor Law § 191 (1).

Defendant argues that since plaintiff was an at-will employee, plaintiff's continued employment with GDS after October 2005 is an assent to the modification of the commissions structure with respect to the CE Account. Defendant contends that the Labor Law § 190 (1) claim should be dismissed because plaintiff's theory of recovery on this cause of action is based upon the calculation of sums due, rather than on the withholding of commissions.

Discussion

On the respective motion and cross-motion for summary judgment, each proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if this burden is met, will it then shift to the party opposing summary judgment, who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial,

therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 NY2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2d Dept. 2003).

Since plaintiff was an at-will employee, GDS was free to modify the terms of plaintiff's employment, subject only to plaintiff's right to leave his employment if he found the new terms unacceptable (see Hanlon v MacFadden Publs., 302 NY 502 [1951]; Waldman v Englishtown Sportswear, 92 AD2d 833 [1st Dept 1983]). Although plaintiff contends that he did not agree to the commissions modification, having remained in defendant's employment, plaintiff is deemed to have assented to the modification and, in effect, commenced employment under a new contract (*supra*). Therefore, the court rejects plaintiff's argument that his explicit consent to the new commissions structure was necessary for the modification to take effect. Rather, the modification essentially serves as a firing and re-hiring of plaintiff with the modified commission rates, superceding the previous commission schedule for the CE Account.

Nonetheless, both the motion and cross-motion must be denied. Neither side has provided sufficient information for the court to determine whether GDS prospectively modified the commissions due to plaintiff on the CE Account sales, or whether GDS unlawfully withheld commissions which were already due to plaintiff at the time of the modification.

In addition, there is a factual dispute about whether GDS and plaintiff agreed to a profit-based reduction of commissions, such that GDS could unilaterally reduce commissions due to plaintiff at all times during the course of plaintiff's employment. Plaintiff claims that the terms of his oral agreement entitled him to receive full commissions on the CE Account for the duration of his employment with GDS, irrespective of profit margins. Plaintiff also maintains that a reduced-commissions policy did not exist. The affidavit from Mr. Martin, a former Account Executive, supports this claim.

Plaintiff's claims were refuted by Mr. Goodstadt at his deposition as well as in his affidavit submitted on this motion. John Slaney, Chief Operating Officer for GDS, has also submitted a letter from plaintiff to Mr. Goodstadt, dated May 12, 2003, which he claims is evidence that plaintiff was well aware of GDS' reduced-commissions policy based upon profitability. Although the letter, in general, gripes about a proposed "restructuring" of commissions, this letter does not serve as an acknowledgment by plaintiff of GDS' alleged longstanding policy of reducing commissions based upon profitability.

Moreover, its not even clear to the court whether GDS is claiming that it reduced plaintiff's commissions due on the CE Account, and if so, that such reduction was based on the subject project's profit margins. Therefore, this issue may in fact be a red herring.

GDS' argument that the Labor Law § 191 claim should be dismissed since plaintiff's claim is premised upon calculations of commissions, rather than GDS' alleged withholding of commissions, is unavailing. Labor Law § 191 (1) (c) provides that "[a] commission salesperson shall be paid the 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..." GDS has failed to establish that plaintiff was timely paid all commissions as they became due, and that plaintiff was not entitled to any further commissions after June 2006, when plaintiff no longer received any commissions on the CE Account.

Accordingly, for at least the reasons stated herein, both the motion and cross-motion are denied in their entirety.

Conclusion

In accordance herewith, it is hereby:


ORDERED that the motion and cross-motion for partial summary judgment are each denied.

This case is ready to be tried. Plaintiff shall serve a copy of this decision/order on the Clerk in Trial Support so that this case can be assigned for trial.

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

This shall constitute the decision and order of the Court.

Dated: New York, New York
May 18, 2009

So Ordered:


Hon. Judith J. Gische, J.S.C.

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MAY 20 2009
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NEW YORK