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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

EUGENE BIEDERMANN,

Plaintiff,

-against-

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

Defendants.

Motion Sequence #4
Submitted May 19, 2009

INDEX NO: 12071/05

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....2
Affidavit in Opposition.....3
Reply Affirmation.....4

Defendants, SKYLINE RESTORATION, INC. (hereinafter referred to as "SKYLINE"), JOHN KALAFATIS, individually, JOHN TSAMPAS, individually, and WILLIAM PEIRRAKEAS, individually, move for an order, pursuant to CPLR §3212, granting defendants summary judgment dismissing the complaint of plaintiff, EUGENE BIEDERMANN. Plaintiff opposes the motion, which is determined as follows:

This is an action for breach of contract, unjust enrichment, and violation of Labor Law § 191-c and § 198. 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 and a shareholder of SKYLINE. Defendants, JOHN TSAMPAS and WILLIAM PEIRRAKEAS, are also shareholders 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 "[i]t is the intention of the parties that Biedermann shall supervise those projects upon which he was the salesman. "Part of plaintiff's responsibility as a project manager was to maintain cost records for the various jobs.

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." If plaintiff solicited a project and it was accepted by SKYLINE, plaintiff was to be paid a bonus of 50% of "the Net" on the project. "Net" was defined as the contract price less "direct hard costs," overhead, and "direct project management fees." Direct costs included labor, materials, and equipment rental. Overhead was fixed at 10% of the contract price. The contract provided that SKYLINE had sole discretion to determine the direct project management fee for a project. Although the contract provided that the bonus was "in addition" to base salary, the practice of the parties was to deduct plaintiff's base salary from his share of the net profits. (Exhibit "B" to the moving papers).

For those projects which plaintiff did not solicit, he was to be paid a bonus of 33% of "the net" on the project. The "net" on a project which plaintiff did not solicit was calculated in the same manner as above, except without a deduction for a direct project management fee. The contract provided that, "[i]t is strictly understood that any bids must

be approved by the Company", whether or not the project was solicited by plaintiff. With respect to projects not solicited by plaintiff, the contract provided that the semi-annual bonus would be paid "upon the completion of the project."

Plaintiff was also to be paid $200 per month as reimbursement for his automobile expenses, including fuel, parking, and tolls. Additionally, 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 (1) year and was to be "extended" automatically, unless either party gave written termination notice at least thirty (30) days prior to the end of the term. The contract provided that it could be terminated by the company "for cause," which included the failure of plaintiff to perform his duties, willful misconduct injurious to the company, violation of law; conviction of a crime involving fraud, dishonesty or moral turpitude, negligence, or breach of a covenant set forth in the agreement. The covenants set forth in the agreement included a covenant not to compete and a covenant not to solicit SKYLINE's employees. The contract provided that plaintiff was entitled to a warning letter prior to termination for failure to perform his duties or negligence.

The contract could be terminated by the company without cause and provided that it "shall be terminated in the event of death or any disability." In the event that plaintiff's employment was terminated by death or disability, his beneficiary or estate was to receive any accrued but unpaid salary for services rendered to the date of termination, and any accrued vacation. In the event of disability, plaintiff was to receive his base salary for up to thirty (30) days following the commencement of the period of disability. In the event the disability extended beyond thirty (30) days, plaintiff was to receive "leave and benefits

consistent with the Company's family and medical leave policy."

The contract provided that in the event of termination for cause, "Biedermann's right to compensation hereunder shall cease, and Biedermann shall be entitled to receive unpaid base salary for services rendered to the date of termination, except in the event of theft, then Company shall be entitled to set-off. However, it is expressly understood that Biedermann will not be entitled to any accrued bonus compensation should the company terminate him for cause."

However, the contract provided that, if the company terminated plaintiff's employment without cause, "Biedermann shall receive an accounting of the Bonus for projects completed, only if Biedermann timely executes an agreement and general release of all claims against the company in a form provided by the company."

Finally, the contract provided that in the event plaintiff terminated his employment with forty-five (45) days written notice, "the Company shall pay to Biedermann unpaid base salary for services rendered to date of termination, vacation accrued to the date of termination, and any Bonus accrued to the date of termination." The contract is silent as to plaintiff's rights in the event that he voluntarily terminated his employment on less than forty-five (45) days written notice.

On May 1, 2004, the parties modified their agreement effective May 21, 2004. (Exhibit "C" to the moving papers). Although the modification states that it is a "new agreement," it operated as an extension of the prior agreement, except as to the modified terms. The modification provided that, "[all future jobs will be based on 20% overhead." "Future jobs" were defined as "all jobs after Job #1135." The modification further provided that the projects at 560 West 218th Street and 600 West 218th Street would be "based on

35% of profit to ... Biedermann and 20% overhead." Additionally, the modification provided that plaintiff's "work week to be reduced by ½ day on Fridays."

On January 3, 2005, plaintiff wrote to SKYLINE's president, JOHN KALAFATIS, as follows: "Confirming our previous conversation at our meeting on December 20, 2004, my last day of work will be January 7, 2005." (Exhibit "D" to the moving papers). Plaintiff stated that the only projects which would not be "100 % complete" were 560 West 218th Street (Job # 1126), 600 West 218th Street (Job # 1127), Pelham Union Free School District (Job # 972), and 37 West 57th Street (Job # 1169). With regard to the Pelham School District project, plaintiff stated that he was "awaiting the School's decision" as to whether to apply a $36,000 credit to another job or " take a negative change order and end this project." Plaintiff stated that, "Final accounting based on completed project[s] and those mentioned above will be submitted on January 7, 2005."

However, plaintiff was not able to render a "final accounting" as promptly as he anticipated. On January 13, 2005, plaintiff wrote again to KALAFATIS stating that the final accounting was "being handled by my accountant." (Exhibit "E" to the moving papers). In the letter, plaintiff stated that there were "numerous projects" which were started in 2003 but completed in 2004 for which "commissions" had not been paid. Plaintiff also stated that the only 2004 projects which were not completed were Jobs #1126, 1127, and 1169.

On March 9, 2005, plaintiff wrote again to KALAFATIS, enclosing schedules for the projects completed in 2003 and 2004, showing contract price, cost, overhead, and net profit. (Exhibit "F" to the moving papers). Plaintiff also enclosed a summary sheet showing commissions due for the various projects of $193,319. In the letter, plaintiff stated that, in addition to this amount, he was seeking $69,906 for work performed at 600 West 218th

Street. Finally, plaintiff stated that he had "bid" the project at Sherwood (Job #1118), suggesting that he was seeking at least a partial commission for this project.

On June 29, 2005, counsel for plaintiff wrote to KALAFATIS, advising him that plaintiff intended to hold him personally liable for all "debts, wages, and/or salaries, and/or commissions due and owing," in the event that plaintiff was unable to recover the sums from SKYLINE. (Exhibit "H" to the moving papers). In the letter, counsel purported to give notice that plaintiff also intended to hold the other shareholders liable for these claims.

This action was commenced on August 1, 2005. Plaintiff asserted claims against SKYLINE for breach of contract, unjust enrichment, double damages for unpaid sales commissions pursuant to Labor Law § 191-c(3), and unpaid wages, attorney's fees, and costs pursuant to Labor Law § 198. Plaintiff also asserted claims for unpaid wages against the individual defendants pursuant to Business Corporation Law § 630.

Plaintiff seeks to recover semi-annual bonuses, referred to in the complaint as "net commissions," on a series of projects completed in 2003, a series of projects completed in 2004, and four projects which continued in 2005 after plaintiff's employment terminated. The projects which continued in 2005 include jobs #1126, #1127, and #1169, referred to in plaintiff's letter of January 3, and also job #1118, referred to in his letter of March 9, 2005. In the complaint, plaintiff calculates all commissions at the 50% rate, as he claims to have solicited all of the projects. Nevertheless, in calculating the commissions, plaintiff has not deducted a direct project management fee from the contract price for any of the projects. As to those projects which continued in 2005, plaintiff acknowledged that the net commissions could not be calculated until direct projects costs were determined upon

completion of the project.[1] 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, all for the period January 1-March 10, 2005.

By Short Form Order, dated June 18, 2008, the Court precluded defendants from offering any documents relevant to contract price, direct cost, overhead, net profit, or commissions earned, other than documents previously produced, or submitted by defendants in support of their motion to renew and reargue plaintiff's motion to strike the answer. Defendants were permitted to offer testimony concerning the calculation of plaintiff's commissions on specific projects only to the extent necessary to authenticate or explain the said documents. Subsequent to the order of preclusion, a note of issue was filed on January 8, 2009.

On the instant motion, defendants move for summary judgment dismissing the complaint and argue that plaintiff is not entitled to a commission on three (3) of the projects which were completed in 2005, Job #'s 1118, 1126, and 1127, because plaintiff neither solicited those jobs nor served as the project manager. Additionally, defendants argue that there are no commissions owing to plaintiff because they are entitled to deduct "negative commissions" on projects which resulted in a loss. Defendants argue that plaintiff may not assert a claim for unpaid sales commissions pursuant to Labor Law § 191-c or unpaid wages pursuant to Labor Law § 198 because he is not an "employee" within the meaning

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[1]Although the complaint shows "net commissions" due on the four projects which continued into 2005, the commissions are simply pro forma figures derived by deducting project overhead from contract price and dividing the resulting number by 2. The court notes that although job # 1169 was apparently a "future job," commenced after job # 1135, plaintiff did not calculate the overhead at a 20% rate.

of Labor Law § 190(2). Finally, defendants argue that the individual defendants are not liable for plaintiff's unpaid wages, even assuming that he has a claim against the corporation pursuant to the contract or the Labor Law.

The Court begins by observing that defendants do not claim that SKYLINE terminated plaintiff's employment either with or without cause. Since defendants claim that plaintiff "left us" voluntarily, plaintiff is entitled to "any bonus accrued to the date of termination," if he complied with, or was excused from, the 45-day notice requirement. If plaintiff's letter of January 3, 2005 is deemed a written notice of termination, his termination date should have been February 17, 2005, rather than January 7, 2005, the date specified in plaintiff's letter. While plaintiff did not comply with the 45-day notice requirement, the Court concludes that compliance should be excused under the circumstances herein. First, plaintiff, in a sense, continued to work for SKYLINE through March 9, 2005, as he was involved in developing cost figures through that date. Indeed, in his letter of January 13, 2005, plaintiff states he had agreed with KALAFATIS to continue to use "Skyline's cell phone, EZ Pass, and BP gas card." (Exhibit "E" to the moving papers). Plaintiff's use of these items confirms that he was continuing to perform services on behalf of SKYLINE. Secondly, defendants have not argued that plaintiff should be denied his accrued bonus because he did not give the required 45-day notice. Since the notice requirement is excused, the Court will proceed to determine whether any bonus accrued as of plaintiff's termination date.

The interpretation of a contract is dependent upon the intention of the parties viewed in the light of surrounding circumstances. Where the parties' intention may be gathered from the four (4) corners of the instrument, interpretation of the contract is a question of

law (*Elite Promotional Mktg. v Stumacher*, 8 AD3d 525, 779 NYS2d 528 [2d Dept 2004]). Because the parties' intention as to the meaning of the term "any bonus accrued to the date of termination" may be gleaned from the four corners of the contract, its interpretation is a question of law for the Court.

Clearly, a bonus would have "accrued" if a project was completed prior to plaintiff's termination date. However, the contract provides that bonuses on projects not solicited by plaintiff were payable "upon the completion of the project." Thus, it appears that no bonus "accrued" on projects not solicited by plaintiff which were not completed as of the termination date. The contract does not expressly state whether a bonus "accrued" as to projects which were solicited by plaintiff, but not completed as of the termination date. However, the provision that "Biedermann shall supervise those projects upon which he was the salesman" suggests that BIEDERMANN's supervision of the projects was the essence of the contract. By supervising the project, plaintiff would be in a position to control costs and maximize the net profit on the project. Obviously, once plaintiff's employment was terminated, this benefit to the employer would be lost. Thus, the Court interprets the term "any bonus accrued" as applying only to projects solicited by plaintiff which were substantially complete as of the termination date of his employment.

This interpretation is consistent with the expressed intent of the parties as to bonuses on non-solicited projects. This interpretation is supported by the fact that there appears to be no basis upon which to apportion a bonus on a project completed after plaintiff's termination of employment. Since there are invariably delays in construction, the work does not proceed at a steady rate. Therefore, apportioning a bonus on the basis of the time which plaintiff was employed, as compared to the time for completion of the entire

project, would not necessarily result in a fair or rational apportionment.

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, 795 NYS2d 502, 828 NE2d 604 [C.A. 2005]). Failure to make such a *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C.A. 1986]).

On the present motion for summary judgment, it is defendants' burden to establish *prima facie* that no bonus was payable on a project because it was not substantially completed on plaintiff's termination date. The court concludes that defendants have made this *prima facie* showing as to Jobs #1118, #1126, #1127, and #1169. The fact that cost information as to these projects was not available suggests that they were not substantially complete as of plaintiff's termination date. Thus, the burden shifts to plaintiff to show a triable issue as to whether these projects were substantially complete as of his termination date. However, with respect to Job #972, the Pelham Union Free School District project, defendants have not made the required *prima facie* showing. Plaintiff's awaiting a decision by the District whether to apply their credit to another job or "end the project" suggests that it was substantially completed as of his termination date.

Plaintiff offers no evidence that Jobs #1118, #1126, #1127, and #1169 were substantially completed on January 3, 2005 or within forty-five (45) days thereafter. Since plaintiff offers no evidence that job #1118 was substantially completed, the Court need not determine whether plaintiff solicited job #1118 by helping another employee prepare a bid on the project. Since plaintiff offers no evidence that jobs #1126 and #1127 were substantially completed, the Court need not determine whether plaintiff served as the project manager for those jobs by supervising other project managers. Accordingly, defendants' motion for summary judgment dismissing plaintiff's breach of contract claim is granted as to plaintiff's claim for a semi-annual bonus on Jobs #1118, #1126, #1127, and #1169. Defendants' motion for summary judgment dismissing plaintiff's breach of contract claim is denied as to plaintiff's claim for a semi-annual bonus on all other projects.

The Court will next consider whether defendants are entitled to offsets for "negative commissions" generated by losses on certain of the projects. The contract provides that, "Biedermann will at all times faithfully, industriously, and to the best of his ability, perform all duties that may be required by virtue of the position of [project] manager." However, there is no provision in the contract whereby plaintiff promised or guaranteed that SKYLINE would earn a profit on any particular project. Because "the performance of contracts for personal services depends upon the skill, volition and fidelity of the person who was engaged to perform such services...it is impracticable, if not impossible, for a court to supervise or secure the proper and faithful performance of such contracts" (*Matter of Baby Boy C*, 84 NY2d 91, 615 NYS2d 318, 638 NE2d 963 [C.A.1994]). Because performance depends upon skill, volition, and fidelity, a Court will usually not grant specific performance of a personal services contract. The dependence of performance upon these factors also

limits the Court's ability to enforce a "best of his ability" provision in such a contract.

SKYLINE's net profit on a project was dependent to some extent upon plaintiff's performance in controlling costs. However, the net profit was also dependent upon a myriad of other factors, such as wage rates, the price of materials, and the cost of equipment rental. On projects which plaintiff solicited, net profit was also dependent upon the direct management fee, a cost item subject to SKYLINE's discretion. Thus, it would be "impracticable if not impossible" for the court to determine that plaintiff's failure to perform his duties faithfully and industriously resulted in a loss on any particular project.

Moreover, the Court notes that defendants are seeking offsets for negative commissions earned on Jobs #1118 and #1127. Since plaintiff was not the project manager for those jobs, which were completed after he left employment, the unfairness in charging plaintiff for losses on those jobs is readily apparent. The Court determines that defendants are not entitled to offset negative commissions on projects which resulted in a loss. To the extent that defendants' motion for summary judgment is predicated upon such offsets, defendants' motion for summary judgment is denied.

Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded (*IDT Corp. v Morgan Stanley*, 12 NY3d 132, 879 NYS2d 355, 907 NE2d 268 [C.A. 2009]). The parties entered into an enforceable contract governing plaintiff's work as a project manager, and plaintiff's unjust enrichment claim arises out of his work on the various projects. Accordingly, defendants' motion for summary judgment dismissing plaintiff's claim for unjust enrichment is granted.

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 "employee" is defined broadly as "any person employed for hire by an employer in any employment"(Labor Law § 190[2]). 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]). A "commission salesman" is an employee whose principal activity is the selling of goods or services. 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]). A commission salesperson shall be paid his wages, commissions, and all other monies earned not less frequently than once a month (Labor Law § 191[1][c]). An employee may enforce such a wage or commission claim in an action pursuant to Labor Law § 198.

Labor Law § 191-a(d) defines a "sales representative" as a person who solicits orders in New York but is not covered by Labor Law § 191(1)[c] because he is an independent contractor. Labor Law § 191-c(1) provides that when a contract between a principal and a sales representative is terminated, all earned commissions shall be paid within five (5) business days after termination or within five (5) business days after they become due, if the commissions are not due when the contract is terminated. Labor Law § 191-c(3) provides that a principal who fails to pay earned commissions timely shall be liable to the sales representative in a civil action for double damages. The prevailing party in any such action shall be entitled to an award of reasonable attorney's fees, court costs,

and disbursements.

In moving for summary judgment dismissing plaintiff's Labor Law claims, defendants argue that plaintiff is not an employee as a matter of law. However, as discussed above, plaintiff may maintain an action for unpaid commissions pursuant to Labor Law § 191-c even though he is an independent contractor. Indeed, only an independent contractor may maintain such an action. Accordingly, defendants' motion for summary judgment dismissing plaintiff's claim pursuant to Labor Law § 191-c is denied.

On the other hand, if plaintiff is an independent contractor, he is not entitled to pursue an action pursuant to Labor Law § 198. To determine whether plaintiff is an employee, as opposed to an independent contractor, 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).

On the present motion for summary judgment, it is defendants' burden to establish *prima facie* that plaintiff was not an employee within the meaning of Labor Law § 190(2). The contract provided that "Biedermann shall work sufficient days necessary for the proper operation and timely progress and completion of the projects under his supervision." This language suggests that plaintiff worked at his own convenience. However, the contract also provided that plaintiff was to "render full time professional services," suggesting that he actually worked on a fixed schedule. Moreover, the May 2004 modification provided that plaintiff's work week was reduced by a half day on Fridays, also suggesting a fixed

schedule. The contract provided that plaintiff could not participate in a joint venture with a supplier or customer of SKYLINE without the approval of the company. The contract provided that, aside from reimbursement for automobile expense and business lunches, plaintiff "will not be eligible to participate in or receive benefits under any other employee benefit plans." However, the contract termination provisions suggest that plaintiff was eligible for vacation pay, disability, and "family and medical leave" benefits. Although plaintiff's base salary was deducted from his commissions, he appears to have been on SKYLINE's payroll. The Court concludes that defendants have not established *prima facie* that plaintiff was not an employee within the meaning of Labor Law § 190(2). Therefore, defendants' motion for summary judgment dismissing plaintiff's claim pursuant to Labor Law § 198 is denied.

Business Corporation Law § 630(a) provides that the ten (10) largest shareholders of every corporation, whose shares are not listed on a national securities exchange or regularly quoted in an over the counter market, shall jointly and severally be personally liable for all debts, wages, or salaries due and owing to any of its laborers, servants, or employees. The statute further provides that before the employee shall charge a shareholder for such services, he shall give written notice to the shareholder that he intends to hold him liable under the section. Such notice shall be given within one hundred eighty (180) days after termination of employment, or within sixty (60) days after examination of the record of shareholders. Because timely notice to the individual shareholder is a condition precedent to the bringing of an action for unpaid wages, it is an essential element of plaintiff's BCL § 630 claim (*Garcia v Tamir*, 269 AD2d 423, 702 NYS2d 904 [2d Dept 2000]). An action against a shareholder for unpaid wages shall be

commenced within ninety (90) days after the return of an execution unsatisfied against the corporation (Business Corporation Law § 630).

Plaintiff's counsel's letter of June 29, 2005 purported to give notice to all shareholders that plaintiff intended to hold them liable for his unpaid commissions. However, because KALAFATIS was the only shareholder named in the letter, the other shareholders did not receive notice of plaintiff's claim. Accordingly, defendants TSAMPAS and PEIRRAKEAS' motion for summary judgment dismissing plaintiff's claims for unpaid wages pursuant to Business Corporation Law § 630 is granted. Because plaintiff has not yet obtained a judgment against SKYLINE, and execution has not been returned unsatisfied, the complaint is dismissed without prejudice as to defendant KALAFATIS on this claim. Based on the foregoing, it is hereby

ORDERED, that defendants' motion for summary judgment dismissing the complaint is granted, in part, and denied, in part, as set forth above.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: July 16, 2009

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