

Rosenfeld v Tuleh LLC

2009 NY Slip Op 31882(U)

August 20, 2009

Supreme Court, New York County

Docket Number: 115632/08

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

IRA ROSENFELD

INDEX NO. 115632/08

Plaintiff,

-v-

TULEH, LLC

MOTION DATE _____
MOTION SEQ. NO. 001

Defendant.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were 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 is decided in accordance with the attached memorandum decision.

FILED
AUG 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/20/09

W
WALTER B. TOLUB, 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: IAS PART 15

-----x
IRA ROSENFELD

Plaintiff,

Index No.115632/08
Mtn Seq.001

-against-

TULEH LLC,

Defendant.

FILED

AUG 21 2009

COUNTY CLERK'S OFFICE
NEW YORK

WALTER B. TOLUB, J.:

This is Defendant's motion to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (7).

Facts

Plaintiff claims that he performed labor and services for the Defendant as its Director of Operations. Plaintiff further claims that he incurred expenses in the course of his employment and was not reimbursed for them in the amount of \$46,259.94 (Expenses).

Plaintiff commenced this action seeking reimbursement of the Expenses as "Wage Supplements" pursuant to Labor Law §198-c. Additionally, Plaintiff seeks \$11,564.09, 25% of the Expenses as statutory liquidated damages and \$22,000 in attorneys' fees (Labor Law §198). Alternatively, Plaintiff seeks \$92,519.88 in liquidated damages pursuant to Labor Law §191-c.

Defendant moves to dismiss the Complaint arguing that Plaintiff's "executive" position excludes him from recovery under the Labor Law and that Plaintiff is not entitled to Labor Law

protections.

Discussion

A party may move for judgment dismissing one or more causes of action asserted against it on the grounds that a defense is founded upon evidence or the pleading fails to state a cause of action (CPLR §3211). When deciding a motion to dismiss, the court considers whether the parties can produce evidence, in admissible form to support their allegations (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §36:10. If there are no triable issues of fact, the motion is granted (Id.).

Article 6 of the Labor Law regulates the payment of wages by employers. Section 190(2) of the Labor Law defines an "employee" as any person employed for hire by an employer in any employment. Other subdivisions of Article 6 of the Labor Law include "executives" as employees except where there is an explicit exclusion (Pachter v. Bernard Hodes Group, Inc., 10 NY3d 609 [2008]).

Plaintiff here argues that he is entitled to reimbursement of his expenses as "wage supplements" pursuant to Labor Law §198-c. However, §198-c(3) states that "[t]his section shall not apply to any person in a bona fide executive, administrative, or professional capacity whose earnings are in excess of nine hundred dollars a week." (Labor Law §198-c[3]). Plaintiff earned

over \$200,00 a year (Shelsky Aff. Ex. A). As such, the Labor Law does not afford Plaintiff any protection regarding his "wage supplement" claims. Since Plaintiff is not afforded Labor Law protections, he is not entitled to statutory attorneys' fees under §198 1-a (Pachter v. Bernard Hodes Group, Inc., 10 NY3d 609 [2008]; Gottlieb v. Kenneth D. Laub & Co., 82 NY2d 457 [1993]). Plaintiff's Labor Law §198 claims are therefore dismissed.

Alternatively, Plaintiff argues that he is permitted to recover under Labor Law §191-c, which provides that commission salespeople shall be paid their wages within five days of their termination and that if Plaintiff recovers, he is entitled to double damages and attorneys' fees.

Plaintiff's appears to argue that he is a commission salesperson because his salary was calculated at 5% of the annual net sales of the Defendant.

However, Plaintiff falls outside the definition of commission salesperson because Labor Law §190(6) excludes individuals whose activity is of supervisory, managerial, executive or administrative in nature. Plaintiff's principal activity was not the selling of any goods, nor was his principal activity raising financing for the Defendant, it was being the Director of Operations.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the

Complaint is dismissed with costs and disbursements to the Defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: *8/20/09*

W

HON. WALTER B. TOLUB, J.S.C.

FILED
AUG 21 2009
COUNTY CLERK'S OFFICE
NEW YORK