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SHORT FORM ORDER

INDEX
NO.: 4884-09

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 7-30-09
SUBMITTED: 10-8-09
MOTION NO.: 005-MG

MARLA ADLER; STEPHEN BAUSENWEIN; AL DEICHLER; MIKE FROST; ED HALPIN; RICH HERBST; KEVIN KELLY; ARTHUR LANDSMAN; ERIK MALAGON; JOE O'BRIEN; and DAN WATTS,

Plaintiffs,

-against-

20/20 COMPANIES; 20/20 COMMUNICATIONS, INC.; VERIZON COMMUNICATIONS, INC.; VERIZON SERVICES CORP.; TRG CUSTOMER SOLUTIONS; BARRY MILLAY, in his individual and official capacities; WILLIAM ROWLAND, JR., in his individual and official capacities; and JASON GREEN, in his individual and official capacities,

Defendants.

THOMPSON WIGDOR & GILLY LLP
Attorneys for Plaintiffs
85 Fifth Avenue
New York, New York 10003

ZABELL & ASSOCIATES, PC
Attorneys for Plaintiffs
4875 Sunrise Hwy, Suite 300
Bohemia, New York 11716

GREENBERG TRAURIG, LLP
Attorneys for Defendants Verizon Communications Inc. and Verizon Services Corp.
200 Park Avenue
New York, New York 10166

Upon the following papers numbered 1 24 read on this motion to dismiss ; Notice of Motion and supporting papers 1-13 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 14-21 ; Replying Affidavits and supporting papers 22-24 ; it is,

ORDERED that this motion by the defendants Verizon Communications, Inc., and Verizon Services Corp. for an order dismissing the complaint insofar as it is asserted against them is granted.

The plaintiffs allege that, in 2007 and 2008, the 20/20 defendants and the Verizon defendants jointly employed them as account executives and sales representatives to sell Verizon

FiOS internet and television services. The plaintiffs allege that, while so employed, the 20/20 and Verizon defendants engaged in unlawful practices in violation of the Labor Law. For example, they failed to pay the plaintiffs earned commissions and made unlawful deductions from their wages. The plaintiffs allege that they repeatedly complained about such practices, but to no avail. On December 24, 2008, the plaintiffs were advised that their office would be closing and that their employment would be terminated effective January 1, 2009. The plaintiffs subsequently applied for positions with the defendant TRG Customer Solutions (hereinafter "TRG") selling Verizon FiOS internet and television services. The plaintiffs allege that they were not hired by TRG because they had been blacklisted by the Verizon defendants and placed on a do-not-hire list. The plaintiffs subsequently commenced this action alleging that the defendants had engaged in unlawful retaliation in violation of Labor Law § 215 and tortious interference with prospective economic or contractual relations. The defendants Verizon Communications, Inc., and Verizon Services Corp. move pursuant to CPLR 3211 (a) (1) and (7) to dismiss the amended complaint insofar as it is asserted against them.

It is well settled that, on a motion to dismiss pursuant to CPLR 3211, the court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see*, **Leon v Martinez,** 84 NY2d 83, 87-88; **Rovello v Orofino Realty Co.**, 40 NY2d 633, 634). When extrinsic evidence is considered, however, the allegations are not deemed true, and the motion should be granted when the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted (**Biondi v Beekman Hill House Apt. Corp.**, 257 AD2d 76, 81). Allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not presumed to be true and are not accorded every favorable inference (**Id.** at 81).

Labor Law § 215 provides, in pertinent part, as follows:

> No employer or his agent, or the officer or agent of any corporation, shall discharge, penalize, or in any other manner discriminate against any employee because such employee has made a complaint to his employer...that the employer has violated any provision of this chapter....

In order to state a claim under Labor Law § 215, a plaintiff must adequately plead that, **while employed by the defendant,** he or she made a complaint about the employer's violation of the Labor Law and was terminated or otherwise penalized, discriminated against, or subjected to an adverse employment action as a result (**Higueros v New York State Catholic Health Plan**, 526 F Supp 2d 342, 347 [EDNY] [emphasis added]). The documentary evidence submitted by the defendants establishes that the plaintiffs were employed by the 20/20 defendants rather than by the Verizon defendants. The marketing agreement between the defendants

Verizon Services Corp. and 20/20 Communications provides that 20/20 is an independent contractor and not an agent of Verizon; that 20/20 staff a sales force responsible for soliciting sales from customers door-to-door; that 20/20's employees are not considered employees or agents of Verizon for any purpose; that 20/20 is responsible for hiring, training, managing and compensating its employees; that 20/20's employees are under the sole and exclusive direction, supervision, and control of 20/20; and that 20/20 is responsible for compliance with all of the laws, rules, and regulations of their employment including, but not limited to, their hours, working conditions, and payment of wages.[1] Additionally, some of the plaintiffs executed employment agreements with 20/20 PowerVision, an affiliate of the defendant 20/20 Companies, in which they acknowledged that they were employees of 20/20 PowerVision and in which the terms of their compensation were set forth.

The plaintiffs contend that they were jointly employed by Verizon and 20/20, and they urge this court to apply the economic-reality test found in **Zheng v Liberty Apparel Co.** (355 F3d 61 [2nd Cir]) to determine the issue. As the Verizon defendants correctly point out, **Zheng** has not been followed by any New York State courts. The Verizon defendants urge this court to follow **Bynog v Cipriani Group** (1 NY3d 193) or **Carter v Dutchess County** (735 F2d 8 [2nd Cir]), which they contend consider factors that are substantively identical to determine whether an employment relationship exists.

In **Bynog v Cipriani Group** (*supra*), the issue was whether professional banquet waiters were independent contractors or employees within the meaning of the Labor Law. In reaching the determination that they were independent contractors, the Court of Appeals considered five factors: (1) whether the waiter worked at his own convenience, (2) whether he was free to engage in other employment, (3) whether he received fringe benefits, (4) whether he was on the employer's payroll, and (5) whether he was on a fixed schedule. Contrary to the Verizon defendants' contentions, these factors are used primarily to distinguish independent contractors from employees. Unlike the **Carter** factors (*infra*), they do not bear directly on whether workers who are already employed by a primary employer are also employed by a secondary employer. Instead, they help courts determine if particular workers are independent of all employers (*see*, **Zheng v Liberty Apparel Company**, *supra* at 67-68 [distinguishing the **Carter** factors from the **Superior Care** factors[2] used by the federal courts to identify independent contractors]). Accordingly, the court finds that **Bynog** is inapplicable to the facts of this case.

Carter v Dutchess County (*supra*) has been cited by at least one New York State court. In **Bauin v Feinberg** (6 Misc3d 1038[A]), the issue was one of joint employment, and the

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[1] A prior marketing agreement between Verizon Services Corp. and 20/20 Video Voice Data, Ltd., contains substantially the same terms.

[2] **Brock v Superior Care, Inc.**, 840 F2d 1054

court applied the economic-reality test found in Carter. That test has four factors: (1) whether the alleged employer had the power to hire and fire the employees, (2) whether it supervised and controlled employee work schedules or conditions of employment, (3) whether it determined the rate and method of payment, and (4) whether it maintained employment records. The record in this case reveals that all of these employment responsibilities were exercised by 20/20 rather than Verizon. Accordingly, the court finds that, under the **Carter** test, Verizon did not jointly employ the plaintiffs.

In **Zheng v Liberty Apparel Co.** (*supra*), upon which the plaintiffs rely, the Second Circuit held that, in determining joint employment, the court's analysis is not limited to the four factors identified in **Carter** and that the court is free to consider any other factors it deems relevant to its assessment of the economic realities. Relying on **Rutherford Food Corp. v McComb** (331 US 722), the Second Circuit identified several factors and opined that the joint-employment determination should be based on the circumstances of the whole activity. In **Rutherford**, the Supreme Court found that a slaughterhouse jointly employed workers who de-boned meat on its premises, despite the fact that a boning supervisor with whom the slaughterhouse had entered into a contract directly controlled the terms and conditions of their employment. In determining that the meat boners were employees of the slaughterhouse, the Supreme Court noted that they did a specialty job on the production line, that their work was a part of the integrated unit of production at the slaughterhouse, that the responsibility under the boning contracts passed from one boning supervisor to another without material changes in the work performed at the slaughterhouse, that the slaughterhouse's premises and equipment were used for the boners' work, that the boners had no business organization that shifted as a unit from one slaughterhouse to another, and that the manager of the slaughterhouse closely monitored the boners' performance and productivity (**Zheng v Liberty Apparel Co.**, *supra* at 70).

Here, unlike in **Zheng** and **Rutherford**, the plaintiffs did not perform piecework that required minimal training or equipment and that constituted an essential step in an integrated manufacturing process on Verizon's premises. Rather, they worked out of 20/20's premises performing work that was not part of an integrated production unit, that was not performed on a predictable schedule, and that required specialized skill or expensive technology (**Id**. at 72-73). 20/20 sought and obtained business from a variety of contractors, not just Verizon (**Id**. at 72). When, as here, the subcontractor does not perform work exclusively or predominantly for a single customer or client, there is no sound basis on which to infer that such customer or client has assumed the prerogatives of an employer (**Id**. at 75). The degree to which Verizon supervised the plaintiffs' work is indicative of joint employment only if it demonstrates effective control of the terms and conditions of the plaintiffs' employment. Supervision of contractual warranties, such as quality and time of delivery, has no bearing on the joint employment inquiry since such supervision is consistent with a typical subcontracting arrangement. Thus, supervision of workers is not indicative of joint employment when, as here, the principal merely gave specific instructions to a service provider concerning performance under a service contract (**Id**. at 75, *citing* **Moreau v Air France**, 343 F3d 1179, 1188). The court finds that the plaintiffs

worked for Verizon only to the extent that their direct employer, 20/20, was hired by Verizon (**Id.** at 74), and the fact that Verizon used other subcontractors such as TRG, who competed for work and had different employees, to sell Verizon products does not warrant a contrary conclusion (**Id.** at 74, n 11). In sum, the court finds that, even under the heightened scrutiny of **Zheng** and **Rutherford**, the subcontracting relationship between Verizon and 20/20 was a typical outsourcing arrangement that did not rise to the level of a joint employment of the plaintiffs.

In view of the foregoing, the court finds that, contrary to the plaintiffs' contentions, 20/20 did not act as Verizon's agent within the meaning of the Labor Law § 2 (8-a), which defines an "agent" of a corporation as "a manager, superintendent, foreman, supervisor or any other person employed acting in such capacity."[3] Although the marketing agreement between 20/20 and Verizon appointed 20/20 as Verizon's limited agent, it was solely for the purpose of accessing, safeguarding, and utilizing information in connection with its communications with Verizon's customers. 20/20 was not employed by Verizon as a manager, superintendent, foreman or supervisor, nor did it act in any such a capacity. Accordingly, the plaintiff's Labor Law claims are dismissed against the Verizon defendants.

Tortious interference with prospective economic relations requires allegations that a third party would have entered into a contractual or economic relationship with the plaintiff but for the defendant's wrongful conduct (**Vigoda v DCA Prods. Plus**, 293 AD2d 265, 266; **Murtha v Kalhorn**, 237 AD2d 496, 497). In order to recover damages in such a situation, the plaintiff is required to show that the defendant used wrongful means. Such means include physical violence, fraud, misrepresentation, civil suits, criminal prosecution, or some degree of economic pressure (**Home Town Muffler v Cole Muffler**, 202 AD2d 764, 766). The plaintiffs have failed to identify the wrongful means used by the Verizon defendants to interfere with the plaintiffs being hired by TRG (*see,* **Vigoda v DCA Prods. Plus**, *supra* at 267). Moreover, the record reveals that TRG was contractually bound not to hire Verizon employees or the employees of Verizon subcontractors such as 20/20. Such covenants are enforceable (*see*, **Veraldi v American Analytical Labs.**, 271 AD2d 599, 600). Accordingly, the plaintiffs' claim for tortious interference with prospective economic relations is dismissed against the Verizon defendants.

Dated: January 5, 2010

HON. ELIZABETH HAZLITT EMERSON

J.S.C.

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[3] The term "person" includes a corporation or joint-stock association (Labor Law § 2 [8]).