

Spinac v Carlton Group, Ltd.

2010 NY Slip Op 30924(U)

April 9, 2010

Supreme Court, NY County

Docket Number: 114579/2007

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 114579/2007
SPINAC, LEVERETT J.
VS.
CARLTON GROUP, LTD.
SEQUENCE NUMBER : 003
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

for attached

is decided

FILED

APR 20 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/9/10

[Signature]

EMILY JANE GOODMAN ^{J.S.C.}

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

*3
4-20-10*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
LEVERETT J. SPINAC,

Plaintiff,

- against -

Index No. 114579/2007

THE CARLTON GROUP, LTD., CARLTON
ADVISORY SERVICES, INC., ROBERT J. GAETA
and HOWARD L. MICHAELS,

Defendants.

FILED
APR 20 2010
NEW YORK
COUNTY CLERK'S OFFICE

EMILY JANE GOODMAN, J.S.C.:

In this action to recover commissions that he allegedly earned as an employee of defendants, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment as to defendants' liability on the complaint's sixth cause of action. That claim seeks to recover attorney's fees, liquidated damages and statutory costs pursuant to Labor Law (LL) § 198.

Defendants cross-move, pursuant to CPLR 3212 and 3211 (a) (7), for an order dismissing the complaint as against defendants Robert Gaeta and Howard Michaels.

FACTUAL ALLEGATIONS

Plaintiff Leverett Spinac, a licensed real estate salesperson, was employed by defendants beginning in 2001. Defendants are engaged in the business of providing services relating to, inter alia, debt and equity placement and investment sale transactions. Spinac and defendant Carlton Advisory Services, Inc. (CAS) entered into an agreement, dated as of April 17, 2006 (the Employment Agreement), pursuant to which CAS agreed to employ Spinac in a position having the title of "broker," to pay him a "draw" of \$1,500 per week against his future commissions, and to pay him commissions for his services in "originating" and "placing" financial transactions. As set forth in the Employment Agreement, originating a transaction means "bringing to [CAS] a client who engages [CAS] to list an asset for sale or financing," and placing a transaction means "finding the appropriate lender and/or investor who provides the necessary capital for [the] transaction" (Employment Agreement, ¶ 4 [A]).

On the same date that Spinac executed the Employment Agreement, he also executed a "fair competition agreement" between him and defendant The Carlton Group, Ltd. (Carlton Group; Carlton Group and/or CAS, Carlton), wherein he made various agreements "[i]n consideration of ... [his] employment or other business relationship or affiliation ... with [Carlton Group] and/or any of its current or future subsidiaries, affiliates, and/or successors."

Defendant Robert Gaeta is allegedly the controller and vice president of CAS, and defendant Howard Michaels is also a principal of Carlton. The complaint alleges that Gaeta and Michaels are licensed brokers who are affiliated with Carlton, and who had responsibility for supervising Spinac, and for ensuring that he was paid the commissions and compensation that he earned pursuant to the Employment Agreement.

Carlton terminated Spinac's employment in July or August 2006. Spinac alleges that Carlton has not paid him certain commissions that he earned in connection with transactions which closed after his employment was terminated. Foremost among those are commissions for a transaction (the Royal Kunia Transaction) in which a Mr. Horita retained Carlton to obtain financing that would enable him to redeem a real estate development project in Hawaii, known as the Royal Kunia Phase II project, that was in bankruptcy proceedings. Spinac allegedly originated that transaction for Carlton, and performed placement services in connection with that transaction both before and after the termination of his employment, but was paid no commission after that transaction closed in March 2007.

By December 2006, Spinac had also allegedly earned other commissions, in connection with matters other than the Royal Kunia Transaction, which amounted to more than \$100,000. Spinac has submitted an affidavit in support of his motion which asserts that he earned and was not paid commissions of between \$60,000 and \$90,000 in connection with mortgage financing for the Standard Oil Building in Los Angeles.

In December 2006, Spinac entered into a release agreement (the Release Agreement) with both Carlton Group and CAS, pursuant to which CAS agreed to pay Spinac \$25,000:

as full consideration for all monies, including all salary, bonuses, and commissions, now owed or which may be owed in the future, to Spinac by Carlton, except for fees or commissions, if any, which may be due to Spinac with respect to the Royal Kunia transaction, if such transaction is consummated.

In the Release Agreement, and in exchange for the foregoing payment, Spinac also agreed to release Carlton and its officers, directors, managers, shareholders and employees from any claims which he had or might in the future have against those parties, including, inter alia, claims under Labor Law §§ 194-198. Spinac allegedly executed the Release Agreement both (a) in reliance upon defendants' representations that he would be paid his commissions relating to the Royal Kunia Transaction when that transaction closed, and (b) because, at that time, he was unemployed, suffering from a heart condition which thereafter required surgery, not represented by counsel, and in need of the \$25,000 that he would receive if he signed the agreement.

The complaint asserts six causes of action which allege claims: (1) as against all defendants for breach of contract; (2) as against all defendants seeking to set aside the Release Agreement on the ground of duress; (3) as against all defendants seeking to rescind the Release Agreement on the ground that it was procured by fraud; (4) as against Gaeta and Michaels, alleging that they are liable, as licensed brokers who supervised Spinac, for the commissions earned by, and owed to, him; (5) as against Carlton Group, Gaeta and Michaels for tortious interference with contract; and (6) as against all defendants, that they have violated LL §§ 191 and 193, and are liable, under LL § 198, for attorney's fees, liquidated damages and certain statutory costs.

DISCUSSION

Spinac's motion is granted, but only to the extent that summary judgment is granted in his favor as to CAS's liability on the complaint's sixth cause of action, and under LL § 198, with respect to Spinac's claim for a commission for the origination of the Royal Kunia Transaction.

Prior to November 29, 2009, and as relevant here, LL § 198 (1-a) provided that:

[i]n any action instituted upon a wage claim by an employee ... in which the employee prevails, the court shall allow such employee reasonable attorney's fees and, upon a finding that the employer's failure to pay the wage required by this article was willful, an additional amount as liquidated damages equal to twenty-five percent

of the total amount of the wages found to be due.¹

Spinac has established that he was an “employee” for purposes of that provision, that the commission which he claims to be owed for the origination of the Royal Kunia Transaction constituted “wages” for purposes of that provision, and that CAS’s failure to pay him that commission constituted a failure to pay a wage required by Article 6 of the Labor Law.

According to the definitions set forth in LL § 190, Spinac was an “employee” and, more particularly, a “commission salesman.” LL § 190 (2) defines “employee” to mean “any person employed for hire by an employer in any employment,” and LL § 190 (6) defines “commission salesman” to mean “any employee whose principal activity is the selling of any goods, wares, merchandise, services, real estate, securities, insurance or any article or thing and whose earnings are based in whole or in part on commissions.” Spinac was an employee within the latter definition, because his principal activity as an employee involved the selling of certain of the services that Carlton provided, and because his earnings were based substantially upon commissions.

Pursuant to LL § 190 (1), “[w]ages’ 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.” Thus, the commission which Spinac claims for the origination of the Royal Kunia Transaction constituted wages.

Defendants contend that any commission which Spinac claims in connection with the Royal Kunia Transaction did not constitute wages under the Labor Law because: (a) pursuant to the terms of the Employment Agreement, it was within Michaels’s sole discretion to determine whether such a commission would be paid; and (2) such a commission was incentive compensation which is exempt from the provisions of the Labor Law. However, those contentions are without merit.

The manner in which Spinac’s commissions were to be determined is set forth in section 4 of the Employment Agreement, which provides that “Broker will receive fees and or commissions

¹LL § 198 (1-a) was amended effective November 24, 2009, but the amendment only applied to offenses which were committed on or after that date.

for consulting and brokerage services to Carlton which Broker procures as outlined below,” and which further provides, in part (A) thereof:

[1] For each brokerage commission earned by Carlton for transactions for which Broker is the sole broker of record for Carlton ... and where Howard L. Michaels (“HLM”) or no other Carlton broker has significant involvement (if HLM or another Carlton broker plays a material role in said transaction then any fee due Broker will be at HLM’s sole discretion and will be determined on a case by case basis), Broker shall be paid as set forth below (the “Broker’s Portion”):

[2] 20% for origination of a transaction (i.e. bringing to Carlton a client who engages Carlton to list an asset for sale or financing) and 20% for placement of a transaction (i.e. finding the appropriate lender and/or investor who provides the necessary capital for said transaction) of the total net commission received by Carlton Further, in order to earn the full listing or placement fee, Broker is expected to materially perform all the requisite responsibilities associated with the origination and/or placement.

[3] Said commission increases to 25% for the origination and 25% for the placement of said transaction when Carlton receives net commissions equal to \$1,000,000 from transactions procured and generated by you

[4] Said commission increases to 30% for the origination and 30% for the placement of said transaction when Carlton receives additional net commissions ... equal to \$1,000,000 from transactions procured and generated by you

[5] For purposes of this “step-up” arrangement, net commissions received on the [Royal Kunia Transaction] will count as 75% towards your step up

[6] The basis for calculating commission splits reverts to 20% for origination and 20% for placement and follows the same split structure outlined above in year two.

[7] For transactions originated by HLM where Broker is materially involved and play[s] a significant and value added role in assisting HLM with the placement of such transaction, any fee due Broker will be at HLM’s sole discretion and will be determined on a case by case basis.

[8] In the event any broker at Carlton in addition to Broker contributes to the earning of the Broker’s commission, then Broker shall work out a mutually acceptable fee arrangement with such other broker in writing and Carlton shall have no responsibility or liability therefore (other than the responsibility to pay the normal broker’s portion of the commission).

(Paragraph numbering added.) Defendants assert that Spinac did not “materially perform all the requisite responsibilities associated with the origination and/or placement” of the Royal Kunia Transaction -- as would have been required by quoted paragraph 2 above in order for Spinac to earn the full origination or placement fee -- because two senior Carlton brokers were brought into that

transaction, at Spinac's request, "to perform the tasks required to get it done" (Gaeta Affid., ¶ 13; *see also* Def. Mem. of Law, at 5). Thus, defendants argue, the Royal Kunia Transaction was one in which "another Carlton broker play[ed] a material role," as set forth in quoted paragraph 1 above, and, pursuant to that paragraph, the amount of any fee due Spinac in connection with that transaction was to be determined by HLM, i.e., Michaels, in his sole discretion.

However, defendants' self-serving interpretation of the contractual language violates basic tenets of contractual interpretation. Spinac acknowledges that two other Carlton brokers were involved in the placement of the Royal Kunia Transaction, but contends that he was entirely responsible for the origination of that transaction. Defendants, in asserting that the services of two other Carlton brokers were required in order "to perform the tasks required to get [the Royal Kunia Transaction] done," appear to concede that Spinac was wholly responsible for the origination of the transaction. Defendants, nevertheless, assert that, because the two other brokers were involved in the placement of the transaction, the contractual language gave Michaels sole discretion to determine the amount of any commission which Spinac should receive in connection with the origination of the transaction.

However, that interpretation of the contractual language would render certain of the above-quoted contractual provisions meaningless, and it is a basic principle of contract interpretation that "contract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect" (*Isaacs v Westchester Wood Works*, 278 AD2d 184, 185 [1st Dept 2000]). The contractual provisions quoted above clearly indicate an intent to treat the origination commission and the placement commission as separable, and to permit Spinac to earn the full amount of either one of those commissions without earning the full amount of the other (*see e.g.* paragraph 2 [providing that, "in order to earn the full listing or placement fee, Broker is expected to materially perform all the requisite responsibilities associated with the origination and/or placement" [emphasis added]).

Moreover, in relative terms, paragraph 1 is a general and introductory provision whereas the

succeeding paragraphs are more specific (*see e.g.* paragraph 7 [which consists of a more limited and specific restatement of part of the language contained in paragraph 1]). “Where there is an inconsistency between a specific provision and a general provision of a contract, the specific provision controls” (*DeWitt v DeWitt*, 62 AD3d 744, 745 [2d Dept 2009] [citation and internal quotation marks omitted]). Thus, the contractual provisions which treat the origination and placement commissions as separable control, because they are the more specific provisions.

Accordingly, inasmuch as it is undisputed that Spinac “materially perform[ed] all the requisite responsibilities associated with the origination” of the Royal Kunia Transaction, as required by paragraph 2 above, he earned the full amount of that origination commission, and defendants’ assertions that it was within Michaels’s sole discretion to determine the amount of any commission which Spinac would be paid in connection with the origination of the Royal Kunia Transaction are incorrect.

Defendants are also incorrect in asserting that the commission for the Royal Kunia Transaction constituted incentive compensation which was exempt from the Labor Law. Where a claim has been found to be for incentive compensation and not for wages under the Labor Law, it has generally been because the claim was for supplemental income, or compensation, which was payable, in addition to a guaranteed base salary, as an incentive (*see Daley v Related Cos.*, 179 AD2d 55, 59 [1st Dept 1992]). Here, by contrast, the Employment Agreement did not guarantee Spinac a base salary with additional compensation to be paid as an incentive, but provided that he would receive a weekly “draw” which was “to be offset against future commissions,” and the commissions provided for in the Employment Agreement were clearly the primary means of compensating Spinac for the services he provided thereunder (*see id.*). Accordingly, the commissions which Spinac seeks are wages under the Labor Law rather than incentive compensation (*see id.*).

As Spinac asserts, and as defendants do not dispute, Carlton failed to pay the origination commission for the Royal Kunia Transaction within the time prescribed for such payment by LL § 191 (1) (c). Thus, Carlton failed to pay wages that were required by Article 6 of the Labor Law.

The court also finds that Carlton's failure to pay Spinac the origination commission for the Royal Kunia Transaction was a knowing, deliberate and voluntary disregarding of its obligation to pay that commission -- and, thus, that the failure to pay was "willful" -- in view of, inter alia: (a) the Employment Agreement's statement that, for purposes of the "step up" arrangement provided for therein, 75% of Carlton's net commissions on the Royal Kunia Transaction would be credited towards Spinac's "step-up"; (b) Carlton's failure to pay Spinac any commission in connection with the Royal Kunia Transaction despite Spinac's counsel's demand for such payment by letter dated August 29, 2007; and (c) defendants' failure to argue, on this motion, that any other broker besides Spinac was involved in the origination (as opposed to the placement) of the Royal Kunia Transaction (*see P&L Group v Garfinkel*, 150 AD2d 663, 664 [2d Dept 1989]; *see also Ayres v 127 Rest. Corp.*, 12 F Supp 2d 305, 309 [SD NY 1998]). Accordingly, pursuant to Labor Law § 198 (1-a), Spinac is entitled to liquidated damages of 25% of the unpaid origination commission,

Defendants assert that, because a bona fide dispute existed between the parties as to whether Spinac was actually owed the commissions which he claims to be owed, that precludes, as a matter of law, a finding that the failure to pay Spinac the commissions was willful. Defendants maintain: that Michaels determined, in his discretion that \$175,000 was the amount which would be paid to Spinac as appropriate compensation in connection with the Royal Kunia Transaction; that they contacted Spinac and advised him that he would be paid this amount; and that Spinac refused to accept that amount because he deemed it to be inadequate. Spinac maintains that defendants actually offered to pay him \$180,000, but that payment was conditioned upon his waiver of any claim to any additional commission in connection with the Royal Kunia Transaction.

Defendants evidently concede that Spinac was owed at least \$175,000 in commissions for the Royal Kunia Transaction, and it has been held that, where there is a dispute between an employee and an employer as to the amount of wages actually owed, the employer "must pay the employee the undisputed portion of wages claimed in order to avoid a finding that failure to pay was willful" (*In re CIS Corp., Monaco v CIS Corp.*, 206 BR 680, 689-690 [Bankr Ct, SD NY 1997]). Defendants

do not assert that they actually tendered the undisputed amount of \$175,000 to Spinac, or that they offered to pay him that amount without condition. Accordingly, inasmuch as LL § 191 (1) (c) required Carlton to pay the amount of the origination commission for the Royal Kunia Transaction to Spinac within the time prescribed by the statute, and to do so without condition -- and inasmuch as defendants do not claim to have tendered even the undisputed amount to Spinac without condition during the requisite time period -- a finding of willfulness is not precluded by the existence of a bona fide dispute.

Although the sixth cause of action is asserted against all defendants, it will be granted, in part, only as against CAS, inasmuch as Spinac has not established to the preclusion of any issue of fact, on this motion, that the three defendants other than CAS, who were not signatories to the Employment Agreement, are liable for the commissions which CAS agreed to pay in that agreement.

Moreover, although Spinac's motion for summary judgment as to liability on the complaint's sixth cause of action is being granted with respect to so much of Spinac's wages claim as is based upon the origination commission owed him in connection with the Royal Kunia Transaction, it is denied with respect to so much of Spinac's wages claim as is based upon (1) any placement commission owed in connection with the Royal Kunia Transaction, and (2) any commissions owed in connection with transactions other than the Royal Kunia Transaction.

Spinac apparently maintains that, because he originated the Royal Kunia Transaction and two other Carlton brokers were involved in the placement of that transaction, the division of the placement commission among the three brokers was governed by the provision of the Employment Agreement, previously quoted, which provides that:

[i]n the event any broker at Carlton in addition to Broker contributes to the earning of the Broker's commission, then Broker shall work out a mutually acceptable fee arrangement with such other broker in writing and Carlton shall have no responsibility or liability therefore (other than the responsibility to pay the normal broker's portion of the commission).

However, assuming that to be true, arguendo, Spinac has not established to the preclusion of any issue of fact, on this motion, that he "work[ed] out a mutually acceptable fee arrangement ... *in*

writing” (emphasis added), which divided the placement commission for the Royal Kunia Transaction among the three brokers who were involved in the placement.

Spinac’s motion for summary judgment as to liability on the sixth cause of action is denied, with respect to any commissions he claims are owed in connection with transactions other than the Royal Kunia Transaction, because Spinac has not yet “prevail[ed]” on a wage claim based upon those commissions, as is required for application of LL § 198 (1) and (1-a). Spinac evidently concedes that the Release Agreement that he executed included a release of wage claims he might have against defendants under LL §§ 194-198 based upon those commissions. There does not appear to be any express restriction on the release or waiver of wage claims under the Labor Law (*compare Wright v Brae Burn Country Club*, 2009 WL 725012, *4 [SD NY 2009]; *cf.* LL § 595 [restricting the waiver of rights to unemployment insurance]), and agreements that clearly and unambiguously release employers from liability for wage claims arising under the Labor Law have generally been held to be enforceable in the absence of fraud, duress, or undue influence (*see Gortat v Capala Bros.*, 2009 WL 3347091, *3 [ED NY 2009]; *Hummel v AstraZeneca LP*, 575 F Supp 2d 568, 570 [SD NY 2008]; *DiFilippo v Barclays Capital*, 552 F Supp 2d 417, 426 [SD NY 2008]; *Simel v JP Morgan Chase*, 2007 WL 809689, *4-*5 [SD NY 2007]). Although Spinac asserts that the Release Agreement should be set aside on the grounds of fraud and/or duress, he has failed to establish his right to such relief, to the preclusion of any issue of fact, on this motion.

Defendants’ cross motion, which seeks an order dismissing the complaint as against defendants Robert Gaeta and Howard Michaels, is denied. Defendants’ moving papers in support of that cross motion argue that the complaint should be dismissed as against the individual defendants on the grounds that (1) they cannot be held vicariously liable for the corporate debts, obligations or liabilities of Carlton, and (2) a breach of contract claim cannot be asserted against either of those individuals because they were not parties to the contract.

However, the complaint alleges that the individual defendants are liable for the payment of Spinac’s commissions primarily on the ground that they were licensed brokers who were affiliated

with the corporate defendants, who had responsibility for supervising Spinac, and for ensuring that he was paid the commissions and compensation that he earned pursuant to the Employment Agreement. Defendants' moving papers do not even address that alleged ground for the individual defendants' liability, other than noting that, generally, individual officers and directors are not liable for corporate debt. In opposition to the cross motion, plaintiff maintains that the individual defendants are personally liable to him under RPL § 442 and Department of State Regulations (holding that only the license broker may collect commissions), based on a private right of action under LL § 198, under BCL § 630, and, because they are corporate officers who actively participated in the wrongful acts of the corporation. Defendants have failed to respond to any of these arguments, and have failed to establish that they are entitled to the relief requested in the cross motion.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is granted, but only to the extent that summary judgment is granted in plaintiff's favor as to defendant Carlton Advisory Services, Inc.'s liability on the sixth cause of action, with respect to so much of plaintiff's claim as seeks the full origination commission, provided for in the Employment Agreement, dated as of April 17, 2006, for the Royal Kunia Transaction which closed in or about March 2007, and the motion is otherwise denied; and it is further

ORDERED that defendants' cross motion is denied.

This Constitutes the Decision and Order of the Court.

Dated: April 9, 2010

ENTER:



EMILY JANE GOODMAN

FILED

APR 20 2010

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