

**Stein v Sapir Realty Management Corp.**

2010 NY Slip Op 31720(U)

June 8, 2010

Sup Ct, Queens County

Docket Number: 7699/2006

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17  
Justice

<p>MARK STEIN,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p>SAPIR REALTY MANAGEMENT CORP., f/k/a ZAR REALTY MANAGEMENT CORP.,</p> <p style="text-align: center;">Defendant.</p>	<p>x</p> <p style="text-align: center;">x</p>	<p>Index Number <u>7699</u> 2006</p> <p>Motion Date <u>March 17,</u> 2010</p> <p>Motion Cal. Number <u>51</u></p> <p>Motion Seq. No. <u>6</u></p>
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The following papers numbered 1 to 18 read on this motion by plaintiff Mark Stein pursuant to CPLR 3212 for summary judgment in his favor on the first and second causes of action seeking to recover severance pay of \$250,000 with statutory interest from January 13, 2004, on the third and fourth causes of action seeking a determination that the defendant is liable for plaintiff's commissions under the contract and quantum merit theories, on the fifth cause of action for unpaid salary and vacation in the aggregate amount of \$37,293.94 with statutory interest from January 13, 2004 and the seventh cause of action for willful denial of wages in violation of New York Labor Law § 190 et seq. seeking reasonable attorneys' fees and liquidated damages in the amount of 25% of total wages (inclusive of commissions, salary and vacation time) due.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-8
Answering Affidavits - Exhibits.....	9-14
Reply Affidavits.....	15-18

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action to recover damages stemming out of an alleged breach of contract. The plaintiff is a former employee of the defendant Sapir Realty Management f/k/a Zar Realty Management who asserts that he is owed a severance payment equal to one year's annual salary after the termination of his employment agreement. The plaintiff further alleges that he is owed unpaid commission payments that were agreed to in the contract.

In or about the winter 1998/1999 the defendant hired the plaintiff to the position of Executive Vice President. On January 11, 1999, the plaintiff and defendant executed a letter contract. The letter contract stated the following:

Pursuant to our discussion we are expressing an interest in having you join Zar Realty Management Corp. (the "Company") as Executive Vice President. Your responsibilities shall include but are not limited to, the daily management of capital projects and development, construction and leasing of the Company's real estate portfolio. Also included in your responsibilities will be budget review and the asset management of the real estate portfolio, leasing oversight, handling vendor and tenant issues and additional responsibilities as may be required in the daily operation of the Company.

Your base salary will be \$250,000 per annum. Additionally, you will be entitled to earn additional commissions based upon the leasing of certain commercial property, to be mutually agreed upon in writing. The leasing commission shall be a mutually agreed upon percentage of existing in house leasing commissions.

Your compensation shall also include existing Company paid medical insurance, employee contributory dental care for you and your dependents and access to the Company's 401K plans. You shall be entitled to thee (3) weeks vacation per year.

Additionally, the Company shall reimburse you for reasonable business expenses and provide, at Company's expense, either a desktop computer or laptop computer (as requested), cellular telephone, parking privileges and or car service when reasonably needed.

In the event that Zar wishes to terminate your employment for any reason other than your resignation, you will receive a one time payment of annual salary (the "Severance Payment").

Following the execution of the contract, the plaintiff worked as the Executive Vice President of the defendant for approximately five years. The plaintiff was terminated by the defendant in January 2004. During the term of his employment the plaintiff received a salary \$250,000 per year. The plaintiff alleges that he made multiple requests for commission payments during the course of his employment.

On a motion for summary judgment, the movant must offer sufficient evidence to establish its prima facie entitlement to judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). In support of his summary judgment motion the plaintiff relies on the pleadings, the contract of employment, an affidavit, the deposition transcripts of Tamir Sapir, the defendant's president, in another action. The plaintiff presented evidence that established, prima facie, that he was terminated from his position and that he did not resign and therefore under the terms of his contract would be entitled to the severance pay equal to one year's salary.

The opponent of a summary judgment motion must present admissible evidence that is sufficient to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). In opposition, the defendant failed to raise a triable issue of fact on the first cause of action. The defendant alleges that the plaintiff was grossly negligent in his performance of his duties and therefore no severance pay is owed. However, the defendant failed to raise an issue of fact that would warrant denial of the summary judgment motion. The affidavit of Lorenzo DeLillo which attached settlement agreements with tenants failed to raise an issue of fact. There was no evidence that any tenant's failure to pay rent was caused by the plaintiff.

Furthermore, Mr. Sapir's conclusory statements that the plaintiff entered into agreements without his consent was not substantiated with any documentation or specific details of the deals which were entered into without his consent. The defendant next argues that the plaintiff exchanged pornographic emails with other employees. However, the evidence established that majority of the emails were sent to the plaintiff by other employees and plaintiff's superiors were aware and, in fact, participated in sending and receiving these emails. Additionally, the defendant argues that the plaintiff was grossly negligent in having conversations about the commissions and this hurt the defendant's reputation. However, the defendant failed to provide any evidence that the plaintiff's actions damaged the defendant.

The defendant next argues that any admission concerning the contract contained in Mr. Sapir's prior deposition testimony is not admissible as it was ruled inadmissible hearsay in a prior order by Justice Taylor, which denied the plaintiff's prior summary judgment order as premature with leave to renew. However, Justice Taylor's decision only addressed the issue of whether the prior testimony was hearsay in dictum. The issue was not addressed by

either party, was not fully litigated, and was not essential to the determination of the motion and, therefore, this part of the decision is not the law of the case (*see Donahue v Nassau County Healthcare Corp.*, 15 AD3d 332 [2005]). While the testimony is hearsay, it is an admission against interest, which is inconsistent with his deposition testimony in this case, and is thus, admissible (*see Pizzo v Gent Uniform Rental Corp.*, 46 AD3d 531 [2007]; *Amann v Edmonds*, 306 AD2d 362 [2003]). In any event, while Mr. Sapir denied knowledge of the contract and stated that the company did not enter into employment contacts in his deposition testimony, in his affidavit in opposition he stated that the defendant entered into an employment letter agreement. Therefore, there is no issue of fact as to whether the letter agreement was an employment contract. Finally the argument that the severance payment is ambiguous is without merit. While it uses the handwritten term “annual salary” rather than base salary the plain meaning of the severance provision is that annual salary is at least the amount of the base salary and therefore the plaintiff is entitled to the \$250,000 payment.

The branches of the plaintiff’s motion for summary judgment for commissions must be denied. Here, the plaintiff failed to make a prima facie case of entitlement to judgment as a matter of law. The contract contains the clause the plaintiff “will be entitled to earn additional commissions based upon the leasing of certain commercial property, to be mutually agreed upon in writing . . . [and] shall be a mutually agreed upon percentage” It is unclear from the contract which leases would entitle the plaintiff to commissions and what the percentage would be for those leases. While the plaintiff submitted a memorandum he wrote in which he outlined the commissions he believed he was entitled to be paid for, this was not signed or acknowledged by the defendant and did not establish entitlement to those commission payments. Even considering the testimony of Tamir Sapir in the prior action, in which he appears to acknowledge commissions, he stated that they were in the amount of “zero zero two percent,” the plaintiff did not establish his entitlement to commissions as the conflicting testimonies just raise an issue of fact. Therefore, the branch of the summary judgment motion on the entitlement to commission payments is denied.

The plaintiff failed to provide sufficient evidence to establish the defendant was allowed to carry over accrued vacation time from the prior year, and further failed to establish the amount of accrued vacation time that he was owed. The plaintiff also claims that he is owed payment for 13 days of employment. This is not established by the evidence submitted. The plaintiff submitted a voided check dated for January 16, 2004 for the week ending January 9, 2004 and submitted his last paycheck dated January 9, 2004, which he claims was for period ending, December 31, 2003. However, there is an issue of fact as to whether the check dated January 9, 2004 was for the week ending January 2, 2004. There are further issues of fact as to the actual date of termination as there are inconsistencies in the affidavit by plaintiff as to whether he was terminated on January 9, 2004 or January 13,

2004. Therefore there are issues of fact as to the number of days that the plaintiff is owed salary for and summary disposition is not appropriate.

Finally, turning to the causes of action under Labor Law § 190 et seq. seeking reasonable attorneys' fees and liquidated damages in the amount of 25% of total wages (inclusive of commissions, salary and vacation time) due, the summary judgment motion must be denied. Inasmuch as the plaintiff was a highly compensated professional serving in an executive, managerial or administrative position and has not stated a cause of action under Labor Law § 190 et seq., he is not entitled to attorney's fees and liquidated damages under Labor Law § 198(1-a) for the failure to pay the severance payment (*see Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457 [1993]; *Schuit v Tree Line Mgt. Corp.*, 46 AD3d 405 [2007]; *Lauria v Heffernan*, 607 F. Supp. 2d 403 [2009]). The plaintiff's argument that failure to pay severance payment was a violation of Labor Law § 198-c(2) is misplaced as Labor Law § 198-c(3) explicitly excludes the application of this section to "any person in a bona fide executive administrative, or professional capacity whose earnings are in excess of nine hundred dollars a week."

Accordingly, the branch of the motion for summary judgment on the first cause of action for breach of contract for failure to pay the termination payment is granted. All other branches of the motion are denied.

Dated: June 8, 2010

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J.S.C.