Clifford v Remco Maintenance, LLC

2010 NY Slip Op 33551(U)

December 1, 2010

Sup Ct, Queens County

Docket Number: 3095/08

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES **PART 17**
Justice

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JAMES CLIFFORD,

Plaintiff,

Index No. 3095/08
-against- **Motion Date: 11/17/10**
Motion Cal. No. 24

REMCO MAINTENANCE, LLC, PATRIARCH PARTNERS, INC., PATRIARCH PARTNERS II, INC., and JOHN DOE CORPORATION,

Defendants.

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The following papers numbered 1 to 12 read on this motion by defendant **REMCO MAINTENANCE, LLC** ("Remco") for an order pursuant to CPLR 3212 granting it summary judgment in its favor and dismissing all of Plaintiff's claims, and granting Remco summary judgment as to its third counterclaim against Plaintiff to recover $25,391.96, from Plaintiff; and cross-motion by Plaintiff for an order pursuant to CPLR 3025 striking Remco's third counterclaim.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Exhibits.....	5
Memorandum of Law in Support.....	6
Notice of Cross-Motion-Affirmation-Exhibits.....	7-10
Reply & Affirmation in Opposition-Exhibit.....	11-13
Reply Memorandum.....	14

Upon the foregoing papers it is ordered that this motion by defendant Remco for an order pursuant to CPLR 3212 granting it summary judgment in its favor and dismissing all of Plaintiff's claims, and granting Remco summary judgment as to its third counterclaim against Plaintiff to recover $25,391.96, from Plaintiff is granted; and cross-motion by Plaintiff for an order pursuant to CPLR 3025 striking Remco's third counterclaim is denied, for the following reasons:

According to the complaint, this action involves claims that plaintiff's former employer, defendant Remco, breached an oral and written employment contract with plaintiff and failed to make payments for commissions owed to plaintiff.. In an Order, dated September 12, 2008, this Court granted the motion by Remco for an order dismissing the complaint as asserted

against it pursuant to CPLR 3211 (a)(7), to the extent of dismissing the second, fourth, fifth and sixth causes of action and denied it all other respects. As such the only causes of action remaining in this Action are the first and third which are for breach of an employment agreement to pay him a yearly salary of $150,000, 8% commission on maintenance contracts plaintiff sold, 6% commission on cash contracts plaintiff sold and "full commission," noted to be 10% and 6%, on existing contracts that plaintiff sold, and a violation of Labor Law § 191 – c(1), which requires the payment of commissions earned by sales representatives within five business days of the termination of a contract between a principal and a sales representative, respectively. Defendant Remco has made the following three counterclaims against plaintiff: The first is for defamatory statements made by plaintiff to past, present, or future customers of Remco that have damaged Remco and seeks money damages. The second is for the improper and unauthorized use and or dissemination of Remco's confidential information including, but not limited to Remco's pricing, contracts, proposals, and business projections, in contravention of Remco's stated policies, and Remco seeks money damages. The third is for money that was paid to plaintiff by Remco in anticipation of sales commissions that were never completed and seeks money damages.

Regarding Remco's motion for summary judgment in its favor, it claims there are no triable issues of fact with regard to plaintiff's two remaining claims against Remco since there existed no agreement, oral or written, for Remco to pay plaintiff the commissions to which he alleges that he is entitled. Plaintiff opposes this motion, claiming there was an agreement between Plaintiff and Remco for the payment of commissions.

As often stated, the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See*, Barr v. County of Albany, 50 NY2d 247 (1980); Miceli v. Purex, 84 AD2d 562 (2d Dept. 1981); Bronson v March, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in Daliendo v Johnson, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied." This proof supports the allegations set forth in the complaint and is sufficient to establish plaintiff's initial burden of demonstrating their entitlement to judgment as a matter of law. Lahage v. Batrouni, 289 A.D.2d 301 (2d Dept 2001.) Sacco v. Sutera, 266 AD2d 446, (2d Dept 1999.)

In support of its motion, Remco has submitted, *inter alia*, Plaintiff's response to Remco's Interrogatories, email correspondence between the parties, Plaintiff's deposition testimony, and the deposition testimony of Raymond G. Saleeby, Remco's C.E.O. and

President. This evidence shows that on October 22, 2001, Plaintiff was hired by Remco and after a few years, became its Chief Operation Officer. As part of his compensation package Plaintiff received a yearly salary of $150,000, a 10% commission on maintenance contracts sold by Plaintiff, and a 6% commission on one-time "cash" contracts sold by Plaintiff. In December 2004, Defendants **PATRIARCH PARTNERS, INC., PATRIARCH PARTNERS II, INC., and JOHN DOE CORPORATION** bought Remco Maintenance Corporation and approximately 5 months later reorganized it as Defendant REMCO. In 2005, Mr. Saleeby circulated the "Remco Maintenance 2005 Commission Plan". This Commission Plan sets forth Remco's policy for payment of sales commissions to its salespeople in the amount of 8% for contract sales and 6% for one time "cash" projects. This Plan excludes plaintiff, stating that "[a]ll employees with the exception of the CEO, CFO and head of operations, have the opportunity to earn a commission on sales" and that "[t]he CFO and head of operations will not receive a sales commission but may receive an annual bonus based on overall corporate results. On October 19, 2005, Mr. Saleeby, sent an E-mail to plaintiff that stated he would be in a non-commission, bonus category. Plaintiff objected to this and Mr. Saleeby sent another email discussing plaintiff's potential payment of a bonus, but with a reduced commission rate. He did not agree to pay plaintiff his full salary and "full commission," defined and understood by plaintiff to be 8% for contract sales and 6% for one time "cash" projects. In a follow-up email to plaintiff, Mr. Saleeby stated again that plaintiff would not get the commission he wanted, but a 50% cut in salary with full commission or full salary with 50% commission might be reasonable. Plaintiff never agreed to either of these proposals, or any other proposal, and throughout plaintiff's employment with Remco, the parties were involved in contract negotiations.

On October 23, 2006, plaintiff and Mr. Saleeby had an email exchange in which Mr. Saleeby stated that although, "in frustration," Remco had paid plaintiff 6% "across the board" for some monies collected in 2006, his commission rate would be 3% "across the board." Plaintiff testified that he was aware that the 6% commissions were limited to sales made in 2005 and that Remco always refused to pay him more than 3% for sales made in 2006 or 2007. Moreover, plaintiff admitted that he was paid 6% for sales made in 2005, leaving only the claimed commissions at issue for 2005 being the difference between six percent across the board or six percent and eight percent.

Plaintiff's testimony indicates that he understood the Commission Plan did not apply to him, since he was the head of operations. His testimony also indicates that while Remco had paid him a 6% commission rate "across the board" for sales made in 2005, plaintiff confirmed

that Remco did not agree to do so for either 2006 or 2007. Moreover, plaintiff admitted that he was paid 6% for sales made in 2005, leaving only the claimed commissions at issue for 2005 being the difference between six percent across the board and eight percent for contract sales and six percent for "cash" projects. Plaintiff also acknowledged that Mr. Saleeby never agreed to pay him the commissions plaintiff claimed to be owed and that there was never an employment agreement wherein Remco contracted to pay plaintiff the commissions he claims are due. With respect to plaintiff's claimed damages in this case, plaintiff's testimony confirms that his figures are based upon the 6% and 8% commission rates plaintiff wanted to be paid, and not the 3% rate that he was to be paid, pursuant to Remco's compensation policy for him. The testimony of Mr. Saleeby indicates that Remco refused to pay plaintiff both a full salary and full commissions and that Remco was entitled to set the terms of plaintiff's compensation.

The Court finds that Remco has established its prima facie entitlement to judgment as a matter of law by producing the above-mentioned evidence that establishes the non-existence of a written agreement or an agreement on material terms to the alleged oral agreement to pay plaintiff the commissions he seeks in this action. Miranco Contracting, Inc. v Allan Perel, et al., 29 A.D.3d 873 (2d Dept. 2006.) "In order for a breach of contract to exist, there must be a meeting of the minds on the agreement said to have been breached and mutual assent evincing the intention of the parties to form a contract is essential. Furthermore, an agreement to agree, which leaves material terms of a proposed contract for future negotiation, is unenforceable. *Id.* Here, Remco has established that the parties never agreed upon the materials terms needed to establish a binding agreement. After this showing, it is incumbent upon the plaintiff to demonstrate, by admissible evidence, the existence of a triable factual issue. *See* Allstate Fin. Corp. v Access Bag N Pack, Inc., 245 AD2d 325 (2d Dept 1997.) Dvoskin v Prinz, 205 AD2d 661, 661-662 (2d Dept 1994.)

In opposition, plaintiff relies upon the above-mentioned evidence and his affidavit. Plaintiff's affidavit indicates that he immediately objected to the "Remco Maintenance 2005 Commission Plan" which did not specifically lay out the terms of Plaintiff's compensation, and was told by Ray Saleeby, not to worry, that they would work out a contract for him independent of that plan. Plaintiff also states that he was encouraged to keep making sales and was assured he would continue to be paid commissions. Plaintiff points out that defendant made a payment to him of approximately $27,000.00 in July of 2006 which was consistent with the commissions owed him at the time computed at 8% and 6%. Additionally at the end of 2006 defendant increased Plaintiff's draw against commissions by $1000.00 on a weekly basis in order to keep pace with the amount of commissions being earned as

computed by using 8% and 6% rates.

According to plaintiff, he continued to perform under the agreement and requested payment of his commissions, but defendants delayed payment, avoided meeting with the Plaintiff to review the commissions owed, and eventually refused to pay Plaintiff the commissions due him pursuant to the Agreement. On or around October 23, 2006 in email correspondence regarding commissions that were owed, Ray Saleeby offered to pay for those commissions at a 6% rate "across the board", presumably meaning for both "Cash" and "Contract" sales. However, plaintiff objected to any changes that would be applied retroactively to commissions he had already earned, and continued to negotiate in earnest with Mr, Saleeby for his compensation and commissions going forward. During negotiations carried out over Plaintiff's last two years with Remco, Mr. Saleeby forwarded several different draft agreements for Plaintiff's approval; none of which were approved by plaintiff. Finally, on December 3, 2007, plaintiff and Mr. Saleeby met to discuss his employment contract and the owed commissions from the past two years. At the meeting Mr. Saleeby told plaintiff that if he did not accept one of the last two agreements that were offered to him, he would be terminated. On or about December 10, 2007, Plaintiff declined to accept Defendant's last offer and was thus terminated from employment by Remco.

Plaintiff claims that his evidence establishes that there are issues of fact as to whether he is entitled to unpaid commissions under his agreement with Remco. He also claims that there are issues of fact concerning whether there was an oral agreement between the parties regarding plaintiff's commissions. Plaintiff also claims there is an issue of fact as to whether he is an "at will" employee incapable of receiving his commissions and if Remco unilaterally changed the terms of his employment agreement.

The Court finds that Plaintiff has not raised any triable issues of fact that prevent this Court from granting Remco's motion to dismiss the remaining causes of action. First, it is clear from the evidence that the parties never agreed to the terms of an employment agreement that comport with plaintiff's causes of action. It is not disputed that the parties never agreed on the duration of plaintiff's employment nor were any assurances given to him that he would be discharged only for good cause. Baker v Citibank, N.A., 178 A.D.2d 627 (2d Dept. 1991.) *See, also*, Negron v. JP Morgan Chase/Chase Manhattan Bank, 14 A.D.3d 673 (2d Dep't 2005.) Second, since there was no agreement, plaintiff's

employment relationship is presumed to be a hiring at will. Cebidae v. Sterling Drug, Inc., 69 N.Y.2d 329 (1987.) Such relationship is terminable at any time by either party *Id.*, at 333. Accordingly, plaintiff's termination cannot give rise to a cause of action for breach of contract. Since he was an at will employee, plaintiff's claims that Remco unilaterally changed the terms of his commissions are unavailing. In New York State, an employer can modify, at its whim, an at-will employment relationship, including changing compensation rates prospectively without approval of the employee because the employee is free to leave. Kronick v L.P. Thebault Company, Inc., 70 A.D.3d 648 (2d Dept. 2010) In fact, by plaintiff's continuing to work for Remco and accepting his pay week after week and not leaving his employment, he agreed to Remco's compensation for him as a matter of law and he cannot sue for some other employment terms. *Id.* See also, Gordon v. Wilson, 68 A.D.3d 1058 (2d Dept. 2009.) Specifically, plaintiff's previous rate of compensation was not binding on Remco and did not affect Remco's right to unilaterally change the terms of his compensation, which it did. As such, plaintiff's claim that he is entitled to receive commissions that were earned prior to his departure from Remco fails since Remco changed his rate of compensation, as it was entitled to do, and paid plaintiff at the changed rate. See Devany v Brockway Development, LLC, et al., 72 A.D.3d 1008, 900 N.Y.S.2d 329 (2d Dept. 2010.) Consequently, the branch of the motion seeking dismissal of plaintiff's remaining causes of action is granted and these two causes of action are dismissed.

The branch of the motion seeking summary judgment in Remco's favor on Remco's third counterclaim is granted. Remco has established that plaintiff was overpaid $25,391.96 for 2006 and 2007, which represents payments he received from the weekly draw in excess of what he actually earned, utilizing Remco's commission rate of 3%, not the rate sought by plaintiff. Specifically, having earned a total of $72,057.73 in sales commissions, but having received the total of $93,488.41 from Remco, plaintiff owes Remco $21,430.68 for the year 2006. Further, having earned a total of $99,654.07 in sales commissions in 2007, but having received the total of $103,615.35 from Remco, plaintiff owes Remco $3,961.28 for the year 2007. Remco has also established that the parties never agreed to different terms of compensation. As set forth above, plaintiff has not raised an issue of fact regarding whether plaintiff was entitled to be paid at the higher commission rate. Accordingly, the branch of the motion seeking summary judgment on the third cause counterclaim is granted and Remco is entitled to judgment against plaintiff James Clifford in the amount of $25,391.96, together with interest, costs and disbursements.

The cross-motion by plaintiff to dismiss this counterclaim is denied. Plaintiff has failed to cite to any legal authority that prohibits the service of a counterclaim as a separate pleading or that requires it to be included within an answer. There was no need for Remco to amend its Answer and the

counterclaim is well within the applicable Statute of Limitations, which would allow Remco to have commenced a separate action against plaintiff for the relief sought in its third counterclaim, i.e. the recovery of $25,391.96, which represents payments he received from Remco in excess of what he actually earned, together with interest, costs and disbursements. Moreover, the added counterclaim presented no prejudice to plaintiff as all needed discovery was timely completed without any undue delay. Accordingly, the cross-motion is denied.

Dated: December 1, 2010

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ORIN R. KITZES, J.S.C.