

Scaglione v Castle Restoration & Constr., Inc.

2010 NY Slip Op 33727(U)

April 27, 2010

Sup Ct, Queens County

Docket Number: 700014/09

Judge: Orin R. Kitzes

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order**NEW YORK SUPREME COURT -QUEENS COUNTY****PRESENT: ORIN R. KITZES****PART 17****Justice**-----X
JAMES SCAGLIONE,**Plaintiff,****Index No.: 700014/09****Motion Date: 4/21/10****-against-****Motion Cal. No.: 42****CASTLE RESTORATION &
CONSTRUCTION, INC.,****Defendants.**

-----X

The following papers numbered 1 to 13 read on this motion by defendant for an order pursuant to CPLR § 3212 granting summary judgment in its favor and dismissing the complaint; and cross-motion by plaintiff for an order pursuant to CPLR § 3212 granting summary judgment in his favor against defendants in the amount of \$114,346.00 plus interest from December 31, 2008.

**PAPERS
NUMBERED**

Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Counter-Statement of Disputed Facts.....	8
Affidavit.....	9
Affirmation-Exhibit.....	10-11
Memorandum of Law.....	12-13
Affirmation in Further Support-Exhibits.....	14-16

Upon the foregoing papers it is ordered that the motion by defendant for an order pursuant to CPLR § 3212 granting summary judgment in its favor and dismissing the complaint; and cross-motion by plaintiff for an order pursuant to CPLR § 3212 granting summary judgment in his favor against defendants in the amount of \$114,346.00 plus interest from December 31, 2008, are decided as follows:

According to the complaint, plaintiff was employed by Castle, a restoration and construction business since about 1982, for approximately 11 years. Since June 2006, plaintiff acted as the Senior Vice-President of Castle, responsible for the company's day-to-day operations, and Robert Castaldi is the principal of Castle and the company's President. On December 5, 2009, Castaldi terminated plaintiff's employment with Castle on two weeks' notice, effective as of December 19, 2009. At the time of his termination, plaintiff's compensation included an annual salary of \$120,000, as well as 1.125% of Castle's annual

gross revenues. In addition, plaintiff was entitled to 20 paid vacation and personal days annually. At the time that he terminated plaintiff's employment, Castaldi told plaintiff that he would be paid the balance of the compensation owed to him by the end of the year. Following his termination of plaintiff's employment, Castaldi repeated his assurances to plaintiff that he would be paid the balance of his compensation by year-end. At the time that Castaldi terminated plaintiff's employment, Castle's gross revenues exceeded \$20 million. Although Castaldi terminated plaintiff's employment on two weeks' notice, Castle paid plaintiff for only one week. At the time that his employment was terminated, plaintiff had taken only 11 of the 20 paid vacation and personal days to which he was entitled. On January 6, 2009, plaintiff wrote to Castle seeking the balance of the compensation owed to him. Notwithstanding due demand, Castle has failed to pay plaintiff the balance of his 2008 compensation, comprising one week's salary, nine vacations days, and 1.125% of Castle's gross revenues less advances taken by plaintiff during the year. On information and belief, and subject to an accounting of Castle's books and records, Castle owes Scaglione an amount to be proved at trial but believed to be approximately \$100,000, plus interest from December 19, 2008.

Plaintiff has brought the instant action and seeks recovery on five causes of action: the first, breach of Contract, the second, an Accounting, the third, Quantum Meruit, the fourth, Violation of New York Labor Law, Article 6, and the fifth, for Violation of New York Civil Rights Law, Article 5. The Accounting cause of action has been withdrawn by plaintiff. Plaintiff is seeking judgment in the amount of \$\$114,346.00 plus interest. Defendant has now moved for an order granting summary judgment in its favor and dismissing the complaint and plaintiff seeks summary judgment on these claims. Each party opposes the respective motions of the other party.

It is axiomatic that 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.

In support of its motion, defendant has submitted, *inter alia*, an affidavit and the deposition transcripts of Robert Castaldi, defendant's President, two handwritten pieces of paper, allegedly claimed by plaintiff to evidence an employment contract, and plaintiff's

deposition testimony. Defendant claims that this evidence shows the parties never entered into a written contract regarding plaintiff's employment with defendant during the period plaintiff was employed by defendant. Moreover, defendant claims this evidence shows that any bonus received by plaintiff was discretionary and thus no breach of a bonus contract can be established. Defendants also claim that, to the extent the handwritten papers are alleged to be a contract, any contract would be void by the statute of frauds. Also, since the bonus was discretionary, such compensation cannot be recovered under a quantum meruit theory. Similarly, defendant claims the bonus was incentive compensation and, as such, not wages that can be recovered in a cause of action for violation of Article 6 of the New York Labor Law. Finally, since plaintiff stated that he did not object to his picture being on defendant's website, his cause of action for violations of Article 5 must be dismissed.

In support of his motion for summary judgment, and in opposition to defendant's motion, plaintiff has submitted, *inter alia*, his affidavit, various financial records of defendant, correspondence from defendant to plaintiff, and has relied upon the evidence submitted by defendant in support of its motion. Plaintiff claims he has shown the existence of an employment agreement between plaintiff and defendant with a base salary of \$120,000.00 per year and a non-discretionary bonus originally agreed by Mr. Castaldi to be 3/4% of defendant's gross revenues, that would increase each year. Plaintiff points out that, as reflected in defendants' payroll records, he was permitted to take a weekly draw against his bonus in the annual amount of \$62,000.00, that was in addition to his salary. This draw is also referenced in correspondence from defendant to plaintiff. Plaintiff claims that it has shown that; the bonus was not discretionary as is unpaid compensation, that the employment agreement was an oral employment agreement, terminable at will and not barred by the Statute of Frauds, that he may proceed with the alternative theory of unjust enrichment to recover for his services provided to defendant, he is owed wages that are actionable under New York Labor Law, and his image appeared without his permission on the defendant's website.

The court finds that there are issues of fact regarding whether plaintiff's bonus was discretionary or a non-discretionary set amount. While there are some discrepancies between plaintiff's testimony and his affidavit regarding the percentage of gross revenues he was to receive, these do not rise to the level that warrant this Court to ignore this evidence. Accordingly, the branches of the defendant's motion and plaintiff's cross-motion regarding the breach of contract, quantum meruit, and labor law causes of action are denied.

The branch of defendants motion seeking dismissal of the cause of action under New York Civil Rights Law is granted. Defendant's evidence shows that plaintiff stated at his deposition that he did not object to his image appearing on the website. Plaintiff has not

submitted any admissible evidence to refute or explain this acceptance, and as such, there is no issue of fact regarding lack of consent or damages to plaintiff as a result of defendant's use of his image on their website. Accordingly, the New York Civil Rights Law violation cause of action is dismissed.

Dated: April 27, 2010

.....

ORIN R. KITZES, J.S.C.