

SRA, LLC v Gardner

2011 NY Slip Op 34174(U)

August 5, 2011

Supreme Court, New York County

Docket Number: 603523/2008

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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APC

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

12

PRESENT: DEBRA A. JAMES
Justice

4

PART 59

SRA, LLC,

Index No.: 603523/2008

Plaintiff,

- v -

DECISION and ORDER

JOHN GARDNER,

Defendant.

Based upon SRA, LLC's original ledgers,
the following draws were paid to defendant
under the Independent Sales Agreement:

1.15.07	\$12,500
2.15.07	12,500
3.16.07	12,500
4.15.07	12,500
5.15.07	12,500
6.11.07	12,500
7.20.07	10,000
8.13.07	10,000
9.15.07	10,000
10.12.07	10,000
11.20.07	5,255.40
1.9.08	3,101.00

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

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1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

2.26.08 3,545.65

TOTAL DRAW \$126,902.05

Though the exhibits in evidence support the above calculation, plaintiff claims the draw amount was \$123,356.00, and in fact, that is the amount reported on the IRS 1099 Form that plaintiff issued to defendant. With credit for the \$4,000 defendant paid plaintiff in June 2008, the amount in advances that plaintiff paid defendant is \$119,356.00.

Based on SRA's tally sheets, the commissions earned by defendant during that period were:

1.07	\$3609.20
2.07	3468.61
3.07	2416.48
4.07	2675.45
5.07	2123.21
6.07	1596.51
7.07	3079.83
8.07	1847.40
	4013.14
9.07	1140.26
10.07	2283.73
11.07	6805.40
	4797.02
12.07	3495.65
	<u>417.00</u>
TOTAL COMMISSIONS	\$43,768.89

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NEW YORK

Plaintiff claims that defendant earned only \$36,707.51 in commissions. However, the calculations of the above tally totals in evidence demonstrate that defendant earned \$43,768.89 in commissions.

Schedules 3-A, 4-A, 3-B, and 4-B, which amended, effective January 1, 2007, the Independent Sales Agent Agreement

of March 13, 2006 state, in pertinent part:

Contractor will be paid a "draw against commission" effective January 1, 2007. This is a payment by SRA to contractor which must be reimbursed should commissions earned by contractor be less than the payments made to the contractor by SRA on the draw.

Period of the draw will be six months [12 months as per Schedules 3-B and 4-B], through June 30, 2007 [December 31, 2007 as per Schedules 3-B and 4-B] at the rate of \$12,500 monthly [monthly for the first six months, \$10,000 for the second six months as per Schedules 3-B and 4-B]. Re-payment in full of any funds due SRA by contractor will be due by December 1, 2007. SRA may deduct funds monthly from commissions earned by contractor, effective July 2007. [SRA may elect to delay repayment at its discretion, but the obligation will stand as per Schedules 3-B and 4-B.] SRA may deduct funds monthly from commissions earned by contractor, effective, July 2007.

The court concurs with plaintiff that the words "which must be reimbursed should commissions earned be less than the payments made to the contractor by SRA on the draw" constitute an express agreement "to repay any excess of advances over the commissions earned".

The facts of the action at bar are distinguishable from those in North-western Mutual Life Ins. Co v Mooney, 108 NY 118 (1888). In North-western, the Court of Appeals, in reversing the appellate court's order affirming judgment in favor of plaintiff company, determined that the language "[the advance] is to remain a first lien upon all the business and renewal interest secured to [the defendant] under the contract" did not necessarily imply a loan. It held that in the absence of any express agreement in the contract on the part of the salesman to pay back the moneys,

or words showing he assumed a personal liability therefore, the sum advanced him could not be considered a loan. Under such circumstances the company could require the salesman to account for any funds he received as the company's agent, but he was not personally liable to repay the advances after termination of the relationship. Also distinguishable from the matter before this court are Weinstein-Goodkind, Inc. v Donovan, 148 Misc 847 (NY City Ct 1933) ("any differences of commissions are to be settled" clause not an express or implied agreement to return excess advances) and Auerbach, Inc. v Ramer, 80 Misc 645 (App Term 1st Dept 1913) (the terms that advances to be charged "personally to the employee" and to be "deducted from the amount of his commissions" do not permit recovery by the former employer).

The court agrees with defendant that any ambiguous terms of an agreement must be resolved against the contract drafter (Battenkill Veterinary Equine Cangelosi, 1 AD3d 856, 858 [3d Dept 2003]), in this instance plaintiff employer. In this case, the court finds though not artfully drawn, the contract terms are not ambiguous but explicit in requiring defendant to repay to plaintiff the advances to the extent that the commissions are less than such draws paid him. Since the word "reimbursed" has the same meaning as "repaid", defendant is personally liable to plaintiff to the extent that the draws he received exceed the amount of commissions he actually earned and was paid.

Defendant argues that the court should find that the draws he received were not loans but income since plaintiff deducted such payments as business expenses on its corporate returns. While certainly an important factor to consider, a party's tax treatment of receipts is not conclusive evidence that they are income as opposed to loans. See People v Grasso, 13 Misc 3rd 1227(A) (NY Co Sup Ct 2006). Moreover, the question of plaintiff's tax treatment of the draws is no more before this court than whether defendant was obligated to pay an unincorporated business tax. See Pochter v State Tax Commission, 70 AD2d 972 (3d Dept 1972). Each party would be well advised to consult with their respective accountants or the appropriate taxing authority for the tax implications of this decision.

Accordingly, it is

ORDERED that upon the record of the trial plaintiff shall have judgment on the first and second causes of action against defendant; and it is further

ORDERED that the third cause of action for injunctive relief is dismissed as moot; and it is further

ORDERED and ADJUDGED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant on the complaint in the sum of \$75,587.11, together with interest thereupon of \$ _____ at the statutory rate as prayed for from the date of December 1, 2007, until the date

as prayed for from the date of December 1, 2007, until the date of entry of judgment, as calculated by the Clerk, for a total of \$ _____ .

This is the decision and order of the court.

Dated: August 5, 2011

ENTER:

Debra A. James
J.S.C.

DEBRA A. JAMES

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