[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C. PART 10

Justice

Index Number : 106551/2010
MARLIN MECHANICAL SERVICES
vs
HOPKINS, CHARLES
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | **No(s).** _____

Answering Affidavits — Exhibits _____ | **No(s).** _____

Replying Affidavits _____ | **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

Motion + X-motion resolved per decision + order annexed.

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

Dated: 7/19/2012

FILED

JUL 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

_____, J.S.C.

JUDITH J. GISCHE, J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

Marlin Mechanical Services, Inc.,

Plaintiff,

-against-

Charles Hopkins,

Defendants.

----------x

DECISION/ORDER
Index No.: 106551/10
Seq. No.: 011

PRESENT:
Hon. Judith J. Gische
J.S.C.

Pursuant to CPLR 2219(A) the following numbered papers were considered by the court on this motion:

PAPERS	NUMBERED
Notice of Motion,	1
WP affirm. 12/6/11	2
CH affd	3
WP affirm. 12/28/11	4
Exhibits	5
Notice of Cross-Motion. RP affd., KM affd., HMK affirm., exhibits	6
Combined Reply and Opposition to Cross-Motion	7
HMK relpy affirm., RP affd., exhibits	8

Upon the foregoing papers the decision and order of the court is as follows:

Defendant, Charles Hopkins ("Hopkins"), moves for summary judgment dismissing the complaint and on his counterclaims. He also seeks sanctions pursuant to the Uniform Rules of Trial Court Part 130.1-1 et seq. Plaintiff, Marlin Mechanical Services, Inc. ("Marlin") has cross-moved for summary judgment on the complaint and also to dismiss the first counterclaim. Issue has been joined on both the complaint and the counterclaims. The motion in chief was timely brought. Although the cross-motion was interposed after the 120 day limit, it raises nearly identical issues to the motion in

chief. The motion and cross-motion are, therefore, properly before the court and may be addressed on their merits. (CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 [2004]; Leonardi v. Cruz, 73 AD3d 580 [1st dept. 2010]; Flanning v. TBTA, 34 AD3d 280 [1st dept. 2006] app. dism. 9 NY3d 862 [2007]).

Facts and Arguments

Hopkins is a former employee of Marlin. The complaint states one cause of action against Hopkins for allegedly failing to fulfill his obligations of employment by working less than a 40 hour work week, but, nonetheless, accepting pay based upon working for that period of time. Marlin seeks damages in the amount of $38,499.28, representing what it claims were overpayments of wages made to Hopkins during his period of employment. Hopkins denies the material allegations of the complaint and asserts two counterclaims, respectively for: [1] violations of ERISA regarding Hopkins' share of Marlin's profit sharing plan and [2] failure to pay wages, sick pay, vacation pay and reimbursement for EZ pass expenses following the termination of his emplyment.

Certain facts are established or otherwise undisputed in this record.

Marlin employed Hopkins from on or about January 26, 1998 through August 31, 2009, the date on which he was terminated by Marlin. Marlin is a firm that provides Heating, Ventilation and Air Conditioning ("HVAC") systems and services to clients. Hopkins' last job title at Marlin was project manager.

Following his termination, Hopkins applied for unemployment insurance benefits (sometimes "UI"). Marlin actively and vigorously opposed any award of unemployment benefits, claiming that Hopkins had been terminated for cause. In papers dated

September 29, 2009, submitted to UI, Marlin's principal, Michael P. Pellino, claimed that the reasons for Hopkins' discharge were he was "working for his own clients, recruiting other employees of our firm, leaving work early [and] misrepresenting expenses and toll reports." Hopkins represented at UI that while he worked for others, it was on his own time on weekends and outside of business hours, that he never recruited other Marlin employees to work other jobs, that he worked full work weeks for Marlin, and that he was neither an hourly employee nor required to record time, but paid a weekly wage, reflecting hours worked for the company both in and outside of the office. Hopkins denied using the company vehicle for anything other than company matters or charging tolls to the company that were not business related.

UI initially denied Hopkins' claim for benefits. Hopkins then requested a hearing, held on December 8, 2009, at which time both he and Marlin offered testimony and produced documentary evidence. Administrative Law Judge ("ALJ") Joseph Wolfermann overturned the original denial of UI and ruled in favor of Hopkins by decision dated December 9, 2009. Marlin then appealed to the Appeal Board, which rescinded the December 9, 2009 decision and remanded the matter for rehearing, with a direction that the parties be allowed to further factually develop the disputed issue of whether Marlin repeatedly left work before the end of the scheduled work day to perform work for another employer.

Following remand, but before the rehearing, on or about May 13, 2010, Marlin brought the instant action.

ALJ Wolfermann conducted the rehearing on August 20, 2010. In addition to

requesting certain documentary evidence and requiring certain further questioning of the parties regarding their employment relationship, the ALJ expressly directed the parties "to produce anyone with first hand knowledge of the claimant leaving prior to schedule end of work day or of [Hopkins'] performance of activities for someone other than Marlin Mechanical during the hours he was supposed to be working for Marlin."

Following the completion of evidence, the written determination of ALJ Wolfermann overturned the initial UI determination denying Hopkins benefits on the basis of misconduct. In his decision dated September 16, 2010, ALJ Wolfermann stated in pertinent part:

> FINDINGS OF FACT: [Hopkins] worked for [Marlin] for more than 10 years. His last job title was project manger. The employer's business was in the field of heating, ventilation and air conditioning (HVAC). The work required [Hopkins] to report to various locations. [Marlin] paid [Hopkins] for 40 hours of work, regardless of the actual number of hours worked. There was no record kept of [Hopkins'] arrival and departure times, either by punch clock, sign-in sheet or telephone call. If [Hopkins] began work early he left work after completing an eight hour day, consistent with a 40 hour work week, unless there was a reason to stay at the job site late. After completing work for [Marlin], [Hopkins] worked on other jobs for another employer. He was not told that doing so could mean the end of his employment. When working at other jobs [Hopkins] did not use [Marlin]'s equipment or tools. On some occasions [Hopkins] received a telephone call at [Marlin]'s workplace, from a customer for another job. There were a few such calls, lasting a few minutes. On [Hopkin]'s last day of work the vice-president of [Marlin] told [Hopkins] that he was being let go because work was slow. [Marlin] did not hire a replacement for [Hopkins].
>
> OPINION: Pursuant to Labor Law § 593(3), a claimant is disqualified from receiving benefits after having lost employment through misconduct in connection with that

> employment. Pursuant to Labor Law § 527, the wages paid in such employment cannot be used to establish a future claim for benefits.
>
> The credible evidence establishes that {Hopkins'] actions did not constitute misconduct. The evidence establishes that [Marlin] terminated the employment of [Hopkins]. [Marlin] contends that [Hopkins] workd on company time, or, in the alternative, that he worked using [Marlin's] tools and equipment for work which was not [Marlin's] work. However, [Marlin] has not produced any first hand witness to substantiate these contentions. I find that [Marlin] relies on hearsay. Hearsay testimony may not prevail over direct sworn testimony when there is nothing in the record tending to impeach the direct testimony (Matter of Perry, 37 AD2d 367). [Hopkins'] sworn and not inherently incredible testimony is therefore accepted, in so far as it establishes that [Hopkins] did not work any other job while on [Marlin's] time and that he did not use [Marlin's] equipment for purposes other than [Marlin's] work. While there were a few brief telephone calls to [Hopkins] at the workplace, no warning was given to [Hopkins] on this subject. I conclude that, while an employer may discharge a claimant for any lawful reason, [Hopkins'] actions did not constitute misconduct, for Unemployment Insurance purposes.
>
> DECISION: The initial determination is overruled. [Hopkins] is allowed benefits with respect to the issues decided herein.

The September 16, 2010 decision was never appealed and became final. Labor Law § 623.

On October 7, 2009, before the UI hearings, Hopkins had retained legal counsel, who notified Marlin that Hopkins disputed Marlin's claims of misconduct and further demanded payment of the following sums that Hopkins' claimed were owed to him: [1] $36,000 form the Profit Sharing Plan; [2] three days pay at $500 per day; [3] five sick days; [4] five vacation days and [5] reimbursement for EZ pass expenses of

approximately $600. These demands became the subject of Hopkins' counterclaims, interposed on or about July 8, 2010. Monies from the profit sharing plan were eventually paid to Hopkins on or about August 13, 2010. The other amounts have never been paid to Hopkins.

Discussion

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]); Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). Issues of law can and should be determined by the court on a summary judgment motion. (Maser Consulting P. A. v. Viola Park Realty, LLC, 91 AD3d 836 [2nd dept. 2012]; Acme Supply Co., Ltd. v. City of New York, 39 AD3d 331 [1st dept. 2007]).

Summary Judgment on the Underlying complaint.

Each of the parties seeks summary judgment on the underlying complaint, therefore, each party bears the burden of proving entitlement to judgment, as a matter of law, on their respective motions. Hopkins claims that this action is barred by the doctrine of collateral estoppel and also by laches. He argues that the UI decision, permitting him to collect unemployment insurance, also factually determined that Marlin's claims in this case that Hopkins failed to work the hours he was required to

work. Marlin claims that its evidence proves that Hopkins violated the terms of his employment.

The doctrine of collateral estoppel is a narrow species of *res judicata* which precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same. (Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500 [1984]). The burden is on the party asserting the doctrine to establish that: 1) the identical issue was necessarily decided in the prior action and is decisive in the present one, and 2) that the party to be precluded had a full and fair opportunity to contest the prior determination. (Ryan v. New York Tel. Co., *supra*, at 500-501; Lumbermen's Mutual Casualty Co. v. 606 Restaurant, Inc., 31 AD3d 334 [1st dept. 2006]). Collateral estoppel effect will only be given to issues "actually litigated and determined" in the prior action or proceeding. (In re Chatham Towers, Inc., 39 A.D.3d 308 [1st Dept 2007]). In addition, it is well established that collateral estoppel applies to quasi-judicial determinations of administrative agencies. (Allied Chemical v. Niagra Mowhawk Power Corp., 72 NY 2d 271 [1988]; Ryan v. New York Tel. Co., *supra*). Provided that the requirements are otherwise met, collateral estoppel effect is available for decisions made by the Department of Labor ("DOL") on unemployment issues. (Matter of LTI, Inc. v Commissioner of Labor, 57 AD3d 1067 [3rd dept. 2008]; Dailey v. Tofel, 273 AD2d 341 [2nd dept. 2000]).

At bar, the two requirements of collateral estoppel are easily met. The issue framed by the underlying complaint is whether Hopkins violated the terms of his employment with Marlin by failing to work a 40 hour work week. This is the identical

factual issue that was litigated and decided by ALJ Wolfermann at the DOL hearing. Marlin's position before the DOL, that Hopkins was not entitled to unemployment insurance because he engaged in "misconduct," was factually premised on a claim that Hopkins was required, but failed, to work a 40 hour work week. This factual claim was squarely rejected by the ALJ.

Marlin had a full and fair opportunity to litigate its position before UI. Marlin appeared at the hearings, had its representative testify and it produced documents in support of its position. Marlin was expressly told at both the hearing and rehearing that it had the right to produce witnesses to support its claim and that it had a right to have witnesses subpoenaed, if necessary (see: DOL hearing transcripts, 12/8/09 p.2; and 8/20/10 p.2). Notwithstanding Marlin's opportunity to present factual support of its claim, the ALJ found that Marlin had failed to produce any witnesses with first hand knowledge of Hopkins' claimed transgressions. The ALJ found Hopkins' testimony and evidence concerning the nature of the employment relationship with Marlin more credible.

Marlin argues that because DOL decision indicates that it is "for unemployment purposes," collateral estoppel does not apply. The court rejects this argument because all DOL decisions are for DOL purposes, yet collateral estoppel may still apply. (Ryan v. New York Tel. Co., *supra*.). Marlin's decision to appear at UI with an attorney does not avoid the effect of collateral estoppel. (See: Pisano v. NYC Board of Education, 2002 WL 484305 [NY Sup. Kings Co. 2002] affd. 303 AD2d 735 [2nd dept. 2003]). Finally, it untrue that as an employer, Marlin had no interest, pecuniary or otherwise, in the outcome of the UI matter. See eg. Labor Law Title 6.

The findings made by ALJ Wolfermann, that Hopkins worked the mandated employment hours in exchange for his salary, preclude Marlin from raising the claim in this court that Hopkins did not. The motion for summary judgment on the basis of collateral estoppel is, therefore, granted and the complaint is dismissed. In view of the court's determination that the claims in the complaint are barred, as a matter of law, by collateral estoppel, the court does not reach the issue of laches raised by Hopkins as a separate basis for awarding him summary judgment. In addition, as a consequence of the application of the doctrine of collateral estoppel, Marlin's cross-motion for summary judgment is denied.

Hopkins also seeks sanctions, pursuant to 22 NYCRR 130-1.1, claiming that the underlying action was frivolous. The court denies the request for sanctions for reasons that include the fact that when the action was brought, the underlying UI decision had not yet been made, and the doctrine of collateral estoppel did not at that time yet attach.

Summary Judgment on the Counterclaims

As his second counterclaim, Hopkins claims, in part, that he is owed monies for: [1] days worked [2] unpaid sick leave [3] unpaid vacation and reimbursement of EZ pass expenses. A letter demanding that Marlin make these payments was sent by Hopkins' attorney on October 7, 2009. In his December 29, 2011 affidavit submitted on this motion, Hopkins states that he is owed approximately $6,100.00 on account of these items. In response, Marlin's representative and Hopkins' former supervisor, Richard Pellino, does not deny that such monies were never paid. Instead he states:

"...Hopkins wages, sick and vacation compensation is payed out of Marlin's operating funds. Those monies have been held as a set-off to the monies owed by Hopkins to Marlin." In Howard M. Katz, Esq.'s reply affirmation, Marlin's counsel admits that the amount owed on account of these items is $6,184.47.

Leaving aside whether Marlin is legally entitled to withhold monies due for wages etc., as a set off against other claims, in this particular case the court has now held that there are no monies owed Marlin. Thus, Hopkins is entitled to a money judgment in the amount of $6,184.47 on his second counterclaim.

The remainder of the second counterclaim seeks relief regarding Hopkins' participation in Marlin's profit sharing plan. He seeks: [1] a direction that he receive all required notices, [2] full distributions; [3] penalties for failing to comply with applicable rules, requirements and laws and [4] counsel fees.

It is undisputed that Hopkins was a participant in Marlin's profit sharing plan. Following his termination, by attorney letter dated October 7, 2009, Hopkins made a demand for his portion of the plan to be distributed to him. On November 17, 2009 Marlin's counsel informed Hopkins that his share of the plan would be distributed to him upon the completion of the plan year, but that "Mr. Hopkins will have to submit the appropriate forms to the Administrator of the Profit Sharing Plan to obtain the funds..." [1] Marlin, however, is the administrator of its own plan. The plan year ended on December 31, 2009.

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[1]Contrary to Hopkins' position on this motion, the November 17, 2009 letter did not seek to offset its claim against the profit sharing plan. It only sought an offset for the wages, sick time, vacation time and reimbursement otherwise admitted due Hopkins.

Marlin claims that it sent the information to its retirement consultants to valuate the plan on February 12, 2010. Marlin's retirement plan consultants sent the "appropriate forms" to, Michael Pellino, a principal of Marlin, on or about March 25, 2010. Nonetheless, they were not sent to Hopkins until June 1, 2010. Hopkins completed the forms, signing the necessary releases, on June 14, 2010. A check was issued by the Plan Administrator on July 8, 2010. Marlin, through its attorney, did not mail the check to Hopkins' attorney until August 13, 2010, which was received on August 17, 2010. By that time Hopkins' had already interposed his counterclaim based upon ERISA violations. The check came with a demand that Hopkins withdraw his ERISA claims.

29 USCA § 1132(c) provides that any plan administrator who fails to comply with a request for information, unless non-compliance is the result of matters beyond the administrator's control, may in the court discretion, be personally liable for a penalty of up to $100 per day, from the date of the failure. The assessment of the penalties, however, is within the court's discretion. (James v. NYC District Council of Carpenters' Benefits Funds, 947 F. Supp. 622 [EDNY 1996]; Grohowski v. U.E. Systems Incorporated, U.E. , 917 F.Sipp. 258 [SDNY 1996]). In making such a determination the court looks to such factors as bad faith or intentional conduct, the length of the delay, the number of requests made, the documents withheld and any prejudice to the participant. (James v. NYC District Council of Carpenters' Benefits Funds, supra; Scarso v. Briks, 909 F. Supp. 211 [SDNY 2006]). Prejudice to participant in the form of a monetary loss is not a prerequisite to an award of civil penalties. Additionally,

prejudice can be found as a result of the a participant having to retain an attorney or commence an action to enforce his or her rights. (Scarso v. Briks, supra).

Hopkins claims that following his attorneys' letter on October 7, 2009, Marlin was required to, within 30 days thereafter, provide the forms necessary for Hopkins to recover his share of the plan. Instead, Hopkins argues, Marlin needlessly waited until June 1, 2010 to get those forms to him. Marlin claims that the October 7, 2009 letter did not request information, but rather distributions, which were premature. Thus, it argues that the penalties do not apply. A fair construction of the October 7, 2008 letter is that Hopkins was seeking information on what needed to be done in order to obtain his share of the profit sharing plan. In fact, Marlin clearly understood the letter in this way, because Marlin's own attorney answered by, in part, stating that Hopkins needed to provide the plan administrator with the necessary forms before receiving the funds. Claims forms to obtain plan funds are considered information, the failure of which to provide, can form the basis for ERISA penalties under 29 USCA §1132. (Kulchin v. Spear Box Company, Inc. Retirement Plan, 451 F. Supp. 306 [SDNY 1978]).

Marlin claims, and Hopkins does not dispute, that the forms could not be generated until at least after the plan year ended. Therefore, any failure to provide them before year's end cannot be the basis for penalties. No real explanation is provided, however, why it took Marlin six weeks to get that information to its retirement consultant or why the consultant then needed six additional weeks to create the forms for Hopkins to fill out.

Where Marlin really was neglectful, however, is that after the retirement

consultant calculated Hopkins' share and created the forms for distribution, Marlin waited over two months to send them to Hopkins. Given that during this same time period the parties were hotly contesting the collateral unemployment insurance issues, this neglect could not have been an oversight, nor was it benign. It ultimately delayed the distribution of a substantial payment to which Hopkins was clearly entitled, and was not made until after a claim was filed in this action for same. The court recognizes that Hopkins was eventually paid the full amounts due him, but believes the delay occasioned by the failure to provide forms warrants the imposition of a penalty.

In view of these considerations, the court exercises its discretion and imposes a penalty on Marlin for the 67 day time period beginning March 26, 2009, when Marlin first received the forms, until the claim forms were actually mailed to Hopkins, on June 1, 2010. The court finds that an appropriate daily penalty for such time period is $75.00, for a total assessed penalty of $5,025.

Hopkins separately seeks to recover that portion of his legal fees incurred as a result of having to assert this counterclaim for the payment of his share of the profit sharing plan. 29 USC §1132(g) permits that court to award legal fees in an action brought to enforce rights under ERISA. The award is permitted even when penalties are also assessed and despite the fact that the ultimate recovery may be modest (Pagovich v. Moskowitz, 865 F. Supp. 130 [SDNY 1994]). The court finds that an award of legal fees is appropriate in this case. While it cannot be known whether and when Marlin would have paid the profit sharing plan monies if no legal action had been brought by Hopkins, the unassailable fact is that the payment was unduly delayed and

that no payment was made until after a legal claim had been formally asserted against Marlin. Hopkins' attorney William Perniciario, Esq., has submitted an affirmation of services detailing the work done in this case that he attributes only to the ERISA claims. The amount sought of $3,281.25 is fair and reasonable for the services provided, the experience of counsel and the results achieved. The court awards such sum.

CONCLUSION

In accordance herewith it is hereby

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted, and it is further

ORDERED that defendant's motion for sanctions is denied, and it is further

ORDERED that plaintiff's motion for summary judgment on the complaint is denied, and it is further

ORDERED that defendant's motion on the second counterclaim is granted to the extent that the clerk shall enter a money judgment in favor of defendant and against plaintiff in the amount of $6,184.47 plus pre-judgment interest from August 31, 2009, and it is further

ORDERED that the clerk shall enter a further money judgment in favor of defendant and against plaintiff in the amount of $5,025, without pre-judgment interest, representing a penalty, and it is further

ORDERED that, the clerk shall enter a further money judgment in favor of

defendant and against plaintiff in the amount of $3,281.25, without pre-judgment interest, representing legal fees and it is further

ORDERED that defendant is allowed the statutory costs and disbursements of this action, as taxed by the clerk and it is further

ORDERED that any requested relief not expressly granted herein is denied and that this constitutes the decision and order of the court.

Dated: New York, NY
July 19, 2012

So Ordered:

J.G. J.S.C.

FILED
JUL 20 2012
NEW YORK
COUNTY CLERK'S OFFICE