

Orgill v Ingersoll-Rand Co.

2013 NY Slip Op 30465(U)

March 4, 2013

Supreme Court, New York County

Docket Number: 101142/10

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

JULIET E. ORGILL, JOSEPH D'ESPOSITO,
TERENCE CONNOR, TIMOTHY MUTKOSKI and
JOEL BENOLIEL, individually and on behalf
of all others similarly situated and on
behalf of the general public,
Plaintiffs,

Index No.: 101142/10

Motion Date: 05/11/12

Motion Seq. No.: 03

Motion Cal. No.: _____

- v -

INGERSOLL-RAND COMPANY and TRANE, INC.,
Defendants.

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

FILED

PAPERS NUMBERED

1 - 3

4 - 6

7

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

NEW YORK

COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Plaintiffs bring this action pursuant to Labor Law 193 alleging that defendants violated the statute by making improper deductions from their commissions. Defendants move for summary judgment asserting that the deductions from plaintiffs' commissions did not run afoul of the statute as a matter of law. Plaintiffs by separate motion (Mot. Seq. No. 05) move for summary judgment asserting that there are no outstanding factual issues that defendants improperly deducted amounts from their pay in

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

* 2]
violation of the statute.

Labor Law 193 (1) provides in pertinent part that

No employer shall make any deduction from the wages of an employee, except deductions which . . . (b) are expressly authorized in writing by the employee and are for the benefit of the employee, provided that such authorization is voluntary and only given following receipt by the employee of written notice of all terms and conditions of the payment and/or its benefits and the details of the manner in which deductions will be made.

Employees have a private right of action to enforce this statute and upon proper circumstances may be awarded additional costs and attorney's fees. See Labor Law 198.

Plaintiffs are former employees of the defendants and were employed as Sales Engineers/Account Managers working as commissioned sales people selling heating, ventilation and air conditioning (HVAC) equipment for residential, commercial and industrial premises, manufactured and marketed by the defendants. Defendants sell and service such HVAC equipment. Defendant Trane bought the operations in which plaintiffs worked from one of its franchisees in 1993, and was itself acquired by defendant Ingersoll Rand in 2008. During the period relevant to the claims herein plaintiffs worked in the New York Sales District encompassing New York City and Nassau, Suffolk and Westchester Counties.

It is undisputed that defendants deducted 4.762% from the amounts paid to plaintiffs for their work. The question presented is whether under governing precedent the deduction was

part of the calculation of plaintiffs' commissions, acquiesced to by the plaintiffs, or a deduction from the commissions earned by the plaintiffs, in which case the deduction would violate the statute because the facts do not demonstrate compliance therewith. That question must be analyzed under the Court of Appeals decision in Pachter v Bernard Hodes Group, Inc. (10 NY3d 609 [2008]).

In Pachter, the Court, on a certified question from the United States Court of Appeals for the Second Circuit, was "asked to decide when, in the absence of a written agreement between employer and employee, a commission is 'earned' and becomes a 'wage' subject to the prohibition on deductions in Labor Law § 193." Pachter, 10 NY3d 609, 612. The Court of Appeals held that "under sections 190 and 193 of the Labor Law . . . the determination of when a commission is earned is governed by the parties' express or implied agreement." Id. at 612. However, the facts leading to the Court's decision are central to holding's application to this matter and must be considered closely. As stated by the Court,

Pachter's commission earnings were calculated using a formula. When a client of Hodes agreed to a media buy, Hodes would advance payment to the media company and the client would subsequently reimburse Hodes and pay a fee for Pachter's services. When the client was billed, Pachter received a percentage of the amount billed minus particular charges that are central to the dispute in this case—client receipts were reduced by certain business costs, such as finance charges for late payments, losses attributable to errors in placing

advertisements, uncollectible debts and Pachter's travel and entertainment expenses. In addition, she chose to work with an assistant, and half of the assistant's salary was deducted from Pachter's percentage of billings. Each month, Pachter received a commission statement that listed her total billings and the percentage of those billings that represented her gross commission. The expenses attributed to her activities and any advances she had drawn from her commission account were then deducted to reach the net amount of income she had earned for that period. Pachter concedes that she was aware of the charges Hodes subtracted from her gross commissions and acquiesced in the compensation scheme for over a decade.

Pachter, 10 NY3d at 613.

The Court began its analysis by stating that

[P]laintiff was paid on a commission basis and a "commission" is considered a "wage" under section 190 (1) of the Labor Law. Section 193 prohibits an employer from making "any deduction from the wages of an employee" unless permitted by law or authorized by the employee for "insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee" (Labor Law § 193 [1] [a], [b]). It is undisputed that the charges Hodes made to determine Pachter's final compensation are not within the categories of permissible deductions delineated in section 193. Their legality therefore depends on when Pachter's commission was "earned" and became a "wage" that was subject to the restrictions of section 193. If the adjustments were made before the commissions were earned, section 193 did not prohibit them; but if the charges were subtracted after her commissions were earned, Hodes engaged in impermissible practices under the statute. Hence, the Second Circuit has asked us to determine when Pachter earned her commissions.

Id. at 617. The Court found that because Article 6 of the Labor Law did not supply any answer to the question of when commissions

are earned for purposes of the statute, the common law rule applied. The Court therefore

conclude[d] that neither section 193 nor any other provision of article 6 of the Labor Law prevented the parties in this case from structuring the compensation formula so that Pachter's commission would be deemed earned only after specific deductions were taken from her percentage of gross billings. Consequently, we answer the second certified question by stating that, in the absence of a governing written instrument, when a commission is "earned" and becomes a "wage" for purposes of Labor Law article 6 is regulated by the parties' express or implied agreement; or, if no agreement exists, by the default common-law rule that ties the earning of a commission to the employee's production of a ready, willing and able purchaser of the services.

Id. at 618. The Court concluded that this meant the parties "may provide that the computation of a commission will include certain downward adjustments from gross sales, billings or receivables. In that event, the commission will not be deemed 'earned' or vested until computation of the agreed-upon formula." Id. at 617-618.

The Second Circuit subsequently held that

Pachter's cause of action must fail, however, because it is undisputed that Pachter knowingly acquiesced over a period of years to the approach used by Hodes when calculating her commissions, conduct that constituted, at the very least, an implied agreement between the parties. As this implied agreement does not violate "section 193 nor any other provision of article 6 of the Labor Law," the deductions in question did not violate that provision.

Pachter v Bernard Hodes Group, Inc., 541 F 3d 461, 464 (2d Cir 2008).

The District Court considering a motion similar to the one at bar has stated that "[w]hether the parties had an express or implied agreement is a matter of contract interpretation which is a question of law for the court to decide. A court first determines if the agreement is ambiguous, mindful that extrinsic evidence is inadmissible to create an ambiguity." Chenensky v New York Life Ins. Co., 2009 WL 4975237, *8 (SD NY, Dec 22, 2009, No. 07-Civ-11504 [WHP]).

Based upon these precedents the court first looks to see whether there is an express agreement between the parties as to when the plaintiffs' earned their commissions. The Sales Engineer's Operating Agreement in the form attached to plaintiffs' opposition papers is silent on when commissions are earned and merely states that commissions will be paid in accordance with the rules and regulations of the defendants and that the "commissions paid or credited to the Sales Engineer shall be subject to backcharges for returned goods, bad debts, collection expense, sales concessions and any other similar expense, in accordance with the applicable rules and guidelines as published in the MOPP in effect at the time of sale." MOPP stands for Manual of Policies and Procedures which is a manual that defines the "employment relationship between Trane and commissioned New Systems Account Managers in its U.S. company-owned District Offices." Section IV.d of the MOPP states that

the "Fixed Commission Amount is established and set at the time an order is accepted by Trane. On all orders accepted by Trane, the Fixed Commission Amount is payable to the Account Manger(s) when the Trane equipment is shipped or services performed. . . . The Fixed Commission Amount shall be subject, however, to all chargebacks, backcharges for returned goods, holdbacks, bad debts, collection expense, sales concessions, split or shared commissions and other deductions, reductions. . . ." Section IV.e of the MOPP provides that the "Net Commission Earned is the Fixed Commission Amount minus the application of all Subsequent Reductions and Reserves." There is no mention in the Sales Engineer's Operating Agreement or the MOPP of the deductions sued upon by plaintiffs in this action and therefore there is no express agreement that establishes whether the deductions should be considered to have been included in the calculation of plaintiffs' earned commissions.

The defendants argue on this motion that the deduction at issue here was to fund a Shared General Expense (SGE) which included the cost of an employee savings plan (401[k]) and an employee stock ownership plan (ESOP). Defendants argue based upon plaintiffs and defendants deposition testimony that plaintiffs were told at a special benefit meeting held in New York in 1993 that the SGE would be included in their commission calculation. Defendants further cite the affidavit of their

Benefits Specialist wherein she states that she gave the plaintiffs a handout and utilized a Powerpoint slide, in the form attached to the affidavit, which described the deduction as being part of a "commission calculation" and that those materials stated that "sales engineer's commissions are automatically reduced by a general shared expense of 4.762% to cover office expenses such as the Savings/ESOP plans."

Therefore, defendants argue that the plaintiffs impliedly agreed as in Pachter that the calculation of their commissions included the SGE deduction and there was no violation of the Labor Law.

Plaintiffs in their separate motion for partial summary judgment (Motion Sequence No. 5) and in opposition to defendants' motion argue that the evidence instead demonstrates that the SGE deduction was taken from their earned commissions and was not part of the commission calculation. Plaintiffs point to their deposition testimony and that of certain of the defendants' witnesses to establish that the commissions were earned upon shipment of products. Plaintiffs' argument also finds further support in the Commission Statements sent by defendants to plaintiffs excerpts of which are appended to the moving papers. Those Statements list line items for "Local Commissions" and then subtracted therefrom is a line item for "Local Backcharges" which is then followed by a line stating "Total Commissions Earned Less

Backcharges." This is followed by a line item stating "Total Earnings Before ESOP Deduction." There is then a line item "ESOP Deduction" followed by the last line on the page "Total Gross Pay."

Plaintiffs argue that these statements demonstrate that unlike Pachter, where it was conceded by the employee that the deductions were part of the commission calculation, in this case the statements demonstrate that the commissions were considered earned before the ESOP deduction. Plaintiffs argue that at a minimum this raises an issue of fact as to any implied agreement that SGE deduction was part of the commission calculation and plaintiffs further argue that partial summary judgment should be rendered in their favor because there is no issue of fact that the deductions were from earned commissions.

Defendants counter that the statements support their position because any deduction from the gross amounts paid to plaintiffs cannot be a deduction from wages based upon Pachter. However, defendants interpretation of the Court's holding in that case would render meaningless the distinction the Court drew between earned commissions, pursuant to the common law rule, and the situation where there was an express or implied agreement as to when commissions were earned. That is, adoption of defendants' argument would mean that no deduction would ever violate Labor Law 193 where an employee was paid by commission

and did not object to the gross amount of their pay in the absence of a written agreement because any deduction no matter when taken would necessarily reduce the amount paid to an employee. Defendants' attempt to expand the holding of Pachter to that extent fails. Notably in Pachter, there was no dispute that the parties had agreed that the challenged deductions were part of the commission calculation. Pachter v Bernard Hodes Group, Inc., 2005 WL 2063838 *4 (SD NY, Aug 25, 2005, No. 03-Civ-10239 [RPP]) ("The parties do not dispute that the Plaintiff consented-either orally or through her course of conduct-to the compensation formula by which the Defendant calculated her pay and that the Defendant complied with this formula in all respects."). In this case it is certainly contested whether the entitlement to commissions vested prior to the challenged deduction.

On the facts presented on these motions, summary judgment must be denied to both parties. There is conflicting testimony and documentary evidence as to whether there was any implied agreement, in contravention of the common law rule, as to whether plaintiffs' commissions were considered earned prior to the defendants application of the SGE deduction. Therefore that issue must be resolved by the factfinder. Chenensky, supra at *8.

Defendants similar argument as to the \$50.00 computer charge also fails for the same reason and must be determined under the same legal standard.

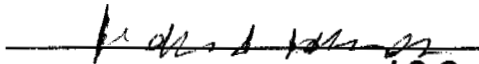
Accordingly, it is

ORDERED that the defendants' motion for summary judgment is DENIED.

This is the decision and order of the court.

Dated: March 4, 2013

ENTER:


DEBRA A. JAMES J.S.C.

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