SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

AMENDED ORDER

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Charles G. Bailey

-v-

Red Alert

INDEX NO. 155908/12

MOTION DATE

MOTION SEQ. NO. 002

Second Amended

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

In accordance with the accompanying Second Amended Memorandum Decision, it is hereby

The Amended Memorandum Decision dated April 11, 2013 is amended in accordance with the attached Second Amended Memorandum Decision, and the Ordered paragraphs in the Amended Order dated April 11, 2013 remain the same.

This constitutes the order of the Court.

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

Dated: 5/3/13

HON. CAROL EDMEAD, 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 35

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CHARLES G. BAILEY LLC,

Plaintiff,

-against-

RED ALERT DISTRIBUTION, LLC AND SOURCING SOLUTIONS WORLDWIDE, LLC,

Defendants.

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Index No.: 155908/2012

Motion No. 002
(Second Amended)
DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION[1]

In this action seeking monies owed for commissions earned, defendants Red Alert Distribution, LLC ("Red Alert") and Sourcing Solutions Worldwide, LLC ("Sourcing Solutions Worldwide") ("SSW") (collectively, "defendants") move to dismiss the Amended Complaint against SSW on the ground that this court cannot obtain personal jurisdiction over SSW; to dismiss the first cause of action under New York Labor Law ("Labor Law") § 191-b(3) and the second cause of action under Labor Law §§ 191-c(1) and 191-c(3) against Red Alert for failure to state a claim; and to dismiss the third cause of action against Red Alert for an audit on the ground that plaintiff failed to state a claim as an audit is a prayer for relief and not a claim.

Factual Background

According to the Amended Complaint, on February 25, 2011, plaintiff Charles G. Bailey, LLC ("plaintiff"), a New York showroom, entered into a written "Sales Representative

[1] This decision addresses the balance of defendants' motion to dismiss the complaint which remained after the Court issued an interim decision, followed by a traverse hearing which resulted in a finding of jurisdiction over Red Alert. (See April 1, 2013 consolidated decision on Motion 003 and Motion 004),

Agreement" with defendants for defendants to pay plaintiff commissions based on plaintiff's sales of defendants' "Product" (see agreement, Exh. A to the Amended Complaint) (the "Agreement"). Under the Agreement, defendants "appoint[ed]" plaintiff as the "independent trade agent in the territory for the Product . . ." and plaintiff was to "use reasonable efforts to promote the Product and maximize the sale of the Product through its sales channel." (Agreement, ¶2). As relevant herein, paragraph seven of the Agreement entitled "Commission" provides that "solely during the term of this agreement the commission shall apply to all orders for Product sold by Showroom that has been accepted by Client . . . . Client shall be deemed to have accepted any and all product orders taken by Showroom if Client does not object to such orders in writing within fifteen (15) days of receipt of said orders from showroom . . . any such commissions shall be paid by the Client to Showroom on or before the end of the month in which the relevant Product sold by Showroom is shipped and no later than the 5th of the following month."

In his first cause of action, plaintiff alleges it made sales of defendant's Product, and that as of May 2012, plaintiff earned $9,566.67 in commissions, earned an undetermined amount commissions on sales in June and July of 2012, and earned $11,960.82 in commissions on sales in August and September of 2012, totaling at least $21,527.49, which defendants failed to pay plaintiff pursuant to the Agreement. In the second cause of action, plaintiff seeks "double damages" for defendants' failure to pay such commissions in violation of Labor Law 191-c. In the third cause of action, plaintiff seeks an audit of defendants' sales from the date of the Agreement to date, pursuant to the terms of the Agreement.

In support of dismissal, defendants argue that the Amended Complaint does not allege

any claims against SSW that arose prior to SSW's dissolution of SSW on September 23, 2011, and thus, the Amended Complaint should be dismissed pursuant to CPLR §3211 (a)(8) for lack of jurisdiction over SSW.

Further, argue defendants, plaintiff failed to state a claim under Labor Law §191-b(3) in that plaintiff did not provide any factual allegations with sufficient particularity that the commissions referred to in the Amended Complaint can be calculated and have been earned by plaintiff under the terms of the Contract. CPLR §3013 requires allegations to be "sufficiently particular to give the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Labor Law §191-b(3) provides that a sales representative "during the course of the contract, shall be paid the earned commission and all other monies earned or payable in accordance with the agreed terms of the contract . . . ."

Defendants argue that plaintiff fails to provide any facts specific to any alleged transaction which would give rise to an obligation by defendant to pay commission. The Amended Complaint lists the "commissions earned" and that the commissions are earned when "the sales are shipped." The affidavit by plaintiff's president, Isaac Greszes (which was previously submitted in opposition to defendants' first motion) is vague, conclusory and devoid of any specifics (the "Isaac affidavit"). Such affidavit states that "if sales were made, then commissions were earned. Sales were made and commissions were earned. However, defendant did not actually pay all commissions due and owing to plaintiff." (see ¶ 5). Plaintiff failed to identify any customer order or sales allegedly made by plaintiff. Plaintiff also failed to allege that the commissions were owed while the Agreement was in force; that Red Alert accepted the

orders; and that plaintiff shipped the orders. Plaintiff also failed to plead that he was a sales representative under Labor Law §191-a(d) and that the defendant was a principal under Labor Law §191-a©. Therefore, plaintiff failed to state a claim under Labor Law §191-b(3).

And, defendants argue, plaintiffs third cause of action seeking an audit fails to include any allegations that defendant failed to perform its obligations under the audit provision of the Agreement. Provision 7(b) of the Agreement provides that the "[s]howroom [plaintiff] shall have the right, at its own expense and not more than once in any twelve (12) month period, to inspect at reasonable times Client's relevant accounting records . . . to verify the accuracy of Commission paid by Client." Plaintiff failed to allege that it requested an audit or that defendants refused to comply with a request for an audit. Further, plaintiff's third cause of does not state a claim, but seek a prayer for relief.

In opposition,[2] plaintiff argues that the criterion for dismissing an action is whether a cause of action exists not whether the proponent has plead one, and this action deals with commissions earned upon the completion of sales. The commissions are earned when the sales are shipped and the Amended Complaint lists the commissions earned. Further, the way for plaintiff to determine if the sales have actually have been shipped are to review the invoices and sales that the defendant actually shipped that originated with plaintiff. The Isaac affidavit

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[2] These arguments are taken from plaintiff's opposition to defendant's first motion to dismiss (sequence 001), since plaintiff's opposition under this motion, sequence 002, merely points out that motion 002 is duplicative of motion 001 and that the Court's order directing a traverse hearing on motion 001 is controlling. It is noted that although plaintiff's opposition to motion sequence 001 correctly acknowledges that the Amended Complaint mooted the branch of defendants' motion to dismiss Sourcing Solutions LLC (see *Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 947 NYS2d 498 [1st Dept 2012] (stating that once plaintiff served the amended complaint, the original complaint was superseded, and the amended complaint becomes the "only complaint in the action"), it fails to reference the substituted party, SSW, referring only to Red Alert and Sourcing Solutions LLC, and does not address dismissal of the action against SSW.

indicates that plaintiff dealt with Alfina Hackney, the wife of Red Alert's president Mark Hackney. Mrs. Hackney "handled decisions and sent invoices" after plaintiff had "difficulty with the invoices from Red Alert . . . ." Given that defendants failed to pay plaintiff commissions due and owing, plaintiff no longer trusts them to calculate commissions on past sales, and thus, an audit is necessary to determine if defendant properly reported all past commissions earned by plaintiff. Therefore, the motion must be denied as premature.

In reply, defendants add that the second motion to dismiss is different from their first motion in that the second motion addresses SSW's dissolution as a basis for dismissal.

Discussion

At the outset, the Court grants the unopposed branch of defendants' motion to dismiss the Amended Complaint as asserted against SSW pursuant to CPLR §3211 (a)(8) for lack of jurisdiction.

Further, contrary to defendants' contention, plaintiff's first cause of action in the Amended Complaint does not seek damages under Labor Law § 191-b(3), but instead, alleges that defendant breached the parties' Agreement. In fact, no reference is made to any statute. Therefore, dismissal of the first cause of action is denied.

As to dismissal of the second and third causes of action, in determining a motion to dismiss pursuant to CPLR 3211(a)(7)for failure to state a cause of action, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on such a motion is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can

be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

While defendants claim that plaintiff's second cause of action fails to state a claim under Labor Law §191-b(3),[3] plaintiff's second cause of action cites §*191-c.*

Under Labor Law §191-c, "When a contract between a principal and a sales representative is terminated, all earned commissions shall be paid within five business days after termination or within five business days after they become due in the case of earned commissions not due when the contract is terminated." (§191-c(1)) A principal's failure to comply with the provision concerning timely payment of all earned commissions shall be liable to the sales representative "for double damages" including "attorney's fees, court costs, and disbursements." §191-c(3)).

Here, plaintiff's Amended Complaint, including the parties' Agreement incorporated by

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[3] Labor Law § 191-b(3) provides "A sales representative *during the course of the contract*, shall be paid the earned commission and all other monies earned or payable in accordance with the agreed terms of the contract, but not later than five business days after the commission has become earned." (Emphasis added). As such, defendants' claim that plaintiff failed to plead that the commissions were owed while the Agreement was in force is misplaced.

reference therein, adequately allege a claim under Labor Law §191-c, in that plaintiff alleges the existence of an agreement, that said agreement was terminated (Amended Complaint, ¶28), and that defendants failed to pay him commissions due thereunder within the time period prescribed. Specifically, plaintiff "realleges each and every allegation as set forth in paragraphs "'1' through '25,'" *i.e.*, that the parties entered into an agreement to pay plaintiff commissions based on sales of defendants' product, and that commissions are owed in the amount of at least $21,000.00 for sales in May, June, July, August, and September of 2012. Plaintiff then continues to allege that defendant did not pay commissions owed to plaintiff (Amended Complaint ¶ 27) in accordance with Labor Law §191-c (Id. ¶¶ 28-29). Defendants' violation of Labor Law §191-c entitles plaintiff to recover "double damages" in penalties from defendant under Labor Law §191-c(3)(Id. ¶¶ 29). The method of calculation is provided for in the parties' Agreement.

As to defendants' claim that plaintiff failed to allege that he was a "sales representative," the statutory definition of "sales representative" (§ 191–a [d]) is clearly limited to independent contractors, as opposed to salaried or commissioned employees (*Deutschman v First Mfg. Co., Inc.*, 7 AD3d 363, 775 NYS2d 855 [1st Dept 2004] *citing Jin v Metropolitan Life Ins. Co.*, 310 F3d 84, 88 n. 4 [2d Cir.] and *Goldberg v Select Indus.*, 202 AD2d 312, 315, 609 NYS2d 202). Here, the Amended Complaint, *and the Agreement* attached thereto, which expressly identifies plaintiff as "an independent contractor" (¶ 5), is sufficient to give defendants' notice of the claim that plaintiff, an independent contractor, is sales representative under the statute.

Likewise, as to defendants' claim that plaintiff failed to allege that defendants are "principals," the "Definitions" under Labor Law § 191-a© define "principal" as "a person or company engaged in the business of manufacturing, and who: (1) Manufactures, produces,

imports, or distributes a product for wholesale; (2) Contracts with a sales representative to solicit orders for the product; and (3) Compensates the sales representative in whole or in part by commissions and a sales representative." Again, the Agreement incorporated by reference into the Amended Complaint provides that "The "Product" shall mean such products as are *manufactured* or sold *by or for the Client [Red Alert]* and of any other kind manufactured or sold by or for the Client a . . . ." (¶1A) and that such plaintiff was appointed or contacted to "*solicit orders for the Product*" (¶2), in exchange for a commission which "shall apply to all orders for Product sold by" plaintiff (¶7). Therefore, defendant's reliance on *DeLuca v Accessit Group, Inc.* (695 F Supp 2d 54, 64 [SDNY 2010]) in support of dismissal for the alleged failure to state that plaintiff was a salesperson or that defendant was a principal, is misplaced, and dismissal of the second cause of action pursuant to CPLR 3211(a)(7) is denied as unwarranted.

As to defendants' motion to dismiss the third cause of action for an audit, dismissal is denied. Defendants' reliance on *Shapolsky v Shapolsky* (22 AD2d 91, 253 NYS2d 816 [1st Dept 1964]) is misplaced. In *Shapolsky*, plaintiff demanded "that each of the defendants 'account to plaintiff for all dividends and distributions to which plaintiff is entitled." The Court faulted plaintiff for failing to clearly and specifically state the basis for the alleged entitlement to the accounting sought. The Court held "there is nothing in the complaint from which it can be determined whether it is claimed that dividends had been declared, and that having been declared plaintiff did not receive them. It is also quite possible that the plaintiff is really complaining about the respective corporations' failure to declare dividends. If that be the plaintiff's claim, then his action would not be against the individuals but only against the corporations. It is rather difficult for the defendant to answer that phase of the complaint upon allegations so vaguely

stated, and demand for relief so indefinitely set forth." Here however, plaintiff clearly alleges that the Agreement entitles plaintiff to commissions earned based on sales, defendant's refusal to pay plaintiff commissions owed, despite due demand for same, and that an audit is necessary and required per the Agreement. And, contrary to defendants' contention, any failure of plaintiff to allege that it requested an audit or that defendants refused to comply with a request for an audit does not render this cause of action facially insufficient, since plaintiff's right to an audit is not conditioned on these terms.

Therefore, dismissal of the third cause of action pursuant to CPLR 3211(a)(7) is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendants' motion to dismiss the Amended Complaint as asserted against defendant Sourcing Solutions Worldwide pursuant to CPLR §3211 (a)(8) for lack of jurisdiction is granted, as unopposed, and the complaint as against this defendant is severed and dismissed; and it is further

ORDERED that the branch of defendants' motion to dismiss plaintiff's first, second, and third causes of action in the Amended Complaint is denied; and it is further

ORDERED that defendant Red Alert shall serve its Answer to the Amended Complaint within 20 days of entry of this order; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment as to defendant Sourcing Solutions Worldwide accordingly.

This constitutes the second amended decision and order of the Court.

Dated: May 3, 2013

Hon. Carol Robinson Edmead, J.S.C.