

Sheehan v Square Mile Capital Partners

2013 NY Slip Op 34171(U)

February 19, 2013

Supreme Court, New York County

Docket Number: 653120/2012

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 653120/2012
SHEEHAN, JAMES W
vs.
SQUARE MILE CAPITAL PARTNERS
SEQUENCE NUMBER : 001
DISMISS ACTION

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).** 1
Answering Affidavits — Exhibits _____ **No(s).** 2
Replying Affidavits _____ **No(s).** 3

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

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Dated: 2/19/13



HON. EILEEN A. RAKOWER, 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 15

-----X
JAMES W. SHEEHAN,

Index No.:
653120/2012

Plaintiff,
- against -

Decision and
Order
Motion Seq: 001

SQUARE MILE CAPITAL PARTNERS,
COOPER SQUARE REALTY, INC., RIVER
TERRACE APARTMENTS, LLC, and SM
ASSET MANAGER,

Defendants.

-----X

EILEEN A. RAKOWER, J.S.C.

In this action, plaintiff James Sheehan seeks to recover employment compensation from Defendants. The Verified Complaint sets forth the following five counts: breach of express written contract for unpaid salary; breach of express written contract for unpaid commissions; breach of express written contract for unpaid bonus; violation of New York Labor Law 191 for failure to pay sales commissions; and violation of New York Labor Law 193 for failure to pay sales commissions.

As set forth in the Verified Complaint, Plaintiff alleges that he “agreed to join the development team for River Terrace as the Project Manager/Owner’s Representative of a joint venture between C&K Properties and Zamir Equities” on or about November 28, 2005, pursuant to an Employment Agreement with defendant Cooper Square. The project involved the conversion of a 408-unit luxury apartment rental building to a 331-unit luxury condominium that was owned by defendant River Terrace Apartments, LLC (“River Terrace”). The Verified Complaint alleges, “Since [defendant] River Terrace was merely an entity set up to hold assets, it was agreed that Sheehan would be employed by Cooper Square, the Managing Agent for the property, as co-employer, and that River Terrace would reimburse Cooper Square on a monthly basis for the cost of Sheehan’s salary and benefits.”

The Verified Complaint alleges that in August 2007, in connection with a “friendly foreclosure” of a mezzanine loan, defendant SM Asset Manager assumed “the operational and day-to-day control of the project.” It further alleges, “In or

around April 2008, Sheehan entered into an agreement with SM Asset and Square Mile regarding the terms, conditions, and privileges of his continued employment.” The agreement was allegedly memorialized in an email that Plaintiff sent at the suggestion of his supervisor, Marc Kotler of Cooper Square, to various individuals, including James Derow, of SM Asset, and confirmed and approved by Mr. Derow in a reply email. In December 2011, Plaintiff’s employment was allegedly terminated. The Verified Complaint alleges that Plaintiff did not receive notice of his termination in accordance with the express provisions of the Employment Agreement until December 29, 2011, at which time he alleges that he was in the midst of his current one-year term of employment, expiring on November 27, 2012. Accordingly, Plaintiff contends that he is due salary through the end of the current term (i.e. November 27, 2012) in the amount of \$197,083. Plaintiff also contends that he is entitled to a \$250,000 commission as a consequence of a refinancing and an annual bonus of \$25,000.

Defendants River Terrace and SM Asset Manager LLC (“SM Asset”) (improperly captioned as SM Asset Manager), move, pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the Complaint in its entirety on the grounds that (i) the complaint fails to establish and the documentary evidence disproves the existence of a contractual relationship between Plaintiff and the moving defendants and (ii) the complaint fails to state a claim for relief under the New York Labor Law. SM Asset is the non-member manager of River Terrace.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (1) a defense is founded upon documentary evidence; [and]
 - (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (see CPLR §3211[a][7]). The court is “required to accord plaintiffs the benefit of all favorable inferences which may be drawn from their pleading, without expressing [its] opinion as to whether they can ultimately establish the truth of their allegations before the trier of fact” (*Campaign for Fiscal Equity, Inc. v. State of New*

York, 86 N.Y.2d 307, 318 [1995]). The court must accept each allegation and all reasonable inferences therefrom as true, and, if the plaintiff is entitled to recovery based upon any reasonable view of the stated facts, the complaint is sufficient (*219 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506 [1979]).

On a motion to dismiss pursuant to CPLR §3211(a)(1), “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Defendants state that dismissal of the Complaint is warranted on the basis that it fails to establish and the documentary evidence disproves the existence of a contractual relationship between plaintiff and River Terrace and SM Asset Manager.

As for River Terrace, Defendants allege that River Terrace was not a party to the November 28, 2005 Employment Agreement between Plaintiff and Cooper Square. Defendants also submit copies of the Management Agreement executed in 2005 and another executed in December 2007 between Cooper Square and River Terrace. Defendants state that the Management Agreements, by their express terms, refute Plaintiff’s allegation in the Complaint that Cooper Square and River Terrace agreed to be Plaintiff’s co-employers, as each provides: “[t]he Agent [Cooper Square] shall hire in its own name all managerial personnel for the efficient discharge of the duties of the Agent hereunder . . . Compensation for the services of such employees shall be the responsibility of the Agent.”

However, the Court notes that a separate paragraph of the Management Agreements states, “[T]he Owner shall not be responsible for any central office expenses, including but not limited to the following: (1) all costs of gross salary and wages, payroll taxes, insurance, workers compensation, overtime, 401K and executive personnel (*other than personnel allocated to the Premises whose positions and salaries are specifically authorized and are in the operating budget*) . . .” (emphasis added). Furthermore, as set forth in the affidavit submitted by James Derow, “River Terrace had agreed to reimburse Cooper Square for any employment compensation it paid to employees of Cooper Square working exclusively on Cooper Square’s

account with River Terrace, provided that the compensation was set forth on a budget that River Terrace had approved.”

As for SM Asset, Defendants state that Mr. Derow’s email in which he “confirmed and approved” the terms proposed by Plaintiff in his April 4, 2008 email “was not intended to create and did not create, a contract with either SM Asset or River Terrace.”

Defendants have failed to demonstrate entitlement to dismissal of Plaintiff’s breach of contract claims based on their contention that no contractual relationship existed between Plaintiff and River Terrace, and Plaintiff and SM Asset. On a motion to dismiss, the Court must accept the allegations as set forth in the Verified Complaint as true. Here, the Verified Complaint alleges a contractual relationship between Plaintiff and River Terrace, and a contractual relationship between Plaintiff and SM Asset, sufficient to support the alleged breach of contract claims. The documents submitted by Defendants do not flatly contradict these allegations or conclusively establish a defense. .

Alternatively, Defendants also contend that Plaintiff is not entitled to the balance of his compensation pursuant to his November 25, 2005 Employment Agreement. As the Court must accept the allegations of the Verified Complaint as true, Defendants’ argument does not warrant dismissal as the Verified Complaint alleges that Plaintiff did not receive notice of his termination in accordance with the express provisions of the Employment Agreement until December 29, 2011, at which time he alleges that was in the midst of his current one-year term of employment, expiring on November 27, 2012, and as such alleges that he is due salary through the end of the current term under the Agreement.

Defendants also seek dismissal of Count Four of the Complaint, which alleges that River Terrace and SM Asset violated Sections 191 of the Labor Law by failing to pay Plaintiff “all earned commissions,” and Count Five of the Complaint, which alleges a violation of Section 193 of the Labor Law.

Section 191-c of the Labor Law provides, in relevant part, that:

[w]hen a contract between a principal and a sales representative is terminated, all earned commissions shall be paid within five business days after termination of within five business days after they become due in the case of earned commissions not due when the contract is terminated.

N.Y. Lab. Law 191-c (McKinney 2012). A “principal” is defined in Section 191-a of the Labor Law as “a person or company engaged in the business of manufacturing, and who ... compensates the sales representative in whole or in part by commissions.” “Sales representative” is defined as a “person or entity who solicits orders in New York state and is not covered by subdivision six of section one hundred ninety and paragraph (c) of subdivision one of section one hundred ninety-one of this article because he or she is an independent contractor ...” Section 190(6) defines “commission salesman” as “any employee whose principal activity is the selling of any goods, wares, merchandise, service, real estate, securities, insurance or any article or thing and whose earnings are based in whole or in part on commission. The term ‘commission salesman’ does not include an employee whose principal activity is of a supervisory, managerial, executive or administrative nature.” “Commission” is defined in Section 191-a(a) of the Labor Law as “compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the dollar amount of the wholesale orders or sales.”

Here, Count Four of the Verified Complaint, which alleges a violation of New York Labor Law 191 for failure to pay sales commissions, fails to state a claim. River Terrace and SM Asset do not qualify as “principals” as it is not alleged in the Complaint that they are in the business of manufacturing. Rather, the Verified Complaint states that they are involved in real estate development and management. Furthermore, it is not alleged that Plaintiff is a commission salesman or sales representative. While the Complaint uses the word “commission” to describe the \$250,000 bonus allegedly due to Plaintiff, it does not constitute a “commission” as defined in Section 191-a(a) of the Labor Law. As alleged in the Complaint, the bonus was to be payable upon a mortgage refinance, and as such, is not based on a percentage of any wholesale orders or sales. As such, Count Four of the Verified Complaint is dismissed for failure to state a claim.

Dismissal of Count Five of the Complaint, which alleges a violation of New York Labor Law 193 for failure to pay sales commissions, is also warranted as it fails to state a claim for relief. Section 193 of the Labor Law provides, in relevant part, that “[n]o employer shall make any deduction from the wages of an employee, except deductions which” (a) comply with law or governmental rules or regulations, or (b) are authorized by the employee in writing and are for insurance premiums, pension or health benefits and similar payments for the employee’s benefit. The claim that River Terrace or SM Asset did not pay Plaintiff the wages allegedly due him pursuant to the Employment Agreement does not state a viable cause of action under this statute. *See Wiggins v. Hain Pure Protein Corp.*, 829 F. Supp. 2d 231, 242 (S.D.N.Y. 2011) (claim of non-payment of wages or severance benefits did not state a claim under Section 193

“because that section ‘has nothing to do with failure to pay wages or severance benefits, governing instead the specific subject of making deduction from wages.’”(citation omitted); *Kane v. Waterfront Media, Inc.*, 2008 WL 3996234 (Sup. Ct. N.Y. County August 20, 2009) (trial order) (“To state a claim for violation of Labor Law 193, a plaintiff must allege a specific deduction from wages and not merely a failure to pay wages.”) Therefore, Count Five of the Complaint fails to state any viable claim against River Terrace or SM Asset for violation of Labor Law 193.

Wherefore, it is hereby

ORDERED that Defendants’ motion is granted only to the extent that Counts Four and Five of the Complaint are dismissed as against defendants River Terrace Apartments, LLC, and SM Asset Manager; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED:

2/19/13



EILEEN A. RAKOWER, J.S.C.