SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

----------X

MCGOVERN CONSULTING, LLC,

Plaintiff,

-against-

NEWSTEX, LLC,

Defendant.

----------X

DECISION AND ORDER

Index No. 101085/12

HON. ANIL C. SINGH, J.:

Defendant moves to dismiss the first and second causes of action of the complaint pursuant to CPLR 3211(a)(7) or, alternatively, for summary judgment pursuant to CPLR 3212, contending that defendant cannot be liable under New York Labor Law sections 191-a, 191-b, and 191-c as a matter of law. Plaintiff opposes the motion and cross-moves for leave to file an amended complaint.

The complaint and verified bill of particulars allege the following facts.

Defendant Newstex, LLC ("Newstex") is in the business of selling information services (consisting of news feeds and blog feeds) to media websites, such as CNN, and database companies, such as LexisNexis and Westlaw.

John McGovern is the principal of plaintiff McGovern Consulting, LLC ("McGovern"). Plaintiff entered into a written agreement with defendant Newstex

on March 30, 2006. The duration of the agreement was between March 30, 2006, and March 30, 2008. Pursuant to the Sales Agent Agreement, defendant agreed to hire plaintiff as a non-employee independent contractor sales agent. The agreement provided that plaintiff would be entitled to a monthly fee of $3,750.00, plus commissions.

In 2007, a disagreement arose regarding payment of commissions, and defendant notified plaintiff that the agreement was terminated.

Plaintiff commenced the instant action by filing a summons and verified complaint on November 18, 2011. The first cause of action alleges breach of contract at paragraph 11 of the complaint and a violation of Labor Law sections 191-a and 191-b at paragraph 13 of the complaint. The second cause of action seeks double damages pursuant to Labor Law section 191-c. The third cause of action asserts a cause of action based on quantum meruit, promissory estoppel and/or equitable estoppel.

Defendant filed an answer asserting eight affirmative defenses and counterclaims for breach of contract, misappropriation of trade secrets and confidential information, and indemnification.

Discussion

Defendant asserts that it is not a manufacturer or "principal" pursuant to the

definition set forth in Labor Law section 191-a and cannot be held liable, as a matter of law, under sections 191-b and 191-c.

Labor Law section 191-a defines the term "principal" as follows:

> "Principal" means 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.

Defendant exhibits the sworn affidavit of Stephen Ellis, who states that he is the co-founder and CEO of the defendant corporation. Mr. Ellis contends that Newstex is in the business of providing information services to business clients via the Internet. Specifically, the company licenses content in electronic form from the owners thereof, and, in turn, sublicenses portions thereof to its business clients according to the latter's requirements via the Internet. Further, the information services that Newstex provides to a customer consists of news feeds, including stories, articles, blog postings, translations, text, graphics, and photographs. Newstex does not create or manufacture any product; it simply licenses for electronic information from the creators of such information and

provides sublicenses and electronic availability to its clients via the Internet. Finally, Newstex does not write or create any of the information services it provides to its customers, nor does it engage in the business of manufacturing.

Plaintiff exhibits the sworn affidavit of John McGovern in opposition to the motion. He contends that there is nothing in the plain language of the statute that precludes a principal, as defined in the statute, from including the creator of a product that is in the business of selling information services, which is a product, to be a manufacturer as defined in New York Labor Law.

Contrary to plaintiff's contention, there is an unambiguous word in the statute establishing that the statute applies only to manufactured goods. That word is "wholesale."

The dictionary definition of the word "wholesale" is, "The sale of goods in large quantities, as for resale by a retailer" (The American Heritage Dictionary of the English Language, 3rd ed., 1992, p. 2039). The word "goods" is defined as "commodities; wares" (Id., p. 780). Likewise, the word "retail" is defined as, "The sale of goods or commodities in small quantities directly to consumers" (Id., p. 1539).

Were the Court to discern any ambiguity in the statute, the legislative history supports the notion that the Labor Law provisions in question were

intended to apply only to manufacturers of goods. Defendant exhibits a "Memorandum in Support of Legislation," which states in part:

> JUSTIFICATION: It has been the history, especially in the garment industry, that manufacturers do not enter into written contracts when they engage the services of sales representatives. These sales representatives are responsible for displaying and selling the manufacturer's product to the retail stores and are generally paid solely on a commission basis. As a result of there being a lack of a signed document, sales representatives are often not receiving their due commission. In addition, any proceeding the sales representative might bring to recover his or her commission is unduly burdened by the lack of a written document.

(Rohrberger Aff., Exhibit E).

The memorandum's specific reference to the garment industry and to the display and sale of manufacturer's products to "retail stores" strongly suggests a legislative intent that the statute applies only to tangible, manufactured objects, rather than services, news or information (see, for example, Polyfusion Electronics, Inc. v. Promark Electronics, Inc., 108 A.D.3d 1186 [4th Dept., 2013]).

For the above reasons, we find that the allegations of the complaint are sufficient to state a cause of action for breach of contract. However, the complaint fails to state a cause of action under Labor Law sections 191-a, 191-b, and 191-c.

Turning to the cross-motion, plaintiff seeks leave to amend the complaint so that the elements of the provisions of the Labor Law are more fully addressed. In

light of our finding that the facts alleged cannot support a cause of action under the Labor Law, amending the complaint would accomplish nothing.

Accordingly, it is

ORDERED that the motion for summary judgment dismissing the Labor Law 191-a, 191-b, and 191-c claims is granted; and it is further

ORDERED that the cross-motion for leave to file an amended complaint is denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 320, 80 Centre Street, on April ~~30~~ 23RD, 2014, at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Date: MARCH 7, 2014
New York, New York

Anil C ~~Singh~~