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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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LAUREN WICHTER FRIEDMAN,

Index No. 159599/2013

Plaintiff,

-against-

DECISION/ORDER

ARSON OFFICE FURNISHINGS,

Defendant.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Affidavits in Reply.....	3
Exhibits.....	4

Plaintiff Lauren Wichter Friedman ("Friedman") commenced the instant action against her former employer, defendant Arson Office Furnishings ("AOF") asserting, inter alia, a claim under the New York Labor Law (the "Labor Law") based on AOF's alleged failure to pay plaintiff her yearly bonus. AOF now moves for an Order pursuant to CPLR § 3212(e) granting partial summary judgment dismissing plaintiff's Labor Law claim. For the reasons set forth below, defendant's motion is denied.

The relevant facts are as follows. On or about February 19, 2008, plaintiff entered into an employment agreement with defendant (the "Agreement") to head up defendant's new Architectural Products division (the "Architectural Division"). According to the Agreement, plaintiff was to receive an annual salary of $200,000. Additionally, pursuant to paragraph 3(b), plaintiff was to receive a bonus as follows:

> (B) Bonus Arrangement - The Bonus for the period through September 30, 2009 and for each fiscal year end thereafter, that employee continues as an employee, is as follows ("Bonus"):
>
> Fifteen (15) percent of the Architectural Products division's net profit. Net profit will be defined as calculated on our normal fiscal year end departmental profit and loss statements which comply with GAAP. These statements will also include a charge of five (5) percent of the Architectural Products division sales for corporate overheads.
>
> The Bonus will be payable prior to December 31 of each year, provided the Employee has not (i) been terminated for cause, or (ii) has voluntarily left the employment of AOF after the end of the fiscal year, unless the Employee resigns to take a position that is not in or related to either of the office furniture or Architectural Products business. In no event will a Bonus calculation be performed or paid for any Fiscal year, if the Employee has not been an Employee for the full twelve months of that year, unless the Employee resigns to take a position that is not in, or related to, either the office furniture or Architectural Products business, in which case the bonus shall be pro-rated based on the number of full months in the fiscal year (or period as it relates to September 30, 2009) during which the Employee was employed by AOF divided by twelve (or nineteen for the period ending September 30, 2009).
>
> Plaintiff continued to work for AOF until July 10, 2013, when she was terminated.

During that time, it is undisputed that plaintiff never received a bonus. According to defendant, plaintiff was never paid a bonus as the Architectural Division never turned a net profit during her tenure at the company. Plaintiff, on the other hand, claims that AOF unfairly manipulated the profit calculation each year and that under a proper calculation there would have been a profit. Thus, plaintiff commenced the instant action alleging, inter alia, that AOF's failure to pay her a yearly bonus was in breach of the Agreement and a violation of the Labor Law. Defendant now moves for partial summary judgment dismissing the Labor Law claim on the ground that plaintiff's allegedly unpaid bonuses are not protected wages under the Labor Law.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary

proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

In the present case, defendant's motion for partial summary judgment dismissing plaintiff's Labor Law claim is denied on the ground that defendant has failed to establish its prima facie right to judgment as a matter of law. Labor Law § 193 provides that "no employer shall make any deduction from the wages of an employee," except in certain limited circumstances. "Wages" are defined as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." Labor Law § 190. Typically, courts have construed this statutory definition as excluding bonuses and other forms of incentive compensation unless the incentive compensation is earned by the employee. *See Truelove v. Northeast Capital & Advisory*, 95 N.Y.2d 220 (2000). An employee's incentive compensation may become earned when the employee acquires a vested interest in the incentive compensation and its payment is not conditioned upon some occurrence or left to the discretion of the employer. *See Westheim v. Elkay Indus.*, 166 A.D.2d 318 (1st Dept 1990); *Dean Witter Reynolds, Inc. v. Ross*, 75 A.D.2d 373 (1st Dept 1980); *see also Aledia v. HSH Nordbank AG*, 2009 WL 855951 (S.D.N.Y. 2009) (applying New York law and interpreting New York Labor Law § 193). Bonuses become vested either by contract or when an employer otherwise awards a specified amount of compensation to the employee. *See id.*

In the present case, the court finds that plaintiff's bonuses, at least for the 2008-2012 fiscal years, qualify as wages under the Labor Law as plaintiff had acquired a vested interest in

these bonuses at the time she was terminated. Pursuant to the unambiguous Agreement, plaintiff was entitled to a non-discretionary and objectively calculated bonus at the end of each fiscal year unless one of the following occurred: (1) she was terminated for cause; (2) she left to work in a position relating to the office furniture or architectural products business; or (3) she did not work for the full twelve months of the fiscal year. As it is undisputed that plaintiff maintained continuous employment for the 2008-2012 fiscal years, she was clearly entitled to a bonus for those years, the payment of which was not conditioned upon any further occurrence or left to AOF's discretion. Contrary to defendant's assertion, the mere fact that it could fire plaintiff prior to the end of any fiscal year does not in itself make the bonuses as a whole discretionary. Any discretion defendant may have held over plaintiff's bonuses for any given year clearly became nonexistent once the fiscal year ended and plaintiff was still employed. Thus, plaintiff's entitlement to the 2008-2012 fiscal year bonuses became vested at the end of each of those respective fiscal years and she may maintain a claim under the Labor Law for the alleged non-payment of those bonuses. As to the 2013 fiscal year bonus, the court need not determine plaintiff's entitlement to such bonus under either the Labor Law or the Agreement at this time as the dispositive issue on this motion was whether plaintiff could maintain a claim under the Labor Law at all.

Accordingly, defendant's motion for partial summary judgment dismissing plaintiff's Labor Law claim is denied. This constitutes the decision and order of the court.

Dated: 5/21/14

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.