

Sherwin v Mestel & Co. N.Y., LLC

2014 NY Slip Op 31768(U)

July 8, 2014

Sup Ct, NY County

Docket Number: 150489/2014

Judge: Ellen M. Coin

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

PRESENT: HON. ELLEN M. COIN

PART 63

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JONATHAN SHERWIN,

Plaintiff,

INDEX NO. 150489/2014
MOTION DATE April 23, 2014
MOTION SEQ. NO. 001
E-FILED

-against-

MESTEL & COMPANY NEW YORK, LLC,

Defendant.

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Appearances:

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Papers

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ELLEN M. COIN, J.:

Plaintiff Jonathan Sherwin ("Sherwin") brought this action to recover commissions from Mestel & Company New York, LLC ("Mestel") for three legal recruitment placements. He pleads claims for breach of contract (First Cause of Action) and claims predicated upon Labor Law Sections 191 et seq (Second through Fifth Causes of Action). Mestel moves to dismiss the action on the grounds that a provision in the contract explicitly bars Sherwin's recovery.

The following facts are not in dispute. On January 23, 2013, Sherwin entered into an employment agreement ("the Contract"; Ex.2 to Affirmation of Evan B. Citron dated February 18, 2014) with Mestel, an attorney placement firm. In May 2013, Mestel entered into contracts with Munger, Tolles & Olson LLP and Weil, Gotshal & Manges LLP (the "law firms"). Pursuant to the contracts with the law firms, Mestel would earn compensation for placing attorneys at the law firms. The law firms would pay Mestel within 30 days after the attorneys' start dates of employment, provided that if an attorney's employment were terminated less than six months after it commenced, Mestel would refund at least a portion of the placement fee, a provision known as the "guaranty period."

Sherwin placed three attorneys pursuant to Mestel's contracts with the law firms. The attorneys' start dates were August 16, 2013, September 2, 2013, and September 5, 2013 respectively. Sherwin voluntarily resigned on September 3, 2013, before the law firms owed compensation to Mestel and long before the six-month guaranty period expired for any of the candidates. Therefore, Sherwin had not "earned" his commissions before his employment termination as this term is defined in the Contract.

Paragraph (b) (iv) of Exhibit A to the Contract provides: "[Sherwin] agrees that no commission on a particular placement shall be considered earned until the completion of the conditions precedent set forth above in Subsections (b) (ii) and (iii). . ."

(Contract, p.11). The conditions precedent to earning a commission are the expiration of the guaranty period (subsection (b)(ii)) and the payment by the law firm (subsection (b)(iii)) (Contract, p.11).

Paragraph (e) of Exhibit A to the Contract provides: "[U]pon the termination of [Sherwin's] employment for any reason [Sherwin] shall not be entitled to a commission on any work in progress, meaning placements in progress where the commission has not yet been earned in accordance with the terms of this Agreement at the time of such termination" (Contract, p.12). Paragraph 9 of the Contract contains a merger clause and paragraph 15 provides that it "may not be changed, modified or cancelled except by written consent of [Sherwin and Mestel]" (Contract, p.9).

Mestel contends that the Contract explicitly bars Sherwin's recovery because his commissions were not "earned" prior to the termination of his employment. Alternatively, Mestel argues that Sherwin failed to plead satisfaction of conditions precedent to the Contract. Sherwin counters that he may make a claim for post-termination commissions because they are of a definite and limited nature and that the Contract should be interpreted against the drafter, Mestel. Sherwin also argues that he need not plead satisfaction of conditions precedent to the Contract pursuant to CPLR 3015(a).

Discussion

On a motion to dismiss pursuant to CPLR 3211, the court must accept as true the facts as alleged in the complaint and the submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; see also *Leon v Martinez*, 84 NY2d 83 [1994]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*Ginsburg Dev. Cos., LLC v Carbone*, 85 AD3d 1110, 1111 [2d Dept 2011], quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). A motion brought pursuant to CPLR §3211(a)(1) “may be granted where ‘documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law’” (*Held v Kaufman*, 91 NY2d 425, 430-31 [1998], quoting *Leon v Martinez*, 84 NY2d at 88; *Foster v Kovner*, 44 AD3d 23, 28 [1st Dept 2007] [“[t]he documentary evidence must resolve all factual issues and dispose of the plaintiff’s claim as a matter of law”] [citations omitted]).

When a contract does not contain an express provision that an employee is barred from receiving commissions that he arranged before his termination, the employee may have a claim for recovery when the claim for commissions is of definite and

limited nature (*Arbeeny v Kennedy Exec. Search, Inc.*, 71 AD3d 177, 180 [1st Dept 2010]; *Yudell v Israel & Assoc.*, 248 AD2d 189, 189 [1st Dept 1998]). However, when such express provision is in the contract, it is enforceable, and the issue of definiteness and scope of claimed commissions is no longer relevant (*Arbeeny*, 71 AD3d at 181 ["Had the employer meant to foreclose the possibility of the employee earning a post-termination commission on a placement unquestionably originated by her, it could have said so explicitly"], citing *Yudell*, 248 AD2d at 189-90).

Here, the Contract contains an explicit provision that Sherwin is not entitled to commissions that are not "earned" as of his termination date, and the Contract specified that the commissions are not "earned" until the guaranty period expires and the law firms pay Mestel. Since Sherwin terminated his employment before he "earned" his commissions under the Contract, he is not entitled to the three commissions he seeks.

Because the commissions were not "earned" prior to termination, they did not constitute wages under Labor Law §190 et seq. Plaintiff cannot assert a statutory claim for wages under the Labor Law if he has no enforceable contractual right to those wages (*Tierney v Capricorn Inv., L.P.*, 189 AD2d 629, 632 [1st Dept 1993]; *Linder v Innovative Commercial Sys. LLC*, 41 Misc 3d 1214[A], *4 [Sup Ct, New York County 2013] [dismissing claims for violations of New York Labor Law as duplicative of breach of

contract claim]; *Simas v Merrill Corp.*, 2004 WL 213013, *2 [SD NY 2004]).

In light of the foregoing, Mestel's alternate argument regarding Sherwin's failure to plead satisfaction of conditions precedent has been rendered academic.

It is therefore

ORDERED that the motion of defendant Mestel & Company New York, LLC pursuant to CPLR §3211(a)(1) to dismiss the complaint is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment dismissing the complaint in its entirety with prejudice and without costs.

This constitutes the decision and order of the Court.

ENTER:



Ellen M. Coin, A.J.S.C.

Dated: July 8, 2014

CASE DISPOSED