

**Edwards v Collective, Inc.**

2018 NY Slip Op 31254(U)

June 18, 2018

Supreme Court, New York County

Docket Number: 450512/2016

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 8

DEBBIE EDWARDS

INDEX NO. 450512/2016

- v -

COLLECTIVE, INC.

MOT. DATE

MOT. SEQ. NO. 002

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s). 43-50, 68-105

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). 53-64

Replying Affidavits

NYSCEF DOC No(s). 65

This is a breach of contract action wherein plaintiff, a former employee of defendant, seeks payment for commissions she claims she's entitled to for sales made in April, May and June, 2015. Defendant (sometimes "Collective") now moves for summary judgment dismissing plaintiff's complaint. Plaintiff opposes the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The motion is decided as follows.

The facts are largely undisputed. Plaintiff began working with defendant as a media salesperson in 2012. Plaintiff executed a sales compensation plan for each year of her employment, including 2015, which set forth the terms by which she would earn commissions. Plaintiff signed the 2015 compensation plan, a copy of which has been provided to the court. With regards to when commissions are earned, the compensation plan provided as follows:

A commission on any fee due from the client for each contract for the performance of Company's services directly procured by you (excluding Windfall Sales and House Accounts) shall be "earned" or vested if: (i) delivery has occurred or services have been fully provided and after final computation by Company of the commission pursuant to the formula set forth in Exhibit A; and (ii) you are actually employed by the Company at the time of the receipt of the eligible fee by the Company.

The commission plan further provided that payments would be made on a quarterly basis:

Quarterly commission payments due in accordance with this Plan shall be paid on the last regular payroll date of the month following the quarter in which the commission was earned. For example, if the commission is earned in the second quarter (i.e., on or before June 30th), the commission shall be paid on July 30, 2015.

Dated:

6/18/18

HON. LYNN R. KOTLER, 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

Finally, the compensation plan expressly provided for post-termination commissions:

In order to qualify for commission payments, the commission sales professional must be employed by the Company. Should the commission sales professional resign from or be terminated by the Company for any reason, the commissions sales professional shall no longer be eligible to receive commissions from the moment of their resignation or termination from the Company.

In the event of the termination of the commission sales professional's employment by either the Company or the commission sales professional, the commission calculations and the payment of earned commissions due, if any, shall be made on or before the last regular payroll date of the month following the month when a commission is earned. Termination of a commission sales professional's employment shall not void the liability of the Company to the commission sales professional for commissions earned prior to the effective date of such termination.

By letter dated June 22, 2015, plaintiff gave defendant two weeks' notice of her resignation with a final date of employment on July 3, 2015. In an email dated July 2, 2015, plaintiff wrote to Melissa Mauricio, defendant's Director of Human Resources:

Per our discussion, please confirm at the earliest opportunity that I will be compensated for my sales efforts with commissions through the final days of my employment as was my interpretation of my 2015 commission document and as had been reinforced during my transition discussions with Holly and Kaitlyn.

This would be a major concern for me as I have worked exceedingly hard for Collective and being a strong team player leading the region in sales performance to goal this year and leaving the territory in fantastic shape to exceed its annual goal.

That same day, Mauricio responded via email as follows:

I've escalated your concerns, but as I mentioned during our phone call, we have not made any exceptions to the policy, and we have made a collective decision to stick to the policy.

Later that day, plaintiff emailed Joe Appendi: "I have done everything to set Collective up for success in the SW. I have been a team player for years and I have worked my tail off to earn this commission. Is this really your policy?" This action ensued, wherein plaintiff's sole cause of action is for breach of contract.

#### Parties' arguments

Defendant characterizes plaintiff as a "sophisticated business person" who earned a six-figure salary with defendant and worked many years prior as a commissioned salesperson. Defendant argues that based upon the plain language of the commission plan, plaintiff did not "earn" commissions for sales made in April, May or June 2012, because two conditions under the compensation plan were not met: [1] a final computation of the commissions was not made while plaintiff was still employed by defendant; and [2] plaintiff was not employed by the defendant at the time of receipt of eligible fees for the sales orders at issue. On the first point, defendant maintains that the "final computation" took place at the end of July 2015, after plaintiff resigned.

On the second point, it is undisputed that 63 sales orders are at issue, of which, defendant received payment for 12 orders prior to July 3, 2015 and 45 orders after July 3, 2015. It is further undisputed that defendant was never paid for six orders which plaintiff seeks commissions on.

Meanwhile, plaintiff contends that there are ambiguities contained in the compensation plan which should be construed against the defendant which drafted same. Plaintiff argues that the term "final computation" is ambiguous because it is not defined in the contract. Plaintiff maintains that the term "earned commission" is ambiguous in the contract because in some places it is in quotes and in others, it is not in quotes. Plaintiff also argues that the post-termination commissions section of the compensation plan is contradictory because the first paragraph states that plaintiff is not eligible to receive commissions from the moment of resignation, and the second paragraph states that termination of employment "shall not void the liability of the company to the commission sales professional for commissions earned prior to the effective date of such termination."

Plaintiff also cites caselaw for the proposition that earned commissions cannot be forfeited based upon public policy. Plaintiff maintains that there is a triable issue of fact as to the parties' understanding of what an earned commission was under the compensation plan. Plaintiff has provided to the court her own sworn affidavit wherein she attests that her interpretation of the compensation plan was that "whether [she] resigned or was terminated that this would not 'void' [her] commissions on orders [she] placed during the [subject time period]." Plaintiff further states that "[t]his was also [her] understanding based upon conversations [she] had with [her] supervisors leading up to [her] resignations."

## DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Earned commissions cannot be forfeited (*Arbeeny v. Kennedy Executive Search, Inc.*, 71 AD3d 177 [1st Dept 2010]). The primary issue here is whether, under the compensation plan, plaintiff earned the subject commissions. The compensation plan will be construed against the defendant, as the drafter (*Yudell v. Ann Israel & Associates, Inc.*, 248 AD2d 189 [1st Dept 1998]).

Here, the court does not find that the term "earned commissions" as defined in the compensation plan is ambiguous as a matter of law. A contract that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*Greenfield v. Philles Records, Inc.*, 98 NY2d 562 [2002]). The court rejects plaintiff's argument that the term "earned commission" is ambiguous, because the compensation plan defined "earned commissions" as vesting if three conditions are met: [1] delivery has occurred or services have been fully provided; [2] defendant has completed a "final computation" of the commission pursuant to the formula set forth in Exhibit A; and [3] plaintiff is "actually employed" by defendant at the time of defendant's receipt of the eligible fee.

The term "earned commissions", can be freely defined by the parties to an at-will agreement, and plaintiff cannot point to any case which holds otherwise. While the contract is construed against defendant, plaintiff herself is a sophisticated businesswoman with years of experience as a commissioned salesperson. The court will not alter the terms of an agreement which was mutually agreed to by the parties.

Nor does the court find that the term "final computation" is ambiguous. This term is not reasonably susceptible to any other meaning that that which defense counsel ascribes to it: a calculation made "at the end of the month following the close of a quarter to allow time for the Company to collect data, issue invoices, collect payments, and reconcile accounts."

The court also rejects plaintiff's argument that the post-termination commissions provision is contradictory. Under this provision, plaintiff was "no longer be eligible to receive commissions from the moment of [her] resignation". The second paragraph of this provision, however, embodies the common law rule against forfeiture of earned commissions. When read together, this provision prohibits plaintiff from earning any commissions on prospective sales orders, but does not otherwise limit plaintiff's entitlement to "earned commissions" as it is defined under the compensation plan.

Since the term "earned commissions" is not ambiguous on its face, the court may not consider extrinsic evidence, such as plaintiff's understanding of the contract terms (*W.W.W. Associates, Inc. v. Giancontieri*, 77 NY2d 157 [1990]). Nor is plaintiff's claim that she was misled by defendant's employees about what commissions she would receive availing, because the compensation plan expressly provided that "[t]here are no additional terms or conditions, written or verbal" other than what was within the four corners of the document, and "[t]his plan... may be altered, amended, modified, deleted and/or deviated from at the sole discretion of the [defendant]." Otherwise, plaintiff's vague and unsubstantiated claims on this point are rebutted by the emails between her and the defendant which expressly stated that plaintiff would not receive commissions through her date of resignation.

Defendant's interpretation of the "earned commission" provision, however, is also flawed. Defendant urges this court to adopt its interpretation that not only must plaintiff be employed at the time it received the eligible fee, but plaintiff must also be employed when defendant has performed its final computation. This interpretation inappropriately compounds the first and second components of the "earned commissions" provision by imposing the employment requirement on the "final computation" element. Imposing the requirement that plaintiff be employed at the time defendant completes its "final computation" would read into the compensation plan language which does not exist.

Therefore, defendant's motion is granted only as to those sales orders for which defendant did not receive the eligible fee on or before July 3, 2015. For the remaining sales orders, the motion must be denied, because plaintiff is entitled to her "earned commissions" on those orders as: [1] it is undisputed on this record that delivery has occurred or services have been fully provided with respect thereto; [2] defendant has completed a "final computation" (there being no time limitation on when that computation needs to be completed by); and [3] plaintiff was "actually employed" by defendant at the time of defendant's receipt of the eligible fee.

## CONCLUSION

In accordance herewith, it is hereby:

**ORDERED** that defendant's motion for summary judgment is granted only to the extent of dismissing plaintiff's claim predicated on the sales orders for which defendant did not receive the eligible fee on or before July 3, 2015; and it is further

**ORDERED** that the motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

6/18/18  
New York, New York

So Ordered:

  
Hon. Lynn R. Kotler, J.S.C.