Divljanovic v Saks & Co
2019 NY Slip Op 30003(U)
January 2, 2019
Supreme Court, New York County
Docket Number: 152134/2017
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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AMRA DIVLJANOVIC *et al.*,

Plaintiffs,

- against -

SAKS & CO d/b/a SAKS FIFTH AVENUE,

Defendant.

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DECISION AND ORDER
Index No.: 152134/2017

Motion Sequence No.: 002

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss, these facts are taken from the Amended Class Action Complaint ("Complaint") and assumed true. In a Decision and Order filed on February 16, 2018, this court set forth the background facts and law applicable to class actions under CPLR Article 9 ("Prior Order") (NYSCEF Doc. No. 38). Said facts and law will not be recounted here except as necessary for this decision and order.

Plaintiffs are sales employees of defendant Saks & Co ("Saks"). Plaintiffs claim Saks made improper wage deductions based on product returns. The case is framed as a class action. In the Prior Order, the court granted defendant's motion to dismiss the class action allegations on grounds that the liquidated damages claim defeats class action status. Plaintiffs have revised the class definition. The proposed class is: "[a]ll persons who are or have been employed by Defendant as sales personnel who were performing the same sort of functions as the named Plaintiffs, who had commissions deducted for returns after the commissions were paid to them, at Saks Fifth Avenue located at 611 5th Avenue, New York, NY 10022, in the State of New York at any time from January 2011 until the close of the opt-out period of the class action" (Complaint at ¶ 19).

Plaintiffs do not claim that defendant's Commission Compensation Plan ("Plan") itself is

unlawful (Opp. p. 2). Nevertheless, plaintiffs challenge aspects of implementation of the Plan. Plaintiffs state that all sales associates were compensated on a "draw versus commission plan" by which they would be advanced $15 per hour for 37.5 hours per week for a total of $562.50 per week. They were told they would earn a commission of 7% after making $8,000 in sales, and if they did not cover their draw, they would owe the defendant more the following week, following that week's draw. However, plaintiffs would, in practice, have to make about $20,000 in sales before receiving any income, because certain returns would be deducted from the entire department (*id.* at ¶¶ 32-33). These returns included: returns made without a receipt, returns from another store, returns where the sales person making the sale was unidentified, and returns made because the alterations department erred (the "Disputed Returns").

Due to these policies and deductions, plaintiffs would take home as little as $200-400 per 5-day, 40+ hour week. The fear of losing sales, and thus commissions, resulted in plaintiffs clocking out for breaks, but continuing to work, as staying clocked in would result in their target sales goals for the next week being higher (*id.* at ¶ 40). Defendant's policies shifted the losses from returns to its employees. Defendant has now changed to a new payment plan, paying employees $21 per hour with a 3% commission, and proper provision for overtime.

This class action complaint alleges a single claim for unpaid wages and unlawful deductions from wages pursuant to New York Labor Law § 193. Despite the Prior Order, plaintiffs seek unpaid wages and liquidated damages in the amount of their unlawfully deducted wages, as well as reasonable attorneys' fees and costs, with interest. They also request a declaratory judgment that defendant's practices are unlawful.

Saks moves to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (7), based on documentary evidence and failure to state a claim.

II. ARGUMENTS

A. Saks' Motion to Dismiss Class Allegations

Saks argues that plaintiffs' claims fail because the Plan does not provide defendant would deduct money from commissions already paid. The formula takes into account downward adjustments for future, unearned, commissions, and so is lawful, pursuant to Labor Law section 193 (Memo at 2, 4).

Plaintiffs were given a draw every week as an advance on their commissions. The commissions were then used to pay back for the draw. No wages were ever reduced, but the commissions calculated were reduced by the amount of returns as described in the next sentence. The commission plans for 2011-14 required the weekly calculation of commissions, and provided that "Commissions are paid each Friday for merchandise sold two weeks earlier" and "[w]hen an item is returned and the original sales associate for that item is identified, commission for the sale will be deducted from that associate's earnings at the same rate it was originally paid" (*id.* at 3).

The New York Labor Law prohibits employers from deducing money from employee wages except under certain circumstances (*id.* at 4-5, citing NYLL § 193[1][a]-[b]). 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" (Memo at 5, citing NYLL § 190[1]). The Labor Law does not provide much more instruction, other than that an "earned commission" is due "according to the terms of an applicable contract" (Memo at 5, quoting NYLL § 191[a][b]).

Defendant relies on *Pachter v Bernard Hodes Group, Inc.,* 10 NY3d 609 (2008). In *Pachter*, the plaintiff was compensated based on a commission, and the formula used included certain

downward adjustments. Plaintiff challenged the formula, claiming the deductions were prohibited by New York Labor Law section 193. The court upheld the formula. That court explained that a commission is a wage when it is earned, and the parties' agreement determines when it is earned (Memo at 5). Accordingly, an employer and employee may agree on how earnings are calculated and what adjustments are made. A commission "will not be deemed 'earned' or vested until computation of the agreed-upon formula" (*id.* at 6, quoting *Pachter*, 10 NY3d at 617-18). Similarly, defendant points to *Gold v New York Life Ins. Co.* (2015 N.Y. Slip Op. 31699[U] [Sup Ct, New York County 2015], *affd as mod,* 2017 N.Y. Slip Op. 05695 [1st Dept, null 2017], *judgment entered,* [1st Dept, 2017], and *revd,* 2018 N.Y. Slip Op. 06784 [Ct App, null 2018], and *affd as mod,* [1st Dept, 2017]), in which a commission scheme allowing for downward adjustments was upheld.

According to the defendant, the compensation system at Saks, as described above, was clearly laid out in the various commission plans (Memo at 7). The policy at Saks did not violate the law.

B. Plaintiffs' Opposition

Plaintiffs argue they have alleged facts showing the commission plan was not applied consistently with its terms, and they were subject to deductions taken after the commissions were paid (Opp at 1). Plaintiffs do not object to the terms of the draw versus commission agreement as set forth in the various commission plans (*id.*). Nor do they object to deductions for returns taken in a timely manner, which plaintiffs define as deductions made before the commissions were paid. Rather, plaintiffs complain of departures from the commission plans (*id.* at 2). Plaintiffs argue that some return deductions were taken late, and so are improper. Other improper deductions were made for returns "due to mistakes made by the alterations department, returns of items made

without the sales receipt, returns made wherein the identity of the original sales person was unknown, and returns that were accepted after the date specified in the return policy" (*id.* at 2-3).

Further, managers accepted returns of worn or damaged items and deducted those commissions from plaintiffs' commission (*id.* at 7-8). The commission plans provided that "Commissions are paid each Friday for merchandise sold two weeks earlier" (Commission Compensation Plan, attached as Exhibit C to Avshalumov aff, NYSCEF Doc. No. 57, §5, Payout Timing). Accordingly, no deductions should be taken after that day, as that is the day when the commission vests and becomes wages. The return policy allowed returns up to 60 or 90 days after purchase, resulting in deductions for returns made long after the vesting date, assuming the vesting date is the Friday two weeks after the sale[1] (Opp at 3). If the vesting date is deemed to be the date on which the return policy no longer permits returns of merchandise (60 or 90 days post-sale, depending on the applicable return policy), then, plaintiffs claim, deductions for returns were still made late, since Saks managers would accept returns after the expiration of the return period (*id.* at 7). Plaintiffs contend that whether vesting occurs at the end of the two-week period or at the end of the 60-90 day period is a question of law (*id.* at 5).

C. Saks' Reply

Saks notes that plaintiffs have admitted the commission formula, as set out in the various Plans, is lawful. It argues that the formula allows for downward adjustments on commissions for returns that week, regardless of when the item being returned was purchased, effectively that a return triggers a reduction in commissions in general, which could allow for a deduction at any time, and not a reduction of the commission on that specific purchase, which has already been vested and paid as wages (*see* Reply at 3). The Plan states that "earnings are impacted by all returns"

[1] The returns policy is not referenced in the Plan document.

(NYSCEF Doc. No. 46). Commission are calculated based on netting sales and returns (where the original sales associate for the item is identified) during the prior two weeks. No deductions were taken against vested commissions, only from new, unvested commissions (*id.* at 4).

IV. DISCUSSION

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.,* 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.,* 60 AD3d 562, 562 [1st Dept. 2009]).

The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85).

Here, the documentary evidence consists of the various commission plans referenced in the Complaint and provided by Saks in connection with this motion (Commission Plans, attached as Exhibits B-E to Konkel aff, NYSCEF Docs. No. 46-49). The authenticity of these documents is undisputed. They constitute appropriate documentary evidence of the commission formula.

The Plan, as laid out in the various commission plans, is lawful. This issue is not disputed. Plaintiffs contend that it was improperly applied, because the deductions taken against commissions when an item is returned are deductions on that specific commission payment, which may already have been paid (and thus is vested and considered wages under New York Labor Law).

Plaintiffs mischaracterize how the commission compensation plan operates, as described in the Plan documents. Earned compensation is tied to a commission formula, not to any particular sale or series of sales. The Plan states unambiguously that "[p]roductivity and earnings are impacted by all returns: (Plan at p. 1, NYSCEF Doc. No. 46). Commissions are calculated based on sales transactions made two-weeks prior and returns transactions made one week prior by the sales associate identified with the items sold or returned. Thus, returns are charged against current unearned sales commissions. Returns are not deducted from past sales commissions. The Plan is silent as to the handling of returns where the selling sales associate cannot be identified, except to state that earnings are impacted by all returns. If a sales associate fails to make over $5,000 in sales for a 37 ½ hour week, he or she will receive a draw (*i.e.* "an advance against future commissions") which is the product of the draw rate ($15/hr for the period in question) and the number of productive hours worked that week. The deficit in sales is carried forward. Employees are never required to return any draw that has been advanced. This arrangement underscores the fact that charges (whether related to returns or law productivity) are made against future commissions and are not deducted from past commissions.

The parties agree that the language of the commission plans defines when commissions vest and become wages (*see* Opp at 6). The commission plans include a provision that "[w]hen an item is returned and the original sales associate for that item is identified, commission for the sale will be deducted from that associate's earnings at the same rate it was originally paid" (Plans at 1, NYSCEF Doc. No. 46). Commission formulae that include downward adjustments have been upheld by New York Courts (*see Parchler,* 10 NY 3d at 617; *Gold,* 2015 Misc. LEXIS 3254. Given that "[c]ommission payments under the plan are paid weekly" (*id.*), and given that returns are allowed for up to 60 or 90 days under Saks' return policy, the commission plans here

contemplate deductions for returns being calculated against commissions on sale made at the time the returns occur, regardless of when the original sale took place.

As far as plaintiffs argue Saks accepted untimely returns (*i.e.,* after expiration of the 60 or 90 day return window, items returned due to alteration department error, or those made without a receipt), the commission plans do not restrict returns to a specific timeline, invoke the terms of any return policy, or restrict deductions for returns to those made for particular reasons. Instead, "earnings are impacted by all returns" (NYSCEF Doc. No. 46). However, plaintiffs also allege they saw their commissions reduced for returns where the identity of the selling salesperson was not known (Complaint, ¶ 33). Such deductions are inconsistent with the terms of Plan, which only references deductions when "an item is returned and the original sales associate for that item is identified" (Commission Plans at 1 *see also Decl. of Anne Whittaker*, ¶ 12, NYSCEF Doc. No. 13).

The complaint does not challenge defendant's commissions deduction policies as set forth in the Plan, only departures therefrom. Such challenges do not involve issues common to all plaintiffs but instead require individualized proof. For this reason, the class action claims must be dismissed (*see* discussion of class action standards in Prior Order, NYSCEF Doc. No. 38).

It is hereby

ORDERED that the motion of defendant Saks & Co. to dismiss the class action allegations in the Amended Class Action Complaint is GRANTED: and it is further

ORDERED that defendant answer the remaining allegations in the Amended Class Action Complaint within 21 days of the date of service this Decision and Order with notice of entry; and it is further

ORDERED that counsel for the parties shall appear at a preliminary conference on January 22, 2019 at 9:30 am at Part 49, Room 252, 60 Centre Street, New York, New York 10007.

This constitutes the decision and order of the court.

Dated: January 2, 2019

E N T E R,

O. PETER SHERWOOD J.S.C.