

O'Callaghan v Leslie Waterworks, Inc.

2019 NY Slip Op 30974(U)

January 9, 2019

Supreme Court, Nassau County

Docket Number: 600069/2017

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 9
NASSAU COUNTY

DANIEL O'CALLAGHAN,

Decision and Order

Plaintiff,

-against-

MOTION SEQUENCE:01
INDEX NO.:600069/2017

LESLIE WATERWORKS, INC.,

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Memorandum of Law in Support	2
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Response to Statement of Facts	4
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In the action to recover damages for, *inter alia*, breach of contract, Defendant Leslie Waterworks, Inc. (the "Company") moves for an order pursuant to CPLR 3212 dismissing the complaint.

Background

The Company is in the business of selling water filtration and purification water coolers. Plaintiff Daniel O'Callaghan was a sales associate of the Company from 2007 until he resigned in October 2016. The Company employs sales associates to secure contracts for the sale or rental of water coolers. Sales associates, who earn commissions for selling/renting water coolers, are

paid pursuant to an individual compensation plan, which is a contract negotiated at the end of each year for the following year. Entitlement to a commission is based upon the “Commission Code of Conduct” set forth in the Company Employee Handbook (*see discussion infra* at pp 3-4).

From 2010 through July 2014, the Plaintiff was paid a salary in addition to commissions for the sale of water coolers. According to the Company, “plaintiff’s salary compensated plaintiff for all work performed beyond completing sales of water coolers, including administrative work, research regarding clients or potential customers and assisting in putting together a sales pitch” (Defendant’s Rule 19-a Statement at ¶ 23).

In 2011, the Plaintiff was involved in preparing a public bid to the City of New York (“NYC bid”). The Company asserts that Plaintiff “assisted” in preparing the NYC bid; Plaintiff alleges that he “prepared the public bid to be submitted to New York City” (Rule 19-a Statement and Plaintiff’s Response at ¶ 28).

It is undisputed that various employees from the Company assisted in preparing the NYC bid (Rule 19-a Statement at ¶¶ 39, 43-45).

The Company submitted its NYC bid in October 2011 and was awarded the contract in February 2012 (the “NYC contract”).

According to the Company, the NYC contract “allowed [the Company] to contact NYC Agencies for a period of five (5) years in an effort to secure purchase orders.” Plaintiff does not dispute that the “awarded bid was an exclusive contract to sell water coolers to the City of New York” and that the Company “still needed to contact NYC Agencies and convince them to issue [purchase orders] and consummate a sale”¹ (Rule 19-a Statement at ¶¶ 51, 55).

The water coolers have since been installed in offices throughout NYC and the Company has been compensated for these sales (Complaint at ¶ 16).

Procedural History

On January 3, 2017, the Plaintiff commenced the instant action alleging causes of action for breach of contract and quantum meruit.

According to the verified complaint, despite the fact that Plaintiff was “the instrumental salesman for the Contract as defined by the [Employee] Handbook, [the Company] in violation of its own written policy has awarded the commission to a manager who [sic] activities regarding the procurement of the Contract were ‘not instrumental’” (Complaint at ¶ 13).

In the first cause of action, Plaintiff alleges that he is the “instrumental salesperson and

¹ Plaintiff states that “City agencies were also free to seek out where they could obtain a water cooler through the exclusive contract with the exclusive vendor” (Rule 19-a Statement at ¶ 55).

procuring cause of the [NYC] contract” and as such, is entitled to \$264,100 as per the terms of his compensation plan. Plaintiff alleges in the second cause of action that “[a]ssuming that no contract was entered into, [Plaintiff] is entitled to be compensated in quantum meruit” and that the Company has been “unjustly enriched by its failure to compensate [Plaintiff] for his services in securing the New York City contract” (Complaint at ¶¶ 20-25).

The Company answered and now moves for summary judgment dismissing the complaint.

For the reasons that follow, the motion is granted and the complaint is dismissed.

The Court’s Determination

In support of its motion, the Company submits, *inter alia*, the pleadings, the affirmation of counsel, excerpts from various depositions, including that of the Plaintiff, the affidavit of Marty Cohen (the Director of Sales for the Company), various email exchanges, and the Company’s Employee Handbooks.²

The Company’s Employee Handbook dated 2012 provides, is relevant part:

Commission

Overview

Each sales employee will be paid commission in accordance with his or her individual compensation plan.

* * *

Commission Code of Conduct

Commission is paid for selling machines, Selling machines includes exemplary customer service and following through on orders to their completion including confirmation, delivery, after sale service, keeping accurate notes, etc. Thus, in order for a Sales Associate to earn their commission they must be actively responsible for a sale beginning with being instrumental in the customer’s decision to contract with us, any follow through and customer contact before the customer receives their machine(s), and ending with the satisfactory completion of the order including any after delivery service required.

² Exhibit “6” is the Company’s 2008 Employee Handbook and exhibit “7” is the Company’s more recent Employee Handbook from 2012.

Commissioned employees are paid commission on installed and billed orders. In order for a sale to be billed, a delivery receipt must be submitted to the Home Office.

It is imperative that all employees are honorable when claiming credit for a sale. In order to honorably claim credit for a sale, the salesperson must have been instrumental in the customer's decision to lease the machine(s)

In general, a salesperson is instrumental in a sale when she/he:

- * Is the initial person to give the customer specific written information that leads to a contract.

- * Is the person that gives the customer additional new specific information that leads to an alteration in an existing quote that ultimately becomes a sale.

* * *

Employees who earn commission are instrumental in the customer's decision to enter into a contract - follow through on the sale, make customer contact before the customer receives their machine(s), and satisfactorily complete the order including any after delivery or after pick-up service. All Sales Associates claiming responsibility on an order must follow this procedure in order to earn commission . . . (Ex. "7" at pp 30-32).³

The Company argues that the Plaintiff was not entitled to commissions solely based on the work he performed in preparing the NYC bid because preparing the NYC bid, and having the bid accepted, did not constitute a "sale." In this regard, as per the Employee Handbooks, a sales associate is entitled to a commission for "selling machines" and "[c]ommissioned employees are paid commission on installed and billed orders" (Ex. "7" at pp 30-31; Defendant's Memorandum of Law in Support at p 13).

The Company's submissions prima facie establish that Plaintiff was not entitled to a commission inasmuch as it is undisputed that after the Company was awarded the NYC contract, the Plaintiff "never contacted a NYC agency, by phone, by email or in person, or in an attempt to secure a purchase order for water coolers" and "never attended a sales meeting with any representative of a NYC agency nor did he ever secure a purchase order from a NYC agency"

³ Similar language is contained in the 2008 Employee Handbook: "In order for a Sales Associate to earn their commission they must be actively responsible for a sale beginning with being instrumental in the customer's decision to contract with us, any [sic] follow through and customer contact before the customer receives their machine(s), and ending with the satisfactory completion of the order including any after delivery service required" (Ex. "6" at p 31).

(Rule 19-a Statement at ¶¶ 66-67).⁴

Plaintiff's submissions are insufficient to defeat summary judgment.

Notably, while Plaintiff's submissions arguably demonstrate that Plaintiff played an active role in preparing the NYC bid and securing the NYC contract, the record is devoid of any evidence that Plaintiff actually sold any water coolers after the Company was awarded the contract. As set forth in the Employee Handbook, "[c]ommission is paid for selling machines."⁵

Nor is there any evidence that Plaintiff was the "initial person" to give New York City specific written information that lead to the NYC contract (see Ex. "7" at p 31). To the contrary, the court notes that Morty Cohen (the Company's Director of Sales) had a preexisting relationship with Liana Patsuria (Purchasing Agent for New York City's Department of Citywide Administrative Services) and that he and Jack Cohen (one of the Company's owners) met with Patsuria in May 2011 at which time they discussed the environmental benefits of the Company's bottleless water coolers. Plaintiff did not attend this meeting (Defendant Rule 19-a Statement at ¶¶ 30, 31 35, 37).

Accordingly, the court finds that Defendant did not breach the compensation plan by not paying Plaintiff a commission for the NYC contract given the undisputed facts, the contractual language of Plaintiff's individual compensation plan, and the Company's policies and operating procedures regarding commissions as set forth in the Employee Handbook.

Summary judgment dismissing the first cause of action is, therefore, granted.

The second cause of action seeking recovery in quantum meruit is dismissed inasmuch as the existence of an express contract between the parties governing the particular subject matter precludes recovery in quantum meruit (*see Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski*, 14 AD3d 644 [2d Dept 2005]).

Here it is undisputed that the Plaintiff's individual compensation plan was a contract concerning Plaintiff's entitlement to commission.

Moreover, to the extent it can be argued that the Plaintiff should be compensated for his work performed in preparing the NYC bid, it is undisputed that in addition to commission,

⁴ Without a purchase order, or instructions to deliver a water cooler under a blanket purchase order, New York City was not obligated to pay and no water cooler would be shipped or installed (Rule 19-a Statement at ¶ 59). Plaintiff does not dispute that "purchase orders were required as part of the awarded contract" (Plaintiff's Rule 19-a Statement at ¶ 59).

⁵ Although the Company was awarded an exclusive contract to sell water coolers to the City in February 2012, it had not sold any water cooler machines at that time. Notwithstanding the exclusive contract to sell, actual sales were not automatic by virtue of having obtained the NYC contract. Such sales required specific purchase orders to effectuate a sale.

Plaintiff was paid a salary from 2010 through 2014 for “being part of the [Company] team” and throughout his employment, Plaintiff, “in the course of his regular job duties, regularly prepared sales pitches and presented the pitch to potential customers” (Rule 19-a Statement at ¶¶ 22, 24-26).

Accordingly, the second cause of action sounding in quantum meruit is dismissed.

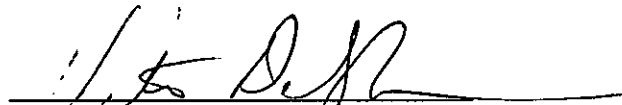
Conclusion

Based on the foregoing, it is hereby

Ordered that the Defendant’s motion is granted and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: January 9, 2019


Hon. Vito M. DeStefano, J.S.C.

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JAN 11 2019
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