

Walker v Page

2020 NY Slip Op 30771(U)

March 12, 2020

Supreme Court, New York County

Docket Number: 655652/2017

Judge: Margaret A. Chan

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

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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JASON WALKER

Plaintiff,

- v -

NATASHA PAGE,

Defendant.

INDEX NO. 655652/2017

MOTION DATE 01/14/2020

MOTION SEQ. NO. (MS) 003

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

In this action regarding breach of contract, tortious interference, and misappropriation of trade secrets, plaintiff/counterclaim defendant Jason Walker and counterclaim defendant JWalker Realty LLC move pursuant to CPLR 3212 for summary judgment to dismiss defendant Natasha Page’s counterclaims for (1) breach of contract; (2) promissory estoppel; (3) injurious falsehood; (4) slander/defamation/libel; (5) violation of Labor Law § 191(1)(c) for failure to pay wages; (6) violation of Labor Law § 215 for retaliation and wrongful discharge; (7) unjust enrichment; and (8) quantum meruit (NYSCEF # 48). Page does not oppose the motion and submitted a letter to the court explicitly declining to oppose it (NYSCEF #56). The Decision and Order is as follows:

PROCEDURAL HISTORY

As a backdrop to this suit, the issues revolve around whether there was an employer/employee or an independent contractor relationship between plaintiff Jason Walker as the alleged employer and defendant Natasha Page as the alleged employee or independent contractor.

Notably, there is a companion case that Natasha Page commenced during the pendency of this action against Jason Walker and JWalker Realty LLC (“the Walker parties”) under Index No. 158660/2018 alleging employment discrimination. The Walker parties moved to dismiss the complaint pursuant to CPLR 3012(b). Oral argument on the motion was scheduled for February 20, 2019. Plaintiff Natasha Page defaulted and gave no reason for her failure to appear. This court dismissed plaintiff Page’s action not on her default but on the deficiency of the service of the complaint (NYSCEF # 54 – Decision/Order of this court on *Page v Walker*, Index

No. 158660/2018 dated May 10, 2019). Page then commenced a new action in an unverified complaint to refile her discrimination claims in *Page v Walker* under Index No. 161002/2019.

As for the instant matter, plaintiff Jason Walker commenced this action September 1, 2017, and served his complaint on defendant Natasha Page on November 13, 2017 (NYSCEF ## 46, 47). On December 11, 2017, defendant filed an answer with counterclaims, bringing JWalker into this dispute solely as a counterclaim defendant (NYSCEF # 48). On December 29, 2017, plaintiff moved to dismiss the counterclaims in Motion Sequence 1 (NYSCEF # 6). Rather than opposing the motion, defendant instead filed an amended answer with new counterclaims on February 1, 2018 (NYSCEF #18). The counterclaim defendants served an answer to defendant's counterclaims on March 7, 2018, and document demands and interrogatories seeking information on the counterclaims on October 11, 2018 (NYSCEF ## 23, 33-34). Defendant did not respond to the demands.

On December 14, 2018, plaintiff served a motion to strike the answer and counterclaims as a sanction for failing to respond to the demands (NYSCEF #27). That motion was resolved on January 30, 2019, by stipulation which provided for a conditional preclusion order unless defendant provided full and complete responses to the counterclaim defendants' demands by February 8, 2019 (NYSCEF #36). The deadline came and went without any response from defendant. Thus, on February 20, 2019, this court issued a preclusion order which granted the counterclaim defendants' motion precluding defendant from "presenting or introducing at trial or at any stage of the litigation any evidence or documents or information which is or would have been responsive to the demands, or any testimony relating thereto, unless defendant provides full and complete responses to all of the demands on or before February 8, 2019" (NYSCEF #37). Defendant never responded to any of the demands and the Order became self-executing. Plaintiff filed his Note of Issue in this matter on November 12, 2019 (NYSCEF #41).

FACTS

Defendant Page's counterclaims in the instant action allege that she was hired as an employee by JWalker in October 2015 where she was assigned to work in real estate sales for Core Marketing Group, LLC ("Core") as part of the "Walker Team" (NYSCEF # 48, ¶ 63)¹. Defendant alleges that "[p]ursuant to [her] independent contractor agreement, any salary or commissions owed to her were to be paid by her assigned Associate Broker, the counterclaim defendants. Her payment was to be 50% of commissions for any sales or rentals that she worked on with Walker" (*id.*, ¶ 68). Defendant claims that the counterclaim defendants failed

¹ In both this matter and the related 2019 matter, Page claims that she was employed by counterclaim defendants directly and denies having a relationship with Core.

to pay the promised commissions and wages; retaliated against her for complaining about her wages and wrongfully terminated her; and spread rumors about her thereby damaging her reputation (*id.*, ¶¶ 119-132, 156).

Counterclaim defendants submit the affidavit of Jason Walker, which refutes all of the counterclaims as baseless (NYSCEF #44 – Aff of Walker). Walker avers that he never hired Page as a JWalker employee and never agreed to pay her salary or commissions (*id.*, ¶¶ 8-9). Walker asserts that Page worked for Core and provides a history of Page's real estate licensure, which indicates that she worked for a variety of real estate companies, including Core, but which does not include JWalker Realty (*id.*; NYSCEF #55 – NY Dept of State Real Estate Licensure Records). Walker further avers that he never fired Page nor did he ever say anything injurious or slanderous about Page (NYSCEF #44, ¶¶ 10-11, 14).

DISCUSSION

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]).

Counterclaim defendants' unopposed motion for summary judgment is granted. As to the first counterclaim for breach of contract, counterclaim defendants aver that there never was an agreement in place between defendant and counterclaim defendants. As there is no evidence that a contract exists, and defendant is precluded from introducing evidence of a contract pursuant to the preclusion order, there is no basis to sustain defendant's first counterclaim (*see Wilson v Galicia Contracting & Restoration Co.*, 10 NY3d 827, 830 [2008] [self-executing conditional order regarding production of discovery appropriately applied by lower court to preclude introduction of evidence]).

Defendant's second counterclaim for promissory estoppel is also dismissed absent any contrary showing of any payment of salary or wages from the counterclaim defendants to defendant.

Defendant's third counterclaim for injurious falsehood and her fourth counterclaim for libel/defamation/slander are dismissed. Walker avers that

defendant failed to specify what was said, to whom it was said, or how the allegedly injurious and defamatory statements impacted her career. Indeed, the only statements that defendant specifically identifies are that Walker called her a “mulatto”, a “lesbian”, made comments about not wanting to hire Latinas, comments about women making “sexual sacrifices” for the JWalker team, and comments regarding Page being bi-racial (NYSCEF #18, ¶ 70).

Defendant’s allegations do not specify the time, place, or manner of the false statements or to whom they were made (*see Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999] [“The complaint also must allege the time, place and manner of the false statement and to specify to whom it was made”]). Furthermore, defendant does not show how the alleged injurious falsehoods affect her property, as required to make out a claim for injurious falsehood (*see Cunningham v Hagedorn*, 72 AD2d 702, 704 [1st Dept 1979] [“The action for injurious falsehood lies when one publishes false and disparaging statements about another’s property under circumstances which would lead a reasonable person to anticipate that damage might flow therefrom”]). Additionally, defendant does not specify how the alleged statements specifically injured her. As defendant is precluded from offering additional evidence regarding these statements, her third and fourth counterclaims are dismissed.

Defendant’s fifth counterclaim for violation of Labor Law § 191(1)(c) is dismissed. Labor Law § 190(2) defines an employee as “any person employed for hire by an employer in any employment” (Labor Law § 190[2]). “Although the definition of employee is broad, independent contractors are not included” (*Bhanti v Brookhaven Memorial Hosp. Medical Center, Inc.*, 260 AD2d 334, 335 [2d Dept 1999]; *see also Bynog v Cipriani Group, Inc.*, 1 NY3d 193, 198-199 [2003] [finding that plaintiffs were independent contractors not subject to Labor Law wage protections]). Walker averred that defendant was not in his employ. Indeed, defendant alleges in her own counterclaim that she was an “independent contractor” for JWalker (NYSCEF #18, ¶ 68). As such, defendant’s fifth counterclaim for unpaid wages is denied on the basis that she was an independent contractor and not subject to Labor Law § 191(1)(c) protections.

Defendant’s sixth counterclaim for violation of Labor Law § 215 is similarly dismissed. As stated above, there is no evidence that defendant was in the employ of counterclaim defendants. There is thus no basis to conclude that counterclaim defendants retaliated or wrongfully discharged defendant as she was never their employee (*see Day v Summit Sec. Services Inc.*, 53 Misc 3d 1057, 2016 NY Slip Op 26295 [Sup Ct, NY County 2016] [defendant did not employ plaintiff at time plaintiff made wage complaint, therefore Labor Law § 215 claim could not stand]). As defendant is precluded from offering evidence regarding her employment, there is no basis to sustain her sixth counterclaim and it is dismissed.

Defendant's seventh counterclaim is for unjust enrichment and her eighth counterclaim is for quantum meruit. Both counterclaims are dismissed as the evidence show that defendant did not work for the counterclaim defendants, provide any service of value to them, and was actually employed by Core during the relevant time period (NYSCEF #44, ¶¶ 15-16). Counterclaim defendants had asked defendant to specify the properties she sold or rented, and for documents regarding the services she performed, and the reasonable value of those service. Defendant did not provide responses to those demands. As defendant is precluded from offering evidence, and she does not oppose the motion, there is no basis to maintain the unjust enrichment and quantum meruit claims; they are dismissed.

Accordingly, it is ORDERED that counterclaim defendants Jason Walker and JWalker Realty's motion for summary judgment dismissing defendant Natasha Page's counterclaims is granted; defendant's counterclaims are dismissed; it is further

ORDERED that counterclaim defendants shall serve a copy of this order with notice of entry on all parties and the clerk of the court within 10 days of its entry; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the court.

3/12/2020
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE