

Comp Trading LLC v Jemal

2020 NY Slip Op 31384(U)

May 15, 2020

Supreme Court, Kings County

Docket Number: 500408/19

Judge: Larry D. Martin

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At an IAS Term, Part COMM-12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of May, 2020.

P R E S E N T:

HON. LARRY D. MARTIN,
Justice.

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COMP TRADING LLC,

Plaintiff,

- against -

SOLOMON JEMAL, RICHARD JEMAL, MADE
SIMPLE LLC d/b/a NATCO, JOSEPH FELDMAN, AND
VANDERBILT HOME PRODUCTS, LLC,

Defendants.

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The following e-filed papers read herein:

DECISION AND ORDER

Index No. 500408/19

Mot. Seq. No. 6

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____ 55-56 _____
Opposing Affidavits (Affirmations) _____	_____ 72-80 _____
Reply Affidavits (Affirmations) _____	_____ 81 _____

Upon the foregoing papers, plaintiff Comp Trading, LLC (Comp Trading) moves for an order, in motion sequence (mot. seq.) six, dismissing defendants Solomon Jemal (Solomon), Richard Jemal (Richard) and Made Simple LLC d/b/a NATCO's amended counterclaims pursuant to CPLR 3211(a)(6) and (a)(7).

Background

Comp Trading brings the underlying action for alleged theft, misappropriation and use of plaintiff's confidential, proprietary and trade secret information by Solomon and Richard in order to start a competing business, NATCO. Comp Trading originally filed its complaint against Solomon, Richard and NATCO (collectively "the Jemal defendants") on January 7, 2019. The Jemal defendants answered the complaint on February 20, 2019 and asserted three counterclaims for allegedly unpaid commissions due to them upon their resignation. Defendants' base their allegations upon: 1) violation of New York Labor Law, Article 6, 191-c, 2) violation of New York Labor Law, Article 6, 191(1)(c) and, 3) quantum meruit.

Plaintiff moved to dismiss the counterclaims on March 26, 2019, in mot. seq. one, arguing each one was defective as a matter of law. The Jemal defendants filed an amended answer on April 15, 2019 and plaintiff withdrew its motion without prejudice on April 24, 2019.

On May 6, 2019 Comp Trading filed a motion, in mot. seq. two, to dismiss the Jemal defendants' amended counterclaims. On May 24, 2019, Comp Trading amended its complaint to include seven causes of action and add two additional defendants, Joseph Feldman (Feldman) and Vanderbuilt Home Products, LLC (Vanderbilt). Plaintiff withdrew its motion without prejudice on or about June 4, 2019.

The Jemal defendants answered the amended complaint on or about October 28, 2019 and asserted three counterclaims against Comp Trading. The instant motion seeks dismissal of those counterclaims.

Parties' Contentions

Plaintiff's Contentions

Comp Trading asserts that, in order to allege failure to pay commissions owed in violation of New York Labor Law § 191-c to a sales representative, or Labor Law §191(1)(c) to a commission salesperson, the contract between the principal and that employee must be in writing. It argues that the defendants' latest amended answer claims that a written contract existed for compensation to Solomon, but the single mention of a written agreement between Comp Trading and Solomon is so vague and conclusory it warrants dismissal of those counterclaims pursuant to CPLR 3013. The Jemal defendants did not allege the existence of such an agreement in their prior answers and failed to attach the alleged agreement to their amended answer. Comp Trading also argues that the factual basis provided for Richard's claims is even more deficient because, the Jemal defendants' amended answer alleges that Comp Trading had an agreement with Richard but does not state that the agreement was in writing.

Comp Trading also claims that the Jemal defendants failed to adequately plead the other elements of these violations because they fail to detail the commissions owed to Solomon and Richard, and they fail to state whether their employment contracts

enumerated that they would be paid their earned commissions upon discharge. Plaintiff finds the allegations scant, given that the Jemal defendants list casinos outside of New York from which Solomon and Richard allegedly solicited sales, and they fail to identify a single order commissioned within New York. Although the counterclaims allege that Solomon should be paid for commissions on three weeks of shipments of merchandise to Muckleshoot, plaintiff claims he is not entitled to them because the commission was only earned when the merchandise was shipped and said merchandise was shipped months after Solomon's resignation. Further, plaintiff argues that the Jemal defendants' allegations and disclosed spreadsheet of commissions earned for each casino is not particularized enough because the amount earned in each deal is not listed.

Plaintiff argues that the counterclaim for quantum meruit is too conclusory and vague, and it can only be sustained if there is no enforceable written contract, which is contradictory to the Jemal defendants' allegations. Plaintiff claims the deficiencies were raised in its previous motions and the Jemal defendants have not addressed them in the amended answer.

Defendants' Opposition

The Jemal defendants argue that Comp Trading's motion unfairly calls for dismissal of the counterclaims even though Comp Trading does not deny that commissions are owed to both Solomon and Richard. The Jemal defendants claim their allegations are not vague, conclusory or ambiguous, and they have satisfied New York's liberal pleading standards by providing sufficient details. They also claim to properly

allege alternative counterclaims, allowed in the early stages of pleadings, as they allege a violation of labor law 191-c - -under the theory that Solomon and Richard would have been considered sales representatives, and alternatively plead for the violation under Labor Law 191(c)(1) - - if Solomon and Richard were commissioned salespeople.

In addition, the Jemal defendants submit an affidavit from Solomon in which he admits that while he never executed an employment contract with Comp Trading, he did exchange emails with Comp Trading executives, and they agreed on the terms of his compensation. He shares emails, other communications, and a spreadsheet created, edited, and shared by the parties online which he claims was used by the parties to track his and Richard's commissions. The Jemal defendants present these as proof of the agreed commission structure and argue that the communications can be considered a writing of the contract terms under the law.

The Jemal defendants argue that their third counterclaim for quantum meruit is adequately plead as an alternative, given that there may be a dispute as to the existence of a contract here and they want to ensure that they are compensated for their services performed in good faith.

Plaintiff's Reply

Comp Trading argues that the Jemal defendants' submissions should not be considered and this court should only base its decision on the allegations contained in the counterclaim, unless the court elects to consider this motion as one for summary judgment. Plaintiff also argues that the Jemal defendants' own admission that there was

no formal employment contract requires dismissal of the counterclaims and the Jemal defendants cannot otherwise reconcile the insufficiencies of their pleadings. Comp Trading reiterates their stance that the Jemal defendants failed to sufficiently specify the amount of commissions earned for each transaction in their pleading.

Discussion

In considering a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Meyer v North Shore–Long Is. Jewish Health Sys., Inc.*, 137 AD3d 880, 880–881 [2d Dept 2016]; *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). Where, as here, we are considering dismissal of counterclaims, the court must find whether the counterclaims, “may not properly be interposed in the action” (CPLR 3211[a][6]). The court “is not concerned with determinations of fact or the likelihood of success on the merits” (*Detmer v Acampora*, 207 AD2d 477 [2d Dept 1994]). “Whether a [party] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*Santaiti v Town of Ramapo*, 162 AD3d 921, 925 [2d Dept 2018] quoting *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). Although a complaint may be inartfully drawn, illogical or even informal, it will be “deemed to allege whatever cause of action can be implied from its statement by fair and reasonable intendment” (*Shields v School of Law, Hofstra Univ.*, 77 AD2d 867, 868 [2d Dept 1980]; quoting *Lupinski v*

Village of Ilion, 59 AD2d 1050, 1050 [4th Dept 1977]).

However, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration” (*Garber v Board of Trustees of State Univ. of NY*, 38 AD3d 833, 834 [2d Dept 2007] quoting *Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]). Pursuant to CPLR 3013, “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” Thus, dismissal is warranted where allegations are conclusory or vague (*see Shariff v Murray*, 33 AD3d 688, 690 [2nd Dept 2006]; *see also Schuckman Realty, Inc. v Marine Midland Bank, N.A.*, 244 AD2d 400, 401 [2d Dept 1997]).

“[S]alaried employees who receive commissions are protected under § 191 (1) (c) while independent contractors are covered by §§191-a though 191-c” (*Derven v PH Consulting, Inc.*, 427 F Supp 2d 360, 369 [SDNY 2006]). Commissions earned by salaried employees are protected where the agreed terms have been reduced to writing and the writing has a description of how the employees’ commissions are calculated (*see Labor Law § 191 [1][c]*). To assert quantum meruit, a party must allege performance of services in good faith, acceptance of the services by the person to whom they are rendered, their expectation of compensation, and the reasonable value of the services rendered (*Tesser v Allboro Equip. Co.*, 302 AD2d 589, 590 [2d Dept 2003]). However, “[t]he existence of an express agreement ordinarily precludes recovery in quantum

meruit” (*id.* at 591).

In their counterclaims, the Jemal defendants allege that Solomon and Richard each had an agreement with Comp Trading that they would receive compensation consisting of a base salary, plus a percentage commission of the profits they generated on their sales. The Jemal defendants allege that their commissions were tracked by a shared spreadsheet, there were various electronic communications between the parties regarding earned commissions, and Comp Trading reviewed and confirmed the defendants’ commissions electronically. Given that Solomon and Richard have conceded that they were salaried employees soliciting deals on commission, the Jemal defendants cannot recover under Labor Law §191-c because it is only applicable to sales representatives (independent contractors) rather than to salaried employees (*see AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 15 [2d dept 2008]; *see also Deutschman v First Mfg. Co.*, 7 A.D.3d 363, 364 [1st Dept 2004]).

However, dismissal of the remaining counter claims is not warranted here. The Jemal defendants have sufficiently alleged that Solomon and Richard were not compensated for services provided to Comp Trading in good faith. Further, they provide sufficient details of their alleged commission structures and list various commissions that were owed to them and never paid. The Jemal defendants assert that Solomon and Richard’s electronic communications with Comp Trading constituted an employment agreement of specific terms. In some cases, electronic communications between parties may be found to constitute a writing for the purposes of the statute of frauds, sufficient to

constitute a contract (*Agosta v Fast Sys. Corp.*, 136 AD3d 694, 695 [2d Dept 2016]; *see also Newmark & Co. Real Estate Inc. v 2615 E. 17 Realty LLC*, 80 AD3d 476, 477 [1st Dept 2011]). Although recovery for a violation of Labor Law §191(1)(c) requires a written employment agreement and quantum meruit allows recovery in the absence of an express agreement, both can be alleged “where, as here, there is a bona fide dispute as to the existence of a contract” (*Sforza v Health Ins. Plan*, 210 AD2d 214, 215 [2d Dept 1994]).

Conclusion

Accordingly, plaintiff’s motion to dismiss the Jemal defendants’ counterclaims is granted to the extent that the request to dismiss the counterclaim alleging violation of Labor Law § 191-c is granted. The plaintiff’s request to dismiss the counterclaims alleging violation of Labor Law § 191(1)(c) and quantum meruit are denied.

The court, having considered the plaintiffs’ remaining contentions, finds them unavailing. All relief not expressly granted herein is denied.

The foregoing constitutes the decision and order of this Court.

E N T E R,



J.S.C.