Goldman v Riverso Assoc., Inc.
2020 NY Slip Op 35171(U)
November 20, 2020
Supreme Court, Westchester County
Docket Number: Index No. 60841/2019
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right
(CPLR 5513[a]), you are advised to serve a copy
of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
---x
HENRY GOLDMAN,

Plaintiff,

-against-

RIVERSO ASSOCIATES, INC. and
VINCENT RIVERSO,

Defendants.
---x

DECISION and ORDER

Motion Sequence Nos. 1 - 3
Index No. 60841/2019

RUDERMAN, J.

The following papers were considered on plaintiff's motion for summary judgment on his claims against defendants for unpaid wage supplements and statutory penalties under the Labor Law, and related relief under the parties' contract (sequence 1); defendants' cross-motion for summary judgment dismissing the complaint (sequence 2); and defendants' separate notice of motion for leave to amend their answer pursuant to CPLR 3025 (b), so as to add affirmative defenses to the complaint's fourth and fifth causes of action, pursuant to Labor Law §§ 198 (1-b) and 198 (1-d) (sequence 3):

Papers - Sequences 1 and 2	Numbered
Plaintiff's Notice of Motion, Affirmation, Exhibits A - T, Affidavit and Memorandum of Law	1
Defendants' Notice of Cross-Motion, Affidavit, Exhibits 1 - 3, and Memorandum in Opposition and in Support	2
Plaintiff's Reply Affirmation, Exhibits 1 - 2, and Memorandum in Opposition to Cross-Motion and Further Support of Motion	3
Defendant's Reply Memorandum of Law	4

- Sequence 3
Defendants' Notice of Motion, Affirmation, Exhibit 1 4
Plaintiff's Affirmation in Opposition, Exhibits A - D 5
Defendants' Reply Affirmation 6

Plaintiff Henry Goldman began working for defendant Riverso Associates, Inc. ("RAI") and its principal, defendant Vincent Riverso, in July 2017. According to plaintiff, he was hired as a Claims Analyst, whose duties included review of correspondence, project documents, project schedules, project estimates and costs, problems or delays, and the preparation of narratives describing any issues on the project. He states that the job had formerly been performed by a salaried employee of RAI. After plaintiff worked there for several months, the parties entered into a contract that was entitled "Agreement for Services," which described plaintiff's services as "construction claims consulting, schedule analysis, estimating and project management." The agreement provided for a term from November 1, 2017 through December 31, 2021, which could be terminated by either party upon two weeks' written notice. The agreement also provided that plaintiff was to be compensated at a rate of $175.00 per hour, and that he would invoice defendant on a bi-weekly basis for actual hours worked. It also included an express statement that

> "Nothing in this agreement will be construed to cause an employer-employee relationship between RAI and Goldman. Goldman is an independent contractor and agrees to waive any claim to RAI employee benefits."

It further contained a non-compete provision that plaintiff would not "consult for, contract with, or become the employee of any of RAI's present or former clients" during the period of the agreement and for three years after its termination.

On or about August 21, 2018, defendant Riverso allegedly terminated plaintiff's position

with RAI pursuant to an in-person conversation; no written notice was given.

In this action, commenced by filing a summons and complaint on July 22, 2019, plaintiff contends that he was an employee rather than an independent contractor, and that as such, defendants are liable to him for their failure to pay him wage supplements, failure to provide a wage notice as required by Labor Law § 195 (1), and failure to provide wage statements compliant with Labor Law § 195 (3). In addition, plaintiff brings causes of action for breach of contract and unjust enrichment.

The answer filed by defendants contains five affirmative defenses: failure to state a cause of action, equitable estoppel, unclean hands, waiver, and the statutes of limitations.

In moving for summary judgment on his claims, plaintiff asserts that his submissions establish as a matter of law that he was misclassified as an independent contractor rather than an employee, pursuant to the criteria set forth in *Bynog v Cipriani*, 1 NY3d 193, 198 [2003]). Plaintiff relies on his own affidavit and deposition transcript; Riverso's deposition testimony in which he described his supervisory authority over plaintiff; plaintiff's time sheet summaries; proof that he received a holiday bonus in 2017; proof that he requested and received approval for a vacation in July 2018; and his submissions to the New York Department of Labor's Unemployment Insurance Division for unemployment benefits, and the agency's determination that plaintiff was an employee and therefore entitled to such benefits. He asserts that Riverso expected him to work a fixed schedule at defendants' premises, generally eight hours per day, Monday through Friday, amounting to between 36 and 40 hours per week, until about August 10, 2018, when he was instructed to work no more than 32 hours per week. He also asserts that Riverso restricted his ability to obtain other employment, including through the non-compete

clause in the parties' agreement, and that the $2,000 holiday bonus he received in 2017 constituted a fringe benefit. In addition, plaintiff claims that Riverso represented to clients that plaintiff worked for RAI, and that he was provided with office space, equipment, a company email address and a company business card.

Based on his submissions, plaintiff argues that he has established his status as an employee, entitled to wage supplements and to the remedies and penalties afforded by the Labor Law for failure to provide a proper wage notice compliant with Labor Law § 195 (1) and wage statements in compliance with Labor Law § 195 (3). Plaintiff further contends that he has established that RAI breached its agreement with him by failing to give him written notice of his termination, and that he is entitled to damages arising out of that breach, calculated as his weekly income through the full term of the agreement.

In opposition to plaintiff's motion and in support of their cross-motion, defendants submit evidentiary materials that they maintain establish that plaintiff was an independent contractor. They rely on the recitals in the parties' agreement that nothing in it would be construed to establish an employer-employee relationship, and that plaintiff agreed to waive any claim to employee benefits. They observe that the contract's non-compete provision merely prohibited him from working for RAI's clients outside of his work for RAI, and did not prevent him from working for any non-client. They also submit the invoices plaintiff submitted to RAI with the written heading "Hal Goldman Consulting and Expert Witness Services" or the printed heading "Henry Goldman Consulting and Expert Witness Services." In addition, they submit an affidavit by Riverso in which he states that plaintiff was given the option, and voluntarily decided to work as an independent contractor rather than an employee; that plaintiff maintained a separate

business address; that plaintiff maintained a flexible schedule and had the ability to work off-site if he so preferred; that plaintiff supplied some of his own equipment at his own expense, and absorbed his travel expenses; and that RAI did not provide plaintiff with fringe benefits, and reported his compensation to the IRS on a 1099 form rather than a W-2 form, without making any payroll deductions. They observe that plaintiff did not receive vacation pay, sick time, or health insurance, and that the holiday bonus was a common gift for businesses to give to nonemployee business contacts. Defendants also argue that plaintiff cannot be considered to be "on RAI's payroll" just by virtue of RAI having kept records of what it paid plaintiff, and that being "on payroll" means more than just being paid; it means that tax withholdings are made, FICA taxes are paid, and income is reported on a W-2 form.

Defendants further contend that plaintiff is not entitled to any relief based on his breach of contract claim, and that his unjust enrichment claim is without merit as a matter of law.

Discussion

The parties agree that the applicable law with regard to plaintiff's employment status is found in *Bynog v Cipriani* (1 NY3d 193 [2003]), which holds that five factors that must be considered when determining whether a worker is an independent contractor or an employee: "whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll, and (5) was on a fixed schedule" (1 NY3d at 198).

The parties dispute whether plaintiff was required to work standard business hours, and at defendants' premises. Beyond their respective assertions, each party's claims are supported with evidentiary submissions. For instance, plaintiff's vacation request and Riverso's approval

thereof tend to indicate that plaintiff was not entirely free to make his own schedule, whereas the lack of tax withholding or health insurance tend to indicate independent contractor status.

Upon a motion for summary judgment the court's function is one of issue-finding rather than issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Contrary to both parties' contentions, the issue of whether plaintiff was an employee or an independent contractor may not properly be determined as a matter of law on the present submissions. Rather, an issue of fact is presented which must be addressed at trial, precluding summary judgment on plaintiff's claims first, fourth and fifth causes of action based on the Labor Law.

While plaintiff now claims entitlement as a matter of law to the compensation he would have received for the term of the contract, based on defendants' failure to provide him with written notice of termination, defendants argue that plaintiff's breach of contract claim must be dismissed, since plaintiff received actual, albeit oral, notice of his termination. They first cite case law holding that when a party to a contract fails to give the promised written notice of termination, the injured party's remedy is to be paid his or her guaranteed salary for the required notice period (*see Barth v The Addie Co. Inc.*, 271 NY 31 [1936]; *Watson v Russell*, 149 NY 388 [1896]; *Denniston v Taylor*, 2004 US Dist LEXIS 1512 at *19-20, 2004 WL 226147 [SD NY 2004], citing *Holt v Seversky Electronatom Corp.*, 452 F2d 31, 34-35 [2d Cir 1971] and *Kemelhor v Penthouse Intl., Ltd.*, 689 F Supp 205, 214 [SD NY 1988]). They then reason that since the agreement provided that plaintiff was to be paid only "for actual hours worked," and since plaintiff acknowledged that RAI had the right to reduce his hours, RAI must have had the unilateral right to reduce his hours to zero at any time. They therefore conclude that he has no

right to any money damages for their failure to give him two weeks' written notice. They cite in support only an inapplicable case involving a requirements contract, in which the seller's claim for damages for breach of contract was dismissed (*see Schoolman Transp. Sys., Inc. v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 51 Misc 3d 1206(A) [Sup Ct NY County 2016]).

Defendants have not established a right to dismissal of the breach of contract claim. Indeed, the authorities they cite establish that plaintiff is entitled to relief, albeit a more limited remedy than that which plaintiff claims. Conversely, while plaintiff has established that defendants breached the agreement's written notice provision, he has not established as a matter of law the amount of damages to which he is therefore entitled.

Plaintiff has not responded to or disputed defendants' contention that third cause of action, sounding in unjust enrichment, cannot stand (citing *Mulcahy v Bristol-Myers Squibb Co.*, 2020 US Dist LEXIS 134218, *12 [ND NY 2020]; *Ferro v Metro. Ctr. for Mental Health*, 2014 US Dist LEXIS 41477, 2014 WL 1265919 [SD NY 2014], reconsideration denied 2014 US Dist LEXIS 67969 [SD NY 2014]; *Barrison v D'Amato and Lynch, LLP*, 2019 NY Slip Op 30905[U], 2019 NY Misc LEXIS 1627 [Sup Ct NY County 2019]). Accordingly, the third cause of action of the complaint is dismissed, without opposition.

Defendants' separate notice of motion for leave to amend their answer pursuant to CPLR 3025 (b), seeks to add affirmative defenses under Labor Law §§198 (1-b) and 198 (1-d), pursuant to which

> "it shall be an affirmative defense that (i) the employer made complete and timely payment of all wages due pursuant to this article or articles nineteen or nineteen-A of this chapter to the employee who was not provided statements as required by subdivision three of section one hundred ninety-five of this article or (ii) the employer reasonably believed in good faith that it was not required to provide the

> employee with statements pursuant to paragraph (e) of subdivision one of section one hundred ninety-five of this article."

In opposing the motion, plaintiff observes that the proposed affirmative defenses are not timely since discovery has closed and the note of issue has been filed, and moreover, the facts relevant to the proposed affirmative defenses have been known to defendants since the beginning of the action or, at the latest, early stages of discovery. He adds that defendants' delay is unexplained.

"In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Calamari v Panos*, 131 AD3d 1088, 1089 [2d Dept 2015] [internal quotation marks and citation omitted]). However, "[i]n exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered" (*Yong Soon Oh v Hua Jin*, 124 AD3d 639, 640 [2015] [internal quotation marks and citation omitted]).

Here, the proposed new defenses are not devoid of merit. The motion for leave to amend was filed less than one month after the note of issue was filed, and plaintiff does not suggest that he has been deprived of discovery on the subject as a result of the belated interposition of the defenses. Indeed, it appears that the factual basis for the proposed defenses *has* been the subject of discovery. Although plaintiff recites that he would be prejudiced, he does not specify how; he focuses solely on defendants' awareness from the outset of the facts upon which the new defenses are based, and the lack of excuse for their delay. In the absence of a showing that the belatedness of this application – as opposed to making it earlier in the litigation – will cause any actual prejudice to plaintiff's case, beyond the need to address those defenses at trial, grounds for

amendment of the answer have been stated.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment is granted only to the extent of dismissing the third cause of action, and is otherwise denied; and it is further

ORDERED that defendant's motion for leave to amend their answer is granted, and the amended answer in the form annexed to the motion as Exhibit 1 (NYSCEF Doc. No. 49) shall be deemed served upon service of a copy of this order with notice of entry, and the filing of an affidavit of service so stating; and it is further

ORDERED that the parties are directed to appear in the Settlement Conference Part to schedule trial on a date and in a manner of which they will be notified by that Part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
November 20, 2020

HON. TERRY JANE RUDERMAN, J.S.C.