SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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LUIS VERGARA,

Plaintiff,

- v -

MISSION CAPITAL ADVISORS, LLC, DAVID TOBIN, JOSEPH RUNK, JORDAN RAY

Defendants.

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INDEX NO. 656441/2019

MOTION DATE 01/07/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74

were read on this motion for DISMISSAL.

Upon the forgoing documents, defendants' motion to dismiss is granted.

On or about October 31, 2019, plaintiff, Luis Vergara ("Vergara"), commenced this action against defendants Mission Capital Advisors, LLC ("MCA"), David Tobin ("Tobin"), Joseph A. Runk, Jr. ("Runk"), and Jordan Ray ("Ray" collectively with MCA, Tobin, and Runk, "Defendants"). On or about December 8, 2019, Vergara filed an amended complaint, alleging five causes of action, to wit, breach of contract (first cause of action); liability pursuant to Labor Law § 191 (second cause of action); liability pursuant to Labor Law § 193(1) (third cause of action); retaliation in violation of Labor Law Article 19 (fourth cause of action); and retaliation in violation of Labor Law § 215 (fifth cause of action).

This action arises from a business dispute as to sales commissions that Defendants allegedly owe Vergara. Vergara's amended complaint alleges essentially as follows. MCA employed Vergara from 2005 until Defendants terminated his employment on or about October 4, 2019. (NYSCEF Doc. No. 36, ¶ 12). Pursuant to the parties' agreement, Vergara was compensated with sales commissions and a salary. (NYSCEF Doc. No. 36, ¶ 13). Defendants' violated the parties' agreement by failing to pay sales commissions owed to Vergara for 2018 and 2019, leaving commissions owed in the amount of $328,254.68. (NYSCEF Doc. No. 36, ¶ 14 - 15). Vergara further alleges that Defendants failed to: (1) pay him overtime; (2) provide him with a notice of pay rate; and (3) keep accurate records of the hours worked by him, all required by Labor Law Article 19. Lastly, Vergara alleges that Defendants unlawfully retaliated against him, violating Labor Law § 215.

Defendants now move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the amended complaint in its entirety. In support of the instant motion Defendants submit the following documentary

evidence, introduced and authenticated through the affidavit of Tobin, principal and co-founder of MCA, and the affirmation of Defendants' counsel: the Commission Sales Agreement, along with various updates to the commission sale structure; Vergara's paystubs for 2013 – 2015 and 2017 – 2019; Vergara's W-2 for 2013 – 2018; a spreadsheet created by Vergara around the time of his termination showing no commissions owed; and various emails, one of which was sent by Vergara on or about October 4, 2019, and states "[a]s both of our spreadsheets show, I don't owe you any additional funds; I just won't get paid anything else until the salary portion is 'covered.'"

Discussion

Dismissal pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes as a matter of law a defense to the asserted claims. Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dept 2013) ("[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law").

Furthermore, dismissal pursuant to CPLR 3211(a)(7) is warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, supra, 84 NY2d at 87-88; see also EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties "notice" of what is intended to be proved and the material elements of a cause of action. CPLR 3013.

First Cause of Action, for Breach of Contract

Here, Defendants claim that the documentary evidence submitted in support of the instant motion, specifically the spreadsheet created by Vergara and his email dated October 4, 2019, establishes that Vergara is not owed any unpaid commissions. Vergara's attorney spends much of his time in his affirmation in opposition arguing that the evidence submitted by Defendants does not qualify as "documentary" because its authenticity has not been established by deposition and/or discovery. Clearly, most of what Vergara's counsel is arguing is form over substance. This Court finds that the evidence submitted by Defendants has been properly authenticated as they were submitted through the affidavit of Tobin and through Defendants' counsel. See Muhlhahn v Goldman, 93 AD3d 418, 418 (1st Dept 2012) ("An affidavit is an appropriate vehicle for authenticating and submitting relevant documentary evidence"); see also Furlender v Sichenzia Ross Friedman Ference LLP, 79 AD3d 470, 470 (1st Dept 2010) (affidavit of defendant's attorney was the proper means for the submission of documents "providing evidentiary proof in admissible form.").

The documentary evidence, specifically the October 4, 2019 email and spreadsheet created by Vergara, illustrate that Defendants do not owe Vergara any commissions. In opposition, Vergara's counsel argues that Vergara has sufficiently plead a cause of action for breach of

contract. However, this argument is directed to a CPLR 3211(a)(7) motion, which is not the whole ball game here.

Vergara's attorney argues in conclusory fashion that he is owed sales commissions. However, Vergara's counsel fails to substantiate this claim with an affidavit of anyone with personal knowledge, nor does he submit any evidence in support of his assertions. Banks v Auerbach, 56 AD2d 819, 819 (1st Dep't 1977) (affirming denial of motion to dismiss where factual basis for defendant's motion rests entirely on affirmation of attorney without personal knowledge of facts). As Defendants assert, with the affidavit of Tobin and through its documentary evidence, that Vergara is not entitled to any sales commissions, Vergara has failed to overcome the documentary evidence illustrating no sales commissions owed. Therefore, the first cause of action is subject to dismissal.

Second Cause of Action, for Liability Pursuant to Labor Law § 191

Labor Law § 191(1)(c) requires the payment of commissions to a commission salesperson "in accordance with the agreed terms of employment, but not less frequently than once in each month and not later than the last day of the month following the month in which they area earned …" Labor Law § 191-c further provides that "[w]hen a contract between a principal and a sales representative is terminated, all earned commissions shall be paid within five business days after termination or within five business days after they become due in the case of earned commissions not due when the contract is terminated."

Defendants argue that this claim must be dismissed as the documentary evidence establishes that Vergara is not owed any sales commissions. As this Court has determined that Vergara has failed to overcome the documentary evidence submitted by Defendants' establishing that Vergara is not entitled to sales commissions, this cause of action is also subject to dismissal.

Third Cause of Action, Liability Pursuant to Labor Law § 193(1)

Labor Law § 193 states that "[n]o employer shall make any deduction from the wages of an employee …" Defendants argue that to adequately state a claim for violation of Labor Law § 193, a plaintiff must allege a specific deduction from wages, not merely a failure to pay wages in general. Defendants further argue that Vergara has failed to state a claim under Labor Law § 193 because he merely alleges the wholesale failure to pay commissions in general. Thus, Vergara may not even have stated a cause of action.

In any event, this Court has already determined that Vergara has failed to overcome the documentary evidence submitted by Defendants' establishing that Vergara is not entitled to sales commissions. As such, there can be no unlawful deductions of sales commissions when the documentary evidence establishes that no commissions were owed. Therefore, this cause of action is also subject to dismissal pursuant to CPLR 3211(a)(1).

Fourth Cause of Action, for Retaliation in Violation of Labor Law Article 19

Labor Law Article 19 regulates unpaid overtime. Defendants' allege that this cause of action must fail as a matter of law because Vergara was an exempt employee who was not entitled to overtime.

Pursuant to 12 NYCRR § 142-2.2, "[a]n employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 U.S.C. 201 et seq., the Fair Labor Standards Act of 1938, as amended, provided, however that the exemptions set forth in sections 13(a)(2) and (4) shall not apply. In addition, an employer shall pay employees subject to the exemptions of section 13 of the Fair Labor Standards Act, as amended, except employees subject to sections 13(a)(2) and (4) of such Act …"

The Fair Labor Standards Act § 13 sets forth the applicable exemptions, namely, that employee's employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman are exempt. The "highly compensated employee" exemption is described in 29 C.F.R. § 541.601, which states "[b]eginning on January 1, 2020, an employee with total annual compensation of at least $107,432 is deemed exempt under section 13(a)(1) of the Act if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee …"

In opposition, Vergara argues that the "highly compensated employee" exemption does not exist under New York law. Essentially, Vergara recognizes that the "highly compensated employee" exemption exists only in the realm of Federal law, and because he has not plead any federal claims only the exemptions found in Labor Law § 651 apply. This argument is unavailing, as 12 NYCRR § 142-2.2 provides that employers shall pay an employee overtime in the manner and subject to the exemptions of the Fair Labor Standards Act § 13.

In any event, this Court finds that Vergara fits into the exemption found in Labor Law § 651(5)(b), namely that Vergara was working in either a bona fide executive, administrative, or professional capacity. The record before this Court illustrates that Vergara's position would be to manage trades and develop a loan sale business. Furthermore, Vergara's work clearly required consistent exercise of discretion and judgment, as he was responsible to "seal deals" for MCA. Thus, Vergara, a salaried employee, but one who exercised discretion and judgment when he negotiated business deals for MCA, qualifies as a professional and thud falls within one of the permitted exemptions. See 12 NYCRR 142-2.14(c)(4). Thus, this cause of action is also subject to dismissal.

Fifth Cause of Action, for Retaliation in Violation of Labor Law § 215

Labor Law § 215(1)(a), as relevant hereto, states that "[n]o employer … shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee … (iii) because such employee has caused to be instituted or is about to institute a proceeding under or related to this chapter …"

Vergara alleges that in response to him filing the instant action, on November 12, 2019, Defendants' counsel sent Vergara's counsel a draft complaint alleging that Vergara had misappropriated MCA's confidential information and breached his duty of loyalty. The draft complaint was accompanied by an email threatening to file the complaint with the United States District Court if Vergara did not discontinue the instant action. Vergara also alleges that Defendants and/or their counsel threatened to create tax liabilities for Vergara and threatened

Vergara's future employment. Vergara further alleges that Defendants' counsel admitted that the allegations in the draft complaint were based on suspicion and belief, not evidence.

In support of the instant motion, Defendants argue that Vergara does not have a good faith basis to allege retaliation pursuant to Labor Law § 215. Defendants submit documentary evidence, namely, an email from Defendants' counsel to Vergara dated October 30, 2019 (one day before the instant action was commenced), in which Defendants notified Vergara of their concerns regarding his possible misappropriation of confidential information. In that email Defendants requested that Vergara return all of the confidential information and requested access to Vergara's electronic devices. Defendants allege that the basis for their concern was that upon review of Vergara's work laptop Defendants determined that certain files were missing. In response to the October 30, 2019 email correspondence, on October 31, 2019, Vergara emailed Defendants' counsel acknowledging receipt of the October 30, 2019 correspondence and then initiated this action. Following the commencement of this suit Defendants continued to express their concerns regarding the misappropriation of their confidential information. Defendants also submit the affidavit of Tobin, which further sets forth the basis for Defendants concerns over their confidential information.

Essentially, Defendants argue that they raised their concerns over MCA's confidential information before Vergara engaged in a protected activity (i.e., commencing the instant suit). Defendants further argue that Labor Law § 215 only applies to employers who employed an employee at the time of the protected activity, and since Vergara was not an employee of MCA at the time this suit was commenced, the cause of action must be dismissed. See Day v Summit Sec. Servs. Inc., 53 Misc.3d 1057, 1062 (Sup. Ct. N.Y. Cnty. 2016) (dismissing retaliation claim because plaintiff was not employed by defendant when plaintiff commenced action for alleged unpaid wage violations).

This Court agrees with Defendants and the case law, which holds that the retaliatory act must occur while the individual is an employee of the employer. See Week Publs., Inc. v Hernandez, 2016 NY Slip Op 51871(U), at **4 (Sup. Ct. N.Y. Cnty. 2016) (dismissing retaliation counterclaim because the alleged retaliatory act occurred months after the defendant-employee was terminated). The record is clear that Vergara was terminated on or about October 4, 2019 and commenced the instant suit on October 31, 2019. Thus, Vergara did not engage in any protected activity while he was an employee. Therefore, Vergara has failed to plead a retaliation claim pursuant to Labor Law § 215.

The Court has considered Vergara's other arguments in opposition to the instant motion and finds them to be unavailing and/or non-dispositive.

Sanctions and Attorney's Fees

This Court, in its discretion, declines to grant Defendants' request for sanctions. Furthermore, the Court also declines to grant Defendants' request for attorney's fees as Labor Law § 198(a-1) only applies to lawsuits in which the employee is the prevailing party.

Conclusions

Motion to dismiss granted. The Clerk is hereby directed to enter judgment dismissing the instant action.

5/22/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE