

Weber v PX, Inc.

2021 NY Slip Op 32175(U)

October 25, 2021

Supreme Court, Kings county

Docket Number: Index No. 506671/21

Judge: Karen B. Rothenberg

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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of October, 2021.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

-----X

CARL WEBER,

Plaintiff,

-against-

Index No.: 506671/21

PX, INC. and REVIMEDIA, INC.,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>5-14</u>
Opposing Affidavits (Affirmations) _____	<u>16-22</u>
Affidavits/ Affirmations in Reply _____	<u>23</u>
Other Papers: _____	_____

Upon the foregoing papers, defendants PX, Inc. and ReviMedia, Inc. (collectively, defendants) move (in motion seq. no. 1) for an order, pursuant to CPLR 3211 (a) (1) and 3211 (a) (7), dismissing plaintiff Carl Weber’s complaint.

Background and Procedural History

ReviMedia is an online marketing company providing lead scoring, automated optimization and analytics for the insurance, automotive and home services industries. PX is an online marketplace catering to both lead buyers and lead sellers and acting as an

exchange that matches supply and demand of leads. Both entities have their principal place of business at 44 Wall Street in Manhattan. Defendants maintain that they are sister companies, both owned by ReviMedia Group, which is not a party in this action.

Plaintiff received a written offer of employment (Employment Agreement) from ReviMedia, dated January 7, 2019, offering him a position as “Sales Executive” at a salary of \$125,000 per year, plus commissions (NYSCEF Doc No. 10). Pursuant to a document denoted as “HR Commissions Form” (Commissions Form) on PX letterhead, dated January 10, 2019, it was agreed that Weber would be paid commissions as follows: “Commission Description: 3% of net Revenues generated by your clients on the Open Exchange (leads, calls, data) over the first 12 months respectively of your client’s activity with PX” (NYSCEF Doc No. 11). Plaintiff was employed by defendants from January 10, 2019 until he voluntarily resigned on September 6, 2019. It is undisputed that plaintiff received commissions due and earned up to the date of his resignation.

On January 12, 2021, Weber’s counsel wrote to PX alleging that “[a]t the time he left, Mr. Weber had earned commissions payable to him in the approximate amount of \$50,000” (NYSCEF Doc No. 13). By letter dated February 9, 2021, ReviMedia’s counsel responded that “Mr. Weber was paid all commissions due to him with respect to revenue which had been collected as of his last date of employment” and that “[n]either Weber’s January 7, 2019, employment agreement ..., nor his signed Commissions Form ... entitle Mr. Weber to be paid any commissions collected after the cessation of his employment ...” (NYSCEF Doc No. 14). ReviMedia pointed to an email exchange from September 19, 2019, wherein Weber sought confirmation that “commission for the accounts [he] closed

... while at PX will be paid up through 9/15/19 and no further?” In reply, a ReviMedia representative stated that Weber would be paid “per [his] agreed terms on a pro-rated basis till [his] last day of employment.” On March 19, 2021, Weber commenced the instant action alleging that defendants’ failure to pay him for earned commissions in accordance with the schedule in the Commissions Form was a violation of Labor Law § 191 (1) (c) and that he was entitled to liquidated damages pursuant to Labor Law §198 (1-a). He also asserted a claim alleging breach of contract related to defendants’ failure to pay him commissions based on revenues received after his resignation.

Defendants’ Motion

In support of the motion, defendants present the affidavit of Sebastiaan Offers, a Director of ReviMedia Group, the Chief Operating Officer (COO) and Co-Founder of ReviMedia, and COO and Co-Founder of PX. They also submit an affidavit from attorney Andre Castaybert, who attests to the veracity and authenticity of various documents including: a Letter Agreement (Employment Agreement) between Weber and ReviMedia; the Commissions Form; a Proprietary Rights and Information Agreement; and correspondence between Weber’s counsel and counsel for defendants, which includes a printout of an email exchange between Weber and Ethel van Hulle, PX’s Chief Financial Officer, which occurred between September 17, 2019 and September 20, 2019.

Defendants argue that Weber’s first cause of action alleging a violation of Labor Law § 191 (1) (c) must be dismissed as there is no private cause of action under this statute and that enforcement of compliance lies solely with the Commissioner of Labor. In further support of this contention, defendants note that several courts have ruled that no private

right of action exists for failure to comply with Labor Law § 191. Specifically, the statute provides as follows:

“[a] commission salesperson shall be paid the wages, salary, drawing account, commissions and all other monies earned or payable 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 are earned ...”

Moreover, defendants argue that Labor Law §198 (1-a) provides for the recovery of damages for a successful claim of unpaid wages, and not as here, untimely paid wages or commissions in the structure of a discretionary bonus. Section 198 (1-a) states, in relevant part, as follows:

In any action instituted in the courts upon a wage claim by an employee ... in which the employee prevails, the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney’s fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer provides a good faith basis to believe that its underpayment of wages was in compliance with the law, and additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due.

Additionally, defendants contend that Weber was not a “commission salesperson” pursuant to Labor Law §§ 191 (1) (c) and 198 (1-a). Rather, they assert that he was hired as a “Sales Executive” which was a highly paid managerial level role. Defendants note that Weber had a weekly salary of \$2,604 and his commissions were structured in his written Employment Agreement, not as “wages,” but as an incentive bonus, as detailed in the Employment Agreement and the Commissions Form. Further, defendants assert that this was subject to change at any time at ReviMedia’s discretion. In this regard defendants point to language at the bottom of the Commissions Form providing that they expressly

reserved the “right to make adjustments to the plan, participants, quota, objectives, components or calculations at any time, at its discretion.”

In opposition, Weber submits an affidavit in which he states that he was a “commission salesman” and was only given the title of “Sales Executive” to help facilitate sales. He notes that he had no executive or managerial authority or responsibilities and did not supervise anyone. Weber maintains that he was provided with a market segment to solicit, and a sales quota to fulfill. Further, he contends that he has a private cause of action for underpayment of wages, which encompasses commissions. Weber notes that this is not a frequency of payment case, as asserted by defendants.

Discussion

Where a defendant moves pursuant to CPLR 3211, “the pleading is to be afforded a liberal construction and the plaintiff’s allegations are accepted as true and accorded the benefit of every possible favorable inference” (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996 [2d Dept 2010] [internal citations omitted]). “When a party moves to dismiss a complaint pursuant to CPLR 3211 (a) (7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action” (*Westchester County Corr. Officers Benevolent Ass’n v County of Westchester*, 197 AD3d 684, 685 [2d Dept 2021], quoting *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]; see *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). “[T]he pleading must be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory” (*Trump Vil. Section*

4, Inc. v Bezvoleva, 161 AD3d 916, 917 [2d Dept 2018], citing *Leon v Martinez*, 84 NY2d 83, 88 [1984]). “A motion to dismiss merely addresses the adequacy of the pleading, and does not reach the substantive merits of a party's cause of action” (*Kaplan v New York City Dep't of Health & Mental Hygiene*, 142 AD3d 1050, 1051 [2d Dept 2016]).

“In opposition to such a motion, a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims” (*Garcia v Polsky, Shouldice & Rosen, P.C.*, 161 AD3d 828, 829 [2d Dept 2018], quoting *Cron v Hargro Fabrics*, 91 NY2d 362 [1998]; see also *Rad & D'Aprile, Inc. v Arnell Constr. Corp.*, 159 AD3d 971, 972 [2d Dept 2018] [holding that the court can consider affidavits and other evidence submitted to remedy pleading defects]).

Labor Law §§ 191 and 198 Claims

In *Phillips v Max Finkelstein, Inc.* (2021 NY Slip Op 21232), the Appellate Term, Second Department, recently weighed in on the issue of whether a private right of action exists to enforce the rights established under Labor Law § 198, which relates to violations under Article 6 of the Labor Law, which encompasses Labor Law § 191. Specifically, the *Phillips* court held as follows:

As this court is bound by principles of stare decisis to follow precedents set by the Appellate Division of another department until the Court of Appeals or the Appellate Division, Second Department, pronounces a contrary rule [internal citations omitted] the decision of the Appellate Division, First Department, in *Vega v CM & Assoc. Constr. Mgt., LLC* (175 AD3d 1144 [2019]), is controlling on the issue of whether plaintiff stated a cause of action for damages, pursuant to Labor Law §§ 191 (1) (a) and 198 (1-a).

Specifically, the *Vega* court held that “Labor Law § 198 (1-a) expressly provides a private right of action for a violation of Labor Law § 191” (*Vega*, 175 AD3d at 1146).

Accordingly, the court finds that Weber has stated a cause of action sounding in a violation of Labor Law § 191, and a cause of action alleging entitlement to liquidated damages pursuant to Labor Law §198 (1-a). Thus, this branch of defendants' motion is denied. In addition, the court notes that Weber submits an affidavit in opposition to the motion affirming that he was a commission salesperson (*see Garcia*, 161 AD3d at 829; *Cron*, 91 NY2d at 362; *see also Rad & D'Aprile, Inc.*, 159 AD3d at 972]).

Breach of Contract

Defendants further contend that Weber's second cause of action, alleging breach of contract, should be dismissed. They argue that based upon the Employment Agreement and Commissions Form, he is not entitled to the payment of discretionary bonus commissions for sums collected after his resignation. In this regard, defendants contend that Weber was an at-will employee and that his commissions were not wages but, rather, an incentive bonus based on his achieving his sales quota and a percent of the net revenues generated yearly and quarterly. Moreover, defendants point to the Commissions Form and note that they expressly reserved the "right to make adjustments to the plan, participants, quota, objectives, components or calculations at any time, at its discretion" (NYSCEF Doc No. 11). Further, defendants assert that there was no commitment to pay Weber any commission on any revenues that were collected after his resignation. Specifically, defendants point to the email exchange between Weber and ReviMedia in which it was confirmed that he would be paid "per [his] agreed terms on a pro-rated basis till [his] last day of employment." Defendants note that Weber failed to raise any opposition to this position and, on or about October 15, 2019, he was paid the final commission bonus to

which he was entitled as of his last day of employment, September 5, 2019. Further, defendants maintain it was entirely within their discretion whether to pay any bonus commissions at all, based on the actual terms of the Employment Agreement and the Commissions Form.

In opposition, Weber contends that defendants disingenuously argue that they reserved the right to change the terms of his employment, noting that they never in fact made a change or modification while he was employed. Further, he notes that he was never informed that his commissions were “discretionary” or an “incentive bonus.” Rather, he points to the Commission Form which explicitly provided that he was entitled to be paid commissions of 3% of the net revenues generated by clients he introduced to defendants, over the first 12 months of each client's activity with PX. Importantly, Weber points out that he was never informed, nor was it stated in the offer letter or commission agreement, that his commissions would cease if he resigned while his clients were still in their first 12 months of doing business with PX. Accordingly, Weber contends that he is owed approximately \$50,000 in commissions that accrued after his resignation.

“To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law” (*Cali v Maio*, 189 AD3d 1337, 1338 [2d Dept 2020], quoting *Gould v Decolator*, 121 AD3d 845, 847 [2d Dept 2014]; see *Leon*, 84 NY2d at 88). To qualify as “documentary,” the evidence must be “unambiguous, authentic, and undeniable” (*Granada Condominium III Assn.*, 78 AD3d at 996-997).

“[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case” (*Giambrone v Arnone*, 197 AD3d 459, 461 [2d Dept 2021], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 84-85 [2d Dept 2010] [internal quotation marks omitted]; see *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012]). “Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence” (*25-01 Newkirk Ave., LLC v Everest Natl. Ins. Co.*, 127 AD3d 850, 851 [2d Dept 2015]).

“The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach” (*Wmc Realty Corp. v City of Yonkers*, 193 AD3d 1018, 1021-1022 [2d Dept 2021]; see *Meyer v New York-Presbyterian Hosp. Queens*, 167 AD3d 996, 997 [2d Dept 2018]; *Reznick v Bluegreen Resorts Mgt., Inc.*, 154 AD3d 891, 893 [2d Dept 2017]).

Here, the existence of a valid contract between Weber and defendants is undisputed, Weber has adequately plead the damages he contends he was caused to suffer as a result of the breach, and defendants do not contend that Weber failed to perform under the contract. Rather, they argue that they are not in breach of any provision contained within the agreements. Weber's complaint and affidavit allege sufficient facts to refute defendants' contentions, which the Employment Agreement and Commission Form do not dispute. Specifically, the Commissions Form provided that Weber was entitled to 3% of net revenues generated by his clients over the first 12 months of the client's activity with PX.

It provided that the commissions were to be paid quarterly, based upon net collected revenues. Nothing in this provision, or in the Employment Agreement, indicates that Weber would not receive commissions earned if he voluntarily ceased working for defendants prior to the expiration of that 12-month period of client activity. Accordingly, the court finds that the documentary evidence fails to “utterly refute” Weber’s factual claims, and that the facts sufficiently support a claim for breach of contract (*see 25-01 Newkirk Ave., LLC*, 127 AD3d at 851 [holding that emails fail to meet the requirements for documentary evidence]). Accordingly, that branch of defendants’ motion seeking to dismiss Weber’s breach of contract claim is denied.

Dismissal of Claims as Against PX

Finally, defendants argue that both of Weber’s claims should be dismissed as against PX because it was not his employer and had no contractual relationship with him. In support of this assertion, defendants point to the statement contained in Weber’s Employment Agreement that he was “joining the team at ReviMedia.” Thus, defendants argue that documentary evidence of the Employment Agreement and the ReviMedia Proprietary Rights Agreement, both of which were signed by Weber on January 9, 2019, establish that Weber was employed by ReviMedia and not by PX. Defendants acknowledge that the calculation of Weber’s commissions was based on a percentage of net collected revenues generated by clients on activity with PX, but maintain that “any amounts due under Weber’s Employment Agreement with ReviMedia, whether as base compensation and wages, or in discretionary commissions bonus paid as an incentive basis

on a quarterly basis, were paid to Weber by ReviMedia and not by PX.” (NYSCEF Doc No. 7, Offers aff at ¶4)

In opposition, plaintiff argues that these two entities are alter egos and points to Mr. Offers’ affidavit which states that “for marketing purposes, what used to be called ReviMedia in the marketplace has been rebranded for marketing purposes generally as PX”. (NYSCEF Doc. No. 7, Offers aff at ¶2). Weber notes that although the written offer of employment he received was made by ReviMedia, it required that he acknowledge reading the employee handbook, which he notes bore the title “PX Employee Handbook”. Weber affirms that “[t]he only mention of ReviMedia in the employee handbook is as follows: “PX was originally established as part of ReviMedia in 2010 and launched in 2016.” Further, the PX.com web site states that “PX was founded in 2010 as ReviMedia by two demand-gen experts and best friends” (NYSCEF Doc No.16, Weber aff at ¶¶ 10-11). In addition, he affirms that he was provided with the Commissions Form issued by PX, which provided that his commissions would be measured by the business generated by clients that he introduced to PX and he points out that his assigned e-mail address was Carl@PX.com. Moreover, he notes that both entities have the same corporate officers, address, and suite number.

This branch of defendants’ motion seeking to dismiss plaintiff’s claims as asserted against PX on the grounds that it was not his employer and had no contractual relationship with him is denied. Defendants’ arguments in this regard are belied by their own submissions. Defendants submit a copy of the Commissions Form provided to Weber, dated January 10, 201, which is printed on PX stationary. This document is signed by

Weber and by Natalie Peled, as Manager. Weber's employment offer from ReviMedia states that he will be reporting to Ms. Peled. Finally, defendants submit a copy of correspondence from their counsel, Richard Friedman, to Weber's attorney, Mr. Mullaney, dated February 9, 2021, in which Mr. Friedman states "Mr. Weber's resignation from PX was effective as of September 5, 2019. Neither his January 7, 2019 employment agreement, which he signed on January 9, 2019, nor his signed HR Commissions Form, which was effective as of January 10, 2019, entitle Mr. Weber to be paid any commissions collected after the cessation of his employment with PX." Thus, the court finds that defendants have failed to establish that plaintiff's claims should be dismissed as against PX.

Accordingly, it is

ORDERED that defendants' motion (seq. no. 1) is denied in its entirety.

This constitutes the decision, order, and judgment of the court.

E N T E R,



J. S. C.