SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU : PART 43

STEPHEN BOLMARCICH,

Plaintiff,

- against -

CESAR GALINDO and CESAR GALINDO, INC.,

Defendant.

Index No. 28392/97

This is breach of contract claim for sales services provided by the plaintiff, Stephen Bolmarcich and his action to recover commissions and wages. This Court held a non-jury trial on Bolmarcich's allegations of commissions and wages earned and expenses not reimbursed for sales services done for the defendant, Cesar Galindo, as an individual. Bolmarcich also seeks punitive damages for wilful nonpayment of wages and attorney fees and disbursements. Galindo appeared pro se and denied Bolmarcich, who was represented by an attorney, ever worked for the him. The corporate defendant, Cesar Galindo, Inc., defaulted in the matter. Bolmarcich seeks monetary damages against the natural person, Galindo. This Court reserved decision after trial.

FACT FINDINGS

Anthony Caesar, an accountant employed by WLBW, a women's fashion business owned by Marvin Waiser and Charles Waiser, father and son respectively, introduced Galindo and Bolmarcich to each other. The Waisers assisted Galindo in the fashion industry. They introduced vendors to Galindo and did promotion, shipping from Long Island City and cut fabric for Galindo. Caesar also assisted Galindo in the accounting with respect to his customers' orders

and bookings and the defendant's payroll. Caesar was present during some of the discussions between Galindo and Bolmarcich.

Galindo and Bolmarcich entered into an agreement as result of their meetings. The plaintiff was not engaged for a fixed term of employment. Bolmarcich worked for Galindo from September 1996 to the second week in May 1997. Bolmarcich agreed to perform certain personal services for Galindo with respect to Galindo's fashion design business. They agreed that Galindo would pay Bolmarcich for the personal services that he would perform, including sales and facilitating sales by compiling line sheets, swatch sheets and supplying these items to contractors and customers. The agreement included $400.00 a week as salary together with a 15% commission for any sales. They also agreed that Galindo would reimburse Bolmarcich for the purchase of $145.00 monthly commuter tickets to take the Long Island Railroad to New York City during his employment and services.

Bolmarcich initially worked out of Galindo's midtown Manhattan residence. At times, Bolmarcich would look for office space in Manhattan on behalf of Galindo as part of his job function. Galindo moved his fashion design business to 500 Seventh Avenue in the fashion industry district of Manhattan where WLBW had a lease. WLBW managed Galindo's office and paid Galindo's exhibit and production costs with respect to his business. In exchange, Galindo agreed to pay WLBW 50% of the profits from his fashion designs.

During his employment and services, Bolmarcich did dress sales, fabric purchases, shipping, conducted business parties, including promotional aspects for the events and made contacts with stores and vendors, including such diverse retail establishments as Bloomingdale's in New York City, Oui in San Juan, Puerto Rico and McClures in Nashville, Tennessee, to raise

interest in the finished product designed by Galindo. Bolmarcich's daily normal work hours were from 10:00 AM TO 6:00 PM, although Bolmarcich worked overtime.

Cesar Galindo, Inc., is a wholly owned corporation with Cesar Galindo as its only officer and shareholder. The corporation had no employees nor payroll. Bolmarcich had no relationship with Cesar Galindo, Inc. and first became aware of Cesar Galindo, Inc. when he received a Cesar Galindo, Inc. draft signed by Cesar Galindo on a checking account at a midtown branch of Citibank. That check was dated March 7, 1997 for $280.50 as partial payment of the sales commissions owed to Bolmarcich.

Bolmarcich demanded payment and salary from Galindo who did not pay. In early 1997, Galindo had a telephone conversation with Cesar about tax filings, records and returns and the salary and commissions Galindo owed to Bolmarcich. A meeting with Galindo, Bolmarcich and Cesar took place a few days after that telephone conversation. At that meeting, Galindo acknowledged he owed Bolmarcich past due salary and commissions. Galindo said he would pay in a week, but later suggested Bolmarcich's salary was too high. Galindo never paid the outstanding debt to Bolmarcich. And, in the Spring 1997, WLBW ran into financial troubles and withdrew its business.

Richard L. Hutchinson, Esq., is a duly licensed attorney admitted to the New York State Bar in December 1990. Hutchinson is currently a senior partner in the law firm of Hudson & Hudson, P. C. in Oyster Bay, New York. Bolmarcich retained Hutchinson to represent him in the instant matter. Hutchinson charged Bolmarcich $175 an hour for this legal work.

Legal Conclusions

Based upon the history between the parties and the billings obtained from buyers by the

plaintiff on the defendant's behalf, it is reasonable to credit the plaintiff's testimony that the evidence represented the products of a contract between the parties and not a contract between the plaintiff and others as claimed by the defendant.

Considering all of the circumstances, the issue is whether there was an implied employment contract and contract for commissions and, if so, whether these contracts were breached. This breach of contract action is based on a contract for employment and services. After a few months, the defendant defaulted in making periodic payments and other payments to the plaintiff. The plaintiff seeks to recover the balance of the agreed payments and legal fees. The plaintiff is entitled to recover. A hearing on counsel fees for the plaintiff was held during the trial with the consent of the parties.

"'[A] contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed'" (***Automotive Mgt. Group v SRB Mgt. Co.***, 239 AD2d 450, 451, ***quoting Morlee Sales Corp . v Manufacturer's Trust Co.***, 9 NY2d 16, 19). "Thus, 'clear, complete writings should generally be enforced according to their terms" (***Matter of Wallace v 600 Partners Co.***, 86 NY2d 543, 548, ***quoting W.W.W. Assocs. v Giancontieri***, 77 NY2d 157, 160).

As the Court of Appeals instructed in ***Weiner v. McGraw-Hill, Inc.*** (57 N.Y.2d 458, 467 ***quoting Brown Bros. Elec. Contrs. v. Beam Constr. Corp.***, 41 N.Y.2d 397, 400), the focus is not on " 'any single act, phrase or other expression,' but 'the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain.' "

Whether a binding agreement was made "depends on the parties' words and deeds

which constitute objective signs in a given set of circumstances (***Winston v. Mediafare Entertainment Corp.***, 777 F.2d 78, 80). In ***Winston***, the Second Circuit applied New York common law in establishing a four-part test to decide whether an agreement was in fact made. New York common law provides that parties are free to enter into oral contracts as long as both parties have an intent to be bound. Under ***Winston***, courts must weigh the following four factors: (1) whether there is any express reservation of the right not to be bound in the absence of a signed writing; (2) whether the contract has been partially performed; (3) whether all of the terms of the alleged settlement contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing. ***Ciamarella***, 131 F.3d at 323; ***Winston***, 777 F.2d at 80 (***citing R.G. Group, Inc. v. Horn & Hardart Co.***, 751 F.2d 69, 74 (2d Cir. 1984)). None of these factors alone is dispositive. ***Id.***

An oral contract may be binding even if the parties plan to create a documentary record of the agreement. ***See Evolution Online Systems, Inc. v. Koninklijke PTT Nederland N.V.***, 145 F.3d 505, 508 (2d Cir. 1995); ***Winston***, 777 F.2d at 80 ("freedom to contract orally remains even if the parties contemplate a writing to evidence their agreement. In such a case, the mere intention to commit the agreement to writing will not prevent contract formation prior to execution."); ***R.G. Group, Inc. v. Horn & Hardart Co.***, 751 F.2d 69, 74 (2d Cir. 1984). Absent any evidence of an intent not to be bound by the oral agreement, this ***Winston*** factor weighs in favor of enforcing the contract.

There has been performance under the parties' oral agreement. And, the plaintiff was unable to perform his obligations under the agreement after the defendant refused to comply.

In deciding whether terms remained to be negotiated, "[e]ven 'minor' or 'technical'

points of disagreement in draft documents" are probative (***Ciamarella***, 131 F.3d at 325). Here, the oral agreement constituted an agreement "in principle." Whether the word used was the word written, or whether it was intended to be understood as "an agreement in principal," as the plaintiff alleges, makes no difference. The meaning of the phrase "in principle," ***see*** Webster's New Collegiate Dictionary 915 (8th ed. 1977) ("with respect to fundamentals"), is not substantially different from that of the word "principal," (***see id.***) ("most important, consequential, or influential"), or the term of art, "agreement in principal," (***see Henchman's Leasing Corp. v. Condren, et al.***, No. 87 Civ. 6478 (PNL), 1989 WL 11440, (S.D.N.Y. February 8, 1989) (stating that "[i]t is convention ... in contract negotiation to use the words 'agreement in principal' to describe the circumstance wherein the negotiations have reached a common understanding on fundamental terms of a proposed contract."). In either case, the parties' oral agreement contained all of the fundamentals of their contract. The parties' own statements in their early meetings point to a conclusion that they had reached fundamental consensus and that all significant terms had already been agreed upon.

Finally, the particular agreement in question, which provides for a commission and wages, would typically be the sort of complex agreement that would be reduced to writing (***see, e.g., Winston***, 777F.2d at 83). However, this oral contract involving payment based upon deals made and wages was not contemplated to be for several years. And, New York law does contemplate the formation of binding oral contracts.

Thus, balancing the four ***Winston*** factors — all four of which favor enforcing the oral agreement — suggest that this is not a case where "the entire history of the parties' negotiations made it plain that any promise or agreement at the time was conditional upon the signing of a

written contract" (***R.G. Group***, 751F.2d at 79. The fact that the defendant had later misgivings does not undermine the binding nature of the agreement as made. The parties did intend to be bound by their oral agreement.

It is well established that a person is entitled to recover a commission if he establishes (1) that he had a contract, express or implied, with the party to be charged with paying the commission, and (2) that he was the procuring cause of the sale (***see, Ormond Park Realty v Round Hill Dev. Corp.***, 266 AD2d 523; ***Buck v Cimino***, 243 AD2d 681, 684; ***Greene v Hellman***, 51 NY2d 197; ***Sibbald v Bethlehem Iron Co.***, 83 NY 378). Based upon a fair interpretation of the evidence (***see, Greenberg v Behlen***, 220 AD2d 720; ***Nicastro v Park***, 113 AD2d 129), and contrary to the contentions of the defendant, the plaintiff did establish the defendant's conscious appropriation of his efforts and the existence of a valid nonexclusive implied agreement between the plaintiff and the defendant (***see, Goldstein v Ballirano***, 262 AD2d 529; ***Greene v Hellman, supra; Sibbald v Bethlehem Iron Co., supra***). It is clear that the plaintiff was the procuring cause of the deals between the defendant and the various buyers. The evidence adduced established an amicable atmosphere, set up by the plaintiff, in which negotiations proceeded and generated a chain of circumstances that proximately led to deals (***see, Getreu v Plaxall Inc.***, 261 AD2d 574; ***Buck v Cimino, supra***; 2 Warren's Weed, New York Real Property, Brokers § 6.01[4][a] [4th ed]; ***cf., Lanstar Intl. Realty v New York News***, 206 AD2d 411; ***Getreu v Liebowitz***, 162 AD2d 585). The defendant's last minute attempt to eliminate the plaintiff's commission was a "mere device to escape payment of the commission" (***Gershner v Sisca***, 253 AD2d 785; ***Werner v Katal Country Club***, 234 AD2d 659, 652).

Since the express purpose of the agreement was to provide the plaintiff with 'salary and

commissions' it follows that any salary owing under these terms is wages within the meaning of Article 6 of the Labor Law (***see Magness v. Human Resource Services, Inc.***, 161 A.D.2d 418).

Nevertheless, defendant contends that Article 6 of the Labor Law was not intended to apply to executive, administrative and professional employees. The Article was aimed, defendant argues, at protecting menial and low-level workers who earn "wages," not those lofty beings who earn "salaries." I am not persuaded.

The dispute in this case arose from the plaintiff's claim that the defendant breached an employment agreement entered into by the parties. The plaintiff alleges that there was a breach of contract by virtue of the failure to pay him his full commission and wages. The plaintiff further asserts that because of the breach under Labor Law 198, he is entitled to liquidated damages, costs and attorneys' fees as a consequence of the defendant's willful refusal to pay wages due him.

The plaintiff also seeks reasonable attorney's fees. Under Labor Law § 198 (1-a):

> In any action instituted upon a wage claim by an employee ... in which the employee prevails, the court shall allow such employee reasonable attorney's fees and, upon a finding that the employer's failure to pay the wage required by this article was willful, an additional amount as liquidated damages equal to twenty-five per- cent of the total amount of the wages found to be due.

This is a valid wage claim and the plaintiff was the defendant's employee. The Court finds the defendant's failure to pay was willful as defined in Labor Law § 190.

Accordingly, the Court awards judgment to the plaintiff against the defendant as follows: (1) $8,155.65 representing commissions earned for sales services; (2) $12,000.00 representing wages earned; (3) $825.00 representing expenses to be reimbursed; (4) $5,245.00 representing punitive damages for wilful non-payment of wages pursuant to Labor Law § 198; and (5)

$7,932.29 representing attorneys fees pursuant to Labor Law § 198. The plaintiff is awarded a total judgment of $32,494.20 with interest from the first day of May 1997 to be computed by the Clerk together with costs and disbursements.

Submit Judgment

Dated: OCT 31 2000

HON. ANTONIO I. BRANDVEEN

ENTERED

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KAREN V. MURPHY
COUNTY CLERK OF NASSAU COUNTY