Hopwood v Infinity Contr. Servs. Corp.
2023 NY Slip Op 34712(U)
June 29, 2023
Supreme Court, Queens County
Docket Number: Index No. 721926/20
Judge: Leonard Livote
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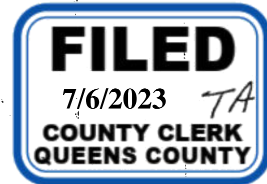

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE Justice

Commercial Division Part A

MARTIN M. HOPWOOD, JR. and MMH DEVELOPMENT COMPANY, INC.
Plaintiffs,

-against-

INFINITY CONTRACTING SERVICES CORP. and SHIRLEY WU,
Defendants.

Index Number 721926/20

Motion Date 1/31/23

Motion Seq. No. 2

The following numbered papers read on this motion by the defendants Infinity Contracting Services Corp. (Infinity) and Shirley Wu for summary judgment dismissing the ninth, tenth and eleventh causes of action.

	Papers Numbered
Notice of Motion-Affirmation-Affidavit-Exhibits..	EF 40-54
Answering Affidavit - Affirmation - Exhibits.....	EF 56-62
Reply Memorandum..................................	EF 66

Upon the foregoing papers it is ordered that the motion is determined as follows:

On November 17, 2020, the plaintiffs Martin M. Hopwood and MMH Development Company, Inc. (MMH), a corporation of which Hopwood was principal and sole shareholder, commenced this action to recover damages arising out of defendants' wrongful termination and age discrimination against Hopwood. Alleging causes of action for breach of contract (ninth), quantum meruit and unjust enrichment (tenth), and promissory estoppel (eleventh) against Infinity, plaintiffs seek to recover damages for unpaid commissions and bonuses for contracts Hopwood brokered on Infinity's behalf with New York City Department of Education (DOE Contract), LiRo Group SCA and others, and severance pay. Defendants now move for summary judgment dismissing the ninth, tenth and eleventh causes of action.

To obtain summary judgment, defendants must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact (CPLR 3212[b]; *Friends of Thayer Lake LLC v Brown*, 27 NY3d 1039, 1043 [2016]; *Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015]). Only if defendants satisfy this standard, does the burden shift to plaintiffs to rebut that *prima facie* showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]; *Nomura Asset Capital Corp.*, 26 NY3d at 49). In evaluating the evidence supporting the motions, the court construes the evidence in the light most favorable to plaintiffs (*De Lourdes Torres*, 26 NY3d at 763; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

At the outset, the court notes that plaintiffs assert the ninth, tenth and eleventh causes of action against only Infinity. Defendants contend that the statute of frauds bars plaintiffs' claims for commissions and bonuses as they are based on oral contracts for payment of compensation for services rendered in negotiating a business opportunity (*see* General Obligations Law § 5-701[a][10]). The statute applies to Hopwood's work in using his connections to secure construction contracts for Infinity (*see Snyder v Bronfman*, 13 NY3d 504, 509-10 [2009]; *Freedman v Chemical Constr. Corp.*, 43 NY2d 260, 267 [1977]). To support their motion, defendants rely on Wu's affidavit dated October 31, 2022, in which she denied any employment agreement, written or oral, between the parties.

In opposition, plaintiffs argue that an email exchange between Hopwood and Wu on April 3, 2017, regarding the DOE Contract demonstrated the existence of a written employment contract. The writing required by the statute of frauds may be provided by considering related writings together (*see William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 477 [2013]; *Bent v St. John's Univ., N.Y.*, 189 AD3d 973, 974 [2d Dept 2020]; *Agosta v Fast Sys. Corp.*, 136 AD3d 694, 695 [2d Dept 2016]). The writings must clearly refer to the subject matter or transaction and contain all the essential terms of a contract (*see Bent*, 189 AD3d at 974; *Dahan v Weiss*, 120 AD3d 540, 541 [2d Dept 2014]). At least one of the writings must be signed by the party to be charged (*Bent*, 189 AD3d at 974). A party's email under which the sender's name is typed may satisfy the signature requirement for statute of frauds purposes (*see Agosta*, 136 AD3d at 695; *Forcelli v Gelco Corp.*, 109 AD3d 244, 251-52 [2d Dept 2013]).

Here, in the email, Wu asked Hopwood whether his "fee was based on 5% of the base of the prevailing wage (no other mark up on it) and 5% of the material," and asked him to "confirm so once we receive the first payment from DOE, I will process the consultant fee for you," to which Hopwood responded affirmatively. Although Wu's apparent request to confirm the rate for Hopwood's fee, the email failed to describe the consideration for that fee (*see Bent*, 189 AD3d at 975), and as defendants point out, differs from the allegation in the complaint that the rate was 5% of the contract value (*see Amico v Graphic Arts Leasing*, 231 AD2d 596, 597 [2d Dept 1996]). In addition, since the email addresses only the DOE Contract, it does not establish the essential terms of an employment agreement between Hopwood and Infinity. Thus, the email fails to satisfy the writing requirement of the statute of frauds. Since defendants demonstrated the absence of a written agreement regarding compensation for plaintiffs' work and plaintiffs fail to raise factual issues, dismissal of the breach of contract cause of action is appropriate (*see Best Global Alternative, Ltd. v FCIC Constr. Servs., Inc.*, 170 AD3d 1101, 1102-03 [2d Dept 2019]).

Turning to the quasi contract causes of action, contrary to defendants' contention, plaintiffs did not concede that these causes of action duplicated the breach of contract cause of action. Rather, plaintiffs conditioned their concession that the tenth and eleventh causes of action would be duplicative of the breach of contract cause of action on the court's finding that a contract existed. Inasmuch as unjust enrichment and quantum meruit are contracts implied in law to pay reasonable compensation, the statute of frauds also bars plaintiffs' recovery of commissions and bonuses under the tenth cause of action (*see* General Obligations Law § 5-701[a][10]; *Snyder*, 13 NY3d at 508-10; *Ausch v Sutton*, 151 AD3d 802, 803 [2d Dept 2017]; *Newman v Crazy Eddie*, 119 AD2d 738, 738 [2d Dept 1986]). Further, with respect to bonuses, defendants point out that even if Hopwood was an employee, Section 8.7 of Infinity's Employment Manual provided that employee performance bonuses were at management's discretion, which does not generally confer an enforceable claim (*see Namad v Salomon Inc.*, 74 NY2d 751, 752-53 [1989]; *PAS Tech. Servs., Inc. v Middle Vil. Healthcare Mgt., LLC*, 92 AD3d 742, 745 [2d Dept 2012]). In opposition, plaintiffs point to an email dated February 19, 2020, in which Hopwood asked if he would receive a bonus, to which Wu responded that she would not know until she reviewed financial statements. Plaintiffs' contention that Wu's failure to deny the request for a bonus outright is insufficient to raise factual issues as the email makes no reference to any agreement between the parties and otherwise fails to satisfy the requirements for a memorandum of an oral agreement (*see Best Global Alternative, Ltd.*, 170 AD3d at 1103; *Newman*, 119 AD2d at 738-39). Thus, dismissal of the causes

of action seeking to recover commissions and bonuses under theories of unjust enrichment and quantum meruit is warranted (*see id.*).

With respect plaintiffs' claims for commissions and bonuses in the eleventh cause of action, promissory estoppel requires a clear, unambiguous promise, reasonable, foreseeable reliance on the promise by the party to whom it is made, and injury from reliance on the promise (*see Bent*, 189 AD3d at 975; *DelMestro v Marlin*, 168 AD3d 813, 816 [2d Dept 2019]). "[W]here the elements of promissory estoppel are established, and the injury to the party who acted in reliance on the oral promise is so great that enforcement of the statute of frauds would be unconscionable, the promisor should be estopped from reliance on the statute of frauds" (*Matter of Hennel*, 29 NY3d 487, 494 [2017]; *see Bent*, 189 AD3d at 975-76). Unconscionable injury has been described as injury beyond that flowing from non-performance of the unenforceable agreement (*see Bent*, 189 AD3d at 976). The complaint's allegation of damages from Infinity's failure to pay commissions and bonuses based on the agreement fails to establish damages to plaintiffs beyond the parties' contract (*cf. Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792, 797 [3d Dept 2002]). Although the complaint also alleges that defendants offered those incentives to induce plaintiffs to leave previous employment, this fact without more is insufficient to demonstrate unconscionable injury (*see Swerdloff v Mobil Oil Corp.*, 74 AD2d 258, 263-64 [2d Dept 1980]). In opposition, plaintiffs argue that the promissory estoppel claim is based on Wu's promise in the February 19, 2020 email that she would review March 2020 financials regarding the bonus. However, the email did not contain a clear promise to provide a bonus (*see DelMestro*, 168 AD3d at 816). Since plaintiffs fail to raise factual issues regarding unconscionable injury, dismissal of this cause of action as a basis to recover commissions and bonuses is also warranted (*see Bent*, 189 AD3d at 976; *DelMestro*, 168 AD3d at 816).

Finally, regarding plaintiffs' claims for severance pay, Wu attested that she never promised Hopwood severance and that Infinity did not have any policy or practice of paying severance. Infinity's Employment Manual is also silent as to severance and only indicates that separating employees are entitled to payment of unused annual leave. Defendants' evidence demonstrated entitlement to dismissal of the claims insofar as they seek severance pay (*see Cohen v National Grid USA*, 142 AD3d 574, 576 [2d Dept 2016]). In opposition, Hopwood attested without substantiation that a specific Infinity employee was given severance in 2018, and failed to demonstrate that he relied on severance pay to continue employment with Infinity (*see Gallagher v Ashland Oil, Inc.*, 183 AD2d 1033, 1034 [3d Dept 1992]). Since plaintiffs fail to raise factual issues, dismissal of the ninth, tenth and eleventh causes of action

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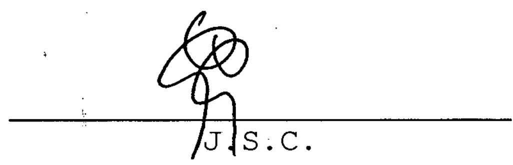
seeking severance pay is warranted (*Cohen*, 142 AD3d at 576; *see Skarren v Household Fin. Corp.*, 296 AD2d 488, 490 [2d Dept 2002]).

In light of the foregoing, the court need not address the parties' remaining contentions.

Accordingly, defendants' motion is granted.

Dated: 6/29/2023


J.S.C.