

Fox v Promed Personnel Servs. of NY Inc.
2016 NY Slip Op 30846(U)
May 5, 2016
Supreme Court, New York County
Docket Number: 154225/10
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**

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RISA FOX,

**Index No. 154225/10
Motion Seq: 02**

Plaintiff,

- against -

**PROMED PERSONNEL SERVICES OF NY INC.,
INFINITE PERSONNEL INC., ADVANCED MEDICAL
STAFFING INC., MENDEL HIRSCH and
CARY WEISS,**

**DECISION/ORDER
ARLENE P. BLUTH, JSC**

Defendants.
----- X

Plaintiff Risa Fox moves for summary judgment on the following causes of action 1) wages/commissions earned and due herein and 2) Liquidated Damages under Labor Law 198(1-a). She also seeks to amend the complaint to conform pleadings to proof as to amounts in the motion and to allow an award of reasonable attorney's fees to be proven at a hearing. All defendants oppose the motion. At oral argument, plaintiff's attorney withdrew the claim for double damages.

Background

In 2004, Fox started working for defendant Infinite Personnel Inc., (Infinite) d/b/a defendant Promed Personnel Services of NY Inc., (Promed), which was owned by defendant Weiss. Promed was in the business of medical personnel staffing, both temporary and permanent. Plaintiff was a salaried "at will" employee. In addition, plaintiff and Weiss had an oral agreement that plaintiff would receive commissions. According to Mr. Weiss, plaintiff

received commissions of 5% of invoices for temporary placements if her weekly billings for temporary placements were at least \$15,000 and a lesser percentage if the weekly billings were lower; this commission was “paid on sales” and if the client failed to pay the invoice, then the commission payment would be reversed and deducted from a future commission due. With respect to permanent placements, the commission was 20% and was due “after the guarantee period was over if the money was collected”(Weiss tr at 76, lines 12-13).

In 2013, Weiss decided to sell Promed to defendant Hirsch and his company defendant Advanced Medical Staffing, Inc. (Advanced). About two weeks before the sale, Weiss told his employees that he was selling the business and Fox alerted Weiss that she was due commissions for some of her permanent placements going back two years (*id.* at 32, lines 11-15). Unbeknownst to Weiss, Fox had arranged with Promed’s comptroller to delay paying commissions to her for her own tax purposes (presumably so she could delay paying taxes on the earnings) (*id.* at 33, lines 11-22). In his deposition, Weiss never denied that plaintiff was owed the commissions for which she has brought suit. Rather, he indicated that he thought Mr. Hirsch would pay them (*id.* at 44, lines 18-24). In fact, emails from Hirsch indicate that he, on behalf of Promed, did agree to pay the permanent commissions due from “before the sale” of \$32,345.20 (affirmation of plaintiff’s counsel, exhibit M, at 1). The sale was completed the next day, on June 18, 2013.

Mr. Weiss also indicated that he sent Fox several checks totaling \$8,000 toward the amount due, presumably for the commissions due on temporary placements before the sale, for which plaintiff claims she is owed \$10,961.60. Weiss testified that he never checked the bank records to see whether the checks were cashed (Weiss tr at 66-67, lines 22-18). In paragraph 33

of her moving affidavit, plaintiff acknowledges receiving certain small payments but could not identify any in particular. Rather, she anticipated the defendants coming forward with whatever proofs of payment they had, and she seemed ready to acknowledge some.

In opposition, however, defendants failed to prove that they made any payments that plaintiff had not already credited. No defendant cited to any invoice to claim that a commission was not due thereon.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac*

d'Amiante Du Quebec, Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

“A party appearing in opposition to a motion for summary judgment must lay bare his proof and present evidentiary facts sufficient to raise a genuine triable issue of fact. Mere conclusory assertions, devoid of evidentiary facts are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation” (*Smith v Johnson Products Co.*, 95 AD2d 675, 676, 463 NYS2d 464 [1st Dept 1983]).

“The elements of [a breach of contract] claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426, 913 NYS2d 161 [1st Dept 2010]).

Under Labor Law Section 191-c, “when a contract between a principal and a sales representative is terminated, all earned commission shall be paid within five business days after termination or within five business days after they become due in the case of earned commission not due when the contract is terminated” (Labor Law 191 [c][1]).

Liquidated damages may be available:

“In any action instituted in the courts upon a wage claim by an employee or the commissioner 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 proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due, except such liquidated damages may be up to three hundred percent of the total amount of the wages found to be due for a willful violation of section one hundred ninety-four of this article”
(Labor Law 198 [1-a]).

The Court will address the four categories of alleged payments due: (1) commissions for permanent placements before the sale, (2) commissions for temporary placements before the sale, (3) commissions for permanent placements after the sale and (4) commissions for temporary placements after the sale.

(1) Commissions for permanent placements before the sale

There is no issue of fact regarding the amount due for this category: Plaintiff claims that she earned \$32,345.20 in commissions for this category and no defendant contests it. Although Mr. Weiss claims post-sale payments of \$8,000, it is not clear whether he claims that was for the permanent or temporary placements. It doesn't matter, anyway, because Mr. Weiss did not show that any of the \$8,000 in checks he claims that he sent her were ever cashed. Therefore, he failed to show payment. Plaintiff does concede, however, that she received \$3,000 on or about July 15, 2013 from Mr. Hirsch when she executed a payout agreement (*see* affirmation of Weiss' counsel, exhibit 3; reply affirmation of plaintiff's counsel ¶¶ 22-23). Therefore, this Court finds the amount due for this category is \$29,345.20.

Rather, the bulk of Mr. Weiss's opposition to this category of commissions argues that Promed's failure to pay permanent commissions when he owned Promed was not intentional. He claims, and it is not disputed, that Ms. Fox made the deferral requests directly with the comptroller and that Weiss had no knowledge of it until she piped up directly to him after he announced that he was selling the company. There is no evidence that Weiss knew that Promed owed a liability of \$32,345.20 to Fox when he entered into negotiations with Mr. Hirsch. In fact, the day before the sale, Weiss secured Mr. Hirsch's promise to pay said money to plaintiff even

though those permanent commissions were due from “before the sale” (affirmation of plaintiff’s counsel, exhibit M, at 1). The sale was complete the day after the email, on June 18, 2013. As there is no evidence that Mr. Weiss purposely tried to avoid paying those permanent commissions, and Fox admits that the failure to pay the commissions as they became due was completely at her request, Fox has not proven entitlement to liquidated damages from Weiss or Infinite on permanent commissions due before the sale. She has shown, however, that the base amount was due from Infinite and Promed

This Court’s findings on liquidated damages with respect to defendants Hirsch, Advanced and Promed is different. Hirsch, on behalf of Promed, took on the responsibility to pay the \$32,345.20 (affirmation of plaintiff’s counsel, exhibit M, at 1) before he bought Promed but did not honor his payment obligations. In his June 17, 2013 email to Fox, he agreed to assume the debt; there are no conditions set forth in that email. The money was owed to Fox for work she had already done and was a liability of Promed.

On July 15, 2013, less than a month after Promed just promised to pay the \$32,345.20 without conditions, Mr. Hirsch and Ms. Fox agreed that Hirsch would be personally liable for the debt and Fox agreed to an 18 month payout during which she would remain employed by Promed/Advanced (affirmation of Weiss’ counsel, exhibit 3, ¶ 2). The \$3,000 check was paid on account of that debt at that time.

Hirsch, however, tried to wriggle out of his and Promed/Advanced’s obligations when, in September, Hirsch sought to completely change the employment agreement: he presented Fox with a written contract, drastically changing the terms of her employment from an “at will” employee to one with a contract subject to a non-compete clause, among other things. Fox was

told that if she did not sign both the contract and the non-compete clause, Fox would not be allowed to continue working for Promed/Advanced. Hirsch's actions constituted a purposeful attempt to avoid the simple obligation of paying the already-owed and promised commissions. On these facts, Fox has proven that defendants Promed, Advanced and Mendel Hirsch are liable for \$29,345.20 in permanent commissions due from before the sale, with interest from June 17, 2013, the date Promed promised to pay. Fox has also proven that the failure to pay was wilful, and liquidated damages and attorneys' fees will be determined at a hearing.

Mendel Hirsch is personally liable because he personally guaranteed that he would pay plaintiff the commissions due for permanent placements made before the sale. "[W]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress, or other wrongful act in its inducement" (*National Westminster Bank USA v Sardi's Inc.*, 174 AD2d 470, 417, 571 NYS2d 712 [1st Dept 1991]). The agreement signed on July 15, 2013 by plaintiff and Mendel Hirsch states that "Mendel Hirsch of Promed Personnel Services, Inc. has agreed to pay Risa Fox the amount of \$32,345.00 for permanent placement fees incurred between January 2011 and June of 2013" (affirmation of Weiss' counsel, exhibit 3, at 1, ¶ 2). This statement unambiguously demonstrates that Mendel Hirsch agreed to pay the outstanding placement fees to plaintiff; Hirsch's signature contains no indication that he was signing on behalf of Promed. Clearly, Mr. Hirsch knew how to indicate when he was signing *on behalf of* a corporation - in the June 17, 2013 email, he specifically wrote "*on behalf of Promed...*" The July 15 guaranty, however, does not state that *Promed* would pay these commissions. Besides, as Promed was already responsible for paying the permanent fees earned before the sale, it makes perfect sense that a guaranty was

added in order to obtain the eighteen month payout. Mendel Hirsch is personally liable for the payment of the \$29,345.20 plus interest from June 17, 2013.

In addition to Mendel Hirsch being liable on the guaranty, Fox has also proven that the failure of Promed to pay all but \$3,000 was wilful, and so she is entitled to liquidated damages and attorneys' fees from Promed and Advanced, which will be determined at a hearing.

(2) Commissions for temporary placements before the sale

Plaintiff claims that \$10,961.60 is due for this category. Temporary commissions were due on sale, and thus they came due while Weiss was in charge of Promed. Weiss does not challenge any of the invoices. Aside from that unsubstantiated \$8,000 payment, Weiss does not even claim to have paid those commissions due. If any of those invoices were not paid by the client, then it was up to Weiss to "lay bare his proofs" and prove that, because the client did not pay the bill, no commission was due. Weiss has done no such thing. The fact that Fox conceded that she may have received some small checks does not absolve Weiss of his duty to prove what checks he gave to her on account of the debt for temporary commissions.

Unlike his arguments regarding the permanent commissions, Weiss has given no excuse or reason for failing to pay Fox commissions for temporary placements she made before the sale. In this category of damages, Fox has proven her entitlement to \$10,961.60, plus interest from, at the latest, June 17, 2013. Fox has also proven that the failure to pay was wilful, and so she is entitled to liquidated damages and attorneys' fees from Weiss, Infinite and Promed, which will be determined at a hearing

(3) Commissions for temporary placements after the sale

Until Hirsch tried to change the terms of plaintiff's employment in September 2013, plaintiff worked for Advanced/Promed under the same terms and conditions as when she worked for Infinite/Promed (*see* affirmation of plaintiff's counsel, exhibit A, exhibit 3 at 1-3). Therefore, as Mr. Weiss testified, the commission (called "Incentive" by Hirsch) was 20% of permanent placements due when the client paid the bill and 5% on temporary placements (if billings were at least \$15k/week) due upon billing the client.

For temporary placements after the sale, Fox proved that she billed in excess of \$15,000 per week during that time period (the average billing exceeded \$31k/week) and thus her commissions due were \$18,627.62. Fox credited Hirsch with a \$2,997.88 payment and thus the balance due is \$15,629.74.

With regard to Mr. Hirsch's affidavit in opposition, it is filled with hearsay and thus is not sufficient to raise an issue of fact. At best Mr. Hirsch's affidavit - when he contradicts something that someone else swore to or the plain contents of a written document - shows that he lacks knowledge. For example, in paragraph six, he states that plaintiff was only to receive 2% on temporary commissions and "She was told from the outset of her employment that she was not going to receive the rate paid to her by Cary Weiss." Glaringly obvious is the passive voice. Nowhere does Mr. Hirsch state that he told her anything. Nor does he say that he was present when a specified other person told her. In fact, he does not even claim to know who allegedly told her. Therefore, his claim that Fox was only to receive 2% on temporary placements fails to raise an issue of fact.

On these facts, Fox has proven that defendants Promed and Advanced are liable for \$15,629.74 in temporary commissions due from after the sale, with interest from August 1, 2013, the midpoint between the sale and the end of plaintiff's employment. Fox has also proven that the failure to pay was wilful, so she is entitled to liquidated damages and attorneys' fees that will be determined at a hearing.

(4) Commissions for permanent placements after the sale

Plaintiff has made her prima facie showing that \$13,129.60 is due from Promed and Advanced for permanent commissions due. Again, Hirsch fails to raise an issue of fact with admissible proof. Rather, in paragraph 11 of his opposing affidavit, he states what his accounting staff told him about certain clients only making partial payments of invoices. Of course, he does not claim any personal knowledge whatsoever. He could have submitted an affidavit from whomever told him these alleged facts, but he did not. Curiously, he did not even annex any documentary proof of any of the alleged partial payments. There is not a scintilla of proof that any of the bills for permanent placements were not fully and timely paid by Promed's clients.

And after Fox no longer worked for Hirsch, Promed, and Advanced, Hirsch admits that he did not forward a single commission that she earned. Therefore, Fox has proven that defendants Promed and Advanced are liable for \$13,129.60 in permanent commissions due from after the sale, with interest from September 13, 2013. Fox has also proven that the failure to pay was wilful, so she is entitled to liquidated damages and attorneys' fees that will be determined at a hearing.

Personal Liability of Weiss and Hirsch

Although Mendel Hirsch is personally liable under the guaranty, the Court finds no basis to pierce the corporate veil to find Cary Weiss personally liable for Promed's or Infinite's debts to plaintiff. Nor does the Court find any basis to pierce the corporate veil to find Mendel Hirsch personally liable for Promed's or Advanced's debts to plaintiff (other than the guaranty).

“The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene” (*Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 142, 603 N.Y.S.2d 807, 623 N.E.2d 1157 [1993]).

It is not claimed that any corporation, functioning as Weiss's or Hirsch's alter ego, was used to commit a fraud against plaintiff (*see e.g., Albstein v. Elany Contr. Corp.*, 30 A.D.3d 210, 818 N.Y.S.2d 8 [2006], *lv denied* 7 N.Y.3d 712, 824 N.Y.S.2d 604, 857 N.E.2d 1135 [2006]). The entities simply did not honor their payment obligations to plaintiff; that is not fraud. For example, it is not alleged that a judgment against a corporation is not collectible because corporate funds were purposefully diverted to make it judgment proof or that a corporation was dissolved without making appropriate reserves for contingent liabilities; that would be sufficient to satisfy the pleading requirement of wrongdoing which is necessary to pierce the corporate veil on an alter-ego theory (*Baby Phat Holding Co. v. Kellwood Co.*, 123 A.D.3d 405 [1st Dept 2014]).

Amending the Pleadings

“The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances” (CPLR 3025[c]). “The operative factor considered upon a motion to conform pleadings is prejudice to the nonmoving party. Upon a motion pursuant to CPLR 3025(c) the effect on the orderly prosecution of the trial may be taken into account” (*Gonfiantini v Zito*, 184 AD2d 368, 369 [1st Dept 1992]).

Here, resolution of the instant action requires a determination of exactly how much money plaintiff is owed. Defendants cannot claim that they are prejudiced because all defendants acknowledge that plaintiff was due at least some amount of commissions, and they can not claim surprise as the defendants had ample opportunity to review, evaluate and raise an issue of fact after studying plaintiff’s proofs on the motion. Therefore, plaintiff’s request to amend the complaint to conform it to the evidence is granted.

Summary of Findings

For pre-sale commissions on temporary placements, Fox is granted summary judgment against Infinite and Promed for \$10,961.60 plus interest from June 17, 2013. Liquidated damages and attorneys’ fees are to be determined after a hearing.

For pre-sale commissions on permanent placements, Fox is granted summary judgment against Infinite, Promed, Advanced and Hirsch for \$29,345.20 plus interest from June 17, 2013.

In addition, defendants Hirsch, Advanced and Promed are liable for liquidated damages and attorneys' fees, which are to be determined after a hearing.

For post-sale commissions on temporary placements, Fox is granted summary judgment against Advanced and Promed for \$15,629.74 plus interest from August 1, 2013, the midpoint between the sale and the end of Fox's employment. Liquidated damages and attorneys' fees against said defendants are to be determined after a hearing.

For post-sale commissions on permanent placements, Fox is granted summary judgment against Advanced and Promed for \$13,129.60 plus interest from September 13, 2013. Liquidated damages and attorneys' fees against said defendants are to be determined after a hearing.

Requests to pierce the corporate veil are denied (Mendel Hirsch's personal liability is based on the guaranty) and the complaint is amended to conform to the proof.

Accordingly, it is

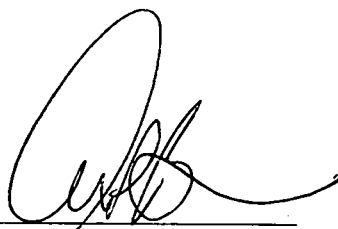
ORDERED that plaintiff's motion for summary judgment is granted as described above and it is further

ORDERED that a conference in this matter is scheduled for June 16, 2016 at 2:30 pm.

This constitutes the Decision and Order of the Court.

Dated: May 5, 2016

New York, New York



HON. ARLENE P. BLUTH, JSC