

Beach v Touradji Capital Mgt., LP

2014 NY Slip Op 30486(U)

February 26, 2014

Sup Ct, New York County

Docket Number: 603611/08

Judge: Melvin L. Schweitzer

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

-----X	
GENTRY T. BEACH and ROBERT A. VOLLERO,	:
	:
Plaintiffs,	:
	:
-against-	:
	:
TOURADJI CAPITAL MANAGEMENT, LP and	:
PAUL TOURADJI	:
	:
Defendants.	:
-----X	

Index No. 603611/08
DECISION AND ORDER
Motion Sequence No. 27

MELVIN L. SCHWEITZER, J.:

Defendant, Touradji Capital Management, LP (Touradji Capital) moves for summary judgment pursuant to N.Y. CPLR 3212 on Count Two of the Amended Complaint, which alleges withholding of wages in violation of § 193 of the New York Labor Law. The defendant argues that Count Two must be dismissed because the undisputed evidence shows that plaintiffs, Gentry Beach (Mr. Beach) and Robert Vollero (Mr. Vollero) seek compensation that does not constitute “wages” under the statute. The defendant’s motion is granted.

Background

Plaintiffs and defendant dispute whether Mr. Beach and Mr. Vollero are owed in excess of \$50 million, in addition to the salary they received, for the approximately four and a half years they were employed by Touradji Capital. Paul Touradji (Mr. Touradji) formed Touradji Capital, a commodities hedge fund, in January 2005 and currently acts as its Managing Partner and controlling General Partner. In May 2005, Mr. Beach and Mr. Vollero accepted employment offers from Touradji Capital to be Portfolio Managers. It is undisputed that the parties agreed

that Mr. Beach and Mr. Vollero would receive salaries of \$200,000 per year and were paid their salary each year. The terms of any extra compensation, however, are contested.

Plaintiffs contend that the initial employment terms included oral promises for percentages of portfolio profits and a percentage of a fund management fee. First, they claim that they were each promised 7.5% of the annual profits of a portfolio (the OG portfolio) that they co-managed. The OG portfolio was a pool of Touradji Global Resources Fund capital invested in equities, including in the oil and gas sector. Second, Mr. Beach and Mr. Vollero assert that they orally agreed with Mr. Touradji that a relative value energy equity fund, Touradji DeepRock Partners, LP (DeepRock) would be created and managed by Mr. Beach and Mr. Vollero. They each further claim an oral agreement for 0.5% of the DeepRock management fee and 7.5% of the yearly profits.

The parties allegedly continued to make oral agreements for extra compensation. Plaintiffs state that in late 2005, they agreed with Mr. Touradji to form and jointly manage another portfolio (the ST portfolio) from which they would each earn 5% of the annual profits. In 2007, Touradji Capital created the Touradji Diversified Fund, which included an OG Diversified (OGD) portfolio and an ST Diversified (STD) portfolio. The parties allegedly extended agreements concerning OG and ST profits to the OGD and STD portfolios.

Mr. Beach and Mr. Vollero claim that from 2005 to 2008 they were not paid the total amounts owed under the above oral agreements. The claimed amounts differ from year to year (and amongst plaintiffs' papers) depending on the claimed profits of each of the portfolios and the DeepRock fund. The yearly amount claimed also depends on the incentive compensation that Mr. Beach and Mr. Vollero, allegedly through their discretion, paid to analysts who were

part of the team working on the portfolios. The analysts' bonuses allegedly came out of Mr. Beach and Mr. Vollero's extra compensation.

According to Mr. Beach and Mr. Vollero, in 2005 Mr. Touradji explained that their extra compensation was reinvested into Touradji Global Resources and he could not currently remove it. In 2006, Mr. Touradji allegedly cited reinvestment again to explain missing compensation for that year. Mr. Beach and Mr. Vollero claim entitlement to the reinvested amounts as well as gains made on such amounts.

The defendant responds that the parties agreed that Mr. Beach and Mr. Vollero would receive bonuses to be determined by Mr. Touradji in his sole discretion. Allegedly over \$3 million in bonuses was paid to Mr. Beach and Mr. Vollero until the end of their employment on September 25, 2008 and December 18, 2008 respectively.

Discussion

As a preliminary matter, plaintiffs make two procedural arguments as to why this court should deny defendant's motion. First, plaintiffs contend that defendant cites to deposition transcripts of Mr. Beach and Mr. Vollero, which had not been provided to Mr. Beach or Mr. Vollero prior to filing this motion, in violation of N.Y. CPLR 3116 (a). However, "where the deposition witness is a party, and the transcript has been certified, pursuant to N.Y. CPLR 3116 (b), by the officer before whom the deposition was taken, then the transcript is usable as an admission." *Palumbo v Innovative Commc'ns Concepts, Inc.*, 668 NYS2d 433, 434 (N.Y. Sup. Ct. 1997). The court reporter certified Mr. Beach and Mr. Vollero's testimony and Defendant, therefore, complied with one alternative for properly using a deposition transcript.

Second, plaintiffs argue that the law of the case doctrine prevents summary judgment on the Labor Law claim because the First Department previously reinstated the claim at the motion to dismiss stage. Law of the case doctrine does not bar summary judgment review of an issue that was also subject to a motion to dismiss because the two motions have different scopes of review. *Friedman v Conn. Gen. Life Ins. Co.*, 818 NYS2d 201, 201 (App Div 2006). The Labor Law issue is properly before this Court for summary judgment determination.

On a summary judgment motion, once the defendant has shown that there are “no material issues of fact in dispute,” the plaintiff must establish that “genuine, triable issues exist precluding the granting of summary judgment.” *Flores v City of N.Y.*, 815 NYS2d 48, 50 (App Div 2006).

The defendant and plaintiffs hotly dispute what Mr. Beach and Mr. Vollero’s agreed-upon compensation formula, and the resulting amount of such compensation, was during their employment at Touradji Capital. However, for the purposes of this motion, Touradji Capital assumes that the alleged agreements concerning the OG portfolio, the DeepRock Fund, the ST portfolio, the OGD portfolio, and the STD portfolio constitute oral contracts for nondiscretionary compensation. Mr. Beach and Mr. Vollero have not introduced any other material factual disputes that are relevant to determining whether the portfolio profit percentages are wages as a matter of law.

Mr. Beach and Mr. Vollero’s Labor Law claim fails as a matter of law because the money sought does not constitute wages. The legislature defined wages as the “earnings of any employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis.” N.Y. LABOR LAW § 190 (McKinney

2013). The New York Court of Appeals explained this definition stating, “[T]he wording of the statute, in expressly linking earnings to an employee’s labor or services *personally* rendered, contemplates a more direct relationship between an employee’s own performance and the compensation to which that employee is entitled.” *Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220, 224 (2000) (italics added). The plaintiffs’ characterization of the legal question as “whether the compensation is ‘expressly linked to [Mr. Beach’s and Mr. Vollero’s] labor or services rendered’” improperly omits the word “personally” from the *Truelove* quote. An employee’s personal performance is at the heart of the separation between wages and incentive compensation based on other factors that fall “outside the scope of the employee’s actual work.” *Id.* (internal quotation omitted). Mr. Beach and Mr. Vollero’s extra compensation is not wages because their personal performance was not directly related to the amount of the portfolio profit percentage.

Even if Touradji Capital was required to pay Mr. Beach and Mr. Vollero some percentage of the portfolio profits, the compensation would still not be wages because the amount depended on factors other than their personal productivity. *See Guiry v Goldman Sachs & Co.*, 814 NYS2d 617, 619-20 (App Div 2006) (noting that nondiscretionary compensation is not automatically wages). *Guiry* showed that compensation with an ultimate value beyond the employee’s control falls outside the definition of wages. *Id.* (holding that restricted stock units and stock options whose value depended entirely on the future market value of the employer were not wages). The compensation amount in *Guiry* was more clearly outside the employee’s control than the profit percentages over which Mr. Beach and Mr. Vollero claim ownership. Nevertheless, outside factors affected the amount of claimed compensation.

The undisputed evidence shows that the value of Mr. Beach and Mr. Vollero's extra compensation depended in part on the management and involvement of Mr. Touradji, team efforts, and the overall success of Touradji Capital. As the managing partner, Mr. Touradji oversaw all Touradji Capital portfolios. The importance of his management role is demonstrated by the "key man" provision in the private placement memorandum for each of the funds containing the portfolios at issue. The provision gave investors the right to redeem their investments if Mr. Touradji was no longer involved in managing the fund. (Ex. 10 at 1108, Ex. 11 at 1244, Ex. 12 at 100)¹. Mr. Touradji was also specifically involved in running the ST and OG portfolios and the DeepRock fund. In regards to the ST portfolio, Mr. Vollero testified that, "Paul Touradji always ran the ST portfolio." (Ex. 4 at 87). As for the OG portfolio and DeepRock Fund, Mr. Vollero testified that the decision to buy certain securities was made by "some combination of myself-Gentry, myself and Paul." (Ex. 4 at 170-73). Mr. Touradji's involvement extends to OGD and STD as well because these portfolios effectively match the OG and ST portfolios. In investors' view and in actuality, portfolio profits were in part attributable to Mr. Touradji rather than solely based on Mr. Beach and Mr. Vollero's personal performance.

Beyond Mr. Beach, Mr. Vollero, and Mr. Touradji, a team of individuals also worked on the portfolios. Their ideas and analysis contributed to the profits the portfolios generated. Mr. Beach testified that he could not distinguish the contributions to profit and losses made by an analyst, himself, or Mr. Vollero for a given book in a given year. (Ex. 7 at 158-159). In addition, the team analysts received yearly, discretionary bonuses taken out of Mr. Beach and Mr. Vollero's extra compensation. (Amended Complaint ¶ 10 (f)). Therefore, the resulting

¹ Citation in the form "Ex. __" are to the exhibits to the Affirmation of Sara Welch in support of Touradji Capital's Motion for Summary Judgment.

value allegedly owed to Mr. Beach and Mr. Vollero varied based on the analysts' contributions, which were somewhat outside of Beach and Vollero's control. Beach and Vollero's management may have enabled the analysts to contribute effectively. They were compensated for their management through their \$200,000 base salaries.

Finally, the additional gains on portions of Mr. Beach and Mr. Vollero's compensation, which were allegedly reinvested in Touradji Global Resources Fund, were entirely outside Mr. Beach and Mr. Vollero's control. Gains based on the success of a fund as a whole are like bonuses based on the financial success of a company, which do not constitute wages. *See Truelove*, 95 NY2d at 224.

The undisputed facts distinguish this case from *Ryan v Kellogg Partners Institutional Services*, 19 NY3d 1 (2012) cited as on-point by the plaintiffs. In *Ryan*, the employee sought \$350,000 as an inducement to change jobs and the employer agreed so long as the payment could be split into a salary of \$175,000 and a guaranteed bonus of \$175,000. *Id.* at 6. The bonus constituted wages because as a salary substitute it directly compensated the employee for his personal services. *Id.* at 16. The amount of the guaranteed bonus was fixed regardless of the company's or some sub-set of the company's performance. In contrast, the amount of Mr. Beach and Mr. Vollero's claimed compensation depended at least on Mr. Touradji's management, the team's contributions and bonuses, and the financial success of the Touradji Global Resources Fund.

This case is actually much closer to *Levion v Societe General*, 503 Fed. Appx. 62, *affirming* 822 F Supp 2d 390 (SDNY 2011). Similar to Mr. Beach and Mr. Vollero, the *Levion* plaintiff managed a group of individuals and was promised a certain percentage of the net profit

and loss of the group in addition to a guaranteed salary. On summary judgment, the court denied that the compensation was wages because it was “supplemental and dependent on the transactions and revenues generated” by the group he co-managed. *Id.* at 405. The portfolio profit percentages claimed by Mr. Beach and Mr. Vollero are not wages because they supplemented their base salary and the amount was in part dependent on factors other than their personal productivity.

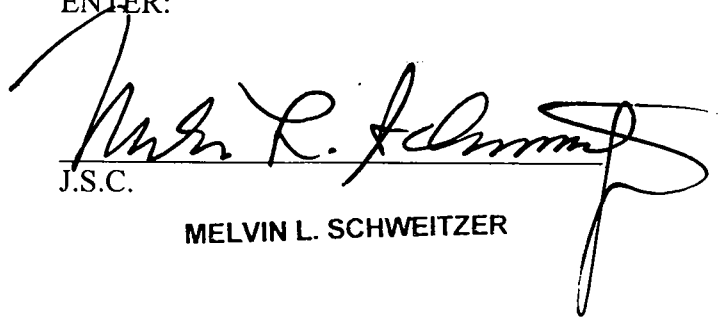
Conclusion

Accordingly, it is hereby

ORDERED that the defendant’s motion for summary judgment is granted and Count Two of the Amended Complaint is dismissed.

Dated: February 26, 2014

ENTER:


J.S.C.
MELVIN L. SCHWEITZER