

Zia-Ul-Haq v. Honda of Staten Island

40 Misc. 3d 139(A), 980 N.Y.S.2d 279 (Table), 2013 N.Y. Slip Op. 51448(U)

Appellate Term, Second Department (2d, 11th & 13th Judicial Districts) · August 21, 2013

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[*1] Zia-Ul-Haq v Honda of Staten Is. Div. of S.G. Hylan Motors Corp. 2013 NY Slip Op 51448(U) [40 Misc 3d 139(A)] Decided on August 21, 2013 Appellate Term, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on August 21, 2013

SUPREME COURT, APPELLATE TERM, SECOND DEPARTMENT, 2d, 11th and 13th JUDICIAL DISTRICTS

PRESENT: : WESTON, J.P., RIOS and ALIOTTA, JJ 2012-471 RI C.

Asim Zia-Ul-Haq, Respondent, —

against

Honda of Staten Island Div. Of S.G. Hylan Motors Corp., Appellant.

Appeal from a judgment of the Civil Court of the City of New York, Richmond County (Mary Kim Dollard, J.), entered August 5, 2011. The judgment, after a nonjury trial, awarded plaintiff the principal sum of \$3,573.48.

ORDERED that the judgment is affirmed, without costs.

At a nonjury trial in this small claims action to recover unpaid commissions, plaintiff testified, and defendant did not dispute, that plaintiff had been employed as a commission salesman by defendant car dealership; that defendant had terminated plaintiff's employment on March 28, 2011; and that plaintiff had not been paid commissions of \$3,573.48, which he had earned and to which he would have been entitled if his employment had not been terminated. Defendant's representative conceded that, following the termination of plaintiff's employment, defendant had made two payments to plaintiff. Defendant contended, however, that those payments had been made in error and that, under the clear terms of plaintiff's employment contract, plaintiff was not entitled to be paid any commissions after his employment for defendant had ceased. Following trial, the Civil Court awarded judgment to plaintiff in the principal sum of

\$3,573.48, noting that defendant had abrogated its own contract by paying commissions to plaintiff after his employment for defendant had terminated.

A copy of plaintiff's employment contract, entitled the S.G. Hylan Motors Corp. Salesperson Commission Plan (the Plan), was admitted into evidence. Under the terms of the Plan, plaintiff had been paid a base salary of \$200 a week plus commissions, which were determined in accordance with a contractual schedule. Paragraph 7 (b) of the Plan provided that, "Commissions are earned' for purposes of this Agreement only upon a completed delivery of the car, service and/or parts and only after all funds related to the transaction have actually been received by the Company," and paragraph 7 (c) thereof provided that, "Subject to Sections 8 and 9 below, the Company shall pay any earned Commissions to the Commission Salesperson thirty days after the last day of each calendar month in which the Commission is earned." Paragraph 9 of the Plan provided, in part: [*2]

"(a) Continued employment at the Company is an express prerequisite for payment of Commissions under this Plan, and a Commission Salesperson who is not employed with the Company at the time his/her Commission becomes due is not considered to have earned such Commission and such Commission is not payable. (b) If a Commission Salesperson ceases to be an employee of Company (whether voluntarily or involuntarily), effective upon such termination, the Commission Salesperson will no longer be eligible to receive Commissions which have not yet been paid for any sales or collections on sales, whether occurring before or after the date of termination."

Commissions are considered wages under section 190 (1) of the Labor Law (see *Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 616-617 [2008]), and commission salesmen are "employees" (Labor Law § 190 [2], [6]). Insofar as contractual language purports to terminate a salesman's right to the payment of commissions which the salesman has otherwise earned following the termination of the salesman's employment, it is unenforceable, because earned commissions cannot be forfeited (see *Devany v Brockway Dev., LLC*, 72 AD3d 1008, 1009 [2010]; *Arbeeny v Kennedy Exec. Search, Inc.*, 71 AD3d 177, 184 [2010]). We note that the Plan's stated purpose was to motivate defendant's employees to maximize sales of cars. However, although incentive compensation which is discretionary may fall outside the protection of the Labor Law (see *Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 223-224 [2000]), non-discretionary payments based on labor and services, such as the commission payments plaintiff seeks to recover in this action, constitute wages within the meaning of Labor Law § 190 (1) (see *Ryan v Kellogg Partners Inst. Servs.*, 79 AD3d 447, 449 [2010]), and, we find, are not subject to forfeiture. We therefore conclude that the judgment of the Civil Court in favor of plaintiff rendered substantial justice between the parties in accordance with the rules and principles of substantive law (CCA 1804, 1807).

We reach no other issue.

Accordingly, the judgment of the Civil Court is affirmed, albeit on grounds other than those stated by the Civil Court.

Weston, J.P., Rios and Aliotta, JJ., concur. Decision Date: August 21, 2013