

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 5/19/11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
AVRAHAM GOLD, :
individually and on behalf of all others :
similarly situated, :
 :
Plaintiff, :
 :
-against- :
 :
NEW YORK LIFE INSURANCE :
COMPANY et al., :
 :
Defendants. :
-----X

09 Civ. 3210 (WHP)
MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiff Avraham Gold (“Gold”) brings this collective and putative class action against Defendants New York Life Insurance Company, New York Life Insurance and Annuity Corporation, NYLIFE Insurance Company of Arizona, and NYLIFE Securities LLC (collectively “New York Life”) for violations of N.Y. Comp. Codes R. & Regs. (“NYCCRR”) tit. 12 § 142-2.2 and New York Labor Law §§ 193 and 652. Gold claims that New York Life failed to pay overtime and a minimum wage and made impermissible deductions from his commissions. New York Life moves for summary judgment dismissing Gold’s claims under NYCCRR 12 § 142-2.2 and N.Y. Labor L. § 193, and to strike the report of Gold’s expert, David Denmark. For the following reasons, New York Life’s motion to dismiss Gold’s overtime claims under § 142-2.2 is granted, and its motion to dismiss Gold’s New York Labor Law § 193 claim is denied. New York Life’s motion to strike is denied as moot.¹

¹ The parties do not discuss Gold’s claim under N.Y. Labor L. § 652, and this Court does not address that claim.

BACKGROUND

I. Work Performed

New York Life is a mutual insurance company that sells life insurance, annuities, and other financial products. (Plaintiff's Statement of Material Facts Pursuant to Local Civil Rule 56.1 ("Pl.'s 56.1 Stmt.") ¶ 1.) Between 2001 and 2004, Gold worked for New York Life as an insurance agent. (Pl.'s 56.1 Stmt. ¶ 4). Gold was compensated purely on a commission basis and received no payment based on the number of hours he worked. (Pl.'s 56.1 Stmt. ¶ 7.) He was also permitted to work as many hours as he chose. (Pl.'s 56.1 Stmt. ¶ 7.) Through the course of his employment, he made 221 sales, generating \$42,000 in commissions. (Pl.'s 56.1 Stmt. ¶¶ 24-25.)

In addition to licenses that permitted him to sell traditional "fixed" insurance policies and annuities, Gold obtained "Series 6" and "Series 63" licenses, which permitted him to sell "registered" products, including variable life insurance policies, mutual funds, and other products regulated by the Financial Industry Regulatory Authority ("FINRA"). (Pl.'s 56.1 Stmt. ¶¶ 10-11.) With these licenses, Gold became a "registered representative," a title that encompasses certain enhanced duties to clients. These duties include the Know Your Customer Rule, which requires registered representatives to "[u]se diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried by such organization and every person holding power of attorney over any account accepted or carried by such organization." (Decl. of Sean P. Lynch ("Lynch Decl.") Ex. KK: Expert Report of David M. Denmark ("Denmark Rep.") 6.) Registered representatives must also comply with the Suitability Rule, which states that "[i]n recommending to a customer the purchase, sale or

exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.”

(Denmark Rep. 6.) Thus, registered representatives must undertake reasonable efforts to obtain information concerning their clients’ financial status, tax status, and investment objectives.

(Denmark Rep. 6.) Finally, registered representatives have a “fundamental responsibility for fair dealing.” (Denmark Report 6.)

New York Life states that its registered representatives are “full-service financial professionals” (Pl.’s 56.1 Stmt. 13.1) and acknowledges that one of the responsibilities of its registered representatives is to help clients assess their financial situation and establish a long-term financial strategy. (Pl.’s 56.1 Stmt. ¶ 20.2.) Gold contends that as a registered representative, his primary duties were as a financial advisor. (Pl.’s 56.1 Stmt., passim). However, registered products accounted for less than 10% of his total sales. (Pl.’s 56.1 Stmt. ¶ 22.) And Gold was never a certified financial planner, financial counselor, portfolio manager, financial advisor, or wealth manager. (Pl.’s 56.1 Stmt. ¶ 14.)

Gold followed New York Life’s agent training and mandated sales practices, known as the “Sales Cycle,” a six-step process composed of: (1) prospecting (i.e., looking for prospective customers), (2) approaching prospective customers, (3) fact-finding (i.e., learning about the client’s financial situation), (4) presenting solutions, (5) closing a sale, and (6) delivery and continuing service. (Pl.’s 56.1 Stmt. ¶ 30.)

II. The Ledger System

New York Life paid Gold through a ledger-based compensation system. (Pl.'s 56.1 Stmt. ¶ 91.) The ledger system was governed by a series of written agreements that authorized New York Life to debit his ledger for certain expenses, including telephone service, computer support, liability insurance, and office space. (Pl.'s 56.1 Stmt. ¶¶ 112-13.) Under this system, New York Life periodically reconciled debits and credits in order to determine Gold's earnings. (Pl.'s 56.1 Stmt. ¶ 95.) New York Life did not match up particular debits against particular credits. Rather, all debits posted to Gold's ledger during a particular period were netted against all of the credits posted to his ledger during the same time. (Pl.'s 56.1 Stmt. ¶ 118.) Gold testified that he was aware of this system, although he disputes that any agreement existed between the parties on this matter. (Pl.'s 56.1 Stmt. ¶ 94.)

Gold did not receive a commission on the sale of a policy until his customer paid the first month's premium. (Pl.'s 56.1 Stmt. ¶ 102.) After a customer paid the first month's premium, New York Life advanced Gold the full first year commission, even though the company had not yet received the full first year premium on the policy. (Pl.'s 56.1 Stmt. ¶ 102.) If a customer subsequently decided not to accept the policy, New York Life refunded the premium and reversed the commission that it had credited to the ledger. (Pl.'s 56.1 Stmt. ¶ 103.) A commission would also be reversed if Gold did not submit a policy delivery receipt to New York Life within 45 days of a sale. In addition, a commission could be reversed if a customer misrepresented material facts on connection the application, or if the agent misrepresented the policy to the customer. (Pl.'s 56.1 Stmt. ¶ 108.)

DISCUSSION

I. Legal Standard

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Davis v. Blige, 505 F.3d 90, 97 (2d Cir. 2007). The burden of demonstrating the absence of any genuine dispute as to a material fact rests with the moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Once the moving party has made the initial showing that there is no genuine dispute of material fact, the non-moving party cannot rely on the “mere existence of a scintilla of evidence” to defeat summary judgment but must set forth “specific facts showing that there is a genuine issue for trial.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (emphasis in original); Niagara Mohawk Power Corp. v. Jones Chem., Inc., 315 F.3d 171, 175 (2d Cir. 2003) (citation omitted). “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” Scott v. Harris, 550 U.S. 372, 380 (2007) (citing Matsushita, 475 U.S. at 586-87). The Court resolves all factual ambiguities and draws all inferences in favor of the non-moving party. Liberty Lobby, 477 U.S. at 255; Jeffreys v. City of N.Y., 426 F.3d 549, 553 (2d Cir. 2005).

II. Tit. 12 § 142-2.2

NYCCRR 12 § 142-2.2, which governs overtime pay, is defined and applied in the same manner as under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 et seq. See NYCCRR 12 § 142-2.2 (“An employer shall pay an employee for overtime . . . in the manner

and methods provided in . . . the Fair Labor Standards Act of 1938.”). Under the FLSA “overtime requirement,” employers must pay employees “a rate not less than one and one-half times the regular rate at which he is employed” for hours worked in excess of forty per week. 29 U.S.C. § 207(a)(1). Exempted from this requirement is “any employee employed . . . in the capacity of an outside salesman.”

An outside salesperson is an employee:

- (1) Whose primary duty is: (i) making sales . . . ; or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- (2) Who is customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty.

29 C.F.R. § 541.500(a) (emphasis added). Gold testified in his deposition that he “customarily and regularly” met clients outside the office, and therefore satisfies the second prong of this standard. (Pl.’s 56.1 Stmt. ¶ 89.)

Work performed “incidental to and in conjunction with the employee’s own outside sales or solicitations . . . [and] . . . work that furthers the employee’s sales efforts [is] exempt work.” 29 C.F.R. § 541.500(b). Determining an employee’s “primary duty” means identifying “the principal, main, major, or most important duty that the employee performs.” 29 C.F.R. § 541.700. “Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.” 29 C.F.R. § 541.700. “Courts applying the outside salesperson exemption consider whether sales are made by the employee but also look for hallmark activities including (1) whether the employee generates commissions for himself through his work, (2) the level of supervision of the employee, (3) the amount of work done away from the employer’s place of business, (4) whether

the employee independently solicits new business, and (5) the extent to which the employee's work is unsuitable to an hourly wage.”² Chenensky v. New York Life Ins. Co., 07 Civ. 11504 (WHP), 2009 WL 4975237, at *5 (S.D.N.Y. Dec. 22, 2009); see also 29 C.F.R. § 541.700. The question of how an employee spends his time working is one of fact, but the question of whether those activities exempt him from the FLSA is one of law. See Icycle Seafoods v. Worthington, 475 U.S. 709, 714 (1986).

Gold argues that his primary duty was not sales, but rather providing financial advice. In Chenensky v. New York Life Insurance Company, this Court held that a similarly situated plaintiff's primary duty was sales and granted summary judgment for New York Life. Gold's position is nearly identical to Chenensky's except that Gold is a registered representative, subjecting him to the Know Your Client, Suitability, and Fair Dealing rules. However, the fact that Gold's employment is subject to certain regulatory requirements does not mean that compliance with the regulations is his primary duty under FLSA. These regulations simply place restrictions on how Gold executes his employment duties; they do not convert a sales position into an advisory one.

Ultimately, this case is indistinguishable from Chenensky. Although Gold “offers narrative . . . about his perceived role as a counselor and advisor, the evidence plainly shows that [his] primary duty at New York Life was to sell insurance.” Chenensky, 2009 WL 4975237, at

² Gold argues that the Second Circuit's recent decision in In re Novartis Wage & Hour Litigation, 611 F.3d 141 (2d Cir. 2010) demonstrates that “the mere presence of the indicia of sales do[es] not establish a primary duty of sales.” (Pl. Opp'n 23.) However, the issue in Novartis was not whether the plaintiffs—pharmaceutical sales representatives—had a primary duty of sales; rather, it was whether a sale occurred at all when sales representatives provided free samples in exchange for a non-binding “commitment” to prescribe them. Novartis, 611 F.3d at 154. As such, its applicability to the present case is minimal.

*6. “There is no issue of disputed fact regarding [Gold’s] workday—it was the six-step Sales Cycle where [Gold] solicited new business, presented available products to prospects, obtained a commitment to purchase, and ultimately received a commission-based salary.” Chenensky, 2009 WL 4975237, at *6. Gold’s financial advice was thus “merely incidental to consummating the deal.” Chenensky, 2009 WL 4975237, at *6. Gold’s arguments are also “undermined by his commission-based compensation.” Chenensky, 2009 WL 4975237, at *6. He was paid solely on commission—if he did not make any sales, he would not be paid. He received no compensation for pure financial advice in the absence of a sale. Such advice was not his primary duty—“it was simply one mark of a good salesman.” Chenensky, 2009 WL 4975237.

Gold’s expert, David Denmark, opines that “[t]he principle [sic] and most important duty of a Registered Representative within the Financial Services Industry is to provide suitable and appropriate investment advice and guidance to clients and potential clients, not as Defendants contend, to sell.” (Denmark Report 3.) This statement is of little relevance, however, because it relates not to Gold’s particular duties, but only to the duties of generic registered representatives. See Meyers v. Hertz Corp., 624 F.3d 537, 549 (2d Cir. 2010) (“[T]he question of entitlement to overtime pay is answered by examining the employee’s actual duties.” (emphasis added)). Specifically as to Gold, Denmark states only that:

The specific duties and responsibilities of New York Life Registered Representatives as presented in Mr. Gold’s declaration, and the relative importance of these duties and responsibilities, accurately reflect the customary practices and procedures relating to the duties and responsibilities of Registered Representatives as required by FINRA and related governmental regulatory authorities.

(Denmark Report 4 (emphasis added).) In offering this opinion, Denmark relied solely on

Gold's own characterization of his employment, in which Gold states, unsurprisingly, that his "primary duty was to . . . advis[e] clients on various insurance and financial products." (Gold Decl. ¶ 3.) But the mere fact that Gold characterizes his primary duty as providing financial advice does not make it so. Notably, Denmark neither spoke with Gold nor read his deposition testimony, and thus did not—and could not—offer a reliable opinion as to Gold's actual primary duty. Instead, at best, Denmark's report shows only that Gold's characterization of his job reflects a primary duty other than sales, consistent with Denmark's views on registered representatives generally. This is insufficient to create an issue of material fact—although Gold disputes certain characterizations of his duties and responsibilities, the facts undergirding these characterizations are not in dispute.

Gold also points to several cases in which courts have "examined the duties of registered representatives in detail [and] concluded that their primary duty either was not sales . . . or that disputed factual questions precluded summary judgment." (Pl. Opp'n 1); see also In re RBC Dain Rauscher Overtime Litig., 703 F. Supp. 2d 910 (D. Minn. 2010); Hein v. PNC Fin. Servs. Grp., 511 F. Supp. 2d 563, 566 (E.D. Pa. 2007); Takacs v. A.G. Edwards & Sons, 444 F. Supp. 2d 1100 (S.D. Cal. 2006). However, these cases addressed only the administrative and professional overtime exemptions of the FLSA and not whether a registered representative might fall under the sales exception. Moreover, the registered representative plaintiffs in Takacs argued that their primary duty was sales. Takacs, 444 F. Supp. 2d at 1112.

Hein, Takacs, and RBC are also distinguishable on their facts. The plaintiffs in both Hein and Takacs were guaranteed a minimum salary even in the absence of commissions. Hein, 511 F. Supp. at 563; Takacs, 444 F. Supp. 2d at 1107-08. Plaintiffs in RBC were securities

brokers who worked as “inside sales people,” RBC, 703 F. Supp. at 914, and thus could not have met the second prong of the sales exemption under 29 U.S.C. § 213(a)(1). And the plaintiff in Hein was a security broker who, in addition to the sale of financial instruments, “managed 200 client accounts,” “research[ed] the performance of particular financial instruments,” and supervised several subordinates. Hein, 511 F. Supp. 2d at 566-67, 569.

Lastly, Gold relies heavily on guidance letters from the Department of Labor (“DOL”). As an initial matter, such letters are not binding on this Court. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). In any case, they do not support a finding that Gold’s primary duty was anything other than sales. Gold first points to DOL letter FLSA 2006-43, stating that “the FINRA regulatory structure fundamentally differentiates the duties of registered representatives from other retail and financial services positions, and supports a distinct primary duty of financial advice and service rather than sales.” (Pl. Opp’n 14; Lynch Decl. Ex. OO: DOL Opinion Letter FLSA 2006-43, dated November 27 (“FLSA 2006-43”).) But this letter addresses the administrative exception, not the sales exception, and relates to employees that receive a regular salary in addition to commissions. FLSA 2009-28, on which Gold also relies, is also not on point. In that letter, the DOL stated that “depending on the duties actually performed, an insurance agent may qualify for either the outside sales or administrative exemption.” (Decl. of Adam C. Mayes dated Oct. 29, 2010, Ex. 40: DOL Opinion Letter FLSA 2009-28, dated Jan. 16, 2009 (“FLSA 2009-28”) (emphasis added).) Like Gold, where an agent’s primary duty is sales, he may qualify for the outside sales exemption. (FLSA 2009-28 at 3.) On the other hand, “administrative” insurance agents “perform[ed] office or non-manual work related to the management or general business operations of the employer . . . [and

engaged] . . . in promotion and business development activities, including the marketing, servicing, and promoting of the firm's . . . products.” (FLSA 2009-28 at 7.) Gold's duties did not include such managerial and promotional responsibilities.

Accordingly, there is no genuine dispute that Gold's primary duty was sales, and New York Life's motion for summary judgment is granted on Gold's claim under § 142-2.2.

III. New York Labor Law § 193

Under New York Labor Law § 193, employers are prohibited from making “any deduction from the wages of an employee” unless “in accordance with the provisions of any law or any rule or regulation issued by any governmental agency” or “expressly authorized in writing by the employee” for “insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee.” N.Y. Lab. Law § 193(1)(a-b); see also Pachter v. Bernard Hodes Grp., Inc., 891 N.E.2d 279, 283-84 (N.Y. 2008). Where an employer makes deductions from an employee's final compensation that are outside the enumerated categories in Section 193, their legality depends on the timing of the deduction. See Pachter, 891 N.E.2d at 284. Where an employee is paid by commission, § 193 does not prohibit deductions “if [they] were made before the commissions were earned.” Pachter, 891 N.E.2d at 284. However, when the deductions are made after the employee earns his commission, § 193 bars them. Pachter, 891 N.E.2d at 284; see also Gennes v. Yellow Book of N.Y., Inc., 806 N.Y.S.2d 646, 647 (N.Y. App. Div. 2005) (finding § 193 violation where deductions from commissions were taken for failure to renew subscriptions). An employer and

employee can agree about the point in time when a commission becomes “earned” and, therefore, a “wage.” Pachter, 891 N.E.2d at 285. Absent such agreement, courts apply the New York common law rule that a commission is earned when “a ready, willing and able purchaser of services” is produced.³ Pachter, 891 N.E.2d at 284-85 (citing Srouf v. Dwelling Quest Corp., 842 N.E.2d 13 (N.Y. 2005) (citation omitted)).

Gold makes two arguments under §193. First, Gold asserts that New York Life illegally deducted certain expenses, such as costs for support staff, office space, and telephone service, from Gold’s earned commissions. Second, Gold asserts that New York Life illegally reversed commissions when purchasers allowed their policies to lapse within a certain period of time. Both of these claims ultimately hinge on when Gold’s commissions became earned.

In Chenensky, this Court held that the patchwork of written agreements between New York Life and its agents was ambiguous on this point. Chenensky, 2009 WL 4975237, at *8-9. Both parties in the present action appear to accept this ambiguity as a starting point. Because the contracts in this action are substantially the same as those in Chenensky, this Court concludes they are ambiguous. (See Lynch Decl. Ex. D: Agent Agreement ¶¶ 9, 15; Lynch Decl. Ex. C: Training Allowance Subsidy Plan Agreement ¶¶ 7, 9; Lynch Decl. Ex. G: Registered

³ New York Life argues that the Second Circuit’s recent unpublished decision in Reiseck v. Universal Commc’ns of Miami, 367 Fed. App’x. 167 (2d Cir. 2010), aff’g 06 Civ. 777 (TPG), 2009 WL 812258 (S.D.N.Y. Mar. 26, 2009), demonstrates that commissions advanced prior to receipt of revenues subject to reversal are not earned under § 193. However, Reiseck involved § 191-c, not § 193. Moreover, unlike § 193, § 191-c expressly provides that an “earned commission” is “a commission due for services or merchandise which is due according to the terms of an applicable contract or, when there is no applicable contractual provision, a commission due for merchandise which has actually been delivered to, accepted by, and paid for by the customer.” N.Y. Labor L. § 191-a(b). This definition is at odds with both Pachter and New York Life’s position as to when a commission is earned.

Representative Agreement ¶ 5; Lych Decl. Ex. GG: Telephone and Equipment Service Agreement; Lynch Decl. Ex. II: Rental Agreement.)

After finding the agreements ambiguous in Chenensky, this Court denied summary judgment, stating that “the parties submitted significant conflicting extrinsic evidence on the parties’ course of dealings . . . [and this] contradictory evidence cannot be reconciled at this stage.” Chenensky, 2009 WL 4975237, at *9. New York Life argues that, unlike Chenensky, Gold understood New York Life’s compensation policies. Although Gold’s understanding is indeed relevant, see Pachter, 891 N.E.2d at 285 (“ample support” existed for a finding of an implied contract where plaintiff “understood the adjustments [to his commission-based compensation] and acquiesced in them”), it is not determinative. New York Life states that commissions are not earned until “all conditions to the underlying policies are fulfilled such that the premiums are non-reversible.” (Def.’s Reply 14.) Yet New York Life’s compensation manuals imply an alternative policy that a commission is earned once a full-year’s premium has been paid. (See Pl.’s 56.1 Stmt. ¶ 97.2 (noting that the compensation manual states that an agent “only earn[s] commissions if the premiums are actually paid.”).)

Moreover, New York Life’s position gives rise to unreasonable results. For example, premiums—and therefore commissions—are subject to reversal if “in the event of a death claim . . . it is determined that a policyholder misrepresented material facts in connection with his or her application.” (Def.’s 56.1 Stmt. ¶ 108.) Thus, under New York Life’s position, a commission is not earned—and is therefore subject to debit—at any point until the policyholder dies and it is determined that the policy can be paid. Even if Gold claims to have understood New York Life’s ledger system, he may not have understood its drastic and arguably


unreasonable consequences. See Eli Lilly Do Brasil, Ltda. v. Fed. Express Corp., 205 F.3d 78, 82 (2d Cir. 2007) (parenthetically citing Restatement (Second) Contracts § 203(a) (“[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.”)). Accordingly, New York Life’s motion for summary judgment dismissing Gold’s N.Y. Labor L. § 193 claims is denied.

CONCLUSION

For the foregoing reasons, Defendants New York Life Insurance Co. et al.’s motion for summary judgment is granted with respect to Plaintiff Avraham Gold’s claim under Title 12 § 142-2.2 of the Codes, Rules, & Regulations of the State of New York and denied with respect to Gold’s claims under New York Labor Law § 193. New York Life’s motion to strike the report of David Denmark is denied as moot.

Dated: May 19, 2011
New York, New York

SO ORDERED:


WILLIAM H. PAULEY III
U.S.D.J.