NOTIFY 24

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
Civil No. 23-1483-BLS1

VINAY MEHRA
Plaintiff

vs.

BOSTON GLOBE MEDIA PARTNERS, LLC
Defendant

MEMORANDUM AND ORDER ON MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS (COUNT I)

Vinay Mehra ("Mehra"), former President of Boston Globe Media Partners, LLC (the "Globe"), brings this action under the Wage Act, G.L. c. 149, §§ 148, 150, and on breach of contract and other related theories, to recover monies allegedly owed to him after he was terminated from the Globe. The case is before me on the Globe's motion pursuant to Mass. R. Civ. P. 12(c) for judgment on the pleadings on Count I, which seeks to recover Mehra's "rightful wages in the form of a commission for 2020," plus treble damages and attorney's fees under the Wage Act.[1] For the following reasons, the motion must be allowed.

BACKGROUND

A. Relevant Factual Allegations

The following is taken from the Complaint and Jury Demand ("Complaint").[2]

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1 See Complaint and Jury Demand ¶ 63.

2 "A defendant's rule 12(c) motion is actually a motion to dismiss that argues that the complaint fails to state a claim upon which relief can be granted. . . . In deciding a rule 12(c) motion, all facts pleaded by the nonmoving party must be accepted as true." Jarosz v. Palmer, 436 Mass. 526, 530 (2002) (internal quotations and citations omitted).

After a number of unprofitable years, the Globe hired Mehra in 2017 to be its President with a mandate to turn the Globe into a profitable enterprise. The parties agreed that in addition to a salary and other incentives, Mehra would receive "5% of the Globe's profits beyond $5 million" for the third calendar year of his tenure and thereafter. The agreement did not condition payment on Mehra's continued employment when the payment was calculated or became due.

Mehra's "dual efforts to augment revenue and cut costs" resulted in the Globe becoming highly profitable by 2019. Plaintiff alleges that "[h]e was the ultimate individual responsible for increasing the Globe's revenues and profits and improving its overall financial position," and that "[b]ased upon his efforts and strong performance, the Boston Globe became highly profitable in 2019." Complaint ¶¶ 4, 5.[3]

As Mehra's incentive payment grew because of the Globe's improved profitability, the Globe tried to negotiate a lower profit share for Mehra and threatened to terminate Mehra if he did not accept a reduction. After Mehra insisted on receiving the negotiated incentive, the Globe paid him his full commission for 2019 of over $1.4 million.

In February 2020, the Globe presented Mehra with a revised compensation agreement that would have reduced his profit share for 2020 and subsequent years. Again Mehra refused, and again the Globe threatened Mehra with termination.

As of June 2020, the Globe was having a profitable 2020. Mehra understood the Globe's profits in the first half of 2020 exceeded $10 million.

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[3] Despite the constraints of Mass. R. Civ. P. 8(a) (complaint "shall contain [ ] a short and plain statement of the claim showing that the pleader is entitled to relief"), Mehra's Complaint is unnecessarily repetitive. See also Complaint ¶¶ 34-37. Accord Id. ¶ 58 ("All profits [in 2020] stemmed directly from Mr. Mehra's efforts while he was at the helm of the Company.").

On June 30, 2020, the Globe terminated Mehra "in retaliation for his protected activity in insisting on his full wage payment for 2019 as well as to avoid paying him his commission for 2020," although the Globe characterized "his discharge as one 'for cause.'" Id. ¶¶ 53, 54.

In 2021, once the Globe's profits for 2020 had been finalized, Mehra demanded his incentive compensation based on a percentage of the Globe's profits in 2020. The Globe acknowledged that Mehra was entitled to payment, but suggested that any payment should be at the lower percentage presented in February 2020.

Since Mehra's termination, the Globe has not paid him any compensation. Mehra alleges that the percent-of-profit incentive payment for 2020 "is a non-discretionary payment, definitively determined in amount, not dependent on any contingencies, and conclusively owed and due," which "[h]e earned . . . under his compensation agreement by generating substantial revenue and profit for the Company in 2020 – including through extensive efforts during that year until his unjustified retaliatory firing." Id. ¶ 60.

B. Procedural History

Mehra filed this case in June 2023. He asserts claims and seeks monetary damages for violation of the Wage Act for failure to pay him his "commission" for 2020 (Count I) and retaliation (Count II); for breach of contract (Count III), including the implied covenant of good faith and fair dealing (Count IV); and for unjust enrichment (Count V).

With discovery ongoing, the Globe moves to dismiss Count I. It argues that Mehra's incentive compensation based on a percentage of the Globe's profits in 2020 is not a "commission" as that term has been construed under the Wage Act, and therefore, even if

recoverable on a contract theory, it is not recoverable under the Wage Act.[4] Mehra counters that because he alleges that he was responsible for the Globe's return to profitability, its increased revenue, and its reduced costs, the incentive compensation measured as a percentage of the Globe's profits is actually a commission covered by the Wage Act, or at least has to be treated as such at this pleading stage. The relevant caselaw compels me to agree with the Globe.

DISCUSSION

"The Wage Act requires that an employer expeditiously pay a terminated employee his full wages and similar compensation (with the precise deadline determined by the act's complicated provisions)." Suominen v. Goodman Industrial Equities Mgmt. Grp., LLC, 78 Mass. App. Ct. 723, 737 (2011). See G.L. c. 149, § 148. "The statute applies to wages, to holiday and vacation pay, and, 'so far as apt, to the payment of commissions when the amount of such commissions, less allowable or authorized deductions, has been definitely determined and has become due and payable to such employee.'" Suominen, 78 Mass. App. Ct. at 737, quoting G.L. c. 149, § 148.

"The only contingent compensation recognized expressly in the act is commissions, which are considered wages when they 'ha[ve] been definitely determined and due and ha[ve] become payable to [the] employee.'" Mui v. Massachusetts Port Auth., 478 Mass. 710, 713 (2018), quoting G.L. c. 149, § 148. Massachusetts courts "have not broadly construed the term 'wages' for the purposes of the act to encompass any other type of contingent compensation." Mui, 478 Mass. at 713. See Weems v. Citigroup Inc., 453 Mass. 147, 153-156 (2009); Prozinski

[4] This is more than an academic exercise. If the payment for 2020 is recoverable as a "commission" under the Wage Act, Mehra would be eligible to recover treble damages and reasonable attorneys' fees. G.L. c. 149, § 150, neither of which would necessarily be available under a standard contract theory.

v. Northeast Real Estate Servs., 59 Mass. App. Ct. 599, 603-604 (2003) ("no evidence that the Legislature intended to provide treble damages and attorneys fees and costs to professionals enforcing their asserted contract rights"), quoting Cumpata v. Blue Cross Blue Shield of Massachusetts, Inc., 113 F. Supp. 2d 164, 168 (D. Mass. 2000).

In this context, a "commission" is commonly understood as "compensation owed to those in the business of selling goods, services, or real estate, set typically as a percentage of the sales price." Suominen, 78 Mass. App. Ct. at 738, citing Webster's New Universal Abridged Dictionary 364 (2d ed. 1983).

However characterized, Mehra's share of the Globe's profits is not a "commission" subject to the Wage Act. Courts have uniformly held that "a profit-sharing arrangement" or "a share of the overall profits generated by [ ] development efforts" is not a commission covered by the Wage Act. Suominen, 78 Mass. App. Ct. at 738 (construction manager's share of "promote" – "a species of profit that developers can enjoy . . . if their projects become extremely successful" – not "commission"). See also, e.g., O'Connor v. Kadrmas, 96 Mass. App. Ct. 273, 288 (2019) ("A payment based on a percentage of the business's overall profits is not a commission."); Barnia v. Kaur, 646 F. Supp. 3d 154, 169 (D. Mass. 2022) (Kelley, J.) (dentist's annual bonus, which was "contingent on the dental practices' profitability, . . . cannot be understood as a commission" and is not subject to Wage Act); Element Productions, Inc. v. Editbar, LLC, 35 Mass. L. Rptr. 593, 2019 WL 4017139 at ** 1-2 (Mass. Super. May 7, 2019) (Davis, J.) (executive's "contractual right to share in [company's] overall profits is not protected by the provisions of the Wage Act"); Roma v. Raito, Inc., 2015 WL 1523098 at ** 1, 7-8 (D. Mass. Mar. 31, 2015) (Sorokin, J.) (New England district office head's entitlement to 4% of New England district's profits over $600,000 after taxes was not commission under Wage Act).

Accord Dwyer v. Blue Sea Products, LLC, 2019 WL 3712176 at * 3 (D.N.J. Aug. 7, 2019) (applying Massachusetts law; where "Profit Share provision . . . allowed Plaintiff to receive a bonus in the form of a share of the overall profits generated by . . . entire New England Division, without regard to any revenue generated by Plaintiff himself," the bonus was not commission under Wage Act).

Mehra's argument that his profit-sharing agreement was tied to revenues entirely dependent on him, and thus is a commission, is unpersuasive. Some courts have held that a compensation agreement tied to the revenue generated by an employee, without an entitlement to a percentage of an employer's overall profits, is a commission. See, e.g., Feygina v. Hallmark Health Sys., Inc., 31 Mass. L. Rptr. 279, 2013 WL 3776929 at * 5 (Mass. Super. July 12, 2013) (physician's incentive compensation "pegged to the amount of revenue [physician's] own practice generated each year" that "did not give [physician] any entitlement to any share of [employer's] profits" was commission under Wage Act); Israel v. Voya Institutional Plan Servs., LLC, No. 15-CV-11914-ADB, 2017 WL 1026416, at * 4 (D. Mass. Mar. 16, 2017) (sales representative's compensation based on generated revenues was commission). That is not the case here. Mehra's compensation agreement, as alleged, expressly entitled him to a share of the Globe's profits, not a percentage of revenues he personally generated.[5] Under the caselaw construing the Wage Act, Mehra's incentive compensation based on a percentage of the Globe's annual profit is not a commission protected by the Wage Act.

[5] If Mehra had produced significant profits for the Globe solely through cost-cutting, for example, the incentive compensation would still have entitled him to a share of the company's profits. Moreover, for 2020, the year in dispute, Mehra did not work for the Globe for the last six months. The Globe's profits for calendar year 2020 therefore necessarily involved, and were contingent on, the efforts and activities of others.

ORDER

Defendant's Motion for Judgment on the Pleadings as to Count I of the Complaint (Docket #15) is **ALLOWED**. Count I is hereby **DISMISSED**.

Dated: January 31, 2024

Peter B. Krupp
Justice of the Superior Court