

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

-----X	
In the Matter of the Petition of:	:
	:
ARTHUR V. COPPOLA, JR. AND ALLBRAND	:
COMMERCIAL WINDOWS & DOORS, INC.	:
	:
Petitioners,	:
	:
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 6 of the Labor Law,	:
dated March 31, 2010,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
-----X	

DOCKET NO. PR 10-129

RESOLUTION OF DECISION

APPEARANCES

Arthur V. Coppola, Jr., petitioner pro se, and for Allbrand Commercial Windows & Doors, Inc.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for the respondent.

WITNESSES

For the petitioners: Anthony Gurino; Barry Leskun; and Labor Standards Investigator Leo Lewkowitz.

For the respondent: None.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on May 4, 2010, and seeks review of an order to comply issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Arthur V. Coppola, Jr. and Allbrand Commercial Windows & Doors, Inc. on March 31, 2010. Upon notice to the parties a hearing was held on August 3, 2012, in New York, New York, before Devin A. Rice, the Board's Associate Counsel, and the designated Hearing Officer in this proceeding. Each

party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and make statements relevant to the issues.

EVIDENCE

The order to comply with Article 6 of the Labor Law under review was issued by the respondent Commissioner of Labor against the petitioners on May 31, 2010. The order directs compliance with Article 6 of the Labor Law and payment to the Commissioner for wages due and owing in the amount of \$14,123.58 to Barry L. Leskun for the time period from November 1, 2005 to July 15, 2006, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$8,389.02, and assesses a civil penalty in the amount of \$14,124.00, for a total amount due of \$36,636.60.

The order was issued by the respondent following a claim filed with the Department of Labor (DOL) by Barry Leskun alleging that the petitioners owe him commissions for two window and door installation projects that he sold. Specifically, the claimant alleges that he is owed a 3% commission on a \$515,000.00 sale for a project at 34-36 Eckford Street in Brooklyn ("Eckford project"), which is an unpaid commission of \$15,450.00. He also alleges that he is owed a 3% commission on a \$283,000.00 sale for a project at 128 Newton Street in Brooklyn, which is an unpaid commission of \$8,490.00. The claimant indicated in his claim form that he was only paid \$2,100.00 in commissions for these sales.

The parties entered into a handwritten commissions agreement, signed by the claimant, but undated. The claimant testified that Allbrand hired him as a salesman in August 2005, and that he signed the commissions agreement a few months later. The claimant and the petitioners agree that the commissions agreement provides that the claimant is entitled to a 3% commission on any sale with a 20% to 30% profit.

Anthony Gurino, the general contractor and construction manager for Tahoe Development, testified that he had two contracts with Allbrand to install windows and balcony doors at projects in Brooklyn, New York. The first contract for work to be performed at 34-36 Eckford Street was entered into between Allbrand and Tahoe on November 30, 2005, and was signed on behalf of Allbrand by Coppola. The total price of the contract was \$516,956.00. The second contract was for work to be performed at 128 Newton Street in Brooklyn, New York, and was entered into between Allbrand and Tahoe on March 23, 2006. The Newton Street contract was signed on behalf of Allbrand by Leskun, and the total price was \$283,286.00.

Gurino testified that Coppola was the representative for Allbrand on the Eckford Street project, and that he did not deal with Leskun on that job. He had no knowledge of the agreement between Coppola and Leskun. Leskun did work on the Newton Street project according to Gurino's testimony; however, Allbrand was not paid the balance due on the project when it was completed, because Allbrand did not finish the project due to a stop work order from the city. Gurino eventually had to bring in an outside vendor to finish the work. Gurino testified that Leskun worked as an "associate" of Coppola on the Newton

Street project, but he was not sure of his exact role. Gurino estimated that a balance of \$110,000.00 to \$120,000.00 was due to Allbrand when work was stopped by the city. Tahoe has never paid this balance.

Leskun testified that based on the handwritten commissions agreement, he was entitled commissions when a customer provided payment to Allbrand. He testified that after having worked on the Newton Street project, Coppola allowed him to work on the Eckford Street contract from the beginning, including bidding, pricing, and selling the job. He explained that he did not sign the Eckford contract because "after the Newton Street job, for whatever reason, Art, I guess, realized that he wanted to take over the business from Tahoe himself." Leskun testified that Newton Street was the first project he had worked on; however, he later clarified that he had confused the two projects because so many years had passed.

Leskun stated that Coppola told him he would receive a commission of 3% of the profit on each contract or up to 10% of the overall profit, but that "[Coppola] would flip flop back and forth whatever was in his best interest." Leskun testified that there was no agreement that if his employment was terminated he would forfeit any unpaid commissions. He believes he is entitled to a 3% commission on the Eckford Street project because there was a 30% profit. He believes he is entitled to a commission on the Newton Street project "based on [Coppola's] handwritten document . . . because there was a total of \$250,000.00 in profit on all three [sic.] of these jobs so whatever his little discrepancy was with Tahoe is not my concern based on his handwritten contract."

Labor Standards Investigator Leo Lewkowitz testified that he investigated Leskun's claim by meeting several times with the claimant and with the petitioners. He determined that no written commission agreement existed, despite admitting that a copy of the agreement was provided to him that he did nothing with since he was unable to read it. Lewkowitz determined that the claimant was owed only a 1.5% commission on each project, because Leskun could not prove he was the only salesperson on those jobs. He testified that the order finds the claimant is owed a 1.5% commission on the Eckford Street project and a 3% commission on the Newton Street project. Lewkowitz testified that a Senior Investigator instructed him to calculate the Newton Street project at 3%. He does not know why that instruction was given.

ANALYSIS

The Board makes the following findings of fact and law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39):

Burden of Proof

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

At the outset, we note that Coppola was the claimant's employer as that term is defined in Article 6 of the Labor Law. The petition alleges that the Coppola was not an employer; however, the petitioners presented no evidence at hearing on this issue. We further note that commissions are "wages" under Article 6 (*see* Labor Law 190 [1]).

The claimant testified that he had an agreement with the petitioners to be paid commissions on jobs that he sold. That testimony was not contradicted by the petitioners and is supported by the existence of a hand written commissions agreement, signed by the claimant, which although difficult to read supports the claimant's testimony that under the agreement he entered with the petitioners, he is entitled to a 3% commission where a sale that he worked on generates a "20% to 30%" profit. Indeed, the petitioners do not appear to contest this, instead arguing that the commission should be split on the Eckford Street project, and that no commissions are due for Newton Street because the general contractor did not pay the petitioners in full. With respect to a split fee on Eckford Street, the claimant credibly testified that he sold the Eckford Street project and worked on it from the start. This testimony was not contradicted by the petitioners. Since there is no mention of split fees that we can find in the written commission agreement, and since the claimant's testimony was un-rebutted, we find that the petitioners owe the claimant a 3% commission in the amount of \$15,508.68 for work on the Eckford Street project (*see e.g. Jacobson v Sassower*, 66 NY2d 991, 993 [1985] [any ambiguities in the terms of a written agreement must be resolved against the party that drafted it]).

The claimant also credibly testified that he sold the Newton Street project, which is supported by the contract itself which was signed by the claimant on behalf of Allbrand. This testimony was not contradicted by the petitioners. In fact, Gurino testified that the claimant worked on the project, although he did not know his exact role. Gurino also credibly testified that the petitioners did not complete work on the project, and that he did not pay them the balance due, which he estimated as \$110,000.00 to 120,000.00. The claimant was clear that he was entitled to a commission under the agreement when "the money came in from the customer." We therefore find that the claimant is entitled to a 3% commission¹ on the Newton Street project for the payments that were actually made, which based on Gurino's testimony, was \$168,286.00². Therefore, the commission due is \$5,048.58 on the Newton Street project, and the total commission due for the two projects is \$20,557.26. Accordingly, the amount of commissions found due by order is affirmed as it is for less than the amount we find is due and owing.

Civil Penalty

The order assesses a 100% civil penalty. The petition did not specifically challenge the imposition of a civil penalty in this case. Accordingly the civil penalty is affirmed (*see* Labor Law § 101 [any objection not raised in the petition shall be deemed waived]).

¹ We do not determine whether the contract's profitability, a factor in determining the commission percentage, because the petitioners, who have the burden of proof, produced no evidence on this issue.

² Contract price of \$283,286.00 less \$115,000.00 (average of the amount Gurino testified was unpaid).

Interest

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include “interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment. Banking Law section 14-A sets the “maximum rate of interest” at “sixteen percent per centum per annum.”

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order is affirmed; and
2. The petition for review be, and the same hereby is, denied.

Absent
Anne P. Stevason, Chairperson

J. Christopher Meagher
J. Christopher Meagher, Member

Jean Grumet
Jean Grumet, Member

LaMarr J. Jackson
LaMarr J. Jackson, Member

Jeffrey R. Cassidy
Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
December 14, 2012.