

Zomber v Golub

2006 NY Slip Op 30792(U)

May 24, 2006

Supreme Court, New York County

Docket Number: 112771/05

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
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SAMUEL ZOMBER,

Plaintiff,

-against-

Index No. 112771/05

GERALD L. GOLUB, PAUL KOREN,
STEVE MAYER, PETER TESTAVERDE, and
GOLDSTEIN GOLUB KESSLER &
COMPANY, INC. LIQUIDATING TRUST,

Defendants.

-----X

Charles Edward Ramos, J.S.C.:

In motion sequence number 002, plaintiff Samuel Zomber moves, pursuant to CPLR 3211 (a)(1) and (7), to dismiss counterclaims by defendants Gerald L. Golub, Paul Koren, Steven Mayer ("Mayer"), Peter Testaverde, and Goldstein Golub Kessler & Company, Inc. Liquidating Trust ("the Trust") for breach of contract, breach of fiduciary, and an accounting.

Background

On July 13, 1998, American Express Tax Business Services Inc., Inc. ("American Express"), former subsidiary of American Express Travel Related Services Inc., acquired the non-attestation business of Goldstein Golub & Kessler & Co., P.C. and Goldstein Golub Kessler & Co., Inc. (Collectively "GGK"). GGK was engaged in the business of accounting, auditing, and tax and business consulting. Pursuant to the acquisition, GGK, American Express, and GGK shareholders entered into numerous agreements to effect the acquisition ("the Acquisition Agreement"), to govern the distribution of acquisition funds (the "Trust Agreement"), to create a new partnership to provide attestation services ("the

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Partnership Agreement"), and to govern the employment of the GGK shareholders by American Express (the "Employment Agreement").

The Acquisition Agreement, governed by Minnesota law, provides a non-compete clause which states in pertinent part:

For a period commencing on the Closing date and continuing until the sixth anniversary of the Closing date, no director shall directly or indirectly: (a) call upon Non-Solicitation Clients [...] for the purpose of soliciting or providing any product or service similar to that provided by the Purchaser, (b) conclude any sale to any of the Non-Solicitation Clients of any product or service similar to that offered to the general public by Purchaser, (c) disrupt, damage, impair or interfere with the business of Purchaser or its Affiliates[...]

The Employment Agreement, which is governed by Minnesota law, contains a non-competition and non-solicitation provision which state that:

[d]uring the term of Employee's Employment by Company and for a period of 24 months following the termination thereof, Employee will not directly or indirectly: (1) call upon any of the Non-Solicitation Clients [...] for the purpose of soliciting or providing any product or service similar to that provided by Company [...]; or (2) conclude any sale to any Non-Solicitation Clients of any product or service similar to that offered to the general public by Company [...]; or (3) disrupt, damage, impair or interfere with the business of the Company or its affiliates, whether by way of interfering with or raiding its employees, agents, representatives or vendors or otherwise.

Zomber had been a shareholder of GGK since 1984. In connection with the Acquisition, all former GGK equity-holders, including Zomber, entered into employment agreements with American Express and began providing non-attest services through American Express.

GGK retained the attestation part of the business which it

provided through the newly formed entity of Goldstein Golub & Kessler LLP (the "Partnership"). All Partners, including plaintiff, executed the Agreement of Limited Liability Partnership of GGK.

The Partnership Agreement, which is governed by New York law, provides in section 9.2:

Non-Solicitation: (a) No Partner who shall withdraw from the Partnership shall solicit or render any Competitive Services [...] on a worldwide basis, directly or indirectly, either individually or as a member [...] to or for any person or entity who was or has been a client of the Partnership at any time prior to said withdrawal and during the period of (3) years following the date of his or her withdrawal; (b) No Partner who shall withdraw from the Partnership shall, directly or indirectly, solicit clients of the Partnership...for a period of (3) years following the date of his or her withdrawal.

Section 9.4 also states that:

Except for the benefit of the Partnership, for so long as a Partner shall remain a Partner of the Partnership, and for a period of two years thereafter, such Partner shall not within a ten mile radius of any office maintained by the Partnership, directly or indirectly provide any Competitive Services [...].

In June 2000, Zomber was hit by a car and suffered physical injuries. When Zomber returned to work, plaintiff alleges that defendants began reducing his salary and ultimately attempted to terminate his employment. After extensive discussions, Zomber received a termination package which included, among other things, affirmation of Zomber's entitlement to his full pay-out pursuant to the Acquisition. Plaintiff asserts that defendants subsequently failed to distribute the acquisition funds to Zomber. As a result, Zomber asserts claims for breach of contract, breach of fiduciary duty and negligence.

Defendants allege that Zomber solicited clients in violation of the Partnership, Acquisition, and Employment Agreements and assert counterclaims for breach of contract, breach of fiduciary duty, and accounting. Defendants argue that as partner and director, plaintiff owed various fiduciary duties, including the duty of loyalty. Defendants further assert that plaintiff breached that duty by soliciting GSK and American Express clients and providing services to such clients in violation of the restrictive covenants contained in the Agreements.

Plaintiff argues that defendants have no standing under the Employment Agreement as the contract involves businesses which are not parties to this action. Plaintiff further asserts that Zomber, as a beneficiary of the Trust, does not owe a fiduciary duty and thus is not obligated to provide an accounting.

Discussion

Under CPLR 3211(a)(7), facts pleaded in the complaint are presumed to be true and will be accorded every favorable inference if they fit within a legally cognizable claim. *Wilson v Hochberg*, 245 AD2d 116 (1st Dept 1997).

Breach of Contract

The Employment Agreement

The Employment Agreement is between Zomber and American Express. While American Express is not a party to this action, American Express assigned its legal rights and remedies under the Employment Agreement to GSK and the Trust. Plaintiff argues that American Express does not have the right to assign its claim to

the Trust under the Employment Agreement. Plaintiff relies on a specific provision in the Agreement which limits the circumstances under which American Express may assign its liabilities and remedies only to a corporation which controls or is controlled by American Express or has succeeded to its assets. The defendants do not allege such a conforming assignment. "In accordance with NY Gen Oblig Law § 13-105, the transferee of an assigned claim is subject to any defense or counterclaim existing against the transferor of the claim before notice of the assignment." *National Commercial Bank & Trust Co. v Malik*, 72 Misc 2d 865, 866 (Sup Ct, Albany County, 1973). The Trust thus does not have standing to assert a claim based on the Employment Agreement.

The individual defendants, Golub, Koren, Mayer and Testaverde, were not signatories to the Assignment Agreement, nor were they signatories to the Employment Agreement. Consequently, the individual defendants do not have standing to raise a claim for breach of the non-solicitation provision under the Employment Agreement. *Michelman-Cancelliere Iron Works, Inc. v Kiska Constr. Corp. USA*, 18 AD3d 722, 723 (2nd Dep't, 2005) ('a claim and counterclaim must be by and against the same party in the same capacity' quoting *Ruzicka v Rager*, 305 NY 191 (1953)). Therefore, the counterclaims raised by the individual defendants under the Employment Agreement are dismissed.

The Acquisition Agreement

In their counterclaim, defendants allege that plaintiff

violated the restrictive covenant contained in the Acquisition Agreement which prohibited Zomber, as an equity holder, to engage in competitive activities with the Partnership. The Trust and the individual defendants in this action were not signatories to the Acquisition Agreement. *Mesibov, Glinert & Levy, Inc. v Cohen Bros. Mfg. Co.*, 245 NY 305 (1927) ("A contract, [...] shall be signed by the party to be charged or his agent in that behalf. [...] A signature, however, there must be, and a name, written or printed, is not to be reckoned as a signature unless inserted or adopted with an intent, actual or apparent, to authenticate the writing. "). Defendants argue that while the Trust and the individual defendants are not signatories to the Acquisition Agreement, the assignment of claims from American Express to GGK authorizes them to pursue their claims against Zomber. The Assignment Agreement specifically assigns legal rights and remedies "under the Employment Agreement". Neither the Assignment Agreement nor the Employment Agreement mention the Acquisition Agreement; therefore, Defendants do not have the right to pursue counterclaims seeking relief under the Acquisition Agreement.

Partnership Agreement

The Trust was not a signatory to the Partnership Agreement and thus does not have standing to assert claims under the Partnership Agreement. See *Michelman-Cancelliere Iron Works, Inc.*, at 723.

Further, individual defendants do not have standing to sue

under the Partnership Agreement. While the individual defendants did sign the Partnership Agreement, they did so in their capacity as partners of GGK LLP. In this action, Golub, Koren, Mayer, and Testaverde are sued as trustees of the Trust.

It is the general rule that a defendant may counterclaim against the plaintiff only in the capacity in which he is sued because of the possibility of prejudice to the person represented. For example, a shareholder bringing a derivative action is not subject to counterclaims against him individually. *Conant v Schnall*, 33 AD2d 326, 328 (3rd Dep't 1970).

Breach of fiduciary duty

Zomber was a partner of GGK LLP. GGK LLP and its partners are not parties to this action; therefore, defendants cannot claim a breach of fiduciary duty against Zomber in his capacity as a partner. *Id.*

The present action concerns the Trust and individual defendants Golub, Koren, Mayer, and Testaverde. As defined by the Trust Agreement, Zomber was a beneficiary of the Trust, not a partner, nor a partner of the trustees of the Trust. A beneficiary of a trust owes no fiduciary duty to the trust. Defendants fail to establish a valid fiduciary duty running from Zomber to the Trust.

Accounting

For an accounting, defendants must show 'the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest.' *Palazzo v Palazzo*, 121 AD2d 261, 265 (1st Dep't, 1986).

As a beneficiary, Zomber has no fiduciary obligation to the Trust. As a result, an accounting is not an available remedy. Accordingly, it is

ORDERED that the motion to dismiss the counterclaims is granted.

Dated: May 24, 2006



J.S.C.

CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions from the internet which have been altered in the scanning process.

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