

Crown It Services, Inc. v Koval-Olsen

2003 NY Slip Op 30064(U)

August 20, 2003

Supreme Court, New York County

Docket Number: 0110620/0620

Judge: Charles H. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

0110620/2002

CROWN IT SERVICES, INC.

VS

KOVAL-OLSEN, JANICE

INDEX NO. _____

MOTION DATE

6/16/03

SCANNED

MOTION SEQ. NO. _____

SEP 05 2003

MOTION CAL. NO. _____

SEQ 1

SUMMARY JUDGMENT

The following papers, numbered 1 to 9 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-4

5-7

8-9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

N.B. — preliminary conference is scheduled in final decretal paragraph.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 8/20/03

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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CROWN IT SERVICES, INC.,

Plaintiff,

Index No. 110620/02

- against -

DECISION AND ORDER

JANICE KOVAL-OLSEN A/K/A JANICE KOVAL
A/K/A JANICE OLSEN; PEABODY ASSOCIATES, LTD.,

Defendants.

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Plaintiff, Crown IT Services, Inc. ("Crown IT"), moves for partial summary judgment pursuant to CPLR § 3212.

Defendants, Janice Koval-Olsen and Peabody Associates, Ltd., oppose the motion, and cross-move for summary judgment and dismissal pursuant to CPLR §§ 3211(a)(1), 3211(a)(7) and 3212; they also seek judgment on their counterclaim. For the reasons stated below, **the** motion is denied and the cross-motion is granted in part.

FACTUAL BACKGROUND

Crown IT is in the business of providing workers for third parties. Janice Koval-Olsen a/k/a Janice Koval a/k/a Janice Olsen ("Koval") and Peabody Associates, Ltd. ("Peabody"), the company of which she is principal and apparently the only employee, were hired by Crown IT and assigned to work at Credit Suisse First Boston Corporation ("Credit **Suisse**"), a Crown IT client. Koval personally signed an **Employee** Consent Agreement dated August 10, 1999 ("**Employee Agreement**"), and she signed a

Contractor Agreement on behalf of Peabody, dated August 23, 1999 ("Contractor Agreement"). In the Contractor Agreement she agreed to provide computer consulting services to Credit Suisse and also that a finder's fee **would** be paid to Crown IT if:

(a) Contractor [Peabody] or any of its personnel within a restricted area (I) provides or attempts to provide (or advises others of the opportunity to provide), directly or indirectly, any services to any client to which Contractor has been introduced or about which Contractor has received information through Crown or through any client **for which Contractor has performed** services or to which Contractor was introduced under this agreement; . . . The parties agree that the finder's **fee** shall be paid immediately upon commencement of the services and **shall be** \$50,000.

Contractor Agreement at paragraph 4 (the Employee Agreement has a similar provision at paragraph 1.)

Koval worked for Credit Suisse through Crown IT for approximately two and a half years. On February 18, 2002, Peabody sent a letter of resignation to Crown **IT** effective March 1, 2002 due to dishonored and late payments to **it** by Crown IT and Crown IT's "inability to maintain an active contract with the client". Peabody then entered into an agreement, beginning on March 4, 2002, to provide computer consulting services to Credit Suisse with a competitor of Crown IT. Crown IT alleges that Koval and Peabody are now jointly liable for the finder's fee. Crown IT further states that defendants **tortiously** interfered with Crown IT's business relationship with Credit Suisse by providing damaging information about Crown IT with the intention

of undermining its business.

Defendants argue that they resigned when Crown IT no longer was on Credit Suisse's **list** of approved vendors in order to continue working for Credit Suisse and they contend that the payment difficulties constitute a material **breach** of the contracts making the provision at issue unenforceable. As to the dishonored checks, Crown IT says the checks were paid eventually and as to **its status** with Credit **Suisse**, it contends that Peabody caused the problem.

On her counterclaim, Peabody seeks payment on its **last** invoice to Crown IT for \$7,410 alleging breach of contract, account stated and quantum meruit.

DISCUSSION

A motion for summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR 3212(b) .

Rather than presenting the **dispute** as one **to enforce** the \$50,000 payment **obligation**, plaintiff defended the contract provision as an enforceable restrictive covenant, to which argument defendants responded. However, the contract does not prevent employment by defendants; **it requires compensation for** the introduction to an employer. Even under the restrictive

covenant analysis, however, plaintiff's motion **fails**.

In New York, restrictive covenants **"will** only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary **to** protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee." Reed Roberts Assoc. v. Strauman, 40 N.Y.2d 303, 307 (1976). The provision here meets those requirements. It only **is** effective for **one** year, and **is** not unreasonably burdensome because **it** permits defendants to **work** for any entity that was not introduced to them by Crown IT.

Another element required **for** the enforcement of a restrictive covenant is that the "employee's services are unique, special or extraordinary." Michael I. Wientraub, M.D., P.C. v. Schwartz, 131 A.D.2d 663 (2d Dept. 1987). Whether Koval's services for Credit Suisse were of a unique or extraordinary nature is a question **of fact**. Victor Temporary Services, Div. Of Victor United, Inc., etc. v. Slattery, 105 A.D.2d 1115 (4th Dept. 1984). Finally, there is a factual dispute about which party was responsible (if either) for Credit Suisse's alleged refusal to continue with Crown IT. Accordingly, plaintiff's motion must be denied.

Koval has cross-moved for summary judgment on two grounds: breach of contract and account stated. Crown IT's late payments do not constitute a material breach. See Graham

Construction v. Village of Gouverneur, 229 A.D.2d 815, 819 (3rd Dept. 1996) (holding that the Village's late payment was not a material breach). Defendant's reliance on Rawcliffe v. Aguayo is misplaced because in that case, as soon as the check bounced the defendant sought to rescind the contract. 438 N.Y.S.2d 697, 699 (Sup. Ct. Kings County 1981). Peabody waited for Crown IT's dishonored checks to be replaced with good ones (and they were replaced), after which **both** parties continued to perform **under** the contract. Therefore, Crown IT's late payments **do** not constitute a material breach.

Peabody's claim for an account stated, however, succeeds. Peabody sent its invoice to Crown IT for the period of February 18, 2002 to March 1, 2002 stating that 78 hours of work were performed at a rate of \$95 per hour. Crown IT did not object. When there is an account stated and no objection is made within a reasonable time, the claimant is entitled to summary judgment. Fink, Wienberaer, Fredman Berman & Lowell, P.C., v. Petrides, 80 A.D.2d 781 (1st Dept. 1981).

Koval also moved to dismiss Crown IT's tortious interference claim. A claim for tortious interference with business relations requires a showing that the "defendant intentionally and through improper means induced the breach of a contract between plaintiff and a third party." WEB Telecommunications, Inc. v. NYNEX Corp., 188 A.D.2d 257 (1st

Dept. 1992). Crown IT **alleges** that Koval made intentional misrepresentations to Credit Suisse in an attempt to "squeeze" Crown IT out of its continued entitlement to fees. In a motion to dismiss, the court must "accord the plaintiff the **benefit** of every favorable inference." Leon v. Martinez, 84 N.Y.2d 83 (1994). The allegations made by Crown IT are sufficient to support this cause of action, and therefore that branch of the cross-motion is denied.

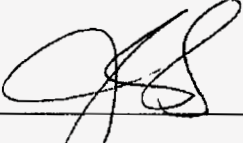
Accordingly, it hereby is

ORDERED that the motion by plaintiff for partial summary judgment is denied; and it further is

ORDERED that defendants' cross-motion is granted to the extent that Peabody is granted summary judgment on its cause of action for an account stated in the amount of \$7,410, plus interest from the date of March 1, 2002, with **entry of** judgment to abide the completion of this action; and it further is

ORDERED that the cross-motion otherwise is denied, and counsel shall appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, New York, New York, on September 15, 2003 at noon.

Dated: August 20, 2003



J.S.C.
JANE S. SOLOMON