

**Gardiner International, Inc. v J.W. Townsend &
Associates, Inc.**

2004 NY Slip Op 30052(U)

February 19, 2004

Supreme Court, New York County

Docket Number: 0602002/0022

Judge: Louis B. York

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

LOUIS B. YORK

PRESENT: _____
Justice

PART 2

Gardner International

- v -
J.W. Townsend & Assoc.'s.

INDEX NO. 602002/03
MOTION DATE 1/14/04
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying explanation decision.

FILED - 1 2004

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____

Dated: 2/19/04 *Lby* LOUIS B. YORK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: 1AS PART 2

-----X
**GARDINER INTERNATIONAL, INC., and
E. NICHOLAS P. GARDINER,**

Index No. 602002/03

Plaintiffs,

-against-

**J.W. TOWNSEND & ASSOCIATES, INC., and
JOHN W. TOWNSEND,**

Defendants.

-----X
LOUIS B. YORK, J.:

Plaintiffs Gardiner International, Inc. (Gardiner, Inc.) and E. Nicholas Gardiner move, pursuant to CPLR 3212 (a), for summary judgment. Defendants J.W. Townsend & Company, Inc. (Townsend, Inc.) and John W. Townsend cross-move for summary judgment dismissing the complaint. Plaintiffs claim that, by virtue of a partnership agreement and an amended partnership agreement, they are entitled to 25% of the revenue that defendants received from placing seven employees with CDC IXIS of North America (CDC IXIS) in late 2002. On July 1, 1997, plaintiffs Gardiner and Gardiner, Inc. and defendants Townsend and Townsend, Inc. founded Gardiner, Townsend Associates (GTA.), an executive search firm. The partnership agreement anticipated that the partnership might not work out, and it provided that, in the event of rupture, the good will created by the partnership would entitle each partner to 25% of the gross income that the other partner would receive in the 12 months following the rupture, "Gross income" was defined as:

income received by the other partner from assignments initiated by (i) clients which have retained the firm in the past within twenty-four months immediately preceding *[sic]* the rupture and (ii) new clients which were

actively solicited by the firm during the six months preceding the rupture.

Gardiner Aff., Exh. 2, at 2.

In March 2001, the parties agreed to end the partnership as of September 30, 2002, the expiration date of GTA's lease. The amended partnership agreement provides, insofar as is relevant here, that:

for the period **April 1, 2001** through September 30, 2002, each party shall be entitled to receive from the other party a payment equal to 25% of the gross revenue of such party. Payment shall be made upon receipt of revenue during such 12-month period or thereafter.

Id., Exh. 3, at 3

By letter dated June 13, 2002, Gardiner advised Townsend and Townsend, Inc. that, effective that date, Gardiner, individually, was withdrawing from the partnership, but that he would remain an employee of the partnership until its termination. The letter further stated that:

the March 2001 Agreement has been frustrated by the change in circumstances on which that agreement is premised; namely, the condition that we intend to continue to work together on various searches * * *. While [Gardiner, Inc.] continues actively to conduct its recruitment business, [Townsend, Inc.] has ceased to conduct its recruitment business * * *. Accordingly, I advise you * * * that neither I, [Gardiner, Inc.] or any entity or affiliate of either, has any continuing obligation to pay over to you, [Townsend, Inc.] or any entity or affiliate controlled by you, any proceeds or revenues received from any business operations * * * originated from and after March 1, 2002.

Id., Exh. 4, at 2.

A few days before or after June 13, 2002, Townsend met with two individuals in the private equity capital markets business, who were seeking to relocate. Thereafter, Townsend

contacted several parties that he believed might be interested in employing private equity capital markets participants. Eventually, Townsend placed the two individuals whom he had met in June 2002, as well five additional persons, with CDC IXIS. The first employees began work on September 3, 2002; the last, in December 2002. Townsend reached agreement with CDC IXIS, as to his compensation, on October 17, 2002. The compensation was paid in two installments, in November 2002 and January 2003.

Defendants contend that they are not liable to plaintiffs for 25% of that compensation, both because Gardiner's June 13, 2002 letter constituted a repudiation, and an anticipatory breach of the amended partnership agreement, and because the placement of the seven employees does not come within the purview of the partnership agreement. Plaintiffs counter that "[i]n this case * * * there was no anticipatory breach of contract, because there was no contract. Instead [t]here was a partnership agreement * * * ." Plaintiffs' Mem. of Law, at 3.

Contrary to plaintiffs' view, the amended partnership agreement is a contract, as, for that matter, was the initial partnership agreement. See Martin v Peyton, 246 NY 213 (1927). The amended agreement is headed "Agreement entered into * * * by and between [Gardiner, Inc.] and [Townsend, Inc.]," it is subscribed by both of the parties thereto, and no element necessary to the formation of a contract is lacking.¹ Gardiner's June 13, 2001 letter did not

¹ Plaintiff's conclusory contention that there was no contract between the parties is especially puzzling, given that the sole cause of action alleged in the complaint is for breach of contract.

merely give notice that he was withdrawing as a partner, thereby triggering the winding up of the partnership; it also stated that neither he, nor Gardiner, Inc., would comply with the provision in the amended agreement concerning the payment by each partner to the other, of 25% of gross revenue carried from April 1, 2001 through September 30, 2002. Where "a party repudiates contractual duties prior to the time designated for performance and before all of the consideration has been fulfilled, the repudiation entitles the nonrepudiating party to claim damages for total breach." Norcon Power Partners, L.P. v Niagara Mohawk Power Corp., 92 NY2d 458, 463 (1998) (citations and internal quotation marks omitted). "A party's repudiation, or anticipatory breach, of its future obligations under a bilateral contract * * * may take the form * * * [of] a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach * * *. [A] repudiation discharges the nonrepudiating party's obligations to render performance in the future." Computer Possibilities Unlimited v Mobil Oil Corp., 301 AD2d 70, 77 (1st Dept 2002), quoting Norcon Power Partners L.P. v Niagara Mohawk Power Co., 92 NY2d at 463, quoting Restatement [Second] of Contracts § 250, and quoting American List Corp. v U.S. News & World Reports, 75 NY2d 38, 44 (1989) (citations and internal quotation marks omitted). Consequently, defendants' obligation to render future performance, under the amended partnership agreement, was discharged as of June 13, 2001. **As** of that date, defendants had not placed anyone at CDC IXIS; they had not been retained by CDC IXIS, and they had not solicited CDC IXIS.

Accordingly, it is hereby

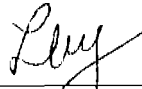
ORDERED that plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that defendants' cross motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 2/19/04

ENTER:



J.S.C.

Dated: _____

~~Louis B. York, J.S.C.~~

