

Willis Re Inc v Hudson

2005 NY Slip Op 30025(U)

August 16, 2005

Supreme Court, New York County

Docket Number: 0_30060/4073

Judge: Herman Cahn

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

PRESENT: Herman Carne

PART 49

Index Number : 604073/2003

WILLIS RE INC.

vs

HUDSON, SIMON M.

Sequence Number : 004

STRIKE

INDEX NO. _____

MOTION DATE 7/19/03

MOTION SEQ. NO. 004

MOTION CAL. NO. 16

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 23 2005
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE.....**

Dated: 8/16/05

Herman Carne
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X

WILLIS RE INC., :

Index No. 604073/03

Plaintiff, :

- against - :

SIMON M. HUDSON and JOHN B. :

COLLINS ASSOCIATES, INC., :

Defendants. :

-----X

Herman Cahn, J.

The corporate defendant moves (seq. no. 004) to strike plaintiff's jury demand, CPLR 4101.

The complaint alleges that defendant Simon Hudson breached a restrictive covenant in his employment agreement with plaintiff reinsurance company, by leaving it to join a competitor, defendant John B. Collins Associates, Inc. The complaint contains causes of action seeking damages for breach of contract and fiduciary duty; tortious interference; unfair competition; unjust enrichment; misappropriation of proprietary information; and civil conspiracy. It contains one cause of action for a permanent injunction.

The claims for damages are premised on theories of economic loss already sustained by plaintiff due to Hudson's defection to Collins, in alleged breach of the restrictive covenant (Complaint ¶¶ 46-71, 77-90). The cause of action for a permanent injunction seeks to prevent future breaches by Hudson on account of continuing employment with Collins (*id.*, ¶¶ 91-94). Defendant/movant argues that the injection of the injunctive cause of action, in equity, into this lawsuit waives plaintiff's right to trial by jury, altogether.

Counsel for plaintiff/non-movant responds that plaintiff is withdrawing its injunction claim (Gavaris Aff. ¶ 4). The reason given, is that discovery has revealed that defendants have already usurped all of plaintiff's clients and, thus, "there is no equity to be had" (*id.*, ¶ 5).

"When, as here, the complaint either joins legal and equitable causes of action arising out of the same alleged wrong or seeks both legal and equitable relief, there is no right to a jury trial" (*Zimmer-Masiello, Inc. v Zimmer, Inc.*, 164 AD2d 845, 846 [1st Dept 1990]). "Once the right to a jury trial has been intentionally lost by joining legal and equitable claims, any subsequent dismissal, settlement or withdrawal of the equitable claims(s) will not revive the right to trial by jury" (*id.*, at 846-47).

These clearly enunciated principles require that the motion to strike be granted. The complaint joins legal and equitable causes of action, and even prefaces its substantive allegations by describing the "nature of the action" thus: "Willis brings this action seeking a permanent injunction as well as compensatory and punitive damages" (Complaint ¶ 1 [emphasis added].) As the Appellate Division has held, the mootness of the equitable claim during the course of the litigation does not revoke the waiver of the right of trial by jury due to plaintiff's initial, voluntary, joinder of legal and equitable claims (*Zimmer-Masiello, Inc., supra; accord, Giammalvo v 2170-2178 Broadway LLC*, 293 AD2d 390 [1st Dept 2002]).

To be sure, a court's determination of a motion to strike a jury demand must include a determination of "the primary character of the case" (*Downtown Art Co. v Zimmerman*, 227 AD2d 226 [1st Dept 1996]). The court is, in that context, reminded by plaintiff's counsel that now, after the withdrawal of the cause of action for a permanent injunction, the character of

the case is at law, and not in equity (Gavaris Aff. ¶¶ 4-5). However, the court is compelled to examine the primary character of the case as of the moment of its commencement – not at an interlocutory phase when equitable claims may, through discovery, prove unsustainable or irrelevant, whatever the reason (*Zimmer-Masiello, Inc., supra; Giammalvo, supra*).

As noted above through quotation of the opening paragraph of the complaint, this action began, primarily, as an attempt to stop defendants from diverting plaintiff's business to themselves. The complaint (¶ 1) prudently adds, "as well," causes of action for damages arising out of past breaches that can no longer be stopped, because they have already occurred, allegedly. Both future and past breaches arise out of the same occurrence – Hudson's defection to Collins (*Zimmer-Masiello, Inc., supra*). The irrevocable waiver of the right to a jury occurred at the moment of joinder of those claims (*id.; Giammalvo, supra*).


Accordingly, it is

ORDERED that defendant's motion to strike plaintiff's demand for a jury trial is granted; and it is further

ORDERED that the parties shall appear for non-jury trial on September 6, 2005, as previously scheduled.

Dated: August 16, 2005

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