

**Invesco Inst. (N.A.), Inc. v Deutsche Inv. Mgt.
Americas Inc.**

2007 NY Slip Op 32367(U)

July 27, 2007

Supreme Court, New York County

Docket Number: 0650154/2007

Judge: Helen E. Freedman

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

PRESENT: Freedman
Justice

PART 39m

Invesco Institutional

INDEX NO. 650154107

MOTION DATE _____

MOTION SEQ. NO. 001,002

MOTION CAL. NO. _____

- v -

Deutsche Investment Manager

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

FILED
PAPERS NUMBERED
JUL 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

*sequence 001 and 002 are
withhold a ppl. for disposition
as decided in*

*accordance with the within
memorandum of law*

*If any reply remains of this
action, the parties are directed
to report to Room 208
at 9:30 am on August 28, 2007.*

Dated: July 27, 2007

HZFreedman
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: PART 39

-----X
INVESCO INSTITUTIONAL (N.A.), INC.,
Plaintiff,

-against-

Index No. 650154/07

DEUTSCHE INVESTMENT MANAGEMENT AMERICAS
INC.,

Defendant.

-----X
HELEN E. FREEDMAN, J:

FILED
JUL 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff, Invesco Institutional (N.A.,) Inc, ("Invesco"), seeks to preliminarily enjoin defendant, Deutsche Investment Management Americas, Inc. ("Deutsche"), from hiring or otherwise retaining four individuals currently employed by Invesco, until March 26, 2008 and from soliciting any other Invesco employee working in Invesco's Worldwide Fixed Income business group in Louisville, Kentucky until March 26, 2008. Invesco claims that the four individuals, Kenneth Bowling, James Guenther and Stephen Johnson, and Randy Paas, Invesco's Global Partners and the core group of its Worldwide Fixed Income group, were secretly induced by Deutsche to resign from Invesco without giving the notice required by their employment contracts, to join Deutsche and to misappropriate trade secrets, thus breaching their fiduciary obligations to Invesco. In effect, plaintiff claims that Deutsche has attempted to steal its Institutional Fixed Income business. Plaintiff also claims that Deutsche tortiously interfered with its contracts with the employees, aided and abetted breaches of fiduciary obligation, and misappropriated trade secrets. Plaintiff also accuses Deutsche of causing the four Global Partners to recruit other key Invesco employees.

In opposing the motion, Deutsche denies the allegations of tortious interference, aiding breach of fiduciary obligations and misappropriations of trade secrets. It specifically claims that did not encourage the Invesco Global Partners to breach their agreements with Invesco with respect to the notice requirements in the contracts and it did nothing to steal or misappropriate any trade secrets. Deutsche points to the fact that in the case pending in the United States District Court for the Western District of Kentucky, *Invesco Institutional (N.A.), Inc. v. Stephen M. Johnson, et al.*, 3:07-CV-175-R, wherein Invesco has sought to enjoin the four above mentioned employees from joining Deutsche (the other half of this litigation), the magistrate Judge made preliminary findings that there was no evidence indicating that the Global Partners had breached fiduciary duties and that Invesco could not argue that the Global Partners had any contractual or common law duty to remain with Invesco in perpetuity. Moreover, Deutsche opines that the District Court Judge, Judge Thomas Russell, has already determined that Invesco had breached its obligations toward the Global Partners.

Since the oral argument and submission of the preliminary injunction papers in this action, the federal District Court in Kentucky, following expedited discovery and a hearing on June 13, 2007, rendered its decision on June 26, 2007 concerning the preliminary injunction sought against the four individuals. *Invesco Institutional (N.A.), Inc. v. Stephen M. Johnson, et al.*, 3:07-CV-175-R. Its findings are as follows:

In the June 26, 2007 decision, Hon. Thomas B. Russell enjoined the four Global Partners from leaving Invesco for a period of four months, until July 27, 2007. The Court found that the Global Partners had each executed Global Partner Agreements (“GPAs”) that contained a notice provision requiring the Partner to provide Invesco with twelve month’s written notice of

the Partner's intention to terminate the employment relationship with Invesco. Invesco was under the same obligation. In fact, Invesco had given each partner the option of choosing the length of the notice provision, with a minimum of four months and a maximum of twelve month's notice, and each had chosen the twelve month option. The GPAs further provided that upon receipt of the notice, employment under the same conditions would continue for the entire notice period. There was no non-compete provision in the GPAs or in any other agreement. The Court made detailed findings concerning several meetings that occurred between the Global Partners and Deutsche in October and November of 2006 the contents of e-mail exchanges among them. In the e-mails, Deutsche told the Invesco Global Partners about its interest in filling a "hole" in its institutional fixed income business and the parties made some general financial projections. Deutsche denominated its efforts to woo Invesco's Global Partners as "Project Daniel Boone" and made written offer letters to the Global Partners several months before the latter gave their termination notices on March 26, 2007. Deutsche also extended offers to other Invesco employees on March 7, 2007.

On March 27, 2007, immediately following receipt of the termination notices, Invesco terminated Randy Paas for cause and put the other three partners (Johnson, Guenther, and Bowling) on Administrative Leave. The employees were notified on April 27, 2007 that they would be returned to active duty on May 21, 2007, but they then notified Invesco that they were terminating their GPAs on April 30, 2007. In response to Invesco's motion for a preliminary injunction to require the employees to honor their twelve month notice commitment and to refrain from competing with Invesco during that time, Judge Russell granted the employees a Temporary Restraining Order finding that, Invesco breached the continued employment

provision of the GPAs without giving the employees an opportunity to cure and ordered Invesco to reinstate the employees no later than May 21, 2007. On May 30, 2007, the employees were returned to active employment but were removed from the trading floor, put together in an office, and told that all communications to staff must be made through Karen Dunn Kelly who had been put in control of the WFI Group following receipt of the termination notices.

The Kentucky District Court then analyzed the preliminary injunction application in terms of likelihood of success on the merits, irreparable injury, harm to others, and whether the public interest would be served by issuance of a preliminary injunction. With respect to likelihood of success on the merits, the Court found that the Global Partners owed Invesco a fiduciary duty and that it was more likely than not that the duty had been breached by their collusion with Deutsche, a direct competitor. The basis for the finding was that the Global Partners identified key Invesco employees to Deutsche and did not disclose any information concerning their long planned defection. The Court, however, rejected Invesco's claim of "inevitable disclosure" as a reason to prevent the Global Partners from working for Deutsche. The Court also found that there was a substantial likelihood that Invesco breached the GPAs by violating the Order to return the Global Partners to their former duties and by isolating them from the other WWFI members. The District Court further found that Invesco would suffer irreparable harm if defendant Global Partners were not enjoined from working for Deutsche and recruiting other employees because the damages that would flow from Invesco's loss of competitive business and possible receipt of confidential information would not be easily calculable. The Court also found that a preliminary injunction would not be overly harmful to the Global Partners, and that the public interest would not be affected by enforcing their notice

period provisions and imposing a penalty on the Global Partners for breaching their fiduciary duties. It then balanced the likelihood of Invesco's succeeding on its claim for breach of fiduciary duty with the Global Partners' likelihood of success on their breach of contract claim and decided that the original default notice period in the GPAs of four months was sufficient to prevent irreparable harm. The court enjoined the three Global Partners (Paas was not involved because he had been terminated by Invesco) from leaving the employ of Invesco for a period of four months from the date that they tendered their resignation notice. The Court further enjoined the Global Partners from disclosing or using any of Invesco's trade secret and/or confidential information for six months following the effective date of termination of their employment relationship with Invesco. The six month injunction against disclosure or use of trade secrets was applied to Paas as well even though he had been terminated and was already working for Deutsche. Additionally, the Global Partners were enjoined from soliciting or hiring any Invesco employees for six months after the effective date of their termination of employment with Invesco and from soliciting the business relationships they developed or acquired while working for Invesco or an affiliated company for six months.

In this motion, Invesco seeks to enjoin Deutsche from hiring or retaining the four individuals, one of whom is already employed by Deutsche as a consequence of Invesco terminating him. It also seeks to enjoin Deutsche from hiring any other Invesco employees and to enjoin use of any trade secrets obtained. The standard for granting a preliminary injunction in New York includes a finding the plaintiff has a substantial likelihood of succeeding on the merits, irreparable harm, and a balance of equities in plaintiff's favor; see *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496 (1981).

While technically the United States District Court injunction was only directed at the individual employees, that Court's findings are directly relevant to the action here. In fact, the claim here is almost a second bite at the same apple. The District Court specifically found that the Invesco employees had breached a fiduciary duty. Based on that, it may be inferred that Deutsche was complicit with or aided and abetted the employees in their breach by negotiating secretly with them for an extended period in effort to develop its (Deutsche's) Institutional Fixed Income business at Invesco's expense. However, in the absence of non-competition covenants, the employees were free to leave after a notice period and the period of injury was clearly time limited. For that reason, the Court issued a limited injunction against the employees that is about to expire. Since the employees are now free to leave Invesco, it would be unfair to prohibit Deutsche from hiring them, and Deutsche is not so enjoined.

In order for plaintiff to prevail on a claim for tortious interference with contract, a valid contract must exist. *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413 (1996). Termination of the contract by a court ends the contract. There is no evidence that Deutsche asked the Global Partners to give less than twelve months notice, nor was there a non-compete clause in any of the partners' contracts. With respect to the claim for unfair competition or misappropriation of trade secrets, the federal District Court addressed that issue by directing the Global Partners not to either use or provide any trade secret information to Deutsche for an additional six months (until January 27, 2008) and to refrain from recruiting any Invesco employees or customers for that period of time. It is also fair to prohibit Deutsche from using any secrets that it may have already obtained from the Global Partners and from recruiting any Invesco employees identified by the Global Partners or in any way referred to Deutsche by the Global Partners until the end of

January of 2008. Any employees already working for Deutsche cannot be terminated based on Invesco's claims inasmuch as the harm, if any, has occurred, and presumably those employees did not have employment contracts that required specific notice periods .

For the foregoing reasons, consistent with the decision in *Invesco Institutional (N.A.), Inc. v. Stephen M. Johnson, et al.*, 3:07-CV-175-R. it is hereby

ORDERED that defendant Deutsche will not use any of Invesco's trade secret and /or confidential information for six months until January 27, 2008; and it is further

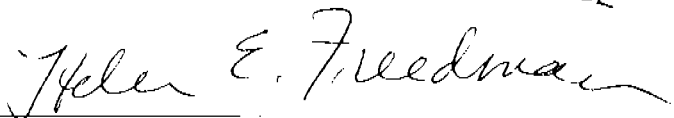
ORDERED that defendant Deutsche will not solicit or recruit any new Invesco employees that have been specifically identified by the Global Partners; and it is further

ORDERED that Deutsche will honor the prohibitions imposed upon the Global Partners by the United States District Court for the Western District of Kentucky.

Dated: July 27, 2007

Enter:

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JUL 30 2007
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Helen E. Freedman, J.S.C.