

Weiser LLP v Coopersmith

2007 NY Slip Op 32498(U)

July 25, 2007

Supreme Court, New York County

Docket Number: 0601805/2005

Judge: Charles E. Ramos

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

PRESENT: _____
Justice

PART _____

Index Number : 601805/2005

INDEX NO. _____

WEISER

MOTION DATE _____

vs

COOPERSMITH, JEFFREY S.

MOTION SEQ. NO. _____

Sequence Number : 004

MOTION CAL. NO. _____

DISMISS

is 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

FILED


AUG 13 2007

NEW YORK
COUNTY CLERK'S OFFICE

**IS DISPOSED OF
IN ACCORDANCE WITH THE ACCOMPANYING
MEMORANDUM**

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

Dated: July 25, 2007



CHARLES E. RAMOS *J.S.C.*

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

into a Merger Agreement ("MA") whereby Lopez, Edwards, Frank & Co., LLP ("Lopez"), the Former Partners' (then current) accounting firm, would merge into Weiser. According to the MA, the merger included an exchange of the Former Partners' ownership interests in Lopez for an ownership interests in Weiser. In addition to this agreement, the Former Partners signed the 1998 Weiser Partnership Agreement ("WPA")¹, which included, among other things, a restrictive covenant and a liquidated damages provision.

In letters dated April 21, 2005, the Former Partners gave notice of withdrawal from Weiser noting their intent to keep the clients that they had brought to the firm, clients referred to them by these clients, and clients from referral services utilized prior to the date of merger². Although admittedly in contravention of 14.1 and 14.3(i) of the WPA, the Former Partners conveyed their position to Weiser that these provisions (restrictive covenant and liquidated damages respectively) were overbroad, inapplicable, unenforceable, and contrary to New York law. Approximately three weeks later, Weiser filed this action seeking damages.

Standard of Proof

CPLR 4401 provides that:

¹ This Agreement was subsequently replaced and superseded by the Second Amended and Restated Partnership Agreement dated December 18, 2003.

² In sum, approximately 482 clients.

"Any party may move for judgment with respect to a cause of action or issue upon the ground that he moving party is entitled to judgment as a matter of law, after close of the evidence presented by the opposing party with respect to such cause of action or issue, or at any time on the basis of admission."

A motion pursuant to this provision should be granted where the trial court finds, upon the evidence presented, that by no rational process could a finding in favor of the non-moving party be found. *Szczerbiak v Pilat*, 90 NY2d 553, 556 (1997). The trial court must afford the party opposing the motion every inference that may be drawn from the facts presented, which must be considered in light most favorable to the non-movant. *Id.*

Weiser, as plaintiff, has the burden of proof on each element of its claims. *Whitlatch v Fidelity & Casualty Co. of New York*, 149 NY 45, 46 (1896).

Discussion

It first should be noted that Greenberg Traurig LLP, attorneys for Weiser, in complete derogation of Rule 17 of the Commercial Division Rules, submitted unreasonably oversized legal memorandums (to the tune of a 46 page cross-motion with opposition and a 24 page reply, as opposed to two 11 page briefs submitted by defendants). Certainly, given the subject matter of both parties' CPLR 4401 motions being clearly similar in issue and law, this abuse is patently egregious. At no time in this case does the record reflect that prior permission was given for

this onslaught of (and in part totally irrelevant³) legal argument.

Plaintiff claims that defendants have breached Sections 14.1 and 14.3(i) of the WPA. 14.1, in relevant part, provides that:

"...A Former Partner...shall not at any time during the period of twenty-four (24) months following the Effective Date: (i) directly or indirectly, either for himself or for any Person...solicit, take away or provide Services to any of the Partnership's Clients, or (ii) become or remain associated with any Person...that solicits, takes away or provides Services to any of the Partnership's Clients, or (iii) directly or indirectly or by action in concert with others induces or solicits any individual who was an employee or Partner of the Partnership at any time during a six month period prior to the Effective Date...to withdraw from or terminate his employment with or membership in the Partnership;...It is acknowledged and agreed that the provision of Services to any client by a Former Partner...shall be presumed to have followed a solicitation of such Client within the aforesaid twenty-four (24) month period in contravention of the terms of this Agreement."
Weiser Partnership Agreement 2003, Section 14.1.

Defendants argue that plaintiff has failed to prove a prima facie case that the restrictive covenant is enforceable as written. The Court agrees.

A covenant restricting former partners in the practice of their profession is enforceable only if it is reasonable as to time and area, necessary to protect a legitimate interest, not harmful to the public, and not unduly burdensome. *BDO Seidman v Hirshberg*, 93 NY2d 382, 389 (1999).

This restrictive covenant cannot be enforced because Weiser has failed to prove that the restrictive covenant is reasonably

³ To wit, pages are dedicated to a fiduciary duty cause of action that was previously dismissed by this Court. See *Weiser Brief in Support of Cross-Motion*, pages 5-7.

necessary to protect a legitimate interest. In *BDO Seidman*, the Court of Appeals recognized that an accounting firm may have a legitimate interest in protecting "customer relationships that [an] employee acquired in the course of employment." However, that interest extends only to relationships "created and⁴ maintained at the [firm's] expense." Emphasis added. *Id.* at 391. Weiser has not provided any evidence that the Former Partners acquired the clients post merger or that Weiser created these client relations. The record shows that these clients originated with the Lopez Firm; Weiser did not create these relationships. Furthermore, nothing in the documentary evidence suggests that Weiser played any part in maintaining these clients other than through the Former Partners' relationships with those clients. Therefore, upon the evidence presented, by no rational process could there be a finding in favor of Weiser.

Consequently, the reasonableness of the related liquidated damages (Section 14.3) clause will not be discussed. As the restrictive covenant has not been shown to be enforceable, the liquidated damages clause is moot.

However, Weiser has proven a prima facie case for monies owed under 14.4 of the WPA. Documentary evidence demonstrates that the Former Partners admitted that \$30,513.16, representing uncollected accounts receivable for Weiser clients are still in their possession. See Trial Ex. 82, P. 228:2-14; Trial Ex. 35.

⁴ Defendants misquote this case in their brief to their detriment.

Defendants have not shown why these funds should not be paid to Weiser under the WPA. Therefore, Weiser is entitled to such relief.

The constructive trust claim is duplicative of the breach of contract claim. Therefore, the constructive trust claim is dismissed as moot.

All other arguments have been considered and are without merit.


Accordingly,

IT IS ORDERED that plaintiff's first cause of action for breach of contract is granted in part to the extent of directing the entry of judgment in favor of the plaintiff against Coopersmith, Simon & Vogel CPAS, P.C. in the sum of \$30,513.16 together with interest; and it is further

ORDERED that the plaintiff's eleventh cause of action for constructive trust is dismissed; and it is further

ORDERED that the plaintiff's twelfth cause of action for declaratory judgment is dismissed.

Dated: July 25, 2007



CHARLES E. RAMOS J.S.C.

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

FILED

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