

Alevy v Uminer

2007 NY Slip Op 34214(U)

December 26, 2007

Supreme Court, New York County

Docket Number: 0601934/2006

Judge: Helen E. Freedman

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

PART 37

PRESENT:

Index Number : 601934/2006

ALEVY, STEVEN M.

vs

UMINER, ISAAC

Sequence Number : 003

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

is decided in accordance w accompanying memo of law

FILED

JAN. 02. 2008

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 12-26-07

[Signature]

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

-----X
STEVEN ALEVY d/b/a BANKERS CAPITAL
REALTY ADVISORS,

Plaintiff,

-against-

Index No. 601934/06

ISAAC UMINER, DITMAS CAPITAL, INC.,
DITMAS CAPITAL REALTY, LLC, and
MELISSA ROSE,

Defendants.

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

Defendants Isaac Uminer (“Uminer”), Ditmas Capital, Inc., and Ditmas Capital Realty, LLC. (collectively “Ditmas”), move to reargue that portion of defendant Uminer’s motion to dismiss the three causes of action against him that this Court allowed to remain in its decision of March 27, 2007. All other claims including the claim against Melissa Rose were dismissed by that decision. The three remaining claims sound in breach of written contract, breach of oral contract, and breach of fiduciary duty.

Briefly, plaintiff claims that Uminer, as a 23 year old without a college degree came to work for plaintiff and had in effect become plaintiff’s Chief Operating Officer in plaintiff’s mortgage brokering business. Plaintiff further claims that while in its employ, plaintiff started a competing business and violated various provisions of both the written employment agreement concerning business secrets and non-competition and a subsequent oral agreement to train new employees. The other remaining claim is for breach of fiduciary duty.

Defendant, relying heavily upon the fact that the written employment agreement denominates Uminer as an “independent contractor”, contends that as such defendant had no

fiduciary duty to plaintiff. Uminer claims that if he was an independent contractor, plaintiff would not have had to pay various taxes or provide benefits, thus, in return, Uminer could not have had any fiduciary duty. Defendant cites *Oursler v. Women's International Center, Inc.*, 170 A.D.2d 407 (1st Dept. 1991) for the proposition that independent contractors cannot breach fiduciary duties. However, that case stands for the fact that where parties have a conventional business relationship, without more, a fiduciary relationship will not be implied. Here, plaintiff alleges that Uminer virtually ran his business and was compensated accordingly. In recent years, Uminer allegedly received fifty percent of the profits of the business in commissions. A fiduciary relationship "is not dependent solely upon an agreement or contractual relation between the fiduciary and beneficiary but results from the relation," *Sergeants Benevolent Association Annuity Fund, v. Renck et al.*, 19 A.D.3d 107, 796 N.Y.S.2d 77 (1st Dept. 2005).

Moreover, the mere fact that a party denominates his relationship as that of an independent contractor, does not necessarily make it such. The question of whether one is an employee or an independent contractor or an employee generally involves a question of fact. *Malamood v. Kiamesha Concord, Inc.*, 210 A.D.2d 26 (1st Dept. 1994). Finally, plaintiff has set forth sufficient facts, if proven, to sustain a cause of action for breach of fiduciary obligation. See *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114 (1st Dept. 1998). The failure to give the thirty day notice was not the basis for the Court's finding. Rather it was the allegation that he secretly formed a company for the purpose of competing with his employer while employed that forms the basis for the breach of fiduciary duty.

Similarly, the breach of contract claims are adequately stated. Plaintiff sets forth specific provisions of the written contract which he alleges defendant breached. As to the oral contract, it

* 4]
is acknowledged that the written contract could not be modified except in writing. However, plaintiff alleges that there was a separate oral agreement, entered into many years later, pursuant to which the parties operated. The oral agreement that plaintiff alleges existed is not a modification of the written agreement. See *Rose v. Spa Realty Assoc.* 42 N.Y.2d 338 (1977).

This decision in no way prevents defendant from moving for summary judgment at the conclusion of discovery. However, at this juncture, the Court adheres to its decision of March 27, 2007 and advises parties to comply with discovery orders.

December 26, 2007

ENTERED
Helen E. Freedman

Helen E. Freedman, J.S.C.

FILED
JAN 02 2008
NEW YORK
COUNTY CLERK'S OFFICE