

Gilbert Tweed Associates v Eastwick

2007 NY Slip Op 34285(U)

January 4, 2007

Supreme Court, New York County

Docket Number:

Judge: Richard B. Lowe

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

DECENT. HON. RICHARD B. LOWE, III

PART 56

Index Number : 600603/2005
GILBERT TWEED ASSOCIATES
vs
EASTWICK, THEODORE T.
Sequence Number : 002
SUMMARY JUDGMENT

C

INDEX NO. _____
MOTION DATE 11/1/06
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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
JAN 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1/4/07


HON. RICHARD B. LOWE, III
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X

GILBERT TWEED ASSOCIATES,

Plaintiff,

Index No. 600603/05

-against-

THEODORE T. EASTWICK, and HUDSON
HIGHLAND GROUP, INC. d/b/a HIGHLAND
PARTNERS,

Defendants.

-----X

Hon. Richard B. Lowe, III

FILED
JAN 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

Defendants Theodore T. Eastwick (Eastwick) and Hudson Highland Group, Inc. d/b/a Highland Partners (Highland) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint in this action brought by plaintiff Gilbert Tweed Associates (Gilbert Tweed) for, among other things, diversion of a corporate opportunity, and the breach of an alleged contract to share fees obtained from a client in the executive search field.

Background

Gilbert Tweed is an executive search firm, in which Eastwick was employed as a recruiter. In December 2004, Eastwick, while employed by Gilbert Tweed, commenced negotiations to join Highland, another executive search firm, which resulted in an offer of employment on December 13, 2004. Eastwick accepted the offer, and began his new employ on December 28, 2004.

While Eastwick was still employed by Gilbert Tweed, he and Gilbert Tweed began wooing Wachovia Bank, N.A. (Wachovia) as a prospective client. Eastwick was familiar with

Wachovia through a long-time acquaintance and former colleague, Wachovia employee, Maria Warnken.

According to Gilbert Tweed, the negotiations between itself and Wachovia were quite extensive, and included meetings with Wachovia personnel at Wachovia's headquarters in North Carolina. Anticipating that it would obtain Wachovia's business, Gilbert Tweed sent a proposed retainer agreement to Wachovia on December 15, 2004. The retainer agreement was, however, never returned.

After Eastwick became an employee of Highland, Wachovia became Highland's client. Gilbert Tweed maintains that Eastwick promised Highland that he would bring Wachovia with him when he joined the firm, at the same time that he was still an employee of Gilbert Tweed, and while he purportedly was still actively seeking Wachovia's business for Gilbert Tweed. Gilbert Tweed claims that this representation to Highland was a key factor in Highland's offer of employment to Eastwick. Thus, Gilbert Tweed believes that Eastwick diverted Wachovia's business to Highland, at Gilbert Tweed's expense. Eastwick denies that he solicited Wachovia's business on behalf of Highland while he was employed by Gilbert Tweed, or thereafter.

In January 2005, after Eastwick began his employment with Highland, Eastwick met for lunch with Gilbert Tweed employee, Karen DelPrete (DelPrete), to discuss the possibility of a fee-splitting arrangement concerning the Wachovia business. According to DelPrete's deposition, Eastwick and she anticipated a two-way split of the Wachovia business, giving 2/3 of the fees to Gilbert Tweed, and 1/3 to Eastwick. Whether or not a viable deal was struck is a question raised on the present motion. In any event, Gilbert Tweed received, in the end, no part of Wachovia's business.

Gilbert Tweed brings the following causes of action against Eastwick and Highland: breach of contract; diversion of corporate opportunity; unfair competition; breach of fiduciary duty and duty of loyalty; unjust enrichment; and a demand for an accounting.¹

Defendants, on this motion, argue, among other things, that there was no valid contract to split fees received from Wachovia; that Wachovia's business was not a corporate asset of Gilbert Tweed; and that Eastwick was not employed by Gilbert Tweed when Wachovia chose Highland over Gilbert Tweed.

Discussion

When moving for summary judgment, the motion's proponent must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to eliminate any material issues of fact." *Epstein, Levinsohn, Bodine, Hurwitz & Weinstein, LLP v Shakedown Records, Ltd.*, 8 AD3d 34 (1st Dept 2004); *see also Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Upon submission of such evidence, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to raise a material issue of fact." *Lewis v Safety Disposal System of Pennsylvania, Inc.*, 12 AD3d 324, 325 (1st Dept 2004); *see also Zuckerman v City of New York*, 49 NY2d 557 (1980).

I. Breach of Contract

Gilbert Tweed alleges that a binding contract was made at the lunch meeting between DelPrete and Eastwick. Eastwick argues that no agreement to share future fees ever came into

¹By means of a stipulation dated May 3, 2006, Gilbert Tweed voluntarily abandoned causes of action for misappropriation of confidential or proprietary information. Aff. of Weber, Ex B.

being between himself and Gilbert Tweed, in that the elements necessary to form a contract are missing.

A contract commences with a valid offer and acceptance. *Matter of Express Industries and Terminal Corp. v New York State Department of Transportation*, 93 NY2d 584 (1999); *Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105 (1981). “[D]efiniteness as to material matters is of the very essence of contract law. Impenetrable vagueness and uncertainty will not do.” *Matter of Express Industries and Terminal Corp. v New York State Department of Transportation*, 93 NY2d at 590, quoting *Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d at 109. “Mutual assent to all of the material terms proposed is essential to the formation of a contract.” *Stockland Martel, Inc. v Donald J. Pliner of Florida, Inc.*, 32 AD3d 779, 557 (1st Dept 2006); *see also Harlock v Scott Kay, Inc.*, 14 AD3d 343 (1st Dept 2005).

Eastwick contends that, if it is found that he made an offer to DelPrete (which he denies), his offer was turned down, leaving essential terms of the alleged contract undecided. In making his point Eastwick relies on the testimony of DelPrete, as follows: DelPrete claims that, at the meeting, Eastwick suggested that that business with Wachovia “might have to go through Highland.” Dep. of DelPrete, at 131. She replied that “[t]hat’s not acceptable, absolutely not.” *Id.* Eastwick notes that the conversation concluded with DelPrete agreeing “to get in touch by phone in the next couple of days to do business” (*id.* at 132), indicating, allegedly, that material terms of the agreement had yet to be ironed out.

Eastwick argues that, as a result of this colloquy, essential terms of the alleged agreement were left unstated, including whether Gilbert Tweed would accept the business “going through Highland”; what terms Eastwick might negotiate with Wachovia; and which company (Gilbert

Tweed or Highland) would perform the candidate searches. Thus, Eastwick urges that the conversation concluded with a mere, unenforceable, “agreement to agree.”

Gilbert Tweed maintains that the parties left the lunch table having dealt with all of the material terms of the agreement which, essentially, involved the terms of the fee-splitting agreement. Although DelPrete admits that she said that Gilbert Tweed opposed letting the booking of the searches go through Highland, she also notes that Eastwick concluded the conversation by saying that he would honor his agreement with Gilbert Tweed. DelPrete Dep., at 130-132; DelPrete Aff., at 3. She maintains that, by stating that she and Eastwick would be getting in touch by telephone in a few days, she meant that the agreement had been wrapped up, and they only needed to “convince Wachovia to sign a retainer agreement.” DelPrete Aff., at 4.

Whether Eastwick’s offer was “impermissibly vague,” whether DelPrete accepted his offer, if made, and whether it might be said that Eastwick acceded to DelPrete’s wishes concerning Highland when he stated that he would honor his agreement with Gilbert Tweed, are all factual issues which must await trial. There are matters of material fact yet to be resolved as to whether the discussion as to the splitting of fees was sufficient to make a valid contract, or whether the other elements recited by Eastwick were necessary before an agreement could be concluded. The deposition testimony diverges as to whether Eastwick intended to pass the matter of the booking of searches through Highland, or whether he would remain loyal to what Gilbert Tweed insists was the original agreement. Further, this court does not agree that leaving some issues to be discussed by telephone at a later date necessarily means that the matters to be discussed were material. All of the above questions militate against a grant of summary judgment.

There is also a factual question as to whether there was consideration for the alleged agreement.² Eastwick argues that there was no consideration for the alleged agreement. “[A] contract is a promise supported by consideration.” *Curtis Properties Corporation v Greif Companies*, 212 AD2d 259, 264 (1st Dept 1995). A contract must be supported by consideration consisting of “a benefit to the promisor or a detriment to the promisee.” *Holt v Feigenbaum*, 52 NY2d 291, 299 (1981); *Beitner v Becker*, ___ AD3d ___, 824 NYS2d 155 (2d Dept 2006).

Eastwick’s claim that there was no consideration is based on a discussion held by Eastwick and DelPrete as to whether Gilbert Tweed would recommend Eastwick as a recruiter to the company Bear Stearns, after his departure from Gilbert Tweed, as a “gift” to him, or as consideration for the contract to obtain a share in the fees obtained from dealing with Wachovia. Gilbert Tweed could not accept the Bear Stearns work itself, because of a conflict of interest.

A gift need not be supported by consideration. *See Speelman v Pascal*, 10 NY2d 313 (1961); *Rubenstein v Rosenthal*, 140 AD2d 156 (1st Dept 1988). In her deposition testimony, Janet Tweed (Tweed), Gilbert Tweed’s Chief Executive Officer, specifically states that Gilbert Tweed offered to recommend Eastwick to Bear Stearns to Eastman as a “gift.” Tweed Dep., at 8, 13, Aff. of Weber, Ex E. However, later in her deposition, Tweed describes Gilbert Tweed’s offer to recommend Eastwick to Bear Stearns as part of the alleged agreement to share fees from Wachovia’s business. *Id.* at 196-197. She firmly repeats this allegation in her affidavit in opposition to Eastwick’s motion. Tweed Aff., at 2. Thus, the question of whether there was

²Gilbert Tweed argues that this court may not address the issue of consideration at all, because such matters are usually a jury question, citing *Daniel Goldreyer, Ltd. v Van de Wetering* (217 AD2d 434 [1st Dept 1995]). However, the mere fact that the existence of consideration is often a jury question does not preclude a court from ruling on the sufficiency of the evidence on a motion for summary judgment.

consideration for the alleged fee-splitting agreement is a factual issue.

Defendants also maintain that Highland cannot be held liable for breach of the alleged contract between Gilbert Tweed and Eastwick/Highland, even if Eastwick can be, because Highland did not give Eastwick authority of any kind to contract with Gilbert Tweed.

A principal-agent relationship may be established by evidence of the consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other to act ... The agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority [internal quotation marks and citation omitted].

Time-Warner City Cable v Adelphi University, 27 AD3d 551, 552 (2d Dept 2006). A principal may empower an agent to act on his or her behalf by means of implied authority "by the assent to and ratification of prior similar dealings." *Zendman v Harry Winston, Inc.*, 305 NY 180, 188 (1953).

No one suggests that Eastwick had actual authority to act on Highland's behalf, and no one suggests that Gilbert Tweed and Highland had any prior relationship which might lead to ratification of any agreement between Gilbert Tweed and Eastwick. Therefore, Highland may only be charged with breach of a contract with Gilbert Tweed if Eastwick had apparent authority to act as Highland's agent.

"Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction." *Hallock v State of New York*, 64 NY2d 224, 231 (1984). An agent's actions alone do not give rise to apparent authority to act for another. "Rather, the existence of "apparent authority" depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the

principal ... not the agent.” *Id.*, quoting *Ford v Unity Hospital*, 32 NY2d 464, 473 (1973).

There is no evidence that Highland ever communicated with Gilbert Tweed, much less that Highland acted in such a way as to leave Gilbert Tweed with the impression that Eastwick could act for Highland. The only piece of evidence offered by Gilbert Tweed for Eastwick’s authority to act on behalf of Highland is an e-mail from Eastwick to Warnken at Wachovia. Weber Aff., Ex. Q. However, this e-mail was not even sent to, or received by, Gilbert Tweed, and in no way creates apparent authority on Eastwick’s part to act for Highland, since it does not comprise an act on the part of Highland which could have misled Gilbert Tweed into believing Eastwick had the authority to act for Highland. In consequence, the cause of action for breach of contract must be dismissed as to Highland.³

II. Diversion of Corporate Opportunity

Gilbert Tweed’s cause of action for diversion of corporate opportunity arises from the allegation that Eastwick was ostensibly negotiating for Gilbert Tweed to obtain Wachovia’s business while he was still an employee of Gilbert Tweed, while he was actually negotiating with Wachovia to bring its business to Highland. Essentially, Gilbert Tweed insists that the Wachovia business was a corporate opportunity belonging to it, which was diverted to Highland through the actions of Eastwick.

“An agent may not divert or exploit for his own benefit an opportunity that is an asset of

³Gilbert Tweed argues that this court is not “empowered” to resolve the factual issue of whether there was an agency relationship between Eastwick and Highland, relying on, inter alia, *Time Warner City Cable v Adelphi University* (27 AD3d 551, *supra*). Gilbert Tweed Memo of Law, at 16. However, this case only stands for the established rule that, where the evidence raises the “possibility of a principal-agent relationship” (*Time Warner City Cable*, at 553), the court may not resolve the issue, i.e., when there is a question of fact.

his principal.” *American Baptist Churches of Metropolitan New York v Galloway*, 271 AD2d 92, 99 (1st Dept 2000); *see also Alexander & Alexander of New York v Fritzen*, 147 AD2d 241 (1st Dept 1989). The courts have developed a test for determining what should be considered a “corporate opportunity,” by looking to whether the company has a “tangible expectancy in the opportunity [internal quotation marks and citation omitted].” *Alexander & Alexander of New York v Fritzen*, 147 AD2d at 247; *see also Samantha Enterprises, Inc. v Elizabeth Street, Inc.*, 5 AD3d 280 (1st Dept 2004).

There is no direct evidence that Wachovia’s business was a “tangible expectancy” of Gilbert Tweed, either before or after Eastwick’s resignation. In fact, it is undisputed that Wachovia did not return the retainer agreement which Gilbert Tweed sent to it. The only evidence offered to create a factual question is the hearsay statements of Tweed and DelPrete, made in their depositions. Tweed testified that a Miss Buckman at Wachovia told Tweed, on December 20, 2004, that Wachovia’s business would be coming in after the first of the year. Tweed Dep., at 256. At her deposition, DelPrete testified that Warnken, early in December, 2004, told Eastwick and Tweed that Gilbert Tweed would begin doing some searches for Wachovia. DelPrete Dep. at 127-128.

“Although hearsay may be used to oppose a summary judgment motion, such evidence is insufficient to warrant denial of summary judgment where ... it is the only evidence submitted in opposition.” *Briggs v 2244 Morris, L.P.*, 30 AD3d 216, 216 (1st Dept 2006). Aside from the above hearsay statements, there is no concrete evidence that Wachovia ever intended to give its business to Gilbert Tweed. In fact, the failure of Wachovia to return Gilbert Tweed’s retainer

agreement rather points the opposite way.⁴ Regardless, Gilbert Tweed's belief that Wachovia's business was a "tangible asset" of the company, which Eastwick diverted to himself and Highland, is unsubstantiated by evidence sufficient to create a triable issue of fact. The cause of action must be dismissed.

III. Unfair Competition

"The obligation of loyalty implied by the relationship between an employee and his (her) employer rests upon the rule that a person who undertakes to act for another shall not in the same matter act for himself (herself)." *Bankers Trust Company v Bernstein*, 169 AD2d 400, 401 (1st Dept 1991), quoting *Alexander & Alexander of New York v Fritzen*, 147 AD2d at 246; see also *Foley v D'Agostino*, 21 AD2d 60 (1st Dept 1964).

After extensive depositions, including that of Warnken at Wachovia, and Gerard G. Cameron at Highland, Gilbert Tweed has failed to come forward with any admissible evidence showing that Eastwick acted on his own behalf to procure Wachovia's business for himself or Highland, while he was still a Gilbert Tweed employee. This cause of action rests on pure surmise and conjecture, which cannot not defeat a motion for summary judgment. *Cillo v Resjefal Corporation*, 16 AD3d 339 (1st Dept 2005). Therefore, the cause of action for unfair competition is dismissed.

IV. Breach of Fiduciary Duty and Duty of Loyalty

An employee acts to his employer as an agent to a principal. See *Western Electric Company v Brenner*, 41 NY2d 291 (1977). "Fundamental to that relationship is the proposition

⁴Warnken testifies that Wachovia was less interested in hiring firms than it was in hiring "talent[ed]" individuals, who were very familiar with the business. Warnken Dep. at 35.

that an employee is to be loyal to his employer and is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties [internal quotation marks and citation omitted].” *Id.* at 295; *see also Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 (2001)(same).

Gilbert Tweed’s cause of action for breach of fiduciary duty and the duty of loyalty is based on its belief that Eastwick obtained his new position with Highland only by assuring Highland that he would be bringing Wachovia with him, and upon Gilbert Tweed’s certainty that Eastwick was working for himself in seeking Wachovia’s business while he was still employed by Gilbert Tweed.

While Gilbert Tweed provides a list of wrongs allegedly perpetrated by Eastwick culminating in the breach of fiduciary duty he owed to Gilbert Tweed (*see* Gilbert Tweed Memorandum of Law, at 23-24), the only fact supported by any actual evidence is the undisputed evidence that Eastwick told Highland that he had the connections (including, presumably, his long standing business relationship with Warnken), to bring Wachovia’s business with him when he left Gilbert Tweed. *See* Dep. of Cameron, at 41-43; Defendants’ Reply Memorandum of Law, at 13.

These representations made to Highland while Eastwick was still employed by Gilbert Tweed are not the same as acts. As stated above, there is no evidence that Eastwick actually acted to procure Wachovia’s business for any other party than Gilbert Tweed while he was still under Gilbert Tweed’s employ. There is no evidence that Wachovia brought its business to Highland as a result of any act on Eastwick’s part. This court finds that Eastwick’s attempt to make himself more attractive to Highland is not the same as acting against Gilbert Tweed’s

interests, without some actual evidence, beyond speculation, of Eastwick's alleged perfidy.

Further, without any evidence that Gilbert Tweed would certainly have obtained Wachovia's business if Eastwick had not allegedly intervened, there is no basis upon which to find that Gilbert Tweed sustained damages.⁵

Therefore, Gilbert Tweed cannot prevail on its claim for breach of fiduciary duty or the duty of loyalty.

V. Unjust Enrichment

A plaintiff attempting to establish a claim for unjust enrichment must prove that the defendant was enriched at the plaintiff's expense, and that "it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Paramount Film Distribution Corporation v State of New York*, 30 NY2d 415, 421 (1972); see also *Cruz v McAneney*, 31 AD3d 54 (2d Dept 2006).

Because Gilbert Tweed cannot establish that it would have succeeded in its attempts to obtain Wachovia's business absent Eastwick's actions allegedly diverting Wachovia's business, Gilbert Tweed cannot claim that Eastwick or Highland was enriched at Gilbert Tweed's expense. Therefore, this claim must be dismissed.

VI. Accounting

Gilbert Tweed is not entitled to an accounting. An accounting is warranted only where

⁵Gilbert Tweed also cites cases allegedly holding that Eastwick might be required to repay Gilbert Tweed for compensation which it previously paid to him "during the period of disloyalty." Gilbert Tweed Memorandum of Law, at 27. However, these cases stand for the proposition that a disloyal employee would not be entitled to receive compensation not yet paid to him or her, not that he or she would have to disgorge payments already made. See e.g. *Feiger v Iral Jewelry, Ltd.*, 41 NY2d 928 (1977).

there is a fiduciary or confidential relationship between the parties. *Saunders v AOL Time Warner, Inc.*, 18 AD3d 216 (1st Dept 2005). There must be a violation of an underlying fiduciary duty in order to create the right to an accounting. *Palazzo v Palazzo*, 121 AD2d 261 (1st Dept 1986).

It has already been established that there is no proof of a breach of fiduciary duty, and so, there is no basis for an accounting. Further, there is no fiduciary relationship between Gilbert Tweed and Highland, and so, no corresponding right to an accounting.

Conclusion

As a result of the above, Gilbert Tweed has failed to raise an issue of material fact as to any of its causes of action, except for breach of contract, which cause of action remains.

Accordingly, it is

ORDERED that defendants Theodore T. Eastwick and Hudson Highland Group, Inc. a/k/a Highland Partners's motion is granted to the extent that the first, second, third, fourth, and fifth causes of action are dismissed, and the sixth cause of action is dismissed only as to Hudson Highland Group; and it is further

ORDERED that the action is severed and dismissed as to Highland, with costs and disbursements to that party, as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action will continue.

Dated: January 4, 2007

ENTER:



HON. RICHARD B. LOWE, III
J.S.C.

FILED
JAN 17 2007
NEW YORK
COUNTY CLERK'S OFFICE