

Szabo v Broadway Group LLC
2008 NY Slip Op 30431(U)
February 11, 2008
Supreme Court, New York County
Docket Number: 0601979/2007
Judge: Helen E. Freedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Freedman

PART 39

Index Number : 601979/2007

SZABO, THOMAS

vs

BROADSTREET GROUP LLC

Sequence Number : 001

DISMISS COMPLAINT

INDEX NO. _____

MOTION DATE _____

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
FEB 15 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 02/11/08

Hoy
J.S.C.

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

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

-----X
THOMAS SZABO,

Plaintiff,

Index No. 601979/07

-against-

BROADSTREET GROUP LLC and
POSITIVE FINANCIAL SERVICES LLC,

Defendants.
-----X

HELEN E. FREEDMAN, J.:

FILED
FEB 15 2008
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In this action, plaintiff Thomas Szabo ("Plaintiff" or "Szabo"), sues defendant Broadstreet Group LLC and Positive Financial Services LLC (collectively, "Defendants"), alleging breach of contract, unjust enrichment, tortious interference with business relations, and defamation. Defendants now move to dismiss the breach of contract claim on Statute of Frauds grounds pursuant to CPLR 3211(a)(5), and the causes of action for unjust enrichment and tortious interference with business relations for failure to state a claim pursuant to CPLR 3211(a)(7). Defendants do not seek dismissal of the defamation claim at this time.

For the reasons set forth below, Defendants' motion is granted as to the second cause of action, the unjust enrichment claim, and otherwise denied as to the first and third causes of action.

Facts

The Complaint alleges that from August 2005 to May 2006, Szabo performed services for defendants in connection with the purchase and sale of thirty live insurance and annuity policies pursuant to an oral agreement which provided that, *inter alia*, Szabo would receive 5% of the

total commissions earned by Defendants. Szabo asserts that he provided the expertise necessary for Defendants to engage in insurance arbitrage, a specialized niche in the insurance industry which Defendants had not developed before. Specifically, Plaintiff's work entailed finding an arbitrage (a "difference in pricing") between a life insurance policy and an annuity policy on the same insured, and a financial institution providing the funds for the premiums pursuant to an agreement with the Defendants. (Pl's Aff. ¶¶ 3, 4.) While working for the Defendants, Szabo developed procedures for coordinating the transfer of information between the insured, the Defendants, and the underwriters, created spreadsheets to track the progress and completion of the documents necessary for the closing of each individual policy, and was involved in the research and recruiting of prospective policyholders. (Pl's Aff. ¶¶ 5, 6.) Plaintiff asserts that pursuant to the oral agreement the Defendants owed him \$155,503.42, but paid him only the sum of \$32,072. Thus, he claims that the Defendants still owe him \$123,431.42.

The Complaint also alleges that in June 2006, after learning that Plaintiff had commenced employment with Berlin Atlantic AG ("BAC"), the Defendants engaged in a pattern and practice of disparagement. Specifically, on June 14, 2006, the Defendants, through an individual named Ali Kewfi, made the following defaming statements to BAC:

- (a) Mr. Szabo "is a New York life agent as an employee and getting health benefits and other things and he was suppose[d] to resign and he did not and that was a conflict of interest;"
- (b) Mr. Szabo "was not honest with Broadstreet people;"
- (c) Mr. Szabo "is in depression and under medication and because of that he stayed as an employee with New York Life to maintain the health benefit[s]."

(*Compl.* ¶¶ 20, 28.) Plaintiff alleges that as a result of these statements his good will and business reputation were damaged and that BAC terminated him.

Discussion

I. Breach of Contract Claim.

Defendants contend that the oral contract at issue is unenforceable under the Statute of Frauds and that the breach of contract claim should be dismissed on the grounds that Plaintiff's alleged activities in connection with the sale and purchase of insurance policies fall within the statute's definition of services rendered in negotiating a business opportunity. In opposition, Plaintiff contends that his contract was one for commissions on sales and purchases of insurance policies and as such it needed not be in writing to be enforceable.

General Obligations Law § 5-701, which codifies New York law regarding the statute of frauds, provides in relevant part as follows:

(a) Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

...
(10) Is a contract to pay compensation for services rendered in negotiating . . . the purchase, sale, exchange . . . of a business opportunity, business, its good will, inventory, fixtures or an interest therein "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.

Gen.Obl. Law § 5-701(a)(10).

The Court of Appeals dealt with the applicability of Subsection 10 in *Freedman v. Chemical Construction Corp.*, 43 N.Y.2d 260 (1977), and explained that "[this] statute, which has had its difficulties of interpretation, applies to various kinds of intermediaries who perform limited services in the consummation of certain kinds of commercial transactions." *Id.* at 266. Its purpose is to protect principals from unfunded claims for commissions and finders' fees since

“the important services of an intermediary may be accomplished in the course of a few and even momentary conversations, [and] false or exaggerated claims can be asserted easily and disproved only with difficulty.” *Id.* Based on those considerations, the Court in *Freedman* held that plaintiff’s “limited and transitory” activity “in bringing about between principals an enterprise of some complexity or an acquisition of a significant interest in an enterprise” fell within the scope of the statutory term “business opportunity.” *Id.* at 267.

In the instant case, viewing the facts alleged in the light most favorable to the non-moving party, Szabo’s role in connection with the purchase and sale of insurance policies on behalf of the Defendants was different from that of an intermediary. Szabo has alleged that he developed and closed thirty life insurance policies through premium financing over a period of about ten months. His activity was not “limited and transitory,” nor was it accomplished in the course of few conversations or targeted at providing Defendants with the opportunity to acquire a business or a portion of a business. Defendants rely heavily on *Ostrove v. Michaels*, 289 A.D.2d 211 (2d Dep’t 2001), for the proposition that Subsection 10 applies to agreements by brokers for commissions. In *Ostrove*, the plaintiff, an insurance broker, contacted the defendant, an insurance salesman, with information about an opportunity to sell policies to a third party hospital; thereafter, the defendant did virtually all the work of developing and selling the policies. After reviewing the trial testimony, the Court concluded that plaintiff’s role was that of an intermediary in that it was limited to introducing the defendant to the hospital. *Ostrove*, 289 A.D.2d at 213. Here, there is no indication at this juncture that Szabo’s role was that of a mere intermediary as the plaintiff in *Ostrove*. Moreover, agreements entitling a plaintiff to commissions on sales or purchases of insurance policies, as it appears to be the case here, do not

require a writing to be enforceable, as long as they may be performed within one year. *Apostolos v. R.D.T. Brokerage Corp.*, 159 A.D.2d 62, 66 (1st Dep't 1990); *see also Caruso v. Malang*, 250 A.D.2d 800 (2d Dep't 1998); *Dickerson v. Dickerson Agency*, 127 A.D.2d 983 (4th Dep't 1987). Thus, the breach of contract claim remains.

II. Quantum Meruit/ Unjust Enrichment Claim.

Plaintiff's second cause of action for unjust enrichment must be dismissed for failure to state a claim. Szabo and Defendants had a valid and enforceable oral contract providing for commissions on sales and purchases of insurance policies. Unjust enrichment is a quasi-contractual claim which may not be maintained where there is a contract between the parties covering the same subject matter. *Goldstein v. CIBC World Markets Corp.*, 6 A.D.3d 295 (1st Dep't 2004) (citing *Clark-Fitzpatrick, Inc. v. Long Is. R.R Co.*, 70 N.Y.2d 382 (1987)).

III. Tortious Interference With Business Relations Claim.

Defendants argue that Plaintiff's third cause of action, the tortious interference with business relations claim, should be dismissed as redundant of his defamation claim on the grounds that the damages sought are for harm to plaintiff's business reputation. Inasmuch as Plaintiff has alleged that he was terminated by BAC as a result of statements attributable to the Defendants, his tortious interference claim seeks redress for damages distinct from those alleged in his defamation claim for injury to his business reputation. *See Dohies v. Brefka*, 273 A.D.2d 776 (3d Dep't 2000). Thus, the third cause of action remains.

Based on the foregoing, it is hereby

ORDERED that Defendants' motion to dismiss is granted to the extent that the second


* 8]
cause of action in the complaint is severed and dismissed, and it is further

ORDERED that the action is continued as to the first, third and fourth causes of action stated in Plaintiff's complaint, and it is further

ORDERED that the parties are directed to appear for a status conference on March 11th, 2008, at 9:30 a.m. in courtroom 208, 60 Centre Street, New York, New York 10007.

Dated: February 11, 2008

Enter:



Helen E. Freedman, J.S.C.

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