

**Sivin-Tobin Assoc., LLC v Akin Gump Strauss
Hauer & Fied, LLP**

2008 NY Slip Op 30938(U)

March 28, 2008

Supreme Court, New York County

Docket Number: 0107123/2006

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 107123/2006
SIVIN-TOBIN ASSOCIATES LLC.
vs.
AKIN GUMP STRAUSS HAUER
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE 2/5/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Notice of Motion
Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-5
6-9
10-13

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum decision and order.

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

FILED
APR 01 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/28/08

Jane S. Solomon
JANE S. SOLOMON S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----x
SIVIN-TOBIN ASSOCIATES, LLC,

Plaintiff,

Index No.: 107123/06

- against -

AKIN GUMP STRAUSS HAUER & FELD, LLP,

Defendant.

FILED

APR 01 2008

NEW YORK
COUNTY CLERK'S OFFICE

JANE SOLOMON, J:

In this breach of contract action, defendant Akin Gump Strauss Hauer & Feld, LLP (Akin Gump, or defendant), moves to dismiss the complaint on the ground that no contract existed between it and plaintiff Sivin-Tobin Associates, LLC (Sivin-Tobin, or plaintiff) in connection with the retention and placement of two attorneys, Chang-Joo Kim and Henry Shin, with Akin Gump.¹ Sivin-Tobin cross-moves for summary judgment in its favor.

As discussed more fully below, defendant's motion is granted and plaintiff's cross motion is denied.

Background

Sivin-Tobin is a a legal recruitment company. It

¹ By stipulation dated October 20, 2007, the parties agreed that each cause of action asserted by plaintiff is deemed to include a claim to recover for the defendant's hiring of Shin, an associate with whom Chang-Joo worked at his prior firm, in addition to plaintiff's claims concerning the hiring of Chang-Joo.

charges a commission when it places attorneys with law firms, corporate law departments and other businesses. On December 19, 2005, Sivin-Tobin sent, via e-mail, an unsolicited resume of Chang-Joo Kim, an attorney specializing in a Korean practice, to Stephen Vine, a partner and member of Akin Gump's New York office. According to Sivin-Tobin, it also sent defendant a copy of its placement terms and conditions (Placement Terms), which, among other things, prescribed the anticipated fee for attorney placement with Akin Gump. In addition, the Placement Terms provided that the fee was to be payable within 10 days after the attorney began employment with Akin Gump. Paragraph 4 of the Placement Terms states that "[t]he interviewing of any attorney submitted to the firm will constitute acceptance of these terms and conditions unless Sivin-Tobin Associates is notified to the contrary in writing prior to the first interview."

Vine avers that he has no recollection of receiving plaintiff's e-mail dated December 19, 2005 (Affidavit of Steven Vine, ¶ 2). Further, Vine states that at the time that the e-mail was sent to Akin Gump, the New York office did not maintain a Korean practice and as such, Chang-Joo Kim's resume would not have been of interest to him (*id.*, ¶ 3).

According to Sukhan Kim, partner and head of Akin Gump's Korean practice in the Washington D.C. office, Phil Morimoto of Boston Executive Search Associates Inc. (Boston

Executives), another recruiting firm, contacted him regarding Chang-Joo (Affidavit in Support, ¶¶ 1 -2) on December 28, 2005. Sukhan had no knowledge of plaintiff's communications with Vine in New York (id., ¶ 3). As a result of Morimoto's submission, and after consultation with Morimoto, Sukhan and his colleagues met with Chang-Joo on January 6, 2006 (id.).

Thereafter, Sukhan and Morimoto engaged in a series of communications in order to effectuate the hiring of Chang-Joo and his associate, Shin. Specifically, on January 13, 2006, Sukhan advised Morimoto that he wanted Chang-Joo as part of the firm's Korean practice with a base in New York; however, he needed to obtain the necessary approval from the firm's Chairman, Bruce McLean, who also was based in Washington, D.C. (id.). On January 24, 2006, Sukhan advised Morimoto that he received the requisite approval (id., ¶ 4). Chang-Joo was hired into the Korean practice to work, along with Shin, in New York.

During the first two weeks of February, Sukhan and Morimoto discussed and finalized Morimoto's fee and Chang-Joo's salary (id., ¶¶ 5-6). At that time, Chang-Joo was allegedly in Korea handling an arbitration for an existing client. Morimoto and Sukhan arranged for a meeting between Chang-Joo and some of the New York partners, including Vine, upon his return. The meeting was allegedly held on February 16, 2006.

That day, by e-mail dated February 16, 2006, Sivin-

Tobin informed Vine that it was aware that defendant had been working with another search firm to secure Chang-Joo's placement, and "reminded" defendant that it had previously introduced defendant to Chang-Joo, and defendant would be obligated to pay plaintiff's fee if Chang-Joo accepted employment with defendant. Defendant never responded.

On or about April 3, 2006, Chang-Joo and Shin joined Akin Gump. Subsequent to their hire, Akin Gump paid Boston Executives a placement fee of \$227,500.

Sivin-Tobin contends that it is entitled to its placement fee as delineated in the Placement Terms sent to Akin Gump on December 19, 2005.

Discussion

The court will first address plaintiff's assertion that defendant's motion for summary judgment is barred by the court's prior decision denying defendant's motion to dismiss. Plaintiff claims that defendant's motion for summary judgment is simply a renewed effort to obtain dismissal for the alleged failure of the complaint to state a cause of action. Plaintiff's assertion is misguided. A motion to dismiss under CPLR 3211 (a)(7) for failure to state a cause of action examines the adequacy of the pleadings, whereas a motion for summary judgment pursuant to CPLR 3212 involves a search of the record and assessment of the sufficiency of the underlying evidence (see Friedman v

Connecticut General Life Ins. Co., 30 AD3d 349, 349-350 [1st Dept 2006], affd as mod, 9 NY3d 105 [2007], citing Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry, Inc., 128 AD2d 467, 469 [1st Dept 1987]). Since "the two motions are distinguishable, the denial of a prior motion to dismiss a complaint for failure to state a cause of action does not bar a subsequent motion for summary judgment" (Tenzer, Greenblatt, 128 AD2d at 469, citing M. Dietrich, Inc. v Bentwood Television Corp., 56 AD2d 753, 754 [1st Dept 1977]). Therefore, the court turns to the sufficiency of defendant's motion for summary judgment.

In order to grant summary judgment, there must be no material or triable issues of fact presented (Ayotte v Gervasio, 81 NY2d 1062 [1993]; Esteva v City of New York, 30 AD3d 212 [1st Dept 2006]). The movant must proffer admissible evidence to make a prima facie showing that establishes the cause(s) of action "sufficiently to warrant the court as a matter of law in directing judgment" (CPLR 3212; see also Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Once the moving party has made this showing, the burden is on the opposing party to demonstrate "the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do" (Zuckerman, 49 NY2d at 562).

"To create a binding contract, there must be a

manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (Matter of Express Indus. & Terminal Corp. v New York State Dept. of Transp., 93 NY2d 584, 589 [1999]; Riom Corp. v McLean, 23 AD3d 298, 299 [1st Dept 2005]). Here, there was "no meeting of the minds that defendant would owe a fee under the circumstances presented" (Howard-Sloan Legal Search Inc. v Todtman Young Tunick Nachamie Hendler & Spizz, P.C., 233 AD2d 191, 192 [1st Dept 1996]). More specifically, "[p]laintiff has failed to present any evidence that the parties intended" (Kenneth D. Laub & Co., Inc. v 101 Park Ave. Assocs., 162 AD2d 294, 295 [1st Dept 1990]) or "reach[ed] a specific understanding that a finder's commission [would] be payable" despite the fact that plaintiff was "not a direct or procuring cause of the acquisition" (Beverley v Mickelberry Corp., 161 AD2d 292, 293 [1st Dept 1990]; id.).

"[E]mployee recruitment firms are entitled to a commission for successfully recruiting an employee if the firm is the procuring cause of the employee's placement" (A N Assocs., Inc. v Quotron Sys., Inc., 159 Misc 2d 515 [Civ Ct, NY County 1993], citing Barrister Referrals, Ltd. v Windels, Marx, Davies & Ives, 169 AD2d 622 [1st Dept 1991]; see also Beverley, 161 AD2d at 293). The analysis is analogous to a real estate broker's entitlement to a commission (id.).

As with a real estate broker, a recruiter is not the procuring cause "simply because he initially called the property to the attention of the ultimate purchaser" (Greene v Hellman, 51 NY2d 197, 206 [1980]; Helmsley-Spear, Inc. v 150 Broadway N.Y. Assocs. L.P., 251 AD2d 185, 186 [1st Dept 1998] ["[a] showing that a broker simply introduced the parties or called the property to the tenant's attention, without more, does not entitle the broker to a commission; there must be a proximate link between the broker's efforts and the consummation of the transaction"]).

While plaintiff may have been the first to submit Chang-Joo's resume to defendant, there is no dispute that: (1) the resume was sent unsolicited; (2) it was sent to a non-hiring partner at the New York office, as opposed to either the recruitment office or to the Washington D.C. office, where the Korean practice was based; (3) there was no communication made by defendant to plaintiff acknowledging receipt of Chang-Joo's resume or concerning his hiring; and (4) plaintiff never arranged an interview or had any conversation concerning either of the candidates with anyone at Akin Gump.

Rather, it was Boston Executives that secured the placement of Chang-Joo and Shin with Akin Gump. Specifically, Boston Executives: (1) introduced Chang-Joo to Sukhan, the head of the firm's Korean practice; (2) arranged and scheduled

interviews; (3) engaged in constant communication concerning the hiring of Chang-Joo, including, but not limited to, the business Chang-Joo intended to bring to the firm; and (4) negotiated the compensation packages of Chang-Joo and Shin (see Mestel & Co., Inc. v Smythe Masterson & Judd, Inc., 215 AD2d 329, 329 [1st Dept 1995] [affirming trial court's dismissal of plaintiff's contract claims based on "defendants' detailed and corroborated showing that defendant ... , and not the plaintiff, was the procuring cause of the ... placement"]).

As there was no mutual assent between the parties and as plaintiff was not the "procuring cause" of the candidates' placement with Akin Gump, plaintiff's breach of contract claim fails as a matter of law.

The criteria for recovery under claims of unjust enrichment and quantum meruit are: "(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services'" (Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp., 296 AD2d 103, 108 [1st Dept 2002], quoting Moors v Hall, 143 AD2d 336, 337-338 [2d Dept 1998]).

Here, as in Joan Hansen, Sivin-Tobin cannot look to defendant where services were not performed at Akin Gump's request (296 AD2d at 108; see also Liberty Marble, Inc. v Elite

Stone Setting Corp., 248 AD2d 302, 304 [1st Dept 1998]). As set forth above, plaintiff, admittedly, sent Chang-Joo's resume unsolicited and did nothing else to secure Chang Joo's placement at Akin Gump, save for a few telephone calls and one subsequent e-mail to a man who, as plaintiff admits, never returned them. As such, it cannot be said that defendant accepted the alleged "services" plaintiff performed. Therefore, plaintiff's claims of unjust enrichment and quantum meruit are dismissed as a matter of law. Accordingly, it hereby is

ORDERED that the motion by defendant Akin Gump Strauss Hauer & Feld, LLP for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

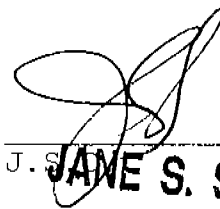
ORDERED that the cross motion by plaintiff Sivin-Tobin Associates, LLC is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 28, 2008

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ENTER:



J. S. **JANE S. SOLOMON**