

Mortgage Source, LLC v Weisman

2008 NY Slip Op 31314(U)

April 28, 2008

Supreme Court, Nassau County

Docket Number: 7596-07/

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

MORTGAGE SOURCE, LLC

Plaintiff,

**INDEX NO.: 007596/2007
MOTION DATE: 04/10/2008
MOTION SEQUENCE: 002 and 003**

-against-

JAIME WEISMAN,

Defendant.

The following papers read on this motion:

Notice of Motion, Affidavit, Affirmation & Exhibits Annexed	1
Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment	2
Reply Affirmation to the Defendant's Motion for Summary Judgment of Albert M. DiMarco	3
Notice of Motion, Affidavit & Exhibits Annexed	4
Plaintiff's memorandum of Law in Support of Plaintiff's Motion for Summary Judgment	5
Affidavit in Opposition to Plaintiff's Motion for Summary Judgment of Jaime Weisman & Affirmation in Opposition to Plaintiff's Motion for Summary Judgment of Albert M. DiMarco	6
Affirmation of Robert J. Valli, Jr. in Reply	7
Plaintiff's Memorandum of Law in Reply in Support of Motion for Summary Judgment	8

This motion by defendant for an order pursuant to CPLR 3212 granting summary judgment on the counter claim and finding against plaintiff and the motion by plaintiff for an order granting summary judgment pursuant to CPLR 3212 are determined as follows.

This action arises out of an at will employment which terminated on or about March 21, 2007, in the wake of defendant's having accepted an employment position with a competitor mortgage brokerage firm. Plaintiff asserted as a first cause of action a Breach of the Covenant not to Compete with respect to soliciting clients of plaintiff Mortgage Source, LLC. The second cause of action asserts a Breach of the Covenant not to Solicit plaintiff's employees and is founded on the fact that approximately four employees left Mortgage Source at about the same time as did plaintiff and three of them went to his new employer, Top Dot, at the same approximate time.

Defendant asserts a counter claim for the aggregate sum of \$16,221.00 which is comprised of commissions on three loans that funded and closed after he left plaintiff's employ, reimbursement for car expenses, and three days of salary.

Plaintiff opposes defendant's motion on the grounds that payment of commissions is discretionary after termination of employment, but is never allowed where the former employee has shown a divided loyalty to his employer, either by stealing its employees, or instigating dissension among his co-workers or by working for another while still being paid by the plaintiff. Defendant argues that the parties made a deal when he spoke of leaving that, in exchange for his leaving the loans with plaintiff instead of taking them with him, he would be paid the commission. It is an agreement denied by plaintiff.

As to defendant's claim for three days of unpaid wages, plaintiff argues that there is no proof of the amount that would or might be owed, but that in any event defendant was a disloyal employee and so he is not entitled to any such compensation. Maritime Fish Products, Inc. v World-Wide Fish Products, Inc., 100 A.D.2d 81 (1st Dept. 1984).

Finally, defendant seeks reimbursement for his car expenses. Plaintiff responds that at a certain point defendant's compensation structure was changed and the allowance for auto expense was rescinded. Plaintiff states that his "employment was at will and therefore his compensation could be changed at any time," and cites to Hanlon v MacFadden Publications,

302 N.Y. 502 (1951). It is a proposition with which the court disagrees, and which the cited case does not espouse. Any change in an at will employment compensation constitutes a material change in the terms of the hiring to which the employee must consent.

The gravamen of plaintiff's complaint is that defendant performed only adequately and was not as productive as was anticipated. It is claimed it was apparent that he was "only going through the motions," and when he announced his departure plaintiff surmised that he had been orchestrating his leave for some time. Around the same time that he left, four others left the plaintiff company, three to go work for, or with, defendant. Plaintiff alleges, and submits affidavits from past or present employees attesting to the fact that defendant talked to his co-workers about the faults of the plaintiff company and the advantages of following him over to the new company.

Defendant on the other hand submits an affidavit by Leroy Rivers swearing to the fact that defendant did not initiate such conversations but that he approached defendant seeking advice on how to move. Defendant testified at an oral examination before trial that it was a collegial group at the plaintiff company, and that he was in effect the head of several salesmen who were always interested in a more lucrative position. When they heard that he was interviewing they questioned whether they too might get a better position. Defendant also submits a letter dated April 24, 2007, from Delores Evans which states that she will take her business to the new firm because she has a long standing relationship with "Roy" Rivers.

It is well established that "[s]ummary judgment permits a party to show, by affidavit or other evidence, that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law...." Brill v City of New York, 2 N.Y.2d 649,651 (2004). When the movant succeeds in sustaining their prima facie burden entitling he or she to judgment as a matter of law, Zuckerman v City of New York, 49 N.Y.2d 557, 562 (1980), the burden shifts to the opponent to show the existence of a viable issue concerning whether defendant solicited plaintiff's employees or whether plaintiff has the duty to pay commissions, wages or car

expenses to defendant.

In order to raise issues of fact sufficient to defeat a motion for summary judgment where the movant has presented prima facie evidence in support of its entitlement to such relief, it is incumbent upon a party opposing summary judgment to raise triable issues of fact based upon more than mere conclusory or unsupported assertions. See Sun Yau Ko v Lincoln Savings Bank, 99 A.D.2d 943, *aff'd*, 62 N.Y.2d 38 (1984) (citing to Zuckerman v City of New York, 49 N.Y.2d 557 (1980)).

It is clearly a factual issue as to whether defendant solicited his co-workers to leave their employ with plaintiff. Neither side has succeeded in establishing that defendant was either engaged in friendly conversation about job prospects elsewhere or was initiating and pursuing the goal of taking a competent team of salespersons with him. Accordingly, plaintiff's motion for summary judgment is denied as to the second cause of action.

However, the proof is different as to the first cause of action. Plaintiff complains that defendant took its customers and serviced them at his new employ. Defendant has shown that there was but one customer, Delores Evans, who switched and she did so for her own good reasons. In opposition plaintiff has not laid bare any proof that there were other customers who left at defendant's suggestion. Accordingly, the court searches the record and grants summary judgment in favor of defendant on the first cause of action.

Turning to defendant's counterclaims, he has established a prima facie case of a right to three days of salary and to car reimbursement. In opposition plaintiff has raised a triable issue of fact as to the three days salary, for it is the law that a disloyal employee is deprived of his right to compensation if he is not serving his master. Maritime Fish Products, 100 A.D.2d 81. Insofar as a question of fact exists as to whether defendant solicited plaintiff's employees while he was still there, summary judgment is denied as to salary.

However, in the case of car reimbursement it is clear that that was part of his employment agreement, see Exhibit B to defendant's motion, and there is no evidence propounded by plaintiff

to show that that condition of employment was changed and defendant was notified of the circumstance and consented before he left. Accordingly, defendant is granted summary judgment on his claim of car reimbursement in the amount of \$1,689.00.

Lastly, defendant has not submitted a prima facie case that he was entitled to commissions. The employee manual for the plaintiff company states that payment of commissions on loans closed after termination is discretionary. Defendant's proposed oral agreement with plaintiff varying this practice is too conclusory to be accepted as fact in light of the denial by plaintiff, and as a factual question it must be tried. Wiener v Diebold Group, 173 A.D.2d 166 (1st Dept 1991) citing to 92 A.D.2d 821.

In summary, it is ORDERED that defendant is granted summary judgment on so much of his counterclaim as seeks reimbursement for car expenses in the amount of \$1,689.00 and is granted summary judgment dismissing the first cause of action in the complaint.

All other claims for relief are denied.

Dated: April 28, 2008



J.S.C.

ENTERED

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