

Karaszek v Blonsky

2008 NY Slip Op 31661(U)

May 30, 2008

Supreme Court, Nassau County

Docket Number: 2660-07/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

MARGARET KARASZEK,
doing business as MORGIT MANAGEMENT
and MICHAEL OSTROWSKI,

Plaintiffs,

-against-

NICOLE BLONSKY, KAREN BLONSKY,
as parent and natural guardian of
NICOLE BLONSKY,

Defendants.

TRIAL/IAS, PART 4
NASSAU COUNTY

INDEX No. 012660/07

MOTION DATE: March 20, 2008
Motion Sequence # 001

The following papers read on this motion:

Notice of Motion..... X
Reply Affirmation X
Memorandum of Law..... XX
Reply Memorandum of Law..... X

This motion, by defendants, for a Court Order dismissing the complaint dated July 20, 2007 in its entirety based on:

- a) Plaintiffs' failure to comply with the licensing requirements of New York General Business Law §172 with respect to theatrical employment agencies;

- b) The undisputed fact that the written agreement between the defendants Nicole Blonsky (a minor), her mother, defendant Karen Blonsky and plaintiff Margaret Karaszek (plaintiff Michael Ostrowski is not a signatory) attached to the Complaint by plaintiffs expired, by its own terms, on January 14, 2006, six months prior to defendant Nicole Blonsky's securing the role in *Hairspray*;
- c) The undisputed fact that any alleged oral promise by defendant Karen Blonsky concerning the extension of the unenforceable written contract for a fixed two (2) year renewal term violates the Statute of Frauds since performance of any such oral promise could not have been completed within one year; and
- d) The fact that plaintiffs' third cause of action for breach of good faith duty cannot be maintained in the absence of a valid, enforceable agreement between the parties; and
- e) The fact that plaintiffs' fourth and fifth causes of action of quantum meruit/unjust enrichment and declaratory judgment are merely duplicate plaintiffs' causes of action for breach of contract,

is determined as hereinafter set forth.

By the instant action, the plaintiffs seek to recover fees due on a "Personal Management Contract" entered into on or about January 14, 2005, when the defendant Nicole Blonsky was a minor; the contract was for one year, which ran through January 14, 2006. The contract was entered into for the purpose of management, promotion and employment of Nicole Blonsky in the entertainment industry in exchange for a 20% fee arrangement. The sole employment secured by Ms. Blonsky, for which the plaintiffs are seeking payment of their commission, is for the role of Tracy Turnblad in the 2007 movie *Hairspray*.

The complaint asserts five causes of action: breach of the initial one year contract; breach of the extended agreement (extended by an oral promise of Karen Blonsky, parent of Nicole); breach of good faith; quantum meruit and unjust enrichment; and declaratory Judgment that the plaintiff are entitled to a commission based on all future income derived

from Nicole's contract with New Line Cinema.

The defendants' counsel notes that the allegation of the complaint is limited to the plaintiffs' assertion that plaintiffs' sole responsibility was to attempt to procure any job in the entertainment industry. Counsel asserts that statutory law in this State requires a theatrical employment agency to obtain and maintain a license, and that the plaintiffs' lack of such license requires dismissal of this action, as the agreement is unenforceable, as ruled upon by courts of this State.

The defendants' attorney contends that the documentary evidence proves that the professional relationship between the parties terminated on January 14, 2006 and the plaintiffs are not entitled to any post-termination commissions. Counsel further contends that the Statute of Frauds bars the plaintiffs' attempt to enforce the oral promise made by the defendant Karen Blonsky, the mother of Nicole, because the alleged oral agreement could not be completed within one year. The attorney argues that, because the underlying agreement is unenforceable, there can be no implied covenant of good faith and fair dealing, and such cause of action must be dismissed. He also argues that the causes of action for quantum meruit and declaratory judgment are duplicative of the Breach of Contract action, and pursuant to pertinent case law, they must be dismissed. Additionally, he avers that the plaintiffs have failed to allege the required elements of quantum meruit, and that the declaratory judgment cause of action is not appropriate because the Breach of Contract causes of action provides an adequate remedy.

In opposition, the plaintiff Karaszek avers that she and her partner have gone to extreme lengths to support and coordinate Nicole Blonsky's career. She describes and asserts the chronological actions that she and her partner took to get the defendant Nicole's career started and nurtured that career with training, coaching and scheduling auditions, together with travel to various activities to engender her career. These actions, as detailed in her affidavit, demonstrate that the plaintiffs were acting as managers, not simply an employment agency. Counsel for the plaintiffs, in his memorandum of law, argues that a motion cannot decide, in a black and white manner, a gray area between the identification of an agent and that of a manager; and that such a determination must await the completion of discovery, inasmuch as the plaintiff's affidavit and the Complaint explicitly describes a full range of management services. Counsel also disputes the applicability of the case law, cited by defendants' attorney, to the instant case, and argues that since the defendants used the plaintiffs's services as a means to their end, the defendants should be estopped from enriching themselves after fully using the plaintiffs' services for a number of years.

Counsel also argues that the New York State licensing statute is unconstitutional, in that certain types of employment agencies are excluded from mandated licensing, and that is violative of the equal protection clauses of the New York State and Federal Constitutions. Counsel avers that, due to the fact that the defendant Nicole's role was procured due to the direct and continuing efforts of the plaintiffs, there was an implied-in-fact contract between the parties which continued after the contract expired; that the defendants have not shown that the Statute of Frauds bars the second cause of action because the contract called for a continuation of the contract; and that the contract with the defendant Nicole, as a minor, is not void, but voidable. With respect to the cause of action for unjust enrichment/quantum meruit, counsel avers that such alternate pleading is appropriate; and that the declaratory judgment action is not duplicative of the breach of contract causes of action because the declaratory judgment action seeks a determination as to the future, regarding the two picture option in the defendant Nicole Blonsky's contract with New Line Cinema.

In reply, defendants' counsel refers to an amended complaint attached to the plaintiffs' opposition papers. Counsel repeats and reiterates the arguments and assertions previously made in the moving papers. He asserts that the plaintiffs' estoppel agreement is unsupported by New York case law and that, constitutionally, the licensing statutes have been upheld. He also contends that relevant case law warrants the dismissal of the causes of action sounding in unjust enrichment/quantum meruit and for declaratory judgment.

DECISION

It is clear that the initial determination to be made herein focuses upon the application of General Business Law §§171 and 172.

§171(8) provides:

““Theatrical employment agency” means any person (as defined in subdivision seven of this section) who procures or attempts to procure employment or engagements for circus, vaudeville, the variety field, the legitimate theatre, motion pictures, radio, television,

phonograph recordings, transcriptions, opera, concert, ballet, modeling or other entertainments or exhibitions or performances, but such term does not include the business of managing such entertainments, exhibitions or performances, or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefor”.

§172 provides:

“No person shall open, keep, maintain, own, operate or carry on any employment agency unless such person shall have first procured a license therefor as provided in this article. Such license shall be issued by the commissioner of labor, except that if the employment agency is to be conducted in the city of New York such license shall be issued by the commissioner of consumer affairs of such city. Such license shall be posted in a conspicuous place in said agency”.

In sum, when read together, the statutes provide that any person or entity (§171[7]) that acts to procure employment must be registered as an agent. The Court notes that, notwithstanding the mandatory language of those statutes, there is no language that explicitly voids contracts with such non-licensed agencies. The applicable case law reveals a divergence of opinion. In **Gervis v Knapp** (43 NYS2d 849, 850, S.Ct., N.Y. County, 1943), the Court denied dismissal stating,

“The contention that the contract is unenforceable because plaintiff was not licensed as a theatrical employment

agency, General Business Law, Sections 171, 172, is not well taken. The contract establishes that plaintiff was primarily a manager”.

In Angileri v Vivanco (137 NYS2d 662, S.Ct., N.Y. County, 1954), it was determined that an unlicensed agency voids the contract. The Court in Friedkin v Harry Walker, Inc. (90 Misc2d 680, 395 NYS2d 611, Civil Ct., N.Y. County, 1977) noted that the regulatory nature of the licensing statute mandates the unenforceability of any contracts made under those circumstances, citing Carmine v Murphy (285 N.Y. 413).

Accordingly, upon a determination that the contractual relationship was strictly one in the nature of an employment, rather than a management, agency, then such contract would be void.

Such determination must, of necessity consider the language of the contract, and the prefatory language reads as follows:

“MORGAN MANAGEMENT
PERSONAL MANAGEMENT
CONTRACT

I UNDERSTAND THAT DURING
THE TERM OF THIS CONTRACT
I AM ABLE, UNDER NEW YORK
STATE LAW, TO DEAL WITH
ONLY ONE PERSONAL MANAGER
EXCLUSIVELY, BUT MAY
FREELANCE WITH AS MANY AS
10 AGENTS”. (emphasis supplied)

“In considering a motion to dismiss for failure to state a cause of action (see CPLR 3211[a][7]), the pleadings must be liberally construed (see CPLR 3026). The sole criterion is whether ‘from [the complaint’s] four corners factual

allegations are discerned which taken together manifest any cause of action cognizable at law' (Guggenheimer v Ginzburg, 43 NY2d 268, 275; see also Bovino v Village of Wappingers Falls, 215 AD2d 619). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (see Morone v Morone, 50 NY2d 481; Gertler v Goodgold, 107 AD2d 481, affd 66 NY2d 946). 'When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one' (Guggenheimer v Ginzburg, supra at 275)". (emphasis supplied)

(Gershon v Goldberg, 30 AD3d 372, 817 NYS2d 322, 2nd Dept., 2006).

The evidentiary material herein is the affidavit of the plaintiff, Margaret Karaszek, which describes, in great detail, a history of the plaintiffs' relationship with the defendants. That affidavit sets forth "hands-on" supervision and approach to managing the defendant Nicole Blonski's career from someone who appeared in high school musicals, to voice training, auditions, and coaching on acting, travel, purchase and cleaning of clothes, etc., to a film audition that was apparently successful.

The pertinent case law indicates that "these are matters which should not be decided on affidavits [because the agent may have rendered management services during the life of the contract]" (Gervis v Knapp, supra). The Court, in Friedkin v Harry Walker, Inc. (supra, p.613) ruled:

"The question whether defendant's business only incidentally involves

the seeking of employment as corollary to being a personal manager of plaintiff would ordinarily be a matter of factual determination”.

In that action, the court noted that there was no evidentiary facts that specified or described the performance of any managerial activities, in contrast to the instant application.

In the context of the application of the motion to dismiss integrating GBL §§171[8] and 172, the plaintiffs herein have factually manifested a cause of action from within the four corners of the complaint (see Guggenheimer v Ginzburg, supra).

With respect to the written agreement, a motion to dismiss on documentary evidence does not lie herein. While the contract language does have a term limitation, that limitation does not necessarily serve as a bar to the action. The language of the complaint and the opposing affidavit of Margaret Karaszek clearly describes extensive efforts by the plaintiffs, that commenced during the contract term and continued post contract termination, on the part of the defendants to obtain the New Line Cinema contract which was entered into subsequent to the expiration of this contract. Relative to the Statute of Frauds argument, a careful reading of the second cause of action alleges a breach of promise that the agreement would continue, and that upon securing a contract for more than \$50,000.00, the contract would be renewed for two years.

Relative to the third cause of action, sounding in breach of good faith, the plaintiffs’ argument is that the written agreement and its implied-in-fact continuation are enforceable, and the breach of the covenant of good faith is a viable cause of action. Based upon a plain reading of the contract and the complaint, the complaint avers a viable cause of action sounding in a breach of good faith.

With respect to the cause of action for a declaratory judgment, the relief sought in the fifth cause of action is based upon the future of the defendant Nicole Blonsky’s career based on her contract in New Line Cinema and her performance in “*Hairspray*”. This is distinctly different from the cause of action for breach of the written contract and the implied-in-fact contract arising out of the written contract and the parties’ actions, and warrants that such cause of action be sustained at this stage of the action.

With respect to the cause of action for quantum meruit,

“The general rule is that the existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi contract for events arising out of the same subject matter (Clark-Fitzpatrick, Inc. v Long Island R.R. Co., 70 NY2d 382, 388, 521 NYS2d 653, 516 NE2d 190). However, a party is not precluded from proceeding on both breach of contract and quasi-contract theories where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue (Joseph Sternberg, Inc. v Walber 36th Street Associates, 187 AD2d 225, 549 NYS2d 144)”.

(Curtis Properties Corporation v The Greif Companies, 236 AD3d 237, 239, 653 NYS2d 569, 1st Dept., 1997). Inasmuch as quantum meruit has been considered as a legal obligation imposed in order to prevent a party’s unjust enrichment (see, Tesser v Cellboro Equipment Co., 302 AD2d 589, 591, 756 NYS2d 253, 2nd Dept., 2003), the two legal theories are intertwined and at this point, sufficiently legally viable to survive dismissal.

With respect to the plaintiff’s assertion of unconstitutionality of the licensing statute, no application is before this Court on that issue, and will not be addressed or determined (CPLR 2215). Similarly, the amended complaint attached to the plaintiffs’ opposition is not properly before this Court, and no determination is made thereon.

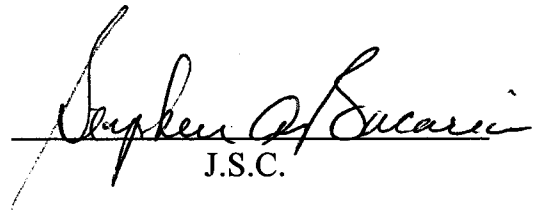
Accordingly, the defendants’ motion is denied.

KARASZEK, et al v BLONSKY

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A Preliminary Conference has been scheduled for July 1, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated MAY 30 2008


J.S.C.

ENTERED
JUN 12 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE