

Vested Capital, Inc. v Wright

2008 NY Slip Op 33300(U)

December 3, 2008

Supreme Court, New York County

Docket Number: 601892/2008

Judge: Louis B. York

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

PRESENT: YORK
Justice

PART 2

VESTED CAPITAL, INC.
- v -
DAVID WRIGHT, ET AL

INDEX NO. 601892/08
MOTION DATE _____
MOTION SEQ. NO. 01
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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
DEC 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/3/08 _____
Luy
LOUIS B. YORK J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----x
VESTED CAPITAL, INC.,

Plaintiff,

INDEX NO.:
601892/2008

- against -

DAVID WRIGHT and DAVID WRIGHT &
ASSOCIATES LLC,

Defendants.

-----x
LOUIS YORK, J.:

FILED
DEC 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

By order to show cause, plaintiff Vested Capital
(Vested) moves this court for a preliminary injunction preventing
defendants David Wright (Wright) and David Wright & Associates
LLC (DWA) from, among other things, interfering with Vested's
contractual relationships with existing clients.

On August 13, 2008, the court issued a temporary restraining
order enjoining defendants from tortiously interfering with
Vested's contractual relationships with its clients.

For the following reasons, Vested's motion is granted.

Background

Vested is a corporation that provides business advisory
services to other companies, including providing advice regarding
the company's strategic and financial plans. In late 2005,
Vested hired Wright to perform corporate financial services on

Vested's behalf. According to plaintiff, Wright was hired as an independent contractor and agent of Vested. Wright was paid a commission by Vested, as a percentage of compensation actually received from Vested's clients.

In October 2007, Vested entered into a written contract with America Hears Inc. (AHI), wherein Vested was engaged to perform financial services for it (Agreement). Vested assigned Wright to the AHI account. Thereafter, Wright allegedly relocated to Pennsylvania, where AHI's offices are located. Plaintiff claims that Wright decided he wanted to terminate his business relationship with Vested and become directly employed by AHI.

In late April 2008, Wright sent Vested an electronic fax, with an attachment of a letter dated April 25, 2008 from AHI to Vested, notifying Vested that it wished to terminate its contract with Vested effective May 4, 2008 (see April 26, 2008 e-mail with attachment, Order to Show Cause, Exh. B). Therein, AHI acknowledged that the Agreement provides for a 30-day notice in advance of the desired date of termination, however, AHI was requesting a waiver of the 30-day notice period.

Three days later, by e-mail dated April 29, 2008, Wright advised Vested that he wished to discontinue his contractual relationship with Vested at the end of the AHI engagement (see

Wright Aff., Exh. A). By e-mail dated April 30, 2008, Wright informed Vested that he gave advice to AHI as to how it might terminate its contract with Vested (see Order to Show Cause, Exh. C). Wright also told Vested that it owed him compensation (*id.*).

By letter dated May 3, 2008, Wright, while still working with Vested, advised AHI that "DWA will no longer be associated with Vested after the termination of the Agreement ... on May 4, 2008" and further advised of Vested's alleged refusal to credit AHI for DWA's services (Order to Show Cause, Exh. D). Specifically, Wright claimed that Vested failed to agree to allow AHI to pay Wright compensation, that would have been owed him through Vested (*id.*). He further advised AHI that he assigned \$9,6523.50 to AHI, the amount he believed he was owed to Vested by AHI (*id.*). Vested never agreed to such an assignment (*id.*).

By e-mail dated May 5, 2008, Wright advised Vested that he accepted a position with AHI as its CFO effective that day (Order to Show Cause, Exh. E).

On May 6, 2006, Wright sent two e-mails to two other clients of Vested, wherein he notified them that he had left Vested and requested that in the event the clients were to pay compensation to Vested under their existing contracts with Vested, that they

pay a portion of the compensation due Vested directly to Wright (Order to Show Cause, Exh. F). According to Vested, its contracts with the two clients contacted by Wright provide that all compensation under the contract should be paid directly to Vested, not to any other person or entity.

By e-mail dated May 7, 2008, Wright sent Vested an invoice dated May 5, 2008 from DWA in the amount of \$9,562.50 due from Vested, and a "credit memorandum" also post-dated May 5, 2008 for the same amount from DWA to Vested, purportedly to bind Vested to issue a credit to AHI (Order to Show Cause, Exh. G).

Vested refused to accept AHI's request to terminate its contract on May 4, 2008, and on May 7, 2008 sent AHI an invoice in the amount of \$15,000.00 pursuant to its contract (see Order to Show Cause, Exh. H).

By letter dated May 9, 2008, AHI stated that its contract with Vested terminated on May 5th (see Order to Show Cause, Exh. I). On May 12, 2008, Wright advised that if Vested failed to pay him the money he was allegedly owed by May 15, 2008, he would file liens against Vested's assets and begin foreclosure proceedings on Vested's bank and securities accounts (*id.*).

On June 25, 2008, Vested filed the instant order to show cause and Verified Complaint alleging the following causes of

action: (1) breach of agent-principal relationship by defendants; (2) breach of fiduciary duties; (3) negligence; (4) tortious interference with contract performance; (5) tortious interference with prospective contractual relationship; and (6) issuance of preliminary and permanent injunction.

By answer dated July 17, 2008, defendants asserted a counterclaim for breach of contract based on unpaid fees.

Discussion

The court will first address why defendants' assertion that this court lacks of personal jurisdiction over them is misplaced. The defense is presented in the answer as a mere denial, defendants failed to raise lack of personal jurisdiction as an affirmative defense, without any recitation of facts, as required by CPLR §§ 3013 and 3018(b) (see Answer, ¶ 5, Helwig Affirmation, Exh. P). "Defenses which merely plead conclusions of law without supporting facts are insufficient and should be stricken" (*Petracca v Petracca*, 305 AD2d 566, 567 [2d Dept 2003]). Even if facts were recited, defendants' waived the affirmative defense by not pleading it in a pre-answer motion to dismiss or after raising it in the answer, not moving within 60 days to dismiss (CPLR Rule 3211 [e]), and by voluntarily participating in the instant action (*McGowan v Hoffmeister*, 15 AD3d 297, 297 [1st Dept

2005] ["[b]y appearing in the action and electing to answer the complaint without an objection to jurisdiction, defendants conferred jurisdiction upon the court and waived the defense"). As such, the court holds that defendants waived their right to challenge jurisdiction.

Plaintiff seeks injunctive relief against defendants for tortious interference with its contract with AHI as well as other clients. In order for a party to meet its burden for a preliminary injunction, the party must establish "(1) the likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities" (*W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]; *U.S. Re Companies, Inc. v Scheerer*, 41 AD3d 152, 154 [1st Dept 2007]).

In order to establish a claim for tortious interference plaintiff must show: (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional interference with that contract; (4) a resulting breach of the contract; and (5) damages as a result (see *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]; *Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]). "Specifically, a plaintiff must

allege that the contract would not have been breached 'but for' the defendant's conduct" (*Burrowes*, 25 AD3d at 373). While defendants contend that Weight was working as an independent contract for Vested, such a finding has no bearing on whether a preliminary injunction is warranted on the tortious interference claim.

"[W]here there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior" (*NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996] [citation omitted]). "Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant" (*id.*).

Defendants assert that Vested fails to show a breach of contract because AHI's decision to terminate the contract is expressly permitted under their contract. Vested counters that Wright forwarded the letter from AHI to Vested which sought to terminate the contract between AHI and Vested without giving Vested the requisite notice, i.e., 30 days, contrary to the terms of the contract, and further, that AHI has not paid Vested the

amount it is allegedly due under the contract. These claims as alleged are sufficient.

As such, looking to the sufficiency of the remainder of the claim the court holds that plaintiff has established a claim for tortious interference to warrant injunctive relief. Specifically, there is no dispute that: (1) there was a valid contract between AHI and Vested; (2) Wright, who worked on the AHI account while with Vested and subsequently became CFO and Business Development Officer of AHI, knew of the contract; (3) defendant intentionally interfered with the contractual relationship for his own gain, as evidenced by his own admission that he advised AHI how to terminate its contract with Vested and that he sent two e-mails to other Vested clients advising them to pay a portion of fees directly to him as opposed to Vested in contradiction of their contracts with Vested; (4) there was a resulting breach as discussed above; and (5) Vested suffered damages for the monies due under the contract as well as compensation it would have earned from AHI for the balance of the contract.

Based on the foregoing, it is clear that there is a likelihood that Vested will succeed on the merits of his claim as there is ample evidence showing that Wright was involved with the

termination of AHI's contract with Vested prior to its expiration. In addition, Wright's e-mails to other Vested clients, as well as the termination of Vested's contract with AHI, led to damage Vested's business reputation, which equitably weighs in Vested's favor.

Therefore, the preliminary injunction is granted.

Conclusion

Accordingly, it is

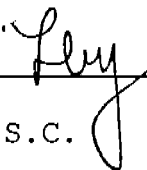
ORDERED that the motion by plaintiff, Vested Capital, Inc., for a preliminary injunction is granted as to the tortious interference with contract and contractual relations claims pending the final outcome of this matter; and it is further

ORDERED that defendants David Wright and David Wright & Associates LLC are enjoined from: (a) inducing Vested's clients to breach any contract(s) they may have with Vested; and (b) advising Vested's clients to pay consideration owed to Vested to any person or entity other than Vested; and (c) divulging any confidential or proprietary information belonging to Vested to any of Vested's clients for purposes of inducing the client to breach or circumvent its contract with Vested; and it is further

ORDERED that under CPLR 6312 (b), as a condition to the imposition of a preliminary injunction, and in view of either

side's failure to discuss the filing of an undertaking, plaintiff is directed to file a nominal undertaking in the amount of \$10,000 with the Clerk of the County of New York and to serve a copy on the defendant within ten (10) days of the filing of a copy of this decision with Notice of Entry.

Dated: December 3, 2008 Enter:



J.S.C.
LOUIS B. YORK
J.S.C.

FILED
DEC 10 2008
COUNTY CLERK'S OFFICE
NEW YORK