

Ameritrans Capital Corp. v JSB Partners, L.P.
2008 NY Slip Op 33440(U)
December 18, 2008
Supreme Court, New York County
Docket Number: 602144/07
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
Justice

PART 55

Ameritrans Capital Corp

INDEX NO. 602144/07

MOTION DATE 7/28/08

- v -

JSB Partners LP

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

The following papers, numbered 1 to 10 were read on this motion to/for Strike

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...
Answering Affidavits - Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1-3
4-6
7-10

Cross-Motion: Yes No

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

FILED
DEC 24 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12-18-08

[Signature]
JANE S. SOLOMON 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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x
AMERITRANS CAPITAL CORPORATION and
ELK ASSOCIATES FUNDING CORPORATION,

Petitioner,

Index No.: 602144/07

-against-

JSB PARTNERS, L.P. and SUSAN CHAN,

DECISION and ORDER

Respondents.

SOLOMON, J.

FILED
DEC 24 2008
COUNTY CLERK'S OFFICE
NEW YORK

Defendant Susan Chan moves to ~~dismiss~~ ^{deny} the complaint for plaintiffs' failure to provide discovery, or, in the alternative, precluding plaintiffs from offering evidence not produced in response to discovery demands. Plaintiffs cross-move for summary judgment dismissing Chan's counterclaims, and to compel Chan to appear for her deposition. By an interim order, the court directed that Chan appear for her deposition, with which she complied.

Plaintiff Elk Associates Funding Corporation (Elk) is a wholly owned subsidiary of plaintiff Ameritrans Capital Corporation (Ameritrans). In December 2006, Ameritrans retained the services of defendant JSB Partners, LP (JSB), an executive search firm, to assist in hiring a comptroller. Ameritrans and JSB agreed that if Ameritrans hired a JSB candidate, it would pay JSB 25% of that employee's first year compensation as a fee. They further agreed that if that employee was terminated from Ameritrans's employment for any reason within ninety days after

the employee's starting date, JSB would find a replacement or refund the fee upon request. JSB introduced Chan to Ameritrans and she was hired on March 12, 2007, at the salary of \$130,000 per year. On June 7, 2007, Elk paid JSB \$32,500, representing 25% of Chan's salary (the papers submitted do not explain why Elk paid on behalf of Ameritrans). On June 11, 2007, Chan informed Ameritrans that she was leaving her job. She had agreed to take the other job on June 4, but did not notify Ameritrans until a week later. Plaintiffs demanded a refund, but JSB rejected it.

Plaintiffs' claims against Chan are as follows: that Chan is liable for tortious interference with a contract between them and JSB; that she breached a duty of loyalty by failing to notify plaintiffs that she accepted a new job for seven days; and that she breached a duty of loyalty to plaintiffs by communicating with and ultimately accepting employment with another company. The alleged damages for these claims is the \$32,500 that plaintiffs were obligated to pay JSB as a placement fee.

Chan made counterclaims and cross-claims against JSB. The first counter-claim demanded unpaid salary, which has since been paid, making this claim moot. The second, third and fourth counter-claims arise from this lawsuit and seek recovery for malicious prosecution, prima facie tort, and commencing a frivolous lawsuit.

Chan served discovery demands on plaintiffs, including written interrogatories and demands for admissions. The interrogatories objected to call for plaintiffs' knowledge of (1) JSB's efforts to assist plaintiffs in hiring Chan and (2) facts supporting plaintiffs' allegation in paragraph 15 of the complaint that JSB coached Chan to delay notifying plaintiffs that she was leaving. In response to each, plaintiffs state that they can only respond on information and belief because they are awaiting discovery from defendants. Plaintiffs also declined to answer certain demands for admissions except to claim they are awaiting discovery from defendants.

Chan's motion is granted to the extent that plaintiffs are precluded from offering any evidence at trial from their own witnesses, or from material provided by defendants before Chan's motion was filed, relating to the subject interrogatories and demands for admissions.

Plaintiffs' cross-motion also is granted. The elements of a malicious prosecution claim arising from a civil judicial procedure "consist of the initiation of a legal action by the defendant against the plaintiff, begun with malice and without probable cause to believe it can succeed, and ending in the accused's favor" (The Purdue Frederick Co. v Steadfast Insurance Co., 40 AD3d 285 [2007]). On its face, Chan's second counter-claim fails to allege that a prior proceeding ended in

her favor. The third counter-claim restates her claim for malicious prosecution under a different theory, and it also is dismissed. Her fourth counter-claim, to recover legal fees incurred in this lawsuit, also is dismissed because it fails to state a cause of action (Chapel v Mitchell, 84 NY2d 345 [1994]).

Upon searching the record, summary judgment dismissing plaintiffs' claims against Chan also is granted with a narrow exception. Absent a specific contractual obligation to the contrary, which is not pleaded, plaintiff was free to seek employment and accept an offer to work elsewhere. Employees owe a duty of loyalty to their employers, but the duty does not extend to prevent the employee from seeking other employment. Plaintiffs urge that Chan be held to standard of conduct better described as "servitude" than "employment". Paragraph 15 of the complaint alleges upon information and belief that Chan timed her notice that she was leaving plaintiffs' employment based on coaching from JSB, to assist JSB to collect a fee it did not earn. The fourth cause of action is preserved to the extent that it can be inferred to make this claim, but the complaint otherwise is dismissed as against Chan. Accordingly, it hereby is

ORDERED that Chan's motion is granted to the extent that plaintiffs are precluded from offering evidence against her as provided herein; and it further is

ORDERED that plaintiffs' cross-motion for summary judgment is granted, and Chan's counter-claims are dismissed; and it further is

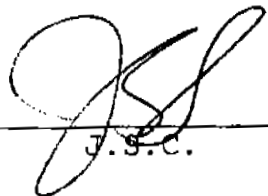
ORDERED that upon searching the record, plaintiffs' fourth cause of action is dismissed except to the extent that a claim can be inferred that Chan conspired with JSB to withhold notice of her departure with the intent of harming plaintiffs, and the fifth cause of action is dismissed; and it further is

ORDERED that the Clerk is directed to enter judgment accordingly, with costs and disbursements to abide entry of a final judgment, if warranted; and it further is

ORDERED that plaintiffs' time to file and serve a note of issue is extended to January 31, 2009.

Dated: December 18, 2008

ENTER:



J.S.C.

JANE S. SOLOMON

FILED
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