SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 10

HIRSCH, BRITT & MOSE,

Plaintiff,

INDEX NO.: 008513/2008
MOTION DATE: 09/26/2008
MOTION SEQUENCE: 001

-against-

LAWRENCE J. BUCHMAN,

Defendant.

The following papers read on this motion:

Notice of Motion, Affidavit & Exhibits Annexed	1
Plaintiff's Memorandum of Law in Support of Motion to Dismiss Counterclaims	2
Affirmation of Andrew T. Miltenberg in Opposition	3
Defendant's Memorandum of Law in Opposition to Plaintiff's Motion to Dismiss Counterclaims	4
Plaintiff's Reply Memorandum of Law in Further Support of Motion to Dismiss Counterclaims	5

This motion by plaintiff for an order pursuant to CPLR 3211(a)(7) dismissing three counterclaims asserted by defendant in his amended answer is determined as follows.

Plaintiff commenced this action to recover damages for defendant's alleged breach of duty during his nearly three years of employment with the plaintiff law firm. Plaintiff alleges that defendant, an associate with the firm, was employed to build a plaintiff's personal injury department but that he misrepresented his abilities, made unilateral decisions without consulting his superiors, did not accomplish a sufficient amount of work for the firm, did not abide by the

firm's rules or adhere to policies, engaged in conduct for his own benefit which should have been for the benefit of the law firm, made independent referrals of cases to outside firms and was engaged in furthering his self interest while using plaintiff's assets to that end. The complaint asserts causes of action sounding in faithless servant, breach of fiduciary duty, theft of corporate opportunity and unjust enrichment.

Defendant's original answer consisted of a denial, a counterclaim for defamation and affirmative defenses alleging that plaintiff was not only financially unable, but was also unwilling to finance the costs of a personal injury practice, did not offer the support defendant counted on when he accepted the job, and interfered with his judgment on case management, did not have enough defense work for him, had him work on matters that had no value, and claims that the referrals of which plaintiff complains happened before he worked for plaintiff or after, and that the members of the firm waived compliance with its policies and forms. Importantly, defendant states that he spent time developing clients for which there are no billable hours, but that those cases are now beginning to generate legal fees.

The amended complaint, served shortly after the initial answer without leave of the court, asserts a total of three counterclaims; the first is a repeat of the defamation cause of action, the second seeks injunctive relief against plaintiff's recouping fees for settlements or verdicts finalized during his present employment with Pillinger Miller Tarallo, LLP, and the third is for negligent misrepresentation.

The parties view of what transpired in three years is totally divergent.

The criterion for dismissal on a CPLR 3211(a)(7) motion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. Guggenheimer v Ginzberg, 43 N.Y.2d 268 (1977). The court must accept the averments of the pleader as true.

Defendant argues that the carefully plead statements plaintiff made to defendant's present employer are slanderous as they impugn his ability to do the very job he was presumably hired to do: try cases, tell the truth to his colleagues, and respect his employer's property (including the electronic data).

Plaintiff moves to dismiss on the grounds that such are communications of opinion not

statements of fact and are not actionable. Hassig v FitzRandolph, 8 A.D.3d 930, 931 (3rd Dept). In opposition, defendant cites to a three prong test used to determine if a statement constitutes an opinion for purposes of a defamation analysis. 1) Does the specific language in issue have a precise meaning which is readily understood; 2) are the statements capable of being proven true or false; and 3) whether either the full context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact. Mann v Abel, 10 N.Y.3d 271 (2008).

The Court of Appeals teaches that the statements should not be looked at abstractly but in context, with regard given to the tone and apparent purpose for which they were made. Id. Patently, defendant as an attorney would be concerned that his ability, experience, ethics and integrity have been impugned. However, the test is what the objective reader or listener would understand. Farrow v O'Connor, Redd, Gollihue & Sklarin, LLP, 51 A.D.3d 626 (2d Dept 2008.)

On this motion to dismiss, it is inappropriate to surmise whether defendant's new employer, or indeed any other listener, understood the words uttered to convey fact or opinion. The curious thing about their argument is that plaintiff seemingly intends to prove that all of the "opinions" shared with Pollinger Miller Tarallo, LLP are true, and, therefore, defendant was a disloyal employee. See Bravin v Fashion Week, Inc., 73 Misc.2d 974 (N.Y.C. Civ Ct. 1973) (did the conduct complained of go to the very heart of the employee's contract.)

Neither the complaint nor the counterclaims are predicated on a breach of contract; defendant was an at will employee.

Plaintiff argues that New York State law holds that there can be no breach of contract where there is no fixed duration to the employment, i.e. where it is at will. Dinio v Olivar, 265 A.D.2d 371 (2d Dept 1999).

That statement of the law leads to a tortured frame work for this action as each party in fact accuses the other of not upholding promises made when employment was agreed upon. That result is evidence that plaintiff's statement of the law is not wholly accurate. DePetris v Union Settlement Ass'n., 86 N.Y.2d 406 (1955). The parties seemingly avoid the fact that defendant could have quit at any time when plaintiff failed to make good on its promises or plaintiff could have fired him. Therefore, it is not the circumstance of termination that is in issue.

What is not in contention is the fact that defendant was hired to create a plaintiff's personal injury department in the plaintiff's defense oriented law firm. This raises another curious inconsistency in the record compiled so far; although defendant was considered an abject failure, the plaintiff strives to insure its receipt of its quantum meruit share of cases that followed defendant and have been settled or successfully tried due to his efforts.

The positions of the party are in direct opposition as to whether, inter alia, the statements plaintiffs have made on the telephone to Pollinger Miller Tarallo, LLP are slanderous. In considering whether to dismiss in such instances the court should not only accept the pleader's averments as true but look at them in the context of the circumstances in which they arose. Credibility is not a consideration. Only the pleading of bona fide elements are of concern to the court. To this end, the court finds that the defendant has adequately stated a claim for slander sufficiently to allow discovery to proceed on the issue of whether the statements should be viewed as fact or opinion.

The second counterclaim is a lengthy statement spanning paragraphs 64 through 93 asking for equitable relief without identifying a cause of action. It is a summary of the alleged misrepresentations made by plaintiff to defendant mostly prior to employment. It is summarized at paragraph 87:

> Buchman relied on the representations made by HBM to Buchman before he accepted employment with HBM that HBM had sufficient defense work including medical malpractice defense work to keep Buchman fully occupied and economically productive, that plaintiff personal injury cases brought to HBM by Buchman would be 'gravy,' that HBM would fully support the plaintiff personal injury practice and that it had the financial resources to do so, and that it would timely and diligently advance all expenses necessary and proper to develop and prosecute plaintiff personal injury cases.

The following paragraph provides:

> If Buchman had known that HBM misled him in making the foregoing representation and if he had known that it was not ready, willing or able to undertake and maintain its part of its agreement with Buchman as aforesaid, he would not have accepted employment with HBM." Amended Answer ¶ 88.

As relief, defendant seeks to enjoin plaintiff from enforcing the parties fee allocation agreement as a remedy for the aforesaid allegation. Defendant was to receive 25% of net fees on

personal injury cases he attracted. The formula would, similarly, apply to plaintiff's recovery of fees in quantum meruit from the cases that were transferred to Pollinger Miller Tarallo, LLP, post employment.

Plaintiff argues for dismissal on the grounds that the pleadings are premised on a theory of breach of contract which does not lie in an at will employment. Moreover, that injunctive relief must attach to an independent legal theory.

Defendant concedes that it is not a claim for breach of contract but, he argues in opposition, that the court has the inherent power to set the fee apportionment between out going counsel and incoming counsel. Ebrahimian v Long Island Railroad, 269 A.D.2d 488 (1st Dept 2000); Pearl v Metropolitan Transp Authority, 156 A.D.2d 281 (1st Dept 1989). Defendant alleges that he did all the work in such cases, not withstanding being hampered by the lack of support and financial capacity of the plaintiff law firm to do such work, so he reasons that the apportionment of fees to plaintiff should be substantially reduced. Padilla v Sansivieri, 31 A.D.3d 64 (2d Dept 2006).

Although defendant's recitation of the aforesaid law is correct, it has no application to the facts of this case. The referring lawyers in this case are Hirsch, Britt & Mose and the incoming lawyer is Pollinger Miller & Tarallo. Any dispute over apportionment of fees earned in transferred case as to factors such as time and labor expended, and the difficulty of questions involved, is between the two appearing law firms. Any dispute between either firm and its employee, defendant Buchman, is a matter of private agreement and is dehors the purview of the court under Judiciary Law § 475. Finally, were the court to analyze the second cause of action under CPLR § 6301 it would still fail as there can be, by definition, no irreparable harm when compensation is at issue.

The third counterclaim rests on the allegations stated in the Affirmative Defenses and the second counterclaim. It is labeled Negligent Misrepresentation. To sustain this cause of action, defendant is required to demonstrate that plaintiff "had a duty, based upon some special relationship with them, to impart correct information, that the information given was false or incorrect and that plaintiffs reasonably relied upon the information provided." Hausler v Spectra Realty, 188 A.D.2d 722, 724 (3d Dept 1992); Berger-Vespa v Rondack Building Inspectors, Inc.,

293 A.D.2d 838, 841 (3d Dept 2002). It is well established that "a negligent statement may be the basis of recovery of damages, where there is carelessness in imparting words upon which others were expected to rely and upon which they did act or failed to act to their damage." White v Guarente, 53 N.Y.2d 356, 363 (1977). That seminal case on negligent misrepresentation arose out of an accounting-client relationship.

"In the commercial context, 'liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified.'" Fresh Direct, LLC v Blue Martini Software, Inc., 7 A.D.3d 487, 489 (2d Dept 2004).

Defendant has not adequately pled the elements of such a claim. The court cannot countenance a theory that the relationship between a prospective employee and an employer is founded on the same degree of trust as an accountant and client, or those who should be known to place reliance on the words. Rivas v Amerimed USA, Inc., 34 A.D.3d 250 (1st Dept 2006); Glanzer v Keilin & Bloom, LLC, 281 A.D.2d 371 (1st Dept 2001).

Accordingly, plaintiff's motion is granted to the extent that the second and third counterclaims are dismissed for failure to state a cause of action, and it is SO ORDERED.

A Preliminary Conference (see NYCRR 202.12) shall be held on February 3, 2009, at 9:30 A.M., before the undersigned in the Supreme Court of Nassau County.

Counsel for all parties are reminded that this matter has been assigned to the Commercial Division of the Supreme Court of Nassau County and the parties are directed to follow the Rules of this Division.

Dated: December 11, 2008

J.S.C.