

Covision Capital Group, LLC v Doyle

2009 NY Slip Op 30015(U)

January 6, 2009

Supreme Court, New York County

Docket Number: 604011/07

Judge: Richard B. Lowe

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

PRESENT: ~~HON. RICHARD B. LORIE, JR.~~
Justice

PART 56

Covision Capital

INDEX NO. 604011/07

- v -

Lawrence Doyle

MOTION DATE 4/22/08

MOTION SEQ. NO. 001

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

FILED

JAN - 7 2009

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**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

Dated: 1/6/09

~~HON. RICHARD B. LORIE, JR.~~

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: I.A.S. PART 56

-----X
COVISION CAPITAL GROUP, LLC and
KENNETH L. TELLJOHANN,

Plaintiffs,

-against-

Index No. 604011/07

LAWRENCE DOYLE, TOWER CAPITAL, INC.,
and TOWER CAPITAL, LLC,

DECISION AND ORDER

Defendants.
-----X

RICHARD B. LOWE, III, J.:

Defendants move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss each of the five causes of action asserted in the complaint, and pursuant to CPLR 3016 (b), to dismiss the second and fifth causes of action.

BACKGROUND

Plaintiffs Kenneth L. Telljohann (Telljohann) and CoVision Capital Group, LLC (CoVision), bring this action to recover damages based upon the defendants' breach of partnership agreement and misappropriation of plaintiffs' software. Telljohann is currently the sole member of CoVision, a limited liability company formed to create and manage portfolios of hedge fund investments for institutional investors.

Telljohann and a partner, Brian Zipp (Zipp), formed CoVision in April 2002. Both Zipp and Telljohann had been senior executives in the trading divisions of prominent Wall Street firms. Together, they developed proprietary hedge fund asset allocation and risk analysis software and evaluation methods, which they termed the "CoVision Analytics."

In late 2003, CoVision approached defendants Lawrence Doyle and his business entity,

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Tower Capital, Inc (TCI). TCI 's business was creating specialized hedge funds that only invested in other hedge funds, known as "funds of funds." To demonstrate the potential value of the CoVision Analytics, Telljohann agreed to perform a complimentary analysis of the 40 hedge fund managers TCI was invested in. That analysis was completed in early December 2003.

Plaintiffs allege that, in January 2004, Doyle contacted CoVision and offered to hire Telljohann as TCI's portfolio manager. After some discussion, the parties agreed that Telljohann would work for TCI on a consulting basis. TCI would pay a consulting fee to CoVision at a rate of \$37,500 per month for 75% of Telljohann's time, which was equivalent to a billing rate of \$300 per hour, beginning on January 12, 2003, and lasting for a period of six months. The parties agreed that while Telljohann was working at TCI, it would be entitled to use any parts of the CoVision Analytics deemed useful or necessary by Telljohann in performing his assignment, without additional charge during the term of the engagement. However, the CoVision Analytics software was to remain on CoVision's systems and be operated only by Zipp or Telljohann.

Shortly thereafter, Telljohann presented Doyle with a draft consulting agreement dated January 12, 2004, to record the agreed terms of the engagement.

Doyle refused to sign the consulting agreement, but provided a letter, dated January 11, 2004, appointing Telljohann as Director of Research of TCI in exchange for a monthly payment to CoVision of \$37,500 (the Employment Letter).

Shortly thereafter, near the end of January 2004, Doyle suggested that the parties abandon the consulting arrangement and that Telljohann join Doyle as a partner. On February 2, 2004, Doyle, Zipp, Telljohann and Michael Zimmerman, a long-time friend of Doyle's

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(collectively, the Members), met to discuss a possible merger of TCI and CoVision.

Plaintiffs allege that, at this meeting, Doyle provided the group with a summary of TCI's existing and "pending" assets under management, and a 2004 forecast income statement for the business (the "Financial Summary"). According to the Financial Summary, with the existing staff and assets under management, TCI would earn over \$1 million for 2004. The financial summary also forecast that if "pending" assets under management were included, TCI could expect to earn \$2.75 million for the year.

Based on the Financial Summary, the Members agreed to become equal partners. Doyle agreed to contribute TCI, Zipp and Telljohann agreed to contribute CoVision, and each of the Members agreed to devote 100% of their time to the partnership. Because TCI was an S corporation, the members agreed to revive Tower Capital, LLC (Tower), a dormant limited liability company formed by Doyle, as the primary operating entity for the business. It was further agreed that, although TCI was to remain the advisor with existing clients, all fee income was to be passed through to Tower.

To formalize their understanding, the Members created a list outlining each Member's responsibilities with respect to both Tower and TCI. Zipp would be the Chief Operating Officer and Chief Risk Officer of Tower, and Telljohann added the role of Chief Investment Officer of Tower to his responsibilities as Director of Research and Portfolio Manager.

Based upon their agreement, Telljohann and Zipp suspended their efforts on behalf of CoVision, terminated CoVision's office lease, moved all of CoVision's physical assets to Tower's premises and integrated its computer system, including the CoVision analytics, with that of Tower.

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From that point onward, rather than pay the \$37,500 monthly to CoVision under the Employment Letter, TCI began the partnership salary payments to Telljohann at the rate of \$100,00 per year, which came to approximately \$8,333 per month. To ease the cash outflow, Zipp agreed to defer his salary payments.

In March 2004, the Members agreed to hire an attorney to draft Tower's operating agreement. They delivered a jointly drafted memorandum, dated March 29, 2004 to the attorney.

According to plaintiffs, Doyle thereafter refused to execute the operating agreement, and refused to execute a sub-advisory agreement between Tower and TCI. In addition, despite the Members' express agreement, Doyle retained sole signing authority over Tower and its accounts, he refused to allow the other Members to inspect TCI's or Tower's books and records, he unilaterally made decisions that were in direct contravention of the Members' agreement on how the business would be managed, and he refused to make any distributions of Tower's profits.

Plaintiffs further allege that, in December 2004, Telljohann gained access to a portion of TCI's books and records, and discovered a number of improprieties, including errors and personal expenses of approximately \$600,000.

In February 2005, Doyle declared that Tower was always his business and that Zipp and Telljohann were no longer welcome in it. Zipp and Telljohann were told to remove their belongings from the premises.

Plaintiffs allege that Zipp and Telljohann exited the premises and attempted to locate and remove all copies of the CoVision Analytics from the Tower system; however, the proprietary methods underpinning the CoVision Analytics had been fully disclosed previously to employees of TCI. That disclosure enabled TCI to replicate the CoVision Analytics without Zipp's or

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Telljohann's permission.

Thereafter, Zimmerman and Telljohann had a meeting at which Zimmerman handed Telljohann a check from TCI made out to CoVision for \$43,521, representing consulting fees accrued from January 12, 2004 through February 29, 2004. Zimmerman then informed Telljohann that, after Zipp and Telljohann's departure, TCI had been selected by the Texas Treasury Safekeeping Trust as a finalist for a large advisory assignment, at least in part on the basis of Telljohann's expertise and the CoVision Analytics. Rather than withdraw from the assignment, Doyle and Zimmerman wanted to engage Telljohann as a consultant to help TCI win the business and then execute it. However, Doyle continued to deny the existence of any distributable Tower income or obligation under the Employment Letter.

Doyle also sent a check to Zipp for \$95,522, representing the unpaid Member salary, and purported to claim that it fully discharged TCI's obligation to Zipp.

Based upon these allegations, plaintiffs' assert causes of action for breach of the partnership agreement (first cause of action), breach of fiduciary duty (second cause of action), unjust enrichment (third cause of action), quantum meruit (fourth cause of action), and unfair competition (fifth cause of action). Prior to the commencement of this action, Zipp assigned his interest in CoVision and his claims against the defendants to Telljohann.

Defendants move to dismiss on the ground that, despite good faith efforts on the part of all parties, and the fact that the four men began working together in February 2004, no agreement regarding a partnership was ever reached. Moreover, defendants contend that it was understood that the commencement of negotiations terminated the consulting agreement between TCI and Telljohann, and thus Telljohann was not entitled to any further consulting fee.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 the court accepts the material allegations of the complaint as true, and gives the plaintiff the benefit of every reasonable inference when analyzing the complaint to determine whether it sets forth sufficient facts to state a cognizable claim (*Sims v First Consumers Nat. Bank*, 303 AD2d 288, 290 [1st Dept 2003], *Kralic v Helmsley*, 294 AD2d 234, 235 [1st Dept 2002]).

In addition, contrary to defendants' assertions that any alleged oral agreement is barred by the Statute of Frauds, "[a]n oral agreement to form a partnership for an indefinite period creates a partnership at will and is not barred by the Statute of Frauds" (*Prince v O'Brien*, 234 AD2d 12, 12 [1st Dept 1996]; see also *Blank v Nadler*, 143 AD2d 966 [2d Dept 1988]).

Here, plaintiffs have alleged that the essential terms of partnership had been agreed to, and that all that remained was the signing of the formal document, as prepared by the parties' attorney. Moreover, plaintiffs have set forth the terms of the alleged agreement, which included their contribution of the CoVision Analytics, with Doyle contributing the client base, and a sharing of profits. Plaintiffs' also allege specific acts they performed on behalf of the partnership, including, inter alia, Telljohann devoting his full-time efforts to the partnership, foregoing a substantially higher consulting fee to which he would have been entitled without the partnership, and Telljohann and Zipp's move into TCI's offices. These allegations set forth the requisite indicia of a partnership based upon an oral agreement, as evidenced by the parties' conduct (see *Richbell Information Servs., Inc., v Jupiter Partners, L.P.*, 309 AD2d 288 [1st Dept 2003]).

If this Court finds that the parties entered into a partnership agreement, then Doyle, as a

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partner, owed a fiduciary duty to each of the other partners, including Telljohann (*Birnbaum v Birnbaum*, 73 NY2d 461 [1989]); *Alizio v Perpignano*, 176 ADF2d 279 [2d Dept 1991]).

Assuming the existence of that relationship, Doyle's conduct, as alleged in the complaint, constitutes a breach of that duty, by inter alia, using partnership funds for his personal expenses, unauthorized payments to third parties, and misappropriating opportunities for himself (*Birnbaum*, 73 NY2d at 466).

If evidence presented at trial reveals that no oral partnership agreement was, in fact, entered into, then plaintiffs may assert claims for unjust enrichment and quantum meruit (the third and fourth causes of action) (*Goldman v Metro. Life Ins. Co.*, 5 NY3d 561 [2005]; *Loheac v Children's Corner Learning Center*, 51 AD3d 476 [1st Dept 2008]). "To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor" (*Nakamura v Fujii*, 253 AD2d 387, 390 [1st Dept 1998]). A cause of action for quantum meruit requires: (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services (*Soumayaj v Minnelli*, 41 AD3d 390 [1st Dept 2007]).

Defendants assert that both Telljohann and Zipp were compensated for their services and that therefore there can be no recovery in either unjust enrichment or quantum meruit. This argument ignores the nature of these causes of action, which is to achieve equity between the parties. Plaintiffs allege that Doyle originally agreed to pay Telljohann \$37,500 per month for 75% of his time, and further, that the \$100,000 per year compensation that Telljohann and Zipp agreed to, was conditioned on them also receiving their share of the profits from the partnership.

If proved at trial, the amount of compensation actually received therefore did not represent the reasonable value of the services rendered.

Plaintiffs' fifth cause of action is for unfair competition. The gist of this cause of action, as stated in the complaint, is that after Telljohann and Zipp's expulsion in February 2005, Doyle continued to falsely represent to clients that they were still partners in his business, and continued to use the CoVision Analytics without permission. Defendants move to dismiss on the ground that plaintiffs' allegations do not state any cognizable legal claim.

The essence of a claim for unfair competition is the misappropriation of a commercial advantage belonging to another (104 NY Jur 2d "Trade Regulation" § 196). Plaintiffs' allegations that Doyle used Telljohann and Zipp's name and software, in an attempt to acquire business, is sufficient, at this stage of the proceedings, to state a claim for unfair competition.

Accordingly, based upon the foregoing, it is

ORDERED that defendants' motion to dismiss the complaint is denied.

This constitutes the decision and order of the Court.

Dated: January 6, 2009

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HON. RICHARD J. LEVINE, J.

J.S.C.