Hayias v May
2009 NY Slip Op 31379(U)
June 17, 2009
Supreme Court, Nassau County
Docket Number: 017132/2008
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

NEAL E. HAYIAS,

Plaintiff,

INDEX NO.: 017132/2008
MOTION DATE: 04/08/2009
MOTION SEQUENCE: 003 and 004

-against-

LAWRENCE E. MAY, MAY FINANCIAL GROUP, LTD., DAVID LAIKIN and JANIS KRONENBERG,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Notice of Cross-Motion to Amend Complaint	2
Affirmation in Opposition of Stacey Tranchina, Affidavit in Opposition of Neal E. Hayias & Exhibits Annexed	3
Affirmation in Opposition to Cross-Motion of Robert J. Grande & Exhibit Annexed	4
Reply Affirmation in Further Support of Motion of Christopher B. Weldon & Exhibit Annexed	5
Reply Affirmation in Further Support of Cross-Motion of Stacey Tranchina	6

Motion by defendants Lawrence E. May and May Financial Group, Ltd. pursuant to CPLR 3211 for dismissal of the complaint as against them, and pursuant to CPLR 3212 awarding them summary judgment is denied in its entirety. Cross-motion by plaintiff Neal E. Hayias for an order permitting him to serve an amended complaint to assert a claim for breach of contract against the May defendants is granted and the Verified Second Amended Complaint annexed to the cross-motion is deemed served. Defendants shall have until twenty days after

service of a copy of this order upon their counsel to serve an answer to the Verified Second Amended Complaint.

Plaintiff Neal E. Hayias entered into an agreement with David Laikin and Janis Kronenberg (the Laikin defendants), who are the children of Elaine Laikin, to replace their mother's existing life insurance policy. Hayias arranged for an arbitrage, selling Elaine Laikin's existing life policy to institutional investors, and securing a replacement policy with a lower premium and better return from a new carrier . The Laikin defendants advised Hayias that Elaine Laikin had breast cancer, and Hayias informed them that the illness would complicate the process but that time would work on her behalf. He advised them that after a one year survival, offers from carriers would improve. In March of 2007, the Laiken defendants requested Hayias to allow the Lawrence E. May and the May Financial Group, Ltd. (the May defendants) to act as co-brokers entitled to 20% of any commissions to be earned on the new policy. Hayias agreed and copied the May defendants with all paperwork, and introduced Lawrence E. May to various carriers with whom he had no prior business relationship.

In April of 2008, notwithstanding Elaine Laikin's illness, Hayias received a "standard" offer from Hartford with a flat extra and a significant amount of money for the settlement of her old policy, thus improving her position to reflect a lower premium and greater return. However, the Laikin defendants terminated Hayias' services, and, while Hayias avers that he was terminated after receiving the Hartford offer, the defendants aver that he was terminated before. A factual issue exists in this regard. Moreover, it is unknown before discovery whether the May defendants accepted the Hartford offer, thus taking advantage of being a listed co-broker to collect commissions for the policy and settlement which Hayias had negotiated.

In the proposed Verified Second Amended Complaint Hayias asserts, inter-alia, four causes of action which the May defendants address. The First is for tortious interference with contract; the Second is for tortious interference with prospective business relations; the Third is for unjust enrichment; and, the Fourth is for breach of contract.

The motion for summary judgment pursuant to 3212 is supported only by the affidavit of Lawrence E. May dated February 2, 2009, several e-mail communications between the parties,

none of which are dispositive, and the affirmation of counsel. With regard to the factual statements of counsel it is well settled that the tender of an affirmation by counsel "who had no personal knowledge of the facts" is "insufficient" as a matter of law and is without probative value (*9394 LLC v. Farris*, 10 AD3d 708, 711 [2d Dept 2004], *lv app denied* 4 NY3d 705 [2005]; *Stainless, Inc. v. Employers Fire Ins. Co.*, 69 AD2d 27, 31 [1st Dept 1979], *affd for reasons stated at the Appellate Division*, 49 NY2d 924 [1980]).

The May affidavit is self serving, and reports on conversations between Kronenberg and plaintiff which he did not witness and which constitute inadmissible double hearsay. He reports on understandings, beliefs, as well as hearsay and double hearsay conversations. The only offer of personal knowledge is in support of an allegation that Hayias did not act quickly enough to secure a policy for Elaine Laikin, and obliquely states without detail that "upon retention" the May defendants "had first hand observations of the lack of responsiveness that the Laikin defendants had from Mr. Hayias." No affidavit from the Laikin defendants regarding the reason or timing of their termination of Hayias is offered.

The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853[1985]). Given the paucity of admissible evidence the May defendants have failed to make out a prima facie case, and the burden has not shifted to plaintiff "to raise an issue of fact" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Turning to the May defendants alternative motion pursuant to CPLR 3211 to dismiss, the court must accept the facts alleged in the complaint as true (*see, Palazzolo v. Herrick, Feinstein, LLP*, 298 AD2d 372 [2d Dept 2002]), and a motion premised upon CPLR 3211 (a) (7) for failure to state a cause of action will be denied if, from the "four corners" of the pleadings, there are factual allegations which "manifest any cause of action cognizable at law" (*Maldonado v. Olympia Mechanical Piping & Heating Corp.*, 8 AD3d 348, 350 [2nd Dept 2004]). In determining the sufficiency of the allegations, the court may consider an affidavit submitted by the plaintiff to remedy defects in the complaint, and must afford the plaintiff "the benefit of

every possible favorable inference" (*supra*). "Dismissal is warranted only when the stated allegations do not, together with all reasonable supporting inferences, state a legally cognizable claim for relief" (*CAE Indus. Ltd. v. KPMG Peat Marwick,* 193 AD2d 470, 472 [1st Dept 1993). "The inquiry is not into whether the validity of the claim has been in any measure demonstrated; it is rather confined to whether the relevant allegations of the complaint liberally construed state a theory upon which relief can be granted" (*supra*).

The complaint sufficiently states causes of action taken together with the affidavit of plaintiff Hayias, accepting as true that Hayias' contention that he completed the contract transaction for the Laikin defendants prior to his dismissal, and accepting as true his contention that he had an agreement to share commissions with the May defendants, and that the May defendants induced the Laikin defendants to breach their contract with Hayias by offering a commission rebate and suggesting that the numbers would "work" only with such a rebate.

Hayias avers that "it became apparent to me that the decision to engage May as exclusive broker of record was driven by the Laikin defendants' expectation of a rebate of part of the commission if Mr. May alone placed the policy. I understand that practice to be illegal under this State's insurance laws." Hayias avers that this scenario is the only one which makes sense, as it is "too coincidental that the act which made it possible for Mr. May to place the insurance derived from the Laikin defendants' instructions "to include Mr. May in the transaction." Hayias states that without the Laikin defendants having a financial incentive to cut him out of the transaction, "which could only come by way of rebate", the Laikin defendants would have had no reason to do so, particularly after he had "done all the work required to satisfy their goals and had actually accomplished their goals."

With respect to the claim for tortious interference with contract, it is plaintiff's claim that the May defendants induced the Laikin defendants to breach their contract with Hayias with a promise to rebate commissions so that May and May Financial would collect 100% rather than 20% of the commissions on the new policy.

In a contract interference case the plaintiff must show "the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper

procuring of a breach, and damages" (*White Plains Coat & Apron Co. v. Cintas Corp.*, 8 NY3d 422, 426 [2007]). Plaintiff has adequately alleged the foregoing elements. Hayias alleged an express contract with the Laikin defendants to procure a new insurance policy and to sell their mother's existing policy, and alleged that Lawrence E. May intentionally induced them to breach the contract through the promise of an illegal rebate of commissions.

It is noted that the proposal from Lawrence E. May advises the Laikins that the Mays should be made co-brokers and be kept up to speed on all applications, and also suggested that a high broker's commission is "not allowing the math to work". He suggests that the Laikins "could get more on the sale of the contract by the broker reducing his fee". May advised that he was enclosing an "authorization that our wholesaler uses who would not charge a fee or commission on the sale of the contract." (Exhibit A to Complaint). Plaintiff avers that it is the explicitly solicited co-broker status which allowed May to deal directly with the carrier and and take control of the application Hayias produced and take his commissions.

With respect to a claim for tortious interference with prospective contractual relations, as compared with a claim for tortious interference with an existing contract, an additional requirement is necessary to state a cause of action. Discussing the requirements of the two causes of action, the Court of Appeals has stated:

> where 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. 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."

(*Carvel Corp. v. Noonan*, 3 NY3d 182, 189-190 [2004], quoting *NBT Bancorp v. Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]). Culpable conduct "as a general rule . . . must amount to a crime or an independent tort" (*Carvel Corp. v. Noonan*, *supra* at p 190). Non tortious or non criminal conduct "will generally be 'lawful' and thus insufficiently 'culpable' to create liability for interference with prospective contracts" (*Carvel Corp. v. Noonan*, *supra*).

Plaintiff contends that May's promise of a rebate for commissions due on premiums and

on sale of Elaine Laikin's existing insurance policy is a violation of New York law and therefore qualifies as wrongful conduct (see, Insurance Law § 2324[a][no offer to give any "valuable consideration or inducement of any kind, directly or indirectly, which is not specified in [a] policy or contract" shall be given as an inducement to the making of an insurance contract]; *see, Bushong v. Hart & Keenan & Co.*, 64 AD2d 814 [4th Dept 1978][assuming that a waiver of consultant fees in exchange for commissions would constitute an unlawful rebate under the Insurance Law]). The allegation of unlawful conduct here satisfies the requirement of wrongful conduct, particularly as the parties were not competitors but were acting in a joint agent capacity, rendering the alleged conduct more egregious.

Plaintiff's cause of action for unjust enrichment seeks restitution of his 80% of the earned commission. Under New York law, an unjust enrichment claim will lie if the plaintiff can show that "(1) defendant was enriched; (2) the enrichment was at plaintiff's expense; and (3) the circumstances were such that equity and good conscience require defendant to make restitution" (*Dolmetta v. Unitah Nat'l Corp.*, 712 F.2d 15, 20 [2d Cir.1983]; *Hutton v. Klabal*, 726 F.Supp. 67, 72 [S.D.N.Y.1989]). Enrichment alone is insufficient. "Critical is that under the circumstances and as between the two parties to the transaction the enrichment be unjust" (*McGrath v. Hilding*, 41 NY2d 625, 629, [1977]). Plaintiff contends that the May defendants took advantage of his efforts which produced the Hartford offer. The cause of action is sufficiently stated, for as between the May defendants and plaintiff Hayias, retention of the 80% of commissions effected by Hayias' efforts would be unjust.

Turning to plaintiff's application to amend the complaint to assert a claim for breach of contract, the court rejects the May defendants' assertion that plaintiff must offer evidence to support the merits of the claim. While it is true that some authority exists which sets forth an evidentiary requirement, the Second Department has rejected such authority, stating:

> Cases involving CPLR 3025 (b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed. No evidentiary showing of merit is required under CPLR 3025 (b). The court need only determine whether the proposed amendment is "palpably insufficient" to state a cause of action or defense, or is patently devoid of merit.

(*Lucido v. Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). Plaintiff's claim for breach of contract, where the parties admittedly acted together and agreed to share commissions is not palpably insufficient or devoid of merit. Nor have defendants shown that they are prejudiced or surprised.

The May defendants assert that the Statute of Frauds precludes any claim for breach of contract without a writing, and the alleged contract to secure a new policy could not be performed within a year because of the delay required by Elaine Laikin's illness.+

A flaw exists in the May defendants reasoning. The year required for Elaine Laikin to remain in remission was measured from the time Hayias entered into a contract with the Laikin defendants, not from the time the May defendants became co-brokers. Accordingly, the alleged contract between Hayias and the May defendants was capable of performance within a year.

Assuming arguendo that the alleged contract was not capable of performance within a year, other grounds dispense with the need for a writing. "Where . . . two brokers work together, deciding to "pool their efforts and share the benefits" * * * a narrow exception to the statute applies, and the agreement to share in the profits of the "business enterprise closely akin to a joint venture" * * * need not necessarily be in writing" (*Ostrove v. Michaels*, 289 AD2d 211, 212 [2d Dept 2001]). Accordingly, the cross-motion to amend is granted as defendants have failed to show that it is palpably without merit.

Insofar as the May defendants seek to dismiss against Lawrence E. May individually, plaintiff need not plead a cause of action to pierce the corporate veil, which is not recognized in New York (*Hart v. Jassem*, 43 AD3d 997, 998 [2d Dept 2007. May is the chief executive officer and sole shareholder of defendant May Financial Group, and plaintiff has made sufficient allegations to withstand a motion to dismiss (*see, Hart v. Jassem, supra*). Moreover, a corporate officer "may be liable for torts committed by or for the benefit of the corporation if the officer participated in their commission", or if he " 'abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice ... such that a court in equity will intervene' " (*Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corp.*, ___ AD3d ___, 878 NYS2d 97, 119 [2d Dept 2009], quoting in part *Matter of Morris v. New York*

State Dept. of Taxation & Fin., 82 NY2d 135, 142 [1993]). Accordingly, the motion with respect to defendant May individually is also denied.

Dated: June 17, 2009

J.S.C.

ENTERED

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NASSAU COUNTY

COUNTY CLERK'S OFFICE