

Tofel & Partners, P.C. v Karan
2009 NY Slip Op 31640(U)
July 14, 2009
Supreme Court, New York County
Docket Number: 601428/08
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN

PART 3

Justice

TOFEL & PARTNERS, P.C.,
Plaintiff,

INDEX NO. 601428/08

MOTION DATE 2/23/09

- v -

MOTION SEQ. NO. 01

PAUL R. KARAN,
Defendant.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for dismissal of causes of action

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

JUL 15 2009

CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

JUL 23 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7-14-09

Eileen Bransten

EILEEN BRANSTEN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MDA 1

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

-----X
TOFEL & PARTNERS, P.C., f/k/a
Tofel, Karan & Partners, P.C.,

Plaintiff,

-against-

PAUL R. KARAN,

Defendant.

Index No. 601428/08
Motion Date: 2/23/09
Motion Sequence Nos: 001, 002

FILED
JUL 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Eileen Bransten, J.:

The following two motions are consolidated for disposition in this action brought by a law firm against a prior partner to the firm.

In motion sequence number 001, defendant Paul R. Karan ("Karan") moves for an order dismissing the second and third causes of action in the complaint, and for sanctions. In motion sequence number 002, plaintiff Tofel & Partners, P.C. ("Tofel") moves to disqualify Karan's law firm of Todtman, Nachamie, Spizz & Johns, P.C. ("Todtman") from representing Karan in this action.

Background

Karan, an attorney, joined Tofel, a law firm, in March 2002, as a partner. According to the original complaint, Karan, prior to being hired by Tofel, represented that he had

extensive expertise in the field of trusts and estates, and had produced hefty revenues while working for his previous firm, which success he could bring to Tofel. Tofel claims that it hired Karan, at a substantial salary, based on these representations.

According to the complaint, Tofel failed to live up to his purported potential, and produced fewer billable hours, and realized less in revenues, than Tofel had expected. As a result, the parties re-negotiated Karan's salary to \$200,000 per year.

In December 2002, the parties entered into a new agreement, which would allow Karan a salary increase if he generated revenues of at least \$600,000, and remained with the firm until the end of 2003 (December 2002 agreement).¹ Should Karan fail to produce the expected fees, he would be required to return any salary paid to him in excess of \$200,000. The December 2002 agreement also included a restrictive covenant prohibiting Karan from working for any other law firm for six months after leaving Tofel. According to this agreement, Karan could avoid the consequences of this covenant by paying Tofel \$250,000.

According to the complaint, a January 2003 agreement included a loan to Karan of \$10,000 (January 2003 agreement). Tofel alleges that Karan owed Tofel in excess of \$37,000 in 2003, as a result of both the December 2002 agreement and the January 2003 agreement, which Karan admitted in a written agreement entered into in August 2003. As

¹All of the agreements are attached as exhibits to the complaint, which in turn is attached as exhibit A to the Tofel affirmation.

a result of sums collected on some of Karan's account, Tofel, in its first cause of action, claims that Karan owes it approximately \$20,000.

In its second cause of action, Tofel alleges that Karan committed fraud when he concealed his intention to leave the firm in mid-2003 to join Todtman, and that, upon information and belief, he actually commenced performing services for Todtman a couple of months before he left Tofel, in breach of his fiduciary duty and duty of loyalty that he allegedly owed to Tofel. Tofel maintains that it justifiably relied on Karan's representation that he would comply with the various agreements, including his acknowledgment of the sum due Tofel in the August 2003 agreement, and would continue to work for Tofel. Tofel claims damages of \$22,276.20 on this cause of action.

In the original complaint, Tofel's third cause of action was for breach of the restrictive covenant in commencing work with Todtman in August 2003, allegedly entitling Tofel to recovery of \$250,000, as provided for in the December 2002 agreement. In an amended complaint served on or about July 8, 2008, Tofel re-casts its third cause of action as one for "breach of contract," rather than for breach of the "restrictive covenant," and seeks the \$250,000 in liquidated damages for Karan's move to Todtman in August 2003.

Analysis

Motion to Dismiss

“On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory”

(*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]; see also *Leon v Martinez*, 84 NY2d 83 [1994]). However, the assumption of truth afforded plaintiff “fail[s] where there are conclusory allegations lacking factual support” (*Dominski v Frank Williams and Son, LLC*, 46 AD3d 1443, 1444 [4th Dept 2007]). “[B]are or conclusory” allegations will not suffice (*Lakeville Pace Mechanical, Inc. v Elmar Realty Corp.*, 276 AD2d 673, 675 [2d Dept 2000]), and the plaintiff “must support his claim with more than mere speculation” (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]).

Fraud

The heart of Tofel’s fraud cause of action, as framed in its complaints, is the allegation that Karan concealed from Tofel his plans to leave the firm to work with Todtman at the time when he entered into the various contracts, thus “misrepresent[ing] his intention to perform his obligations under the aforesaid agreement[s]” (Complaint, ¶ 26; Amended Complaint, ¶ 28).

Strangely, Tofel alters its theory of recovery for fraud in its Memorandum of Law, arguing that “Karan fraudulently induced the Tofel Firm to put him on its payroll by falsely representing his prior business production and scope and nature of his practice and then fraudulently persuad[ing] the Tofel Firm to keep him on the payroll, by falsely representing his expectation of improved business production” (Tofel Memorandum of Law, at 4).

Tofel decries Karan’s “knowingly false representations, and his continuing representations, of his ability to produce business, both in the past and in the future” (*id.* at 5). This statement has nothing to do with any alleged misrepresentations made by Karan that he would work solely with Tofel until the end of 2003, when his intentions allegedly lay elsewhere.

A cause of action for fraud requires a showing of a representation of “a material existing fact, falsity, *scienter*, deception and injury” (*New York University v Continental Insurance Company*, 87 NY2d 308, 318 [1995]; *see also Serino v Lipper*, 47 AD3d 70 [1st Dept 2007]). Each of these elements must be pled with particularity (CPLR 3016 [b]; *Papp v Debbane*, 16 AD3d 128 [1st Dept 2005]; *LaSalle National Bank v Ernst & Young LLP*, 285 AD2d 101 [1st Dept 2001]).

If Tofel’s fraud in the inducement claim is based on Karan’s promises to produce revenue for the firm in the future, it is merely a promise of future performance, which will not support a cause of action for fraud (*Sandra Greer Real Estate, Inc. v Johansen Organization*, 182 AD2d 468, 469 [1st Dept 1992])[“A fraud claim is not sufficiently stated where it alleges

that a defendant did not intend to perform a contract ... when he made it”). Tofel has not alleged any facts showing that Karan, when he claimed that he would bring large revenues to the firm, knew “perfectly well that no such thing [was] to occur” (*Channel Master Corp. v Aluminum Limited Sales, Inc.*, 4 NY2d 403, 408 [1958]).

If Tofel’s fraud claim is based on the allegation that Karan knew that he would not perform for Tofel at the time he entered into the agreements, because he intended to leave Tofel’s employ in favor of Todtman, as the complaints suggest, the allegations are speculative and insufficient to support a claim of fraud in the inducement. At oral argument, Tofel’s attorney claimed that he could sufficiently allege that Karan had already begun working for Todtman while still employed by Tofel, based on the fact that Karan was producing 50% less work in the period before he left the firm (*see* Transcript, February 10, 2009, at 19). In making this assertion, Tofel was referring to what he calls the “faithless servant” doctrine (*id.*; *see also* Tofel Memorandum of Law, at 2, n 5).

Tofel’s theory of fraud based on Karan’s alleged intention not to work for Tofel, despite the agreements, is entirely speculative, and does not support a claim for fraud in the inducement. Tofel’s assertion that it can prove that Karan breached some duty of loyalty by working with less diligence for Tofel before he left Tofel is equally without basis. As a result of the foregoing, the second cause of action is dismissed.

Breach of Contract

Tofel's breach of contract claim--which he no longer alleges to be breach of a restrictive covenant, acknowledging that such a provision would be unenforceable-- is, in any event, based on the clause in the December 2002 agreement restricting Karan's right to work for any other firm for six months after leaving Tofel. Tofel hones in on the language:

“[Karan] shall be free of the restrictions imposed under subparagraph (i) hereof with respect to any period subsequent to his employment, by payment to [Tofel] of the liquidated amount of \$250,000, said amount being understood agreed and intended by [Karan] and [Tofel] to compensate [Tofel] for the loss of [Karan's] services, and the incremental expenses and commitments hereunder.”

Tofel now urges, in contrast to his earlier position recognizing that the contract contained a restrictive covenant, that the parties' agreement simply provided that Karan would continue to work for Tofel for a full six months after he ceased to be an employee of the firm or that he could pay \$250,000 to release himself from that restriction.

Tofel's new interpretation makes no sense and is not consistent with the plain language of the parties' agreement (*see South Road Associates, LLC v International Business Machines Corp.*, 4 NY3d 272, 277 [2005] [“[W]hen parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms”]).

The “liquidated damages” portion of the contract specifically refers to the terms of the restrictive covenant, which Tofel has properly disavowed since it is not enforceable (*see Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 380-381 [1993]). This court will

not read a portion of a contractual provision divorced from its context and circumstances. The “liquidated damages” portion of the clause, which is part and parcel of the invalid restrictive covenant, cannot be the basis for recovery. Consequently, the third cause of action is dismissed.

Sanctions

Despite the fact that the court has found the two causes of action dismissible, there does not appear to be grounds for the drastic remedy of sanctions. This part of Karan’s motion is denied.

Disqualification of Karan’s Attorneys

Tofel, moving by order to show cause, seeks to disqualify Todtman from representing Karan in this action because Todtman knew or should have known about Karan’s contractual commitments to Tofel, which suggest that it will “almost certainly” be “joined as a co-defendant herein for action by [sic] inducing defendant to breach those obligations to plaintiff” (Aff. of Laurence E. Tofel, at 2). Tofel also maintains that Todtman “ought” to be called by Karan, as a witness at trial “and the testimony elicited will be prejudicial “ (*id.*).

Tofel has offered nothing but conclusory allegations concerning anything that Todtman might have done that would support a cause of action against it, and, if Tofel thought a cause

of action existed against Todtman, it should have moved to amend. Tofel has not established that disqualification of Todtman is appropriate on the ground that it might become a party to this action.

Concerning the possibility that a representative of Todtman might be called to be a witness in the present action, it must be remembered that “[t]he right to choose one’s own counsel is a valued right” (*Matter of Advent Associates, LLC v Vogt Family Investment Partners, L.P.*, 56 AD3d 1023, 1024 [3d Dept 2008], citing *S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 440, 443 [1987]). However, disqualification of an attorney pursuant to DR 5-102 (22 NYCRR 1200.21) may be called for if it appears that the attorney’s testimony is necessary to the action (see *Hudson Valley Marine, Inc. v Town of Cortlandt*, 54 AD3d 999 [2d Dept 2008]). Disqualification may also follow a showing that the testimony of the attorney will be prejudicial (see *East Forty-Fourth Street LLC v Bildirici*, 58 AD3d 542 [1st Dept 2009]).

The party seeking disqualification of its opponent’s counsel has the burden of showing such necessity (*Zutler v Drivershield Corp.*, 15 AD3d 397 [2d Dept 2005]). The movant must “identify the projected testimony of the witness and show that it would be so adverse to the factual assertions or account of events offered on behalf of the client as to warrant his disqualification” (*Martinez v Suozzi*, 186 AD2d 378, 379 [1st Dept 1992]).

Tofel offers no proposed testimony that might make Todtman's entry into this action as a witness "necessary." Tofel has only the most conclusory allegations concerning necessity. As such, it has failed to meet its burden to deny Karan his choice of counsel. Tofel's motion to disqualify Todtman is denied.

Accordingly, it is

ORDERED that the motion brought by defendant Paul R. Karan to dismiss the second and third causes of action, and for sanctions is granted soely as to the dismissal of these causes of action, and is otherwise denied; and it is

ORDERED that the second and third causes of action are dismissed; and it is further


ORDERED that the motion brought by Tofel and Partners P.C., f/k/a Tofel, Karan & Partners, P.C. to disqualify defendant's attorneys is denied; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Dated: July 14, 2009

ENTER:


Hon. Eileen Bransten

