

Marc Nichols & Assoc., Inc. v Waller Capital Corp.

2009 NY Slip Op 32156(U)

September 17, 2009

Supreme Court, New York County

Docket Number: 102676/07

Judge: Judith J. Gische

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: JUDITH J GISCHE PART 10

Index Number : 102676/2007

MARC NICHOLS & ASSOC., INC.

vs

WALLER CAPITAL CORP.

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

... remaining 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

*The parties resolved the discovery issues.
The only issue submitted is on the statute of
frauds. J 2/18/09.*

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

FILED
SEP 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: Sept 17, 2009

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: PART 10**

-----X
Marc Nichols & Associates, Inc.,

Plaintiff (s),

-against-

Waller Capital Corp.,
Waller Capital Partners, LLC and
Waller Capital Securities, LLC,

Defendant (s).
-----X

DECISION/ORDER

Index No.: 102676/07

Seq. No.: 001

PRESENT:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf n/m (§3212) w/JL affirm, MK affid, exhs	1
Defs' opp w/DMC affid, exhs	2
Pltf reply w/JL affirm	3
Affid of Actual Engagement (TVL)	4
Prelim Conf Order	5

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff, an employment agency, for its referral fee.

Defendants are individually or collectively the company (ies) that allegedly hired the person whom plaintiff referred. Issue has been joined and in its answer, defendants raise as a defense the statute of frauds. Plaintiff has brought this pre-note of issue motion to strike that affirmative defense, arguing it does not apply to the facts of this case as a matter of law. CPLR 3212. Another branch of plaintiff's motion, to enforce its discovery demands, was resolved when the motion was argued and the parties entered into a preliminary conference order. Defendants oppose this remaining branch of plaintiff's

motion on the basis that summary judgment is premature because discovery is incomplete. CPLR 3212 (f).

Arguments

Plaintiff contends that it is an "employer fee paid employment agency" within the meaning of General Business Law § 171 (2)(a)(2), and that it is in the business of providing to its clients, who are prospective employers, the names of qualified applicants for jobs. The person looking for a job or "job applicant" never pays the agency a fee and, therefore, the plaintiff's client is the employer. If the employer hires the job applicant, then the employer pays a fee to the agency in amount equal to 30% of the person's annual salary plus his or her expected commissions for the first year. Once hired, the job applicant works for the employer and receives his or her compensation from the employer.

Plaintiff contends it referred Jeffrey Brandon to the defendants and they hired him. Plaintiff's president ("Kaufman") provides his sworn affidavit in support of plaintiff's motion. Kaufman states that once defendants hired Brandon, they were obligated to pay that plaintiff's fee. Plaintiffs deny that the Statute of Frauds (GOL § 5-701) applies to this case or is an available defense to its claims for several reasons. First, plaintiff argues that as an employer fee paid agency, it is exempt from licensing requirements that apply to agencies that have their fees paid by job applicants. Furthermore, plaintiff argues that the contract being enforced is not an employment contract, but a service contract. Plaintiff argues there is legal precedent on point, that GOL § 5-701 does not apply to the services of employment agencies like plaintiff. Finally, plaintiff argues that GOL § 5-701 applies to contracts incapable of performance within one year, but this contract could be.

Defendants acknowledge that Brandon was employed by Waller Capital Corp. from

May 8, 2006 through December 31, 2006 (Interrogatory No. 2). Defendants argue nonetheless that it was not plaintiff that placed Brandon, but another company that is not a named party in this action. Defendants argue that the terms of the "agreement" involving Brandon is unknown because it is not a written agreement. They seek to depose plaintiff's principals to find out more about the arrangement they had with Brandon, the other agency and itself.

Discussion

The proponent seeking summary judgment has the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle them to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if it meets this burden, does it then shift to the party opposing summary judgment to establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*.

Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 (1st dept. 2004).

On this motion plaintiff has established that Brandon was hired by the defendants and he worked for them some months. Plaintiff has also established that, as a matter of law, GOL § 5-701 has been held not to apply to the services of employment agencies. Howard-Sloan Legal Search, Inc. v. Todman, Young, Tunick, et al., 193 AD2d 404 (1st

Dept 1993). Thus, where there was no obligation on the part of the employee that was hired to to pay a fee to the employment agency which placed him or her in the job, an oral agreement by the employer to pay its fee to the employment agency does not violate the statute of frauds. Arrow Employment Agency Inc. v. Tom Rice Buick-Pontiac-GMC Truck Inc., 185 Misc.2d 811 (N.Y.Sup.,2000); Blaine Personnel, Inc. v. Raymond Lee Organization, Inc., 76 Misc.2d 110 (N.Y.City Civ.Ct. 1973).

In opposition to plaintiff's motion, defendants argue they have insufficient information about plaintiff's claims, particularly the relationship among plaintiff, the other agency and Brandon. Since these facts are central to plaintiff's claims, and defendants have made a strong showing that this motion is premature because discovery is in its preliminary stages, plaintiff's motion for summary judgment striking the statutory defense is denied so that discovery can proceed.

Conclusion

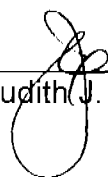
Plaintiff's motion for summary judgment striking the first affirmative defense is denied for the reasons stated.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
September 17, 2009

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
SEP 23 2009
CLERK'S OFFICE
COUNTY OF NEW YORK