

Megan Beard, Inc. v Fadina

2009 NY Slip Op 32359(U)

October 8, 2009

Supreme Court, New York County

Docket Number: 107626-2009

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: GISCHE
Justice

PART 10

MEGHAN BEARD, INC.

INDEX NO. 107626/09

AINA FADINA,
ETAL.

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for CPLR §3212

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
OCT 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: Oct 8 2009

J. GISCHE
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----x
Megan Beard, Inc. d/b/a
Decorum Model Management,

Plaintiff (s),
-against-

Aina Fadina and Muse Management, Inc.,

Defendant (s).
-----x

DECISION/ORDER

Index No.: 107626-2009
Seq. No.: 002

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
Defs' OSC w/AF affid, exhs	1
Pltf's opp w/ MB, KK, EP, PF, EO, affids, exhs	2
Defs' reply w/CMC affirm, AF affid, EW affid (sep back) exhs	3,4
Steno record 9/3/09	5

FILED
OCT 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

This is an action by plaintiff, a model management agency ("Decorum") against Aina Fadina, a free lance model formerly associated with Decorum. Defendant Muse Management, Inc. ("Muse"), is Ms. Fadina's current model management agency. Among other claims, Decorum contends Muse has tortiously interfered with plaintiff's business relationship with Ms. Fadina. The court has before it defendants' preanswer motion to dismiss the complaint for failure to state a cause of action. A separate branch of Ms. Fadina's motion is for an accounting of fees she claims she earned while associated with Decorum that the plaintiff has not turned over to her. Plaintiff opposes the motion in all respects.

On a motion to dismiss pursuant to CPLR § 3211 *et al*, the pleading is to be

afforded a liberal construction and the facts as alleged in the complaint must be accepted by the court as true, and are to be accorded every favorable inference. Leon v. Martinez, 84 NY2d 83 (1994); Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st Dept. 1997). In deciding defendants' motion to dismiss, the court will consider whether, accepting all of the plaintiff's facts, they support the causes of action asserted. Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 (1976).

Facts in the complaint and arguments presented

Decorum states the following facts in its complaint and the sworn affidavits of submitted by the plaintiff to sharpen the claims (Leon v Martinez, 84 NY2d 83, 88 [1994]):

Plaintiff is a corporation doing business as "Decorum Model Management." It is a modeling agency that provides a number of services. Not only does it introduce models to their clients, it also provides counseling services, helps build their portfolios, provides grooming advice, and all around network of support. For these services, Decorum charges a 20% fee to the client and also receives a commission of 20% from the model.

Ms. Fadina began her association with Decorum in August 2006 as a freelance model. The agency did not have a written contract with Ms. Fadina, which is a typical business arrangement for Decorum. Only some of their models have written contracts. Meghan Beard ("Ms. Beard"), plaintiff's principal, met with Ms. Fadina and outlined the agency's policy to her. She explained to Ms. Fadina that although she is a freelance model, and can leave at any time, once she is introduced to and hired to work for a particular company or "client" through Decorum, the model cannot work freelance for that

fees (20%). The rest of the money was put into escrow. The other company (Oscar De La Renta), however, cancelled its booking through Decorum and rebooked with Muse. Ms. Fadina appeared as Oscar De La Renta's model and the company paid the fees charged for her appearance to Muse. Oscar De La Renta did not pay Decorum a fee.

Plaintiff contends its oral agreement with Ms. Fadina is standard within the modeling industry. According to Ms. Beard's affidavit, Ms. Fadina was free to terminate her contract with plaintiff, but not allowed to take Decorum clients with her to another agency or work with them on a freelance basis without Decorum's permission.

Based upon these facts, Decorum has asserted claims for a permanent injunction, enjoining Ms. Fadina from working with the 13 clients identified in the complaint which Decorum claims were introduced by plaintiff to Ms. Fadina (1st cause of action). Plaintiff also seeks a permanent injunction against Muse contacting those 13 clients on behalf of Ms. Fadina (2nd cause of action). Decorum's has asserted a claim for breach of contract based on Ms. Fadina's failure to honor her modeling commitments with two Decorum clients (Akris and Oscar De La Renta) (3rd cause of action). Plaintiff alleges that Muse has engaged in "tortious interference" because one of Decorum's clients cancelled a booking it had through plaintiff, and also because Muse induced Ms. Fadina to leave Decorum and join Muse (4th cause of action). Plaintiff alleges that Muse has unfairly competed with Decorum (5th cause of action) and that Ms. Fadina has been unjustly enriched at plaintiff's expense (6th cause of action). Decorum also seeks to have the defendants held financially responsible for its legal expenses in connection with this litigation (7th cause of action).

Decorum contends that monetary damages are an inadequate remedy because

plaintiff made a long term investment in Ms. Fadina and Decorum will, therefore continue to suffer irreparable harm for however long Ms. Fadina models for the clients it introduced her to. Plaintiff further alleges that as long as Ms. Fadina models for these clients, and she is available to them, the clients have no reason to seek a replacement model through Decorum.

In support of its motion to dismiss, defendants first argue that since there is no valid and enforceable contract between Ms. Fadina and Decorum, all of plaintiff's claims must fail because they are all premised on the existence of such a contract. Thus, there is no basis for a permanent injunction, enjoining Ms. Fadina from working with the 13 clients identified in the complaint, or Muse from contacting those clients on Ms. Fadina's behalf. Nor is there any factual basis for Decorum's breach of contract or tortious interference with business relationships claim. Ms. Fadina claims that Akris and Oscar De La Renta are clients she worked for before meeting Ms. Beard or becoming associated with Decorum. In any event, the defendants argue that these companies are not Decorum's "clients" in any sense, but simply companies that are always looking for models to showcase their designs, and none of the companies are beholden to Decorum.

Defendant Muse denies they caused any of Decorum's clients to cancel their contract with plaintiff or that Muse has unfairly competed with Decorum for those clients. Defendants deny that they have been unjustly enriched at plaintiff's expense. Ms Fadina argues that if any money is owed it is to her by plaintiff because she has unpaid modeling fees. The defendants deny they have to pay for plaintiff's legal fees because there is no statutory or contractual basis requiring them to do so.

Discussion

The first issue is whether the agreement alleged violates the Statute of Frauds because it is oral, not written. GOL § 5-701 (a) (1). Since the agreement was capable of being fully performed and fully computed within one year of being made, the statute of frauds argument raised by defendants is not a basis to dismiss plaintiff's complaint.

Shirley Polykoff Advertising, Inc. v. Houbigant, Inc., 43 N.Y.2d 921(1978).

The court also considers whether the agreement alleged is for an "oral finder's fees." Such fees are barred by the Statute of Frauds. GOL § 5-701 (a) (10); Stone Capital Advisors, LLC v. For trend International, 15 AD3d 300 (1st Dept 2005). In relevant part, GOL § 5-701 (a) (10) provides as follows:

"a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman."

The services described by Ms. Beard included "introducing" models to prospective clients, for which Decorum is paid a fee. However, Decorum did more than just match up models to clients. It also counseled its models and provided general advice about grooming, portfolio development and image branding. Allowing the complaint its most liberal construction, the oral agreement alleged by plaintiff is more than simply "procuring

an introduction to a party.” Although companies and Ms Fadina remunerated Decorum for matching them up, Decorum’s services are more like an informal management or representation agreement. This liberal construction, however, is unavailing and does not save this complaint from being dismissed for the reasons that follow.

Decorum is seeking injunctive relief against both defendants. Plaintiff does not want Ms. Fadina modeling for any client that it helped Ms Fadina book and Decorum does not want Muse booking those clients for Ms. Fadina either. Decorum has not, however, pled facts that support a cause of action for injunctive relief against either defendant. Ms. Fadina does not have a written contract with Decorum. It is black letter law that to be enforceable, a non-competition agreement must be express; it cannot be implied. American Broadcasting Companies, Inc. v. Wolf, 52 N.Y.2d 394, 406 (1981). Thus, in the absence of a valid contract restricting her from doing so, Ms. Fadina is free to work for whomever she likes. Russell-Stewart, Inc. v. Birkett, 24 Misc.2d 528 (N.Y.Sup., 1960). Furthermore, a restrictive covenant must be reasonable as to time and area. BBDO Seidman v. Hirshberg, 93 NY2d 382 (1999); Gelder Medical Group v. Webber, 41 NY2d 680 (1977); North Shore Hematology/Oncology v. Zevros, 278 AD2d 210 (2nd Dept 2000); Zelner v. Conrad, 183 AD2d 250 (2nd Dept 1992). The argument plaintiff presents is that Ms. Fadina should be permanently enjoined from working with the companies enumerated in the complaint because they are plaintiff’s clients and the product of Ms. Beard’s personal investment of time. This kind of broad, sweeping agreement is not reasonable on its face and even if it were a valid contract, plaintiff has not presented any facts that Ms. Fadina’s services are so unique and irreplaceable that

she should be permanently enjoined from working for the clients they have enumerated in the complaint. Russell-Stewart, Inc. v. Birkett, *supra*. Nor is plaintiff's argument availing, that it will suffer irreparable damages because Ms. Fadina is now associated with Muse. The damages described could be compensated through an award of monetary damages.

While it may be standard industry practice for models not to work with clients that Decorum introduces them to, unless Decorum gives them permission to do so, this "code" of conduct is not binding, it is not a contract, it is not a non-competition agreement, and therefore, does not warrant the relief sought which is an injunction against the defendants. Accordingly, defendants motion for the dismissal of the claims against them for a permanent injunction (1st and 2nd causes of action) is granted and those claims are dismissed.

Although plaintiff claims that Muse has engaged in "tortious interference," without delineating whether this is with a contract or business relationship, the facts recited in the complaint do not support neither claim. In order to establish a cause of action for tortious interference with contractual relations, plaintiff must plead facts tending to show: (1) the existence of a valid contract between itself and a third party, (2) defendant had knowledge of that contract; (3) defendant must have induced the third party to breach the contract; and (4) damages resulting from the breach. Click Model Management, Inc. v. Williams, 167 AD2d 279 (1st Dept 1990). To properly state a tortious interference with business relationship cause of action, the plaintiff must assert facts that the defendant interfered with the plaintiff's business relationships either with the sole purpose of

harming the plaintiff, or by means that were unlawful or improper. 71 Pierrepont Associates v. 71 Pierrepont Corp., 243 A.D.2d 625 (2nd Dept 1997).

Ms. Fadina was a free lance model and did not have a written contract with Decorum. Ms. Beard acknowledges that Ms. Fadina was free to end her relationship with Decorum at any time and for any reason; nothing bound her to work for Decorum. Ms. Fadina voluntarily ended her association with plaintiff in April 2009; she was not induced or forced to do so by Muse or any one else. Click Model Management, Inc. v. Williams, supra. Since there is no enforceable contract between Ms. Fadina and Decorum for Muse to have interfered with, nor was Ms. Fadina induced to leave plaintiff, but decided to do so of her own accord, two essential elements of plaintiff's tortious interference with business claim are missing.

Although Decorum alleges that at least one client (Oscar De La Renta) decided to cancel a booking with Decorum once Ms. Fadina left, there are no facts pled by plaintiff tending to show that Muse induced the client to leave, solely to harm the plaintiff, or that Muse used any unlawful or improper means to get the client to leave Decorum. Evidently Decorum's clients liked working with Ms. Fadina; so much so that they left Decorum and followed the model to Muse. Accepting plaintiff's facts, that Muse pestered Oscar De La Renta about the booking with Ms. Fadina, there is nothing improper or unlawful about the actions alleged. Moreover, there are no facts presented that the companies enumerated in the complaint were contractually obligated to use Decorum or could not use a different agency for their modeling talent. Bryce v. Wilde, 39 AD2d 291 *aff'd* 31 NY2d 882 (1972). Accordingly, defendants motion for the

because they are based upon the same facts as the breach of contract cause of action, and are therefore redundant. A simple breach of contract claim may not be considered a tort unless a legal duty independent of the contract, that is, arising out of circumstances extraneous to, and not constituting elements of, the contract itself, has been violated. Brown v. Brown, 12 AD3d 176, 176 (1st Dept 2004) (citing Clark-Fitzpatrick Inc. v. LIRR, 70 NY2d 382, 389 [1987]).

On the basis of quasi-contract, plaintiff claims that the defendants were unjustly enriched. The principle of unjust enrichment applies to a situation where someone has received the money or goods of another which is inequitable or against good conscience for him or her to retain. Miller v. Schloss, 218 NY 400, 407 (1916). The remedy for unjust enrichment is restitution, which is essentially returning the money or property unjustly conferred. For reasons that have been addressed in this decision, plaintiff has not pled facts tending to show that Muse or Ms. Fadina received money (i.e. commissions, fees, etc.) that the defendants did not earn. Plaintiff and defendants resolved their disagreement about the Akris fees and Oscar De La Renta decided to cancel its booking through Decorum and book with Muse instead. Thus, neither defendant received money belonging to Decorum that it cannot retain. Defendants' motion for the dismissal of the 6th cause of action is hereby granted and it is hereby dismissed.

There being no valid and enforceable contract requiring either defendant to pay for plaintiff's legal expenses, plaintiff has not stated a claim for legal fees against either defendant. Chapel v. Mitchell, 85 NY2d 345 (1994). Plaintiff is responsible for its own

legal fees in connection with this action. Accordingly, plaintiff's 7th cause of action for legal fees is hereby dismissed.

Although this motion is brought preanswer, Ms. Fadina nonetheless requests an accounting of the fees she claims she earned while she was still associated with Decorum. According to Ms. Fadina, she is owed more than \$36,000. Since the court has dismissed each cause of action in the complaint, and this motion was brought before issue was joined, the relief Ms. Fadina seeks is not the subject of a pleading, and therefore not before the court to decide. The court denies this branch of defendants' motion without prejudice to the defendants commencing a new action for the adjudication of those claims.

Conclusion

Defendants' motion to dismiss the complaint is granted. The entire complaint is dismissed. Defendants' motion for an accounting of fee owed to Ms. Fadina is denied, without prejudice. The Clerk shall enter a judgment of dismissal in favor of Defendants against the Plaintiff.

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
 October 8, 2009

So Ordered:

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

FILED
OCT 15 2009
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NEW YORK