

Gilbertson v Johnson

2009 NY Slip Op 32875(U)

December 3, 2009

Supreme Court, New York County

Docket Number: 106464-2008

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB PART 15
Justice

STEVEN E. GILBERTSON INDEX NO. 106464/08

Plaintiff,

-v-

GORDON K. JOHNSON MOTION DATE _____
MOTION SEQ. NO. 001

Defendant.

MOTION CAL. NO. _____

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

	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 is decided in accordance with the underlying memorandum decision.

FILED
DEC 09 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/3/09 W
WALTER B. TOLUB, 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: IAS PART 15

----- X

STEVEN E. GILBERTSON,

Plaintiff,

- against-

GORDON K. JOHNSON,

Defendant.

----- X

WALTER B. TOLUB, J.S.C.:

Index No. 106464-2008

DECISION AND ORDER
Mtn. Seq. 001

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

This is defendant's motion for partial summary judgment dismissing plaintiff's causes of action for breach of contract, unjust enrichment and money owed. Plaintiff cross-moves for an order dismissing defendants counterclaims for the wrongful retention of \$109,911.44.

Facts

Plaintiff commenced the underlying action to recover \$61,963.56, claiming that it is the remaining amount owed under an agreement it entered into with the defendant for consulting fees.

Plaintiff was hired by W. L. Hambrecht & Co. (Hambrecht) in 2004 as an associate investment banker in Hambrecht's Healthcare Banking Group.

Defendant was the managing director of the Healthcare Banking Group and supervised the plaintiff.

On or about May 2006, Ortek Therapeutics, Inc. (Ortek) hired Hambrecht to act as its financial advisor in connection with an investment banking transaction (Ortek transaction). Both Mr. Johnson and Mr. Gilbertson worked extensively on the Ortek transaction while employed by Hambrecht.

In May 2007, Hambrecht discontinued the Healthcare Banking Group. Mr. Gilbertson's job was abolished effective May 21, 2007. Mr. Johnson continued to perform services for Hambrecht pursuant to a consulting agreement (the consulting agreement), dated May 30, 2007 (Ex. D to Mov. Aff.).

The consulting agreement provided that Hambrecht would pay Mr. Johnson a percentage of fees that it had not yet collected related to transactions on which Mr. Johnson had worked while employed by Hambrecht, in the event that the deals closed.

Mr. Johnson then asked Mr. Gilbertson to assist him by continuing to work on certain transactions with him, including the Ortek transaction and the parties exchanged proposals (Defendant's Exs. F and I). One of the proposals provide that the defendant would be paid 12.5% of the gross fee received by Hambrecht for the Ortek transaction (Defendant's Ex. I ¶3).

On August 7, 2007, Mr. Johnson sent Mr. Gilbertson a check for \$109,911.44, which Mr. Gilbertson states is 12.5% of the net fee that Mr. Johnson received from Hambrecht in connection with the Ortek transaction. How the net fee was calculated is not stated in the record.

Mr. Gilbertson contends that Mr. Johnson agreed to pay him 12.5% of the gross fee, or an additional \$61,963.56, as his share of the payment to Mr. Johnson from Hambrecht.

Mr. Johnson now seeks an order dismissing the first three causes of action in the verified complaint, which sound, respectively, in breach of contract, unjust enrichment, and monies owed. The fourth cause of action, against which no motion is made, sounds in quantum meruit.

Mr. Gilbertson cross-moves for summary judgment dismissing Mr. Johnson's three counterclaims. The first counterclaim seeks return of the \$109,911.44, on the ground that Gilbertson did not perform the services required to entitle him to payment, and had accepted full-time employment at the time of the Ortek closing. The second counterclaim is for unjust enrichment. The third counterclaim alleges that the services Mr. Gilbertson performed in connection with the Ortek transaction after leaving Hambrecht had negligible value under a quantum meruit assessment.

Both motions are denied in their entirety.

Discussion

The primary issue is whether Mr. Johnson has submitted sufficient evidence, in admissible form, to establish as a matter of law that there was no oral agreement between himself and Mr. Gilbertson to pay a part of the payment from Hambrecht to Mr. Gilbertson. There is no fully executed written agreement, but there are written proposals, and a counter-proposal.

Mr. Johnson argues that, from the beginning of their discussions, Mr. Gilbertson insisted that any agreement they entered into must be in writing. He argues that there was never a meeting of the minds as to the amount he would pay Mr. Gilbertson, that no written agreement was ever executed, and therefore, that no enforceable agreement exists.

Mr. Johnson argues that Mr. Gilbertson was only entitled to a small payment measured in quantum meruit for the value of Mr. Gilbertson's services in connection with the Ortek transaction after leaving Hambrecht, and states that he voluntarily made the payment out of concern for Mr. Gilbertson, who was unemployed and his wife had just given birth to twins. Mr. Johnson also argues that Gilbertson's assertion of a claim for quantum meruit is inconsistent with the assertion of a breach of contract claim.

In support of his motion for summary judgment, Mr. Johnson submits his own affidavit, Gilbertson's deposition testimony, and the correspondence between himself and Mr. Gilbertson relating to sharing the Ortek fee.

By e-mail dated May 22, 2007, Johnson wrote to Gilbertson:

[a]s we just discussed, I will pay you the following amounts for your assistance on completing/closing the following investment banking assignments/transactions:

* * *

Ortek advisory: \$75,000, subject to WRH & Co. receiving a \$1,000,000 payment from Ortek for our services and WRH & Co. paying me my consulting fees less all withheld expenses as determined by WRH & Co.

* * *

Please let me know if you have any questions about this compensation proposal

(Ex. F to Mov. Aff.).

By e-mail dated May 23, 2007, sent as of 12:15 p.m. (Ex. G to Mov. Aff.), Mr. Johnson wrote to Mr. Gilbertson, proposing that he pay 10% of the gross fee received by Hambrecht from Ortek, conditioned upon Mr. Johnson's receipt of his related consulting fee.

Then, by letter dated May 23, 2007, Mr. Johnson wrote to Gilbertson: "as we discussed, I will pay you ... [a] fee of 12.5%

of the gross fee ... paid to [Hambrecht] by Ortek" (ex. H to mov. aff.).

Mr. Gilbertson returned a copy of the May 23, 2007 letter to Mr. Johnson with proposed changes, including an arbitration clause, as well as a provision requiring Mr. Johnson to negotiate in good faith with Gilbertson to agree upon a payment in the event that Hambrecht does not pay Mr. Johnson his consulting fee and to submit the matter to arbitration if they cannot agree.

After Mr. Gilbertson sent the draft letter agreement back to Mr. Johnson with the changes stated above, Johnson informed Gilbertson that he had sent it to his lawyer for review (Ex. J to Mov. Aff.).

No further written communications have been submitted.

Mr. Johnson states that he had no intention of signing the counter-proposal because the new terms were unacceptable, and that he had no further negotiations with Gilbertson. Yet, Mr. Johnson paid Mr. Gilbertson \$109,911.44, after negotiations on the letter agreement had ended, and after Mr. Gilbertson had secured full-time employment.

Mr. Gilbertson testified at his deposition that Mr. Johnson confirmed to him that the letter agreement was their agreement, and that Mr. Johnson would pay him according to that agreement,

but that he could not sign it because his lawyer advised him that signing it might violate his agreement with Hambrecht (Tr. pp. 39-40). Mr. Gilbertson also testified that he requested a written agreement to be signed by Mr. Johnson, so that Johnson "couldn't back out of the agreement" (Ex. E to Mov. Aff., Tr. pp. 74).

Mr. Johnson has not demonstrated his entitlement to judgment as a matter of law (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Based on the documentary evidence and in light of the payment to Mr. Gilbertson, an issue of fact is presented both as to the existence and terms of any agreement. Mr. Johnson fails to present sufficient evidence to establish, as a matter of law, that Mr. Gilbertson intended that a writing be executed as a condition of formation. Indeed, such a position would be illogical where the entire obligation of performance rested upon Mr. Johnson.

There is no merit to Mr. Johnson's contention that Mr. Gilbertson may not plead the existence of a contract, and also plead a cause of action for quantum meruit, in the alternative. Where "there is a bona fide dispute as to the existence of a contract, a plaintiff may proceed alternatively upon quasi-contractual theories" (*Halliwell v Gordon*, 61 AD3d 932, 934 [2d

Dept 2009]; see *Ellis v Abbey & Ellis*, 294 AD2d 168, 170 [1st Dept 2002]).

Mr. Gilbertson has not demonstrated his entitlement to judgment as a matter of law dismissing the counterclaims.

It cannot be determined on this record whether the obligation underlying the payment by Mr. Johnson to Mr. Gilbertson was pursuant to an enforceable oral contract, and if so, what the terms of that contract are.

Accordingly, it is

ORDERED that defendant Gordon K. Johnson's motion for partial summary judgment dismissing the first, second and third causes of action in the verified complaint is denied; and it is further

ORDERED that plaintiff Steven E. Gilbertson's cross motion for summary judgment dismissing defendant's counterclaims is denied.

Counsel for the parties are directed to appear as scheduled on December 4, 2009 at 11:00 AM in room 335 for a Pre-Trial conference.

This constitutes the decision and order of the Court.

Dated: 12/13/09

ENTER:

FILED
DEC 09 2009
NEW YORK
COUNTY CLERK'S OFFICE

W

Walter B. Tolub J.S.C.