

Bedrick v O'Day

2010 NY Slip Op 31362(U)

May 27, 2010

Sup Ct, NY County

Docket Number: 600135/09

Judge: Eileen A. Rakower

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5-28-10

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. EILEEN A. RAKOWER

PART 15

Index Number : 600135/2009

BEDRICK, CLIFFORD

vs
O'DAY, JAMES P.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO.

60013519

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following 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

1, 2
~~2, 3, 4~~
5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

MAY 28 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: _____

5/27/10

HON. EILEEN A. RAKOWER

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 15

-----X
CLIFFORD BEDRICK,

Plaintiff,

Index No.600135/09

Seq No.: 001

- against -

Decision and Order

JAMES P. O'DAY, C.P.A., P.C., PRO TAX OF
NEW YORK, INC., JAMES P. O'DAY and FRANCES
J. O'DAY,

Defendants.

HON. EILEEN A. RAKOWER

FILED
MAY 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff brings this action for breach of contract¹ and tortious interference², arising out of a contract entered into with defendant James P. O' Day, C.P.A., P.C. (the P.C.") on December 12, 2007, for the sale of plaintiff's tax preparation business ("the agreement"). In his second cause of action, plaintiff also seeks an accounting "as to the services performed . . . for former clients . . . and the amounts paid by the former clients . . . so as to determine the additional sums due and owing to him." The P.C. brings counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing. Defendants James P. O' Day, C.P.A., P.C., Pro Tax of New York, Inc.³ ("Pro Tax"), James P. O' Day and Frances J. O' Day, brother of James P. O' Day and an independent contractor who prepared tax returns for Pro Tax, ("defendants") now move for summary judgment pursuant to CPLR 3212, dismissing plaintiff's complaint. Plaintiff opposes.

Pursuant to the terms of the agreement, the P.C. was granted access to all of

¹First Cause of Action

²Third Cause of Action

³ The corporation which was set up for the newly acquired tax business, and is allegedly owned by James O' Day and Frances O' Day.

plaintiff's clients' files⁴, the right to use plaintiff's cooperative unit located at 288 Lexington Avenue every weekday between January 15, 2008 and April 15, 2008, and on designated days thereafter, the right to retain plaintiff's employees at the rate of \$25.00 an hour, access to the office equipment and tax software, and the right to use an email address connected with the business. Plaintiff agreed to "provide his services to [the P.C.] in connection with the transfer of [plaintiff's] business (e.g. client introduction, consulting) at the rate of \$25.00 per hour . . ."

The purchase price was to be paid as follows:

- (a) \$50,000 by bank or certified check upon execution of this Contract;
- (b) a sum equal to the product of (1) 1/3 of (2) the excess of (x) the 2007 Fees collected on or before April 15, 2008; over (y) \$50,000.00, shall be paid to [plaintiff] on April 15, 2008;
- (c) a sum equal to the product of (1) 1/3 of (2) the excess of (x) the 2007 Fees collected on or before October 15, 2008; over (y) \$50,000 shall be paid to [plaintiff] on October 15, 2008;
- (d) a sum equal to the product of (1) 1/3 of (2) the excess of (x) the 2007 Fees collected on or before December 15, 2008; over (y) \$50,000.00 shall be paid to [plaintiff] on December 15, 2008; and
- (e) the balance of the Purchase Price shall be paid to Transferor on January 31, 2009.

In order to "back up" the payments, plaintiff was entitled to examine the client records so that he could be assured that he was receiving adequate payments.

Defendants, in support of their motion, submit: the pleadings; a copy of the agreement; a copy of a check made out to plaintiff; a list of accounts from 2007 to 2008; the deposition transcript of plaintiff; the deposition transcript of James O' Day; and the deposition transcript of Francis O' Day. Defendants assert that plaintiff cannot maintain his breach of contract claim because he did not "perform under the purchase/sale agreement because he prepared tax returns in violation of the agreement." Defendants point to Section (10) of the agreement which states:

[Plaintiff] agrees not to engage in the tax preparation business for a

⁴There were nearly 500 clients transferred.

period of thirty six (36) months. Except as set forth in the immediately preceding sentence, [plaintiff] may engage in any business pursuit and shall not be restricted temporally or geographically in connection therewith.

Defendants claim that the above non-compete clause was prepared by plaintiff's attorney, without any input from the P.C. .Between May 2008 through August 2009, defendants claim that plaintiff has prepared at least "sixty (60) tax returns⁵ for his former individual and corporate clients and had been paid at least \$17,130 for his services." After learning of plaintiff's alleged breach, the P.C. stopped making payments on the contract.⁶ Defendants also argue that the tortious interference cause of action should be dismissed because there is no evidence that a third party intentionally procured a breach of the agreement.

Plaintiff, in opposition, argues that although he performed under the agreements, defendants defaulted by not paying him and depriving him of records from which he could determine how much was owed to him pursuant to the payment schedule in the agreement. Plaintiff also contends that there is a question of fact as to whether the non-compete clause itself is invalid because it does not include a geographical limitation.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d

⁵Defendants provide a list of clients who plaintiff serviced. The list contains names of clients who plaintiff filed "amended" returns for. At his deposition, plaintiff testifies that he also prepared between 10 and 15 original returns.

⁶According to James O'Day's testimony, on April 15, 2008 the P.C. paid plaintiff approximately \$5,500.00. James O'Day testifies that plaintiff was dissatisfied with the amount.

249, 251-252 [1st Dept. 1989]).

The elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damages (*Noise in Attic Productions v. London Records*, 10AD3d 303 [1st Dept. 2004]). It is undisputed that there was formation of a contract between plaintiff and the P.C., that the P.C. failed to perform when it withheld payment, and that such failure resulted in damages to plaintiff. At issue then is whether plaintiff himself failed to perform under the contract by violating a valid non-compete clause.

Where a non-compete clause is inserted into a contract for a sale of a business, as opposed to an employment contract:

the courts will enforce an incidental covenant by the seller not to compete with the buyer after the sale . . . [t]his rule is grounded, most reasonably, on the premise that a buyer of a business should be permitted to restrict his seller's freedom of trade so as to prevent the latter from recapturing and utilizing, by his competition, the good will of the very business which he transferred for value . . . the sole limitation on the enforceability of such a restrictive covenant is that the restraint imposed be 'reasonable,' that is, not more extensive, in terms of time and space, than is reasonably necessary to the buyer for the protection of his legitimate interest in the enjoyment of the asset bought." (*Purchasing Associates, Inc. v. Weitz*, 13 NY2d 267,271[1963])

It is undisputed that plaintiff prepared tax returns for his former clients. However, plaintiff claims that he was not in breach of the non-compete clause because those clients contacted him out of dissatisfaction with defendants' services.⁷ Where, as here, a contract contains an express non-compete clause, there is not only a "duty to refrain from soliciting former customers, which arises upon the sale of the 'good will' of an established business . . . [but there is also] the separate duty to refrain from competing with the purchaser, which [arises] out of an express agreement." (*Mohawk Maintenance Co., Inc. v. Kessler*, 52 NY2d 276,282[1981])

⁷Plaintiff does not provide evidentiary support for this assertion.

A non-compete clause contained in a contract for the sale of a business is more likely to be considered reasonable because it is "designed to protect the goodwill integral to the business from usurpation by the former owner while at the same time allowing an owner to profit from the goodwill which he may have spent years creating." (*Reed, Roberts Associates, Inc. v. Strauman*, 40 NY2d 303,307[1976]) Such covenants are not subject to "exacting scrutiny." (*Ashland Management, Inc. v. Altair Investments NA, LLC*, 59 AD3d 97,112[1st Dept. 2008])

"Where an otherwise valid restrictive covenant does not contain a geographical limitation, the court may, if warranted by equity . . . interpret the clause in conformity with the intent of parties." (*Deborah Hope Doelker, Inc. v. Kestly*, 87 AD2d 763,764 [1st Dept. 1982]). The tax preparation business at issue is located in New York. "It is therefore reasonable to conclude that the agreement contemplated that [plaintiff] . . . would not engage in [the tax preparation business] within the same geographical area." (*Id.*)

"A party is not automatically excused from the future performance of contract obligations every time the other party commits a breach; if a breach is relatively minor and not of the essence, the plaintiff is still bound by the contract and may not abandon performance . . . [a] party is discharged from further performance . . . only when there is a material breach . . ." (*23 Williston on Contracts* [4th ed.], §63:3) Williston defines material breach as "a failure to do something so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract." (*Id.*) Generally, materiality of breach is not properly decided in a motion for summary judgment and should be a question left for trial unless "the contract itself is clear in making a certain event a material breach of [the] contract." (*23 Williston on Contracts* [4th ed.], §63:3). The subject agreement does not clearly state that a violation of the non-compete clause constitutes a material breach.

Turning now to plaintiff's third cause of action, in order to prove tortious interference, plaintiff must establish four elements: (1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff. (*Kronos Inc. v. ADX Corp.*, 81 AD2d 90[1993]). The interference referred to in the third element must be clearly intentional, not merely negligent or incidental to some other lawful purpose. (*Alvord & Swift v. Stewart M. Muller Const. Co., Inc.*, 46 NY2d 276[1978]).

Here, the contract is between plaintiff and the P.C.. Plaintiff alleges that James O' Day, in his personal capacity, Pro Tax and Frances O' Day tortiously interfered with the contract between him and the P.C. by "ensuring that [the P.C.] does not perform under the [a]greement." Initially, plaintiff's tortious interference claim as against James O'Day in his personal capacity must fail. "It is well established that only a stranger to a contract, such as a third party, can be liable for tortious interference." (*Koret, Inc. v. Christian Dior*, 161 AD2d 156,157[1st Dept. 1990]). James O' Day, sole shareholder of the P.C., was "no stranger" to the contract as he was the party who negotiated and executed the agreement, and, thus, had a right to "interfere with the contract . . . in order to protect [his] economic interests." (*Id.*)

The allegation of tortious interference then essentially remains only against Frances O' Day, in his personal capacity, and as against Pro Tax, to the extent that Frances O' Day is part owner of Pro Tax. James O' Day states at his deposition that no payments were made after April 2008, because he learned that "Mr. Bedrick violated the contract and was preparing tax returns." Frances O' Day testifies that he was not aware that his brother stopped making payments until a payment became due in October 2008, and that he thought that his brother and plaintiff were "in negotiation." Plaintiff fails to submit proof in admissible form which would establish that Frances O' Day and/or Pro Tax committed "an intentional tort . . . in the sense of an intention to harm plaintiff without economic or other lawful excuse or justification." (*Alvord* at 281).

Wherefore it is hereby

ORDERED that the motion for summary judgment is granted to the extent that the Third Cause of Action is hereby severed and dismissed; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: May 27, 2010

FILED
 MAY 28 2010
 NEW YORK
 COUNTY CLERK'S OFFICE



 EILEEN A. RAKOWER, J.S.C