SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

ROY NAZINITSKY,

Plaintiff,

INDEX No. 7037/10

MOTION DATE: July 15, 2010
Motion Sequence # 001

-against-

FAIRMONT INSURANCE BROKERS, LTD.,

Defendant.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X
Reply Affirmation X
Memorandum of Law..... X

Motion by defendant, Fairmont Insurance Brokers, Ltd., pursuant to CPLR 3212, for an Order granting it partial summary judgment dismissing plaintiff's complaint is **granted** in part and **denied** in part.

Plaintiff Roy Nazinitsky ("Nazinitsky" or "Plaintiff") brings this action against Fairmont Insurance Brokers, Ltd. ("Fairmont" or "Defendant") for defendant's alleged breach of contract and fraudulent misrepresentation.

Plaintiff was employed by Fairmont from 1993 to 2004. Fairmont operates an insurance brokerage business in Brooklyn, New York and primarily relies on salespersons,

known as associate producers to sell insurance to customers. Prior to commencing work at Fairmont, associate producers, including the plaintiff, were required to sign an Associate Producer Agreement ("APA"). In the summer of 1993, Nazinitsky and Fairmont entered into an APA. The APA provided that Nazinitsky would act as an independent contractor and, Fairmont would supply Nazinitsky with workspace, telephones, and copying equipment, but it would not control or supervise the hours or the manner of Nazinitsky's work. Additionally, the APA provided that Nazinitsky would receive forty percent of the "gross commission" received by Fairmont from the insurer upon the issuance of the policy.

The APA also included a Restrictive Covenant that prohibited Nazinitsky from engaging in competitive activities for a period of three years after his termination from Fairmont. Specifically, Nazinitsky was not permitted to solicit or accept renewal business from or otherwise deal with Fairmont customers, induce Fairmont customers to change coverage or open his own insurance brokerage business in Brooklyn. The APA also granted Nazinitsky the right to receive "additional compensation" based on his years of service and the volume of commissions retained by Fairmont.

Nazinitsky alleges that early in his tenure, Fairmont provided him with inadequate customer support. Although, initially, Nazinitsky worked in a public area among other associate producers, Fairmont later provided Nazinitsky with a private office in 1996 due in part to his high earnings. He was one of only two producers who had a private office at this time.

In or about 2001, Nazinitsky began to work at the Fairmont offices less frequently. He maintains that the decreased time in the office was due to the discrimination he experienced while at work, as well as the increasing difficulties he encountered at and traveling to Fairmont. First, Nazinitsky's computer broke and despite repeated requests, Fairmont never fixed it. Instead, they removed the broken computer from his office. Faced with the need for a functioning computer, Nazinitsky bought his own desktop computer. Thereafter, Nazinitsky spent more time working from home. Second, Nazinitsky asserts that he moved from Brooklyn to Long Island, which made it more difficult and time consuming to work at Fairmont's Brooklyn offices. Third, another employee affiliated with Fairmont began to use Nazinitsky's private office. The president of Fairmont, Moishe Mishkowitz ("Mishkowitz"), claims that because Nazinitsky was in the office less frequently and not producing at his former level, Nazinitsky was no longer entitled to the exclusive use of a private office. Fairmont later removed Nazinitsky's personal desk from the shared office and placed it in an adjacent Fairmont building. By 2002, Fairmont no longer provided Nazinitsky

with a private office and required Nazinitsky to share open desk space with the other producers. When Nazinitsky asked Mishkowitz where he should work, Nazinitsky recalls Mishkowitz responding "work at another desk." By this time, Nazinitsky was the only salesperson who did not have his own computer or his own desk.

In addition to his discrimination claims (advanced in the Federal Court, *infra*), Nazinitsky alleges that Fairmont engaged in improper business practices that, had he known about prior to his employment, would have negated his decision to work at Fairmont. Nazinitsky contends that Fairmont: (1) illegally allowed its unlicensed customer service representatives to sell insurance; (2) altered its "loss runs;" (3) extensively used wholesalers to place insurance as opposed to insurance companies; (4) failed to timely remit premiums; (5) improperly charged finance fees to its insureds; and (6) blocked the market.

By 2002, Nazinitsky's production began to decline and, as a result, he earned fewer commissions. During 2003, Nazinitsky only visited the office one or two days per week. He claims that his decreased attendance coincided with his denial of a specifically assigned workplace and the subsequent humiliation of not having his own office, desk and computer. In May 2004, Mishkowitz and another Fairmont principal met with Nazinitsky to discuss his declining production and offered options including "book-sharing" with another associate producer. Soon after, Nazinitsky sent a formal letter of resignation to Mishkowitz.

A few months after his resignation, Nazinitsky joined Grober-Imbey Agency ("Grober"). Fairmont commenced an action in the Supreme Court Kings County, alleging that Nazinitsky was soliciting Fairmont customers in breach of the APA's Restrictive Covenant. Fairmont sought injunctive relief, restraining violation of the restrictive covenant, which the Supreme Court granted. Nazinitsky denied that he breached the restrictive covenant and filed a counterclaim for fraud and breach of contract, alleging that Fairmont failed to pay commissions owed to him before and after his resignation. In 2005, the parties agreed to dismiss the action without prejudice.

Subsequent to the dismissal, Fairmont paid Nazinitsky $25,000 in lost commissions and asserted that Nazinitsky forfeited his rights to any additional compensation due to his breach of the restrictive covenant. Nazinitsky insists that this payment is insufficient as Fairmont owes him commissions totaling $200,000. Fairmont maintains that $25,000 is more than adequate, that Nazinitsky was entitled to only $24,010 and that, in return, Nazinitsky owes Fairmont $16,800 for lost commissions due to his breach of the restrictive covenant.

On May 11, 2005, Nazinitsky filed a charge of discrimination with the New York State Division of Human Rights, and was issued a Right to Sue Letter on July 17, 2006. Meanwhile on June 7, 2006, Nazinitsky commenced an action against Fairmont in this court asserting the same breach of contract and misrepresentation claims which are asserted in the present action. Nazinitsky also commenced an action in the United States District Court for the Eastern District of New York, alleging that he was the victim of discrimination on the basis of his lack of religiosity and that the defendant treated him disparately. Thereafter, the parties agreed to consolidate the two cases. After the Eastern District complaint was amended to encompass the state court common law claims, the action in this Court was discontinued without prejudice. The Eastern District ultimately granted summary judgment to Fairmont dismissing plaintiff's discrimination claims and declined to exercise pendent jurisdiction over the state common law claims. The state law claims were remanded back to this Court.

This action, asserting the breach of contract and fraudulent misrepresentation claims which the federal court declined to entertain, was filed in April 2010. In its answer, Fairmont, asserts five counterclaims: (1) breach of the Associate Producer Agreement (APA) - restrictive covenant; (2) breach of fiduciary duties; (3) tortious interference with contract; (4) misappropriation of trade secrets; and (5) unfair competition.

Upon the instant motion, Fairmont seeks summary judgment dismissing plaintiff's complaint. Fairmont does not seek summary judgment with respect to its counterclaims.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v. Prospect Hosp.***, 68 NY2d 320, 324 [1986]; ***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Id*).

Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (***Alvarez v. Prospect Hosp.***, supra at 324). The evidence presented by the opponent of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference (***Demishick v. Community Housing Management Corp.***, 34 AD3d 518, 521 [2nd Dept. 2006]; ***Secof v. Greens Condominium***, 158 AD2d 591 [2nd Dept. 1990]).

Breach of Contract Claims

Plaintiff's first and second causes of action allege respectively that Fairmont breached the APA by failing to pay all commissions due to him prior to his resignation of employment and following his resignation of employment.

Plaintiff's claims for breach of contract are premised upon the theory that Fairmont is obligated to compensate him for insurance which he placed pursuant to a formula set forth in the APA. Fairmont admittedly refused to pay Nazinitsky on the ground that Nazinitsky allegedly breached the non-compete provision of the APA by soliciting and/or servicing Fairmont customers after he joined Grober, a competing insurance brokerage. Plaintiff's alleged failure to abide by the terms of the restrictive covenant forms the basis of Fairmont's first counterclaim for breach of contract.

In a reply affirmation in support of its motion for summary judgment, Moishe Mishkowitz, Fairmont's president, states that plaintiff was paid a draw which exceeded the commissions which were due him. Mishkowitz further asserts that Fairmont was justified in reducing plaintiff's status with the company because of his "poor attitude" and work performance. Arguments advanced for the first time in reply papers are entitled to no consideration by a court entertaining a summary judgment motion (***Clearwater Realty Co v Hernandez***, 256 AD2d 100 [1st Dept 1998]). Accordingly, defendant's motion for summary judgment dismissing plaintiff's first and second causes of action sounding in breach of contract is **denied**.

Fraudulent Misrepresentation

In his third cause of action, plaintiff alleges that he was induced to enter into the APA based upon his reliance that the defendant would abide by the terms of the APA and not engage in improper business practices. Plaintiff maintains that had he known about these improper business practices prior to joining Fairmont and that Fairmont never intended to comply with the APA, he would never have invested his time, money and effort working for the company. In this cause of action, plaintiff asserts claims for both fraudulent and negligent misrepresentation.

To establish a prima facie case for fraud, plaintiff must prove that 1) defendant made a representation as to a material fact, 2) such representation was false, 3) defendant intended to deceive plaintiff, 4) plaintiff believed and justifiably relied upon the statement and was

induced by it to engage in a certain course of conduct, and 5) as a result of such reliance plaintiff sustained pecuniary loss (***Ross v. Louise Wise Services, Inc.***, 8 NY3d 478, 488 [2007]). Defendant has established prima facie that it did not make any false representations to plaintiff with regard to its not engaging in improper business practices. Plaintiff has failed to offer any evidence to show a triable issue of fact as to this issue. Plaintiff's claim of fraud with respect to defendant's abiding by the terms of the APA is duplicative of his breach of contract claim. Accordingly, defendant's motion for summary judgment dismissing the complaint is **granted** as to plaintiff's fraud claim.

"A cause of action based on negligent misrepresentation requires proof that a defendant had a duty to use reasonable care to impart correct information due to a special relationship existing between the parties, that the information was false, and that a plaintiff reasonably relied on the information" (***Fresh Direct, LLC v. Blue Martini Software, Inc.***, 7 AD3d 487, 489 [2nd Dept. 2004]; *see also* ***Kimmell v. Schaefer***, 89 NY2d 257, 263 [1996]). "This reliance must be justifiable, as a casual response given informally does not stand on the same legal footing as a deliberate representation for purposes of determining whether an action in negligence has been established" (***Kimmell v. Schaefer***, **supra** at 263). Moreover, "since a vast majority of commercial transactions are comprised of such casual statements and contacts" liability for negligent misrepresentation has been imposed in the commercial context only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified (***Kimmell v. Schaefer***, **supra**; *see also,* ***Murphy v. Kuhn***, 90 NY2d 266, 270 [1997]; ***Parisi v. Metroflag Polo, LLC***, 51 AD3d 424 [1st Dept. 2008]).

Initially, it is noted that plaintiff's misrepresentation claim must be dismissed on the grounds that it is time barred. It is well settled that the cause of action for negligent misrepresentation accrues on the date when the defendant makes the alleged misrepresentations upon which the plaintiff relies (***Fandy Corp. V. Lung-Fong Chen***, 262 AD2d 352 [2nd Dept. 1999]). In this case, there is no dispute that the parties entered into the APA in 1993, i.e., more than ten years before plaintiff commenced suit. Thus, it is clear that his third cause of action is time barred. Nazinitsky attempt to salvage his claim by arguing that he only discovered the basis for his claim - i.e., Fairmont's refusal to abide by the APA's terms and its allegedly improper business practices - within a short time before suit was filed, is futile. Plaintiff himself testified that he was aware of the various problems that allegedly plagued his tenure with Fairmont from the inception of - and early on during - his tenure. He also states that he had concluded that Fairmont was failing to perform as promised at the

inception of and throughout the entire 11 year relationship. Therefore, based upon the statute of limitations for fraudulent misrepresentations, plaintiff's third cause of action is time barred.

In addition to being time barred, plaintiff's third cause of action fails on the grounds that he has failed to demonstrate, *inter alia*, the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff (***J.A.O. Acquisition Corp. v. Stavitsky***, 8 NY3d 144, 148 [2007]; ***Parrott v. Coopers & Lybrand***, 95 NY2d 479, 484 [2000]). As stated above, in the commercial context, "liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (***Kimmell v. Schaefer***, **supra** at 263-264; ***Fresh Direct, LLC v. Blue Martini Software, Inc.***, **supra** at 489). A claim for negligent misrepresentation can proceed only when the defendant and plaintiff were parties to a special relationship that gave rise to a duty to give correct information and the defendant must have made a false representation that it knew to be incorrect. That representation "must be factual in nature and not promissory or relating to future events that might never come to fruition" (***Hydro Investors, Inc. v. Trafalgar Power, Inc.***, 227 F.3d 8, 33 [2nd Cir. 2000]; ***Sheth v. New York Life Ins. Co.***, 273 AD2d 72 [1st Dept. 2000]; ***Glanzer v. Shepard***, 233 NY 236, 242 [1922]).

In this case, a special relationship did not exist between Nazinitsky and Fairmont; their relationship was contractual. Special relationships are defined narrowly in New York (***Ossining Union Free Schl. Dist. v. Anderson LaRocca Anderson***, 73 NY2d 417, 424 [1989]; ***Skyes v. RFD Third Ave. 1 Assoc., LLC.***, 67 AD3d 162, 165 [1st Dept. 2009]). While the Federal Court held that the issue of whether Nazinitsky was an employee of the defendant or an independent contractor is an issue of fact, in either case, the relationship is not a special one of trust or confidence such that plaintiff's negligent misrepresentation claim could survive defendant's motion for summary judgment (*see e.g.*, ***Glanzer v. Kellin & Bloom LLC***, 281 AD2d 371 [1st Dept. 2001]).

Insofar as Nazinitsky's claim is based on misrepresentations made by Fairmont in the APA itself or in inducing the plaintiff to join Fairmont, even if timely, the claim is nonetheless barred by the well settled rule that a negligent misrepresentation claim lies only when, unlike here, "the requisite relationship between the parties must have existed prior to the transaction from which the alleged wrong emanated, and not as a result of it" (***Elghanian v. Harvey***, 249 AD2d 206 [1st Dept. 1998]; ***Emigrant Bank v. UBS Real Estate Solutions***,

Inc., 49 AD3d 382, 384-85 [1st Dept. 2008]). Defendant's motion for partial summary judgment dismissing the complaint is **granted** as to plaintiff's negligent misrepresentation claim.

This matter will proceed to trial on the plaintiff's first and second causes of action as well as the defendant's counterclaims.

This shall constitute the decision and order of this Court.

Dated AUG 12 2010

Stephen A. Bucaria
J.S.C.

ENTERED
AUG 16 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE