

**Sannon-Stamm Assoc., Inc. v Keefe, Bruyette &  
Woods, Inc.**

2010 NY Slip Op 32546(U)

September 17, 2010

Supreme Court, New York County

Docket Number: 106510/08

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON  
Justice

PART 55

Index Number : 106510/2008  
SANNON-STAMM ASSOCIATES, INC.  
VS.  
KEEFE, BRUYETTE & WOODS, INC.  
SEQUENCE NUMBER : 002  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE 5/16/10  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-5  
6-8

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 annexed memorandum decision and order.

N.B. -- a preliminary conference is scheduled for October 18, 2010 at 11 AM.

**FILED**  
SEP 20 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9/17/10

JANE S. SOLOMON  
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 55

----- X

SANNON-STAMM ASSOCIATES, INC.,

Plaintiff,

INDEX NO. 106510/08

-against-

KEEFE, BRUYETTE & WOODS, INC.,

Defendant.

**FILED**  
SEP 20 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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HON. JANE S. SOLOMON, J.:

Defendant moves for an order (i) pursuant to CPLR 3211(a)7 dismissing plaintiff's amended complaint, and/or (ii) pursuant to CPLR 3212 granting it summary judgment dismissing the amended complaint. Plaintiff cross-moves for an order pursuant to CPLR 3212(e) granting it partial summary judgment (i) adjudicating that defendant is liable to pay a placement fee to plaintiff in connection with defendant's hiring of Andrew Crossfield ("Crossfield"), and (ii) awarding plaintiff partial summary judgment in the principal sum of \$75,000 on its cause of action for an account stated.

Plaintiff is an executive search and recruitment firm which specializes in placement of candidates seeking employment in the financial services industry. Defendant is in the business of providing financial services. In this action plaintiff is seeking to recover the balance of its fee for introducing Crossfield to defendant.

Prior to this action, plaintiff sued defendant in the Civil Court to recover the alleged first of four \$25,000 installments of its fee. After issue was joined, plaintiff accepted defendant's offer to allow judgment to be taken against it pursuant to CPLR 3221. The judgment was entered and defendant paid plaintiff \$25,000 plus costs. Shortly thereafter, in May 2008, plaintiff commenced this action to recover the next two installments. Defendant moved to dismiss the complaint pursuant to CPLR 3211(a)(5) on the ground that plaintiff's claims, which were based on the same facts and asserted in the same causes of action as plaintiff's Civil Court complaint, were barred by the doctrine of *res judicata*. By decision and order dated December 4, 2008 this court granted the motion (see plaintiff's exhibit C). On Plaintiff's appeal, the First Department reversed on the ground that the doctrine of *res judicata* was not applicable because the issues relating to the non-payment of the subsequent installments of the placement fee had not matured when the Civil Court action was brought and consequently had never been litigated (see *Sannon-Stamm Associates, Inc. v Keefe, Bruyette & Woods, Inc.*, 68 AD3d 678 [1<sup>st</sup> Dept 2009]).

In February 2010 plaintiff served its amended complaint (the "complaint"). Issue was joined in March. The complaint (defendant's exhibit 1) alleges the following: prior to August 13, 2007 defendant gave plaintiff a nonexclusive listing to refer

candidates for employment to it; through a prior course of conduct defendant agreed that plaintiff's fee for any candidate hired as a result of plaintiff's referral would be 10% of the expected and annual gross billings of such candidate, payable at the rate of 25% upon hiring with the balance to be paid quarterly thereafter; Crossfield was hired by defendant as a result of plaintiff's referral and commenced his employment on August 13, 2007; Crossfield's annual gross billing was anticipated to be in excess of \$1 million; the initial payment of \$25,000 became due upon Crossfield being hired; the \$25,000 was paid by defendant pursuant to plaintiff's acceptance of defendant's offer of judgment in the Civil Court action; and, pursuant to the agreement between the parties, defendant owes the remaining three installment payments plus 10% of Crossfield's annual gross billings in excess of \$100,000 during the first year of his employment. The complaint, as with that in the Civil Court, asserts causes of action based on breach of contract, account stated, *quantum meruit*, and unjust enrichment.

Defendant argues that plaintiff's breach of contract claim cannot be sustained because the complaint fails to allege the existence of a written or oral contract and plaintiff's conclusory allegation that the parties engaged in a "prior course of conduct" is not factually supported. Defendant then argues that the undisputed facts demonstrate that no "prior course of

conduct" existed and that plaintiff was not the "procuring cause" of Crossfield's hiring. In this connection, defendant submits the affidavit of Katherine McGuire ("McGuire"), its Assistant Vice President of Payroll and Benefits, who avers that defendant "never hired anyone" referred to it by plaintiff during the period of January 2006 through March 2007. Defendant also submits Crossfield's affidavit in which he states that he began looking for potential employment in "early 2007," contacted plaintiff, and along with a colleague, Sheila McGrath ("McGrath"), was interviewed by defendant in March 2007. Crossfield was not hired by defendant for that position, and he took a job at a different firm in April 2007. Crossfield states that a few months later, he met with some of defendant's employees to see if any other opportunities had developed. He was subsequently hired by defendant and started work on August 13, 2007. Crossfield states that "[plaintiff] was not involved in any way with the discussions that led to my hiring by [defendant] in the summer of 2007" (Crossfield affidavit, ¶¶ 3-4, 7). Crossfield further states that he does not generate "gross billings" of any kind (*id.*, ¶ 8).<sup>1</sup>

Defendant next argues that plaintiff's cause of action based on an account stated cannot be sustained because it is

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<sup>1</sup> The fee claimed by plaintiff is based on Crossfield's "gross billings" (see complaint, exhibit 1 to defendant's motion, ¶ 5).

duplicative of plaintiff's breach of contract claim and "preposterous" in view of the fact that defendant's answer in the Civil Court action denied all liability for the first installment allegedly due under the parties' "agreement." Defendant then argues that plaintiff's *quantum meruit* and unjust enrichment claims fail as a matter of law because defendant did not receive any benefit from plaintiff's alleged acts. Defendant adds that "if [plaintiff] can recover for breach of contract - as discussed above, it cannot - the quantum meruit and unjust enrichment must be dismissed as duplicative" (see defendant's memorandum of law, 10).

In opposition to the first branch of defendant's motion plaintiff contends that the complaint asserts legally cognizable claims. In opposition to defendant's request for summary judgment plaintiff has submitted the affidavit of its president, Premeeta Janssens-Sannon ("Sannon"), who states that McGrath, who, along with Crossfield, was referred by plaintiff to defendant in March 2007, was hired by defendant in early April 2007 and defendant thereafter paid plaintiff's invoice "for the introduction and placement of Sheila McGrath" (see Sannon affidavit, ¶¶ 18-21). Sannon concludes by stating, in essence, that Crossfield's hiring by defendant is analogous to McGrath's (*id.*, ¶ 22).

In support of its cross-motion plaintiff argues that it

cannot be disputed that Crossfield's hiring resulted from plaintiff's referral because defendant requested referrals from plaintiff, defendant hired two of plaintiff's referrals (McGrath and Crossfield), and defendant paid plaintiff's invoice for McGrath and the first installment of plaintiff's advance fee for Crossfield. Next, plaintiff argues that it is entitled to summary judgment on the issue of liability because defendant conceded liability in the Civil Court action by allowing judgment to be taken against it and is now barred by the doctrine of *res judicata* from re-litigating its claim that it is not liable for plaintiff's fee. Plaintiff argues further that defendant's arguments in support of its prior motion to dismiss the first complaint in this action on the ground of *res judicata* constitute an informal judicial admission that a valid judgment exists in the Civil Court which precludes re-litigation of the liability issue at this time. Plaintiff concludes that it is entitled to partial summary judgment on its cause of action for an account stated because defendant received and retained plaintiff's two invoices totaling \$75,000 without objection. These invoices are dated April 2008 and June 2008 (plaintiff's exhibit I), i.e., five and seven months, respectively, after defendants had served an answer in the Civil Court Action denying liability in connection with the Crossfield hire.

A threshold question raised by the papers before the

court is whether defendant is precluded from contesting liability herein because it allowed a \$25,000 judgment by consent to be taken against it pursuant to CPLR 3221 in the Civil Court action where the validity of plaintiff's claim to the first installment of its fee was at issue. In *Card v Budini* (29 AD2d 35 [3d Dept 1967]), relied on by plaintiff, the Third Department held that there is no doubt that a prior judgment can be affirmatively used to establish a right of recovery and that there is no distinction between a consent judgment entered under CPLR 3221 and a judgment entered after trial (*id.*, at 38). Nevertheless, the Court's ruling in *Card*, which has been criticized,<sup>2</sup> does not warrant application of the doctrine of *res judicata* herein, as argued by plaintiff, or collateral estoppel.

The doctrine of *res judicata* provides that once a claim is brought to final conclusion, all other claims arising out of the same transaction or series of transactions are barred (see *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Collateral estoppel is an equitable doctrine which precludes a party from relitigating an issue previously decided against it (see *D'Arata v New York Central Mutual Fire Ins. Co.*, 76 NY2d 659, 664 [1990]). The court is constrained to conclude that neither doctrine applies because the First Department has already

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<sup>2</sup> See, e.g., Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3221:2.

for summary judgment the court is not to determine credibility, but whether a factual issue exists]). The credibility issues as well as the fundamental issue of whether Crossfield's contact with plaintiff resulted in his employment by defendant are for resolution at trial (see *Barrister Referrals, Ltd. v Windels, Marx, Davies & Ives, Esqs.*, 169 AD2d 622 [1<sup>st</sup> Dept 1991]).

Since plaintiff's claims arise from a contract, it will have the burden of proving at trial the existence of the contract, its terms, that it performed and that defendant breached its obligation to perform. The Appellate Division's determination that plaintiff's claim is not precluded by res judicata rested upon plaintiff's contention that defendant failed to pay agreed-upon installments of a referral fee, and that plaintiff's claim for the full fee had not yet matured when the Civil Court action was brought (68 AD3d at 678). Plaintiff's equitable claims for *quantum meruit* and unjust enrichment are viable only in the absence of an express agreement (*Clark-Fitzpatrick, Inc. v LIRR Co.*, 70 NY2d 382, 388 [1987]); they survive as potential alternative claims if the contract claim is dismissed on the ground that there was no contract.

Accordingly, it hereby is

ORDERED defendant's motion is granted to the extent that summary judgment dismissing the second cause of action (account stated) is granted, and the motion otherwise is denied;

and it further is

ORDERED that plaintiff's cross-motion is denied in its entirety; and it further is

ORDERED that counsel shall appear in Part 55, 60 Centre Street, Room 432, New York, NY for a preliminary conference on October 18, 2010 at 11 AM.

DATED: September 17, 2010

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**JANE S. SOLOMON**

**FILED**  
**SEP 20 2010**  
NEW YORK  
COUNTY CLERK'S OFFICE