

Columbo v AXA Network, LLC

2011 NY Slip Op 31627(U)

June 13, 2011

Supreme Court, Suffolk County

Docket Number: 9718-2009

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 10-14-2011
Motion Submit Date: 03-04-2011
Motion Sequence No.: 002 MG

FINAL
 NON FINAL

JOSEPH COLUMBO,

Plaintiff,

-against-

AXA NETWORK, LLC,
Defendant.
_____X

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FACTUAL AND PROCEDURAL BACKGROUND

On or about September 1, 1998, the Plaintiff, Joseph Colombo (“Plaintiff” or “Colombo”) entered into an agreement entitled “Agent’s 14th Edition Agreement” (“Agent Agreement”) with Defendant, AXA Network, LLC (“Defendant” or “AXA Network”), that authorized Plaintiff to offer life insurance and annuity products on behalf of AXA Equitable Life Insurance Company (“AXA Equitable”).

On October 24, 2002, Plaintiff and Defendant executed an amendment to the Agent Agreement (“Equity Letter”) concerning renewal compensation, collection charges,

service fees and asset based compensation. The Equity Letter provides, in relevant part:

“Both service fees and/or asset based compensation accrued by the Agent under the Agent Agreement are hereby vested provided, however, . . . (ii) if Agent’s persistency rate drops below 90%, AXA Network reserves the right in its sole discretion to assign a new servicing agent to any of the Agent’s remaining clients for which the Agent is acting as the servicing agent and the Agent’s entitlement to any service fees and/or asset based compensation shall terminate as of the effective date of such change . . .”

The parties understood “persistency rate” to be a percentage reflecting that portion of an agent’s book of business remaining in place at the end of a given year as compared to the beginning of that year.

On June 1, 2007, Plaintiff resigned from AXA, at which time the Agent Agreement terminated. However, the terms of the Equity Letter survived Plaintiff’s resignation.

On October 27, 2008, AXA Network informed Plaintiff in writing that his persistency rate of the eligible insurance policies and annuity contracts he serviced pursuant to the Equity Letter had fallen below 90% and that AXA had decided to exercise its right under the Equity Letter to reassign Plaintiff’s remaining policies and contracts. Plaintiff was further informed that no further service fees or asset based compensation would be due or payable to him on such policies or contracts.

Plaintiff commenced the instant action in 2009. Plaintiff’s Verified Complaint alleges that after he resigned, AXA Network denied his request for access to files maintained in connection with clients originated and serviced by Plaintiff prior to his resignation, in an effort to cause Plaintiff’s persistency rate to fall below 90% and terminate his entitlement to any service fees and/or asset based compensation pursuant to the Equity Letter. Further, Plaintiff alleges that some time between June 1, 2007 and August 1, 2008, AXA Network instructed and/or permitted other AXA Network agents to access Plaintiff’s book of business and solicit his clients; that AXA Network ceased paying Plaintiff renewal compensation pursuant to the Equity Letter, as of August 1, 2008, without notice or justification; that AXA Network assigned new servicing agents

to Plaintiff's clients and directed those agents to falsely represent to Plaintiff's clients that Plaintiff was no longer interested in servicing their accounts and/or that Plaintiff was no longer active in the life insurance and annuity business. Based upon the foregoing factual allegations, Plaintiff asserts causes of action against Defendant for breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with business relations, and a permanent injunction.

Defendant now moves for summary judgment dismissing Plaintiff's Complaint. In support of the its motion, Defendant submits, among other things, excerpts of the sworn deposition testimony of Plaintiff's daughter, Melissa Colombo. Ms. Colombo testified that during the first week of May 2007, at Plaintiff's request, she went to the AXA Network office in Lake Success with Plaintiff and copied the most recent quotes from client files for several hours. Two or three days later, Ms. Colombo returned to the AXA Network office, this time with her boyfriend, and she again copied the most recent quotes from client files for several hours at Plaintiff's instruction. On the first two days, Ms. Colombo copied more than 10 but less than 100 files on each day. Ms. Colombo returned the next day and copied recent quotes from client files for several hours at Plaintiff's request. Again, she copied material from more than 10 but less than 100 files on the third day. She returned the next week for a fourth day and made copies of the same type of information from approximately 100 files. Later that week, she returned to the office on a fifth occasion and copied more information from client files at Plaintiff's request. However, that day she was asked to stop copying and leave by Joe Irving of AXA. Plaintiff testified at his deposition that he brought his daughter and her boyfriend to the office to copy client quotes and pertinent information within a week or two prior to his resignation. Plaintiff further testified that there were no other occasions when he had sought to make copies of files but was denied access.

With regard to Plaintiff's allegation that AXA Network instructed or permitted its agents to contact and solicit clients that were assigned to Plaintiff for servicing, Defendant submits an affidavit from Joseph Irving, Branch Operations Manager for the Long Island Branch of AXA Network, stating that each policyholder of AXA Equitable

is a client of AXA Network and AXA Equitable, not of any agent, such as Plaintiff, even though agents sold the policies and serviced the accounts. Also, Irving states that the insurance policies and annuities serviced by Plaintiff were reassigned to other agents after Plaintiff's Equity Letter benefits were terminated. With regard to Plaintiff's claim that an agent named Matt Miller called a client serviced by Plaintiff to set up an appointment and solicit business from him, Defendant cites to Plaintiff's deposition testimony that he complained to the Branch Manager who told Plaintiff that he would tell Miller to stop.

With regard to Plaintiff's allegation that after AXA Network assigned new servicing agents to the policies and contracts serviced by Plaintiff, AXA directed those agents to falsely represent to Plaintiff's clients that Plaintiff was no longer interested in servicing their accounts and/or that Plaintiff was no longer active in the life insurance and annuity business, Defendant points to the lack of testimony from Plaintiff at his deposition indicating that AXA directed agents to make such representations.

Defendant argues that it should be granted summary judgment dismissing Plaintiff's first cause of action for breach of contract because (1) the evidence demonstrates that Plaintiff was permitted to access client files following his resignation, (2) Plaintiff cannot demonstrate that AXA Network breached any specific contractual provision, (3) AXA Network had the contractual right to reassign the life insurance policies and annuities to other agents after Plaintiff's persistency rate fell below 90% for the calendar year 2007.

Defendant contends that it should be granted summary judgment dismissing the Plaintiff's second cause of action alleging breach of the implied covenant of good faith and fair dealing because it is duplicative of his breach of contract claim as it arises from the same alleged facts and seeks the same damages.

With regard to Plaintiff's third cause of action alleging tortious interference with business relations, Defendant argues that Plaintiff failed to proffer any evidence that the alleged conduct occurred or that AXA Network directed any independent contractor agent

to contact clients and make misrepresentations concerning Plaintiff. Additionally, Defendant contends that there is no evidence that such calls were made as Plaintiff failed to identify any call between an AXA Network agent and a client in which it was stated that Plaintiff was no longer interested in servicing the client's account and/or that Plaintiff was no longer active in the life insurance and annuity business. Further, Defendant argues that because AXA Network had existing relationships with its insureds, Plaintiff cannot identify any third-party with whom he had an independent business relationship that was interfered with. Defendant also argues that Plaintiff has failed to show that AXA Network engaged in any wrongful conduct for the sole purpose of harming Plaintiff because there is no evidence that any contact by agents to clients was undertaken to harm Plaintiff rather than for the agents own economic self-interest. Additionally, Defendant argues that Plaintiff cannot demonstrate any damages caused by the alleged tortious interference.

Finally, Defendant contends that the fourth cause of action for a permanent injunction must be dismissed because Plaintiff does not have a viable underlying claim.

In opposition to the motion, Plaintiff argues, among other things, that the evidence demonstrates the existence of material issues of fact as to whether Defendant breached the implied covenant of good faith and fair dealing and/or tortiously interfered with Plaintiff's business relations by retaining Plaintiff's client files and terminating his electronic work station, which frustrated the purpose of the Equity Letter by precluding him from communicating with insurance and annuity clients and prevent a decline in his persistency rate. Plaintiff also claims that he had an established relationship with New York Life and was about to enter into an employment relationship with New York Life when AXA Network's actions with respect to a customer complaint, motivated to harm Plaintiff, forced New York Life to freeze discussions with Plaintiff for several months thereby delaying his employment with New York Life and compromising his future in the industry. Further, Plaintiff claims that the evidence demonstrates that disparaging and false representations were made by AXA agents to his former clients which caused him to lose future business from those clients. The only argument made by Plaintiff in opposition to that branch of Defendant's motion seeking summary judgment dismissing

the first cause of action for breach of contract is that if his persistency rate was in fact 90% or greater, then Defendant's termination of the Equity was a breach of contract. If Plaintiff's persistency rate was below 90%, Plaintiff argues that it was because Defendant withheld Plaintiff's client information rendering him unable to service the clients and maintain his persistency rate, in breach of the implied covenant of good faith and fair dealing.

As evidentiary support for his position that Defendant breached the implied covenant of good faith and fair dealing, Plaintiff relies upon a letter dated June 1, 2007, sent to him immediately after he tendered his resignation, from AXA Executive Vice President Ferdinand Ruplin, wherein he was informed, among other things, that he was required to return all AXA client files in his possession and/or control. By letter dated May 30, 2007, two days earlier, to AXA Vice President Christopher Barber, Plaintiff had tendered his resignation and promised "to serve [his] existing clients at a high level and keep them aligned the AXA Family of Products that have served them well." In the letter, Plaintiff also advised that he had accepted another position. Although Plaintiff's counsel argues that it was reasonable for Plaintiff to believe that AXA denied him access to client files based upon the letter dated June 1, 2007, no evidence in admissible form, e.g. affidavit or deposition testimony, is provided wherein Plaintiff states that he believed the letter had such an effect. Plaintiff testified at his deposition that after his resignation he left several messages for someone in information technology support at the branch to inquire as to how he could access information, but he never received a return phone call. He claims that the fact that his calls went unreturned demonstrates that he was denied access to his workstation (computer). Although Plaintiff acknowledges that Mr. Barber granted his request for access to a file on one occasion, he claims that the letter from Mr. Ruplin demonstrates the existence of an issue of fact with respect to his ability to access client files in order to maintain a persistency rate at 90% or higher and whether Defendant breached the implied covenant of good faith and fair dealing in doing so.

Plaintiff also argues that there are triable issues of fact with regard to his cause of action for tortious interference with contract based upon his deposition testimony that certain clients told him that other agents had told them that Plaintiff had been terminated,

that something had been set up by Plaintiff incorrectly, or “might be wrong,” as well as Defendant denying Plaintiff access to client files. Plaintiff also relies on an excerpt from the deposition testimony of Frank Chaimowitz, Plaintiff’s brother-in-law, who testified that an AXA representative told him that Plaintiff had “problems with his accounts in that office” and that Chaimowitz had grounds to file a complaint against Plaintiff. Plaintiff concedes that there is no way to quantify the referrals or cross-sales he allegedly lost due to misrepresentations by agents to clients but claims that the historical average of his past commissions provides evidence of his damages and demonstrates the existence of issues of fact.

Plaintiff also claims that Defendant mishandled a complaint from a former client made in October 2009 and thereby tortiously interfered with his pursuit of employment with New York Life. However, Plaintiff does not provide any factual evidence or expert opinion in admissible form to support his allegation that AXA mishandled the complaint.

In reply, Defendant argues (1) that Plaintiff failed to address Defendant’s arguments in support of summary judgment dismissing the claims for breach of contract and a permanent injunction, (2) that Plaintiff’s claim for breach of the implied covenant of good faith and fair dealing should be dismissed because Plaintiff failed to set forth any evidence demonstrating that he did not have access to client files and information and that he was unable to service client accounts after his resignation, and (3) that Plaintiff failed to provide any admissible evidence showing that AXA Network tortiously interfered with Plaintiff’s business relations.

At the time of oral argument of this motion, the Court granted the Plaintiff’s motion for leave to serve and file an amended complaint, considered the amended complaint filed and served as of the date of oral argument, and considered Defendant’s summary judgment motion to be against the amended complaint as Defendant addressed the differences between the original complaint and the amended complaint in its motion papers. Also at the time of oral argument, Plaintiff’s counsel discontinued, on the record, the claim for a permanent injunction. Plaintiff’s counsel also conceded that the amended

complaint does not set forth any specific term and/or provision of the contract allegedly breached by the Defendant.

DISCUSSION

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue; however, once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2d Dept 1996]). Speculative and conclusory allegations are insufficient to defeat summary judgment (*see, Boone v. Bender*, 74 AD3d 1111, 1113 [2d Dept 2010]).

“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, (4) resulting damage” (2 NY PJI2d 4:1, at 638 [2011]). “Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance . . . This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . .” *Lonner v. Simon Property Group, Inc.*, 57 AD3d 100, 108 [2d Dept 2008], quoting *Dalton v. Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). The covenant of good faith and fair dealing is breached when a party acts in a manner that deprives the other party of the right to receive benefits under their agreement (*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144 [2002]). In order to establish a breach of the covenant, a plaintiff must prove facts that tend to show that the defendant sought to prevent performance of the contract or to withhold its benefit from the plaintiff (*see, Aventine Inv. Mgt., Inc. v. Canadian Imperial Bank of Commerce*, 265 AD2d 513 [2d Dept 1999]).

Here, viewing the evidence in the light most favorable to the Plaintiff, the non-movant (*see, Pearson v. Dix McBride*, 63 AD3d 895 [2d Dept 2009]), the Defendant established its entitlement to judgment as a matter of law dismissing the Plaintiff's breach of contract and breach of the covenant of good faith and fair dealing causes of action. Initially, as correctly noted by the Defendant, the Plaintiff failed to identify a specific contractual provision allegedly breached by the Defendant. In any event, the evidence submitted by Defendant demonstrates that it did not deny Plaintiff access to client information and/or files, nor did it otherwise act to prevent performance of the Equity Letter or withhold its benefits from the Plaintiff. In fact, Plaintiff's daughter copied client quotes and pertinent information from client files at AXA's offices for several hours on five separate occasions at the request and direction of the Plaintiff. Although this occurred shortly before Plaintiff resigned, and Defendant instructed Plaintiff's daughter to stop making copies on the fifth occasion, it shows that the Plaintiff was not denied access to client files and information. Moreover, the Plaintiff testified that there were no other occasions when he sought to copy client files but was denied access. Defendant also demonstrated that policy holders are clients of AXA Network and AXA Equitable, and not of any individual agent, such that AXA was not prohibited from contacting its own clients. When Plaintiff complained about an agent that had contacted a client serviced by Plaintiff, the branch manager instructed the agent to stop.

In opposition, the Plaintiff has failed to present evidence in admissible form raising a triable issue of fact. With regard to the breach of contract claim, Plaintiff's argument that if his persistency rate was actually 90% or greater, then Defendant's termination of the Equity Letter was a breach of the contract, is entirely speculative and unsupported by any facts. With regard to the claim for breach of the implied covenant of good faith and fair dealing, Plaintiff does not submit his own affidavit stating that he believed that the Ruplin letter dated June 1, 2007, actually prevented him, as an Equity Letter holder, from accessing client information or files, that he returned client information/files in response to the Ruplin letter, or that his attempts to access client files after receiving the letter were denied. Plaintiff does not even address his daughter's testimony that she copied client information from numerous files on several occasions. Moreover, Plaintiff admits that

Mr. Barber granted his request for access to a file on one occasion. Additionally, the failure of someone in AXA's IT Department to return Plaintiff's calls simply does not constitute the denial of access to his workstation/computer. Thus, the Court finds that Plaintiff's assertions regarding breach of the implied covenant of good faith and fair dealing are insufficient to demonstrate the existence of a triable issue of fact as they are vague, speculative and conclusory.

In order to make out a claim for tortious interference with business relations, a plaintiff must show (1) that it had business relations with a third party, (2) that the defendant interfered with those relations, (3) that the defendant acted with the sole purpose of harming the plaintiff or by means that were unlawful or improper, and (4) injury to the business relationship (*see, 71 Pierrepont Assocs. v. 71 Pierrepont Corp.*, 243 AD2d 625 [2d Dept 1997]; *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F3d 368, 382 [2d Cir. 2000]).

Here, the Court agrees with Defendant's argument that the Plaintiff did not have independent business relations with third parties to support his tortious interference claim. It is undisputed that Plaintiff was an independent contractor authorized to offer life insurance and annuity products on behalf of AXA. It is also undisputed that the business relations that Plaintiff claims that AXA interfered with are the AXA policy holders and annuity customers formerly serviced by the Plaintiff. Because none of the business relationships which the Plaintiff alleges AXA interfered with are independent of AXA, Plaintiff does not have a valid claim for tortious interference with business relations (*see, Frishberg v. Espirit de Corp. Inc.*, 778 FSupp 793, 804 [SDNY 1991]). Contrary to the Plaintiff's contention, it has not been demonstrated that he had an existing relationship with New York Life.

In any event, the allegations by the Plaintiff of conduct by AXA agents after the Equity Letter was terminated and the damages allegedly caused thereby are vague and unsupported by evidence. Mr. Chaimowitz's testimony that an AXA representative told him that Plaintiff "had problems with his accounts" and that Mr. Chaimowitz had the

basis to file a complaint against Plaintiff is insufficient to raise a triable issue of fact because, even if true, no evidence has been submitted demonstrating that such statements interfered with the business relationship between Plaintiff and Chaimowitz, nor that the unknown AXA representative acted with the sole purpose of harming the Plaintiff or by means that were unlawful or improper. Additionally, as mentioned above, Plaintiff does not provide any factual evidence or expert opinion in admissible form to support his allegation that AXA mishandled the complaint against him made by Susan Groenewoud.

Based upon the foregoing, the Defendant's motion for summary judgment dismissing the amended complaint is granted.

This constitutes the *DECISION* and *ORDER* of the Court.

Dated: June 13, 2011
Riverhead, New York


EMILY PINES
J. S. C.

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