

**Sterling Resources Intl. LLC v Leerink Swann LLC**

2012 NY Slip Op 33507(U)

September 19, 2012

Supreme Court, New York County

Docket Number: 602906/2009

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN  
*Justice*

PART 60

STERLING RESOURCES INTERNATIONAL LLC,

INDEX NO. 602906/2009

PLAINTIFF

MOTION DATE \_\_\_\_\_

- against -

LEERINK SWANN LLC,

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

DEFENDANT.

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 \_\_\_\_\_

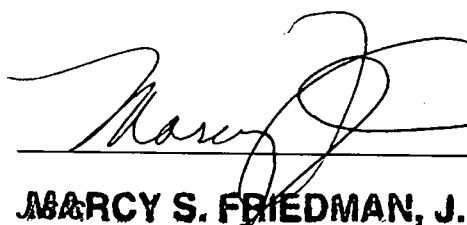
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision, dated September 19, 2012.

Dated: September 19, 2012

  
\_\_\_\_\_  
**MARCY S. FRIEDMAN, J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

x

STERLING RESOURCES INTERNATIONAL LLC,

*Plaintiff(s),*

Index No.: 602906/2009

Motion Seq. 003

- against -

DECISION/ORDER

LEERINK SWANN LLC,

*Defendant(s).*

x

This is an action by plaintiff Sterling Resources International, LLC (Sterling) to recover for executive search services provided to defendant Leerink Swann LLC (Leerink). Leerink moves for summary judgment dismissing plaintiff’s sole remaining cause of action for breach of contract.

Leerink and Sterling executed a letter retainer agreement, dated December 24, 2008. (Amended Compl., Ex. A [retainer agreement].) The retainer agreement provided in pertinent part that Sterling’s “fee for placement services rendered will be 33.3% of the candidate’s total first year compensation. Any placement between \$3,000,000 - \$5,000,000 total compensation will be subject to a cap of \$450,000 per candidate.” (*Id.* at 4.) The retainer agreement also contained a provision entitled Multiple Hires which stated: “We will apply a reduced fee of 27% of the total first year compensation package with a cap of \$450,000 per candidate.” (*Id.* at 5.) Thereafter, on March 27, 2009, the CEO and founder of Sterling sent Leerink an email that

“delineate[d] the fees in regard to moving additional hires from Merrill Lynch Healthcare” and provided that managing directors’ “cost” would be \$50,000 each, directors would be \$40,000 each, vice presidents would be \$30,000 each, and associates would be “[g]ratis.” (Amended Compl., Ex. B [Email from Laura Lofaro to Jeff Leerink, dated March 27, 2009] [March 2009 email].)

It is undisputed that the retainer agreement governed the fees to be paid for the “Head of Investment Banking” position at Leerink. (Amended Compl., ¶¶ 51, 57; Aff. of Timothy Gerhold [General Counsel to Leerink], dated March 14, 2012 [Gerhold Aff.], ¶ 7.) However, in addition to providing services with respect to the Head of Investment Banking position, Sterling also assisted Leerink in recruiting 13 lower-level professionals and support staff (lower-level hires). (Amended Compl., ¶ 51; Gerhold Aff., ¶ 7.)

The issue in this litigation was whether the fee structure that applied to the lower-level hires was that set forth in the retainer agreement or in the March 2009 email. Sterling contended that the retainer agreement Multiple Hires provision set forth the governing fee structure, and that the fee structure in the March 2009 email was a discounted rate applicable only if Leerink hired a specific group from Merrill Lynch referred to as the Robinson Group. (Amended Compl., ¶¶ 49-52; Aff. of Laura Lofaro [Sterling CEO], dated April 5, 2012, ¶¶ 14-15.) In contrast, Leerink contended that the Multiple Hires provision of the retainer agreement applied only to hiring co-Heads of Investment Banking and that the March 2009 email was the operative agreement for any hires other than the Head of Investment Banking. (Leerink’s Memo. of Law in Support, dated March 14, 2012, at 3.)

By decision and order dated July 13, 2010, Justice Fried of this Court, now retired, granted Leerink's motion to dismiss the amended complaint in its entirety. The decision dismissed Sterling's first cause of action for breach of contract pursuant to CPLR 3211(a)(1). It also dismissed Sterling's second cause of action for unjust enrichment based on failure to state a cause of action pursuant to CPLR 3211(a)(7). (Decision at 10.) In interpreting the contract, Justice Fried found that, by its express terms, the retainer agreement "applies to fees related to the hiring of a Head of Investment Banking position, while the fees delineated in the March email regard all other hiring." (Id. at 6.)

On appeal, the Appellate Division affirmed Justice Fried's order, holding that "[t]he Retainer Agreement is not ambiguous, because [Sterling's] interpretation – that the contract applies to individuals other than a Head of Investment Banking – is not reasonable. By contrast, [Leerink's] interpretation – that the Multiple Hires provision of the agreement would apply if [Leerink] ended up hiring co-Heads of Investment Banking – accords with the overall purpose of the contract." (Sterling Resources Int., LLC v Leerink Swann, LLC, 92 AD3d 538, 538-39 [1st Dept. 2012] [internal citations omitted].) The Court found that the parties agreed that Leerink owed Sterling \$450,000 for recruiting of the Head of Investment Banking and that the documentary evidence established that Leerink had paid Sterling only \$150,000. The Court thus modified Justice Fried's order to reinstate Sterling's breach of contract claim for the remaining \$300,000. (Id. at 539.)

It is undisputed that following the Appellate Division's decision and order, Leerink paid Sterling \$590,000, representing \$300,000 for the recruitment of the Head of Investment Banking pursuant to the retainer agreement, and \$290,000 for the recruitment of the 13 lower-level hires,

at the rates set forth in the March 2009 email. (Gerhold Aff., ¶ 7.) Sterling cashed the check for \$590,000, albeit under protest. (Id.)

Although it is undisputed that Leerink paid Sterling the outstanding \$590,000, Sterling opposes this motion, contending that Justice Fried's decision and order and the subsequent affirmance resolved only what amount was due for the Head of Investment Banking placement and not for the lower-level hires. (Sterling Memo. of Law in Opp. at 7.) Alternatively, Sterling seeks leave to re-plead its complaint in light of Justice Fried's determination, and claims that "discovery is required to sort through the fees due Sterling for those individuals that are NOT Group Heads of Investment Banking." (Id. at 11.)

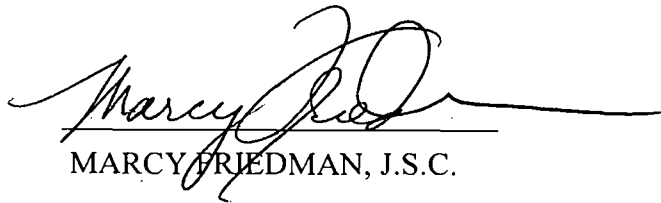
Sterling takes the position that the appeal did not resolve the issue of the rate of fees for the lower-level hires because Sterling did not appeal Justice Fried's holding that the quantum meruit claim was not maintainable in light of the existence of a valid agreement for such fees—namely, that set forth in the March 2009 email. This assertion is patently lacking in merit. The court cannot comprehend how Sterling, in good faith, could read Justice Fried's decision and order and the Appellate Division's affirmance as leaving unresolved the applicable fee structure for the 13 lower-level hires.

Leerink has met its burden of showing that no triable issues of material fact remain as to the amounts owed to Sterling for the recruitment of the Head of Investment Banking and the 13 lower-level hires, and has offered unrefuted proof that it has satisfied those obligations. Sterling does not dispute that fees for these hires have been paid at the rates set forth in the March 2009 email. It offers no opposition to Leerink's motion other than its insupportable argument that an

issue remains as to the rates for payment.

It is accordingly ORDERED that defendant's motion is granted to the extent of dismissing the amended complaint with prejudice, with \$100 costs to defendant. This constitutes the decision and order of the court.

Dated: New York, New York  
September 19, 2012



MARCY FRIEDMAN, J.S.C.