LePatner & Assoc., LLP v Jaffe
2014 NY Slip Op 32755(U)
October 16, 2014
Sup Ct, New York County
Docket Number: 650064/2013
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42

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LePATNER & ASSOCIATES, LLP,

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 650064/2013

JOSEPH JAFFE,

Defendants

---x

NANCY M. BANNON, J.

In this action to recover damages for breach of contract, the plaintiff moves to amend the complaint by adding Proactive Integrity Associates LLC ("PIA") as a derivative plaintiff and adding a cause of action for breach of fiduciary duty pursuant to CPLR 3025(b) and 1003. The defendant cross moves for summary judgment on his counterclaims and to dismiss the complaint and for disqualification of plaintiff's counsel. For the reasons set forth below, the plaintiff's motion is denied and the defendant's cross-motion is granted in part.

The plaintiff is a law firm located in New York, NY. The defendant is an attorney and private investigator. On October 1, 2010, Barry LePatner, sole equity partner of the plaintiff law firm, and the defendant executed an agreement (the "Agreement") pertaining to the defendant's employment with the plaintiff law firm. The defendant was to perform legal work for the plaintiff and form a limited liability company for the purpose of carrying out the defendant's monitoring, investigative consulting, intelligence, and risk management business. The Agreement contained clauses addressing, *inter alia*, the defendant's compensation, limitation of liability, indemnification, and the intended formation of a limited liability company. The Agreement also detailed the plaintiff's intent to procure new office space with additional space to accommodate the defendant and the limited liability company and the defendant's responsibility for rent. In November 2010, the defendant incorporated Proactive Integrity Associates, LLC ("PIA") in New York and thereafter registered PIA to do business in Connecticut and Texas. On March 1, 2012, the defendant ceased employment with the plaintiff.

The plaintiff commenced this action on January 8, 2013, to recover damages for breach

of contract. The plaintiff alleges that the defendant failed to pay the pro rata cost of the additional office space after his voluntary resignation and that the defendant failed to assist in the recovery of receivables from PIA clients and ensure payment of PIA contractors. Issue was joined by the defendants answer, dated July 12, 2013, wherein the defendant asserted two counterclaims for breach of contract and for an accounting. The defendant alleges that the plaintiff breached the Agreement by reducing his compensation by approximately 35% from mid-July 2011 to his departure on March 1, 2012. The defendant also contends that he is entitled to an accounting of the hours he worked on matters for the plaintiff and the total amount collected on such matters.

The plaintiff now moves for leave to amend the caption to add PIA as a derivative plaintiff and to amend the complaint to reflect a cause of action for breach of fiduciary duty. The defendant opposes and moves for summary judgment to dismiss the complaint and on his counterclaims against the plaintiff. The defendant also moves to disqualify the plaintiff's counsel.

Leave to Amend

The plaintiff seeks to add a cause of action for breach of fiduciary duty against the defendant and argues that there is no prejudice to the defendant because no discovery has yet been conducted. The plaintiff argues that the defendant breached his fiduciary duty to the plaintiff and PIA by accumulating "substantial" debt for the plaintiff and PIA, "abandoning" the plaintiff and PIA, refusing to assist with any outstanding collections matters for PIA clients, and competing with the plaintiff and PIA while still a partner of the plaintiff and member of PIA. The plaintiff further contends that PIA should be added as a derivative plaintiff because Barry LePatner is a member of PIA.

In opposition, the defendant argues that he never assumed any fiduciary obligations to the plaintiff. Further, the defendant argues that he is the sole member of PIA and the plaintiff, therefore lacks standing to assert any claims on PIA's behalf.

Leave to amend is freely given absent prejudice or surprise resulting directly from the delay and where the evidence submitted in support of the motion indicates that the amendment may have merit. See CPLR 3025(b); McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp., 59 NY2d 755 (1983); 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552 (1st Dept. 2011); Smith-Hoy v AMC prop. Evaluations, Inc., 52 AD3d 809, 811 (1st Dept. 2008). Here, the plaintiff submitted no evidence of the existence of a partnership between

the parties, such as an executed partnership agreement, joint accounts, joint loans, sharing of losses, joint management or control, or capital contributions on the part of the defendant. See Tedesco v Ecobank Transnational Inc., 102 AD3d 607 (1st Dept. 2013); Community Capital Bank v Fischer & Yanowitz, 47 AD3d 667 (2d Dept. 2008). Accordingly, there is no evidence that the defendant assumed the status of partner with its concomitant fiduciary duties.

"An employee may create a competing business prior to leaving [her or] his employer without breaching any fiduciary duty unless [she or] he makes improper use of the employer's time, facilities or proprietary secrets in doing so." Island Sports Physical Therapy v Burns, 84 AD3d 878, 878 (2d Dept. 2011) quoting Schneider Leasing Plus v Stallone, 172 AD2d 739, 741 (2d Dept. 1991). Here, the plaintiff alleges that the defendant "communicated and met with representatives for potential clients to solicit business for his would-be future employer...in direct competition with [the plaintiff] and PIA." However, the plaintiff does not allege that the defendant utilized its confidential or proprietary information to do so or that he did so by improperly using the plaintiff's time or facilities. Cf. Ashland Management Inc. v Altair Investments NA, LLC, 59 AD3d 97, 107 (1st Dept. 2008). Further, the Agreement contains no restrictive covenant prohibiting the defendant from competition with the plaintiff. The plaintiff's evidence of merit of a breach of fiduciary duty cause of action is, therefore, lacking.

The plaintiff also failed to establish that it has standing to assert any claims on PIA's behalf. In opposition to the plaintiff's motion to add PIA as a derivative plaintiff, the defendant submitted documentation reflecting the defendant as the sole member of PIA. In reply, the plaintiff failed to submit any documentation to substantiate its assertion that Barry LePatner holds membership status in PIA, such that he has standing to assert claims on its behalf. Barry LePatner, in his affirmation, stated that, pursuant to the Agreement, he and the defendant were the initial members of PIA and that he paid for all of PIA's costs and expenses. The Agreement, however, spoke only of the parties' future intentions to form a limited liability company, which is insufficient to establish Barry LePatner's membership in PIA. See Royal Warwick S.A. v Hotel Representative, Inc., 106 AD3d 451 (1st Dept. 2013). Neither the plaintiff nor Barry LePatner were listed as members in PIA's articles of organization and no operating agreement was entered into. The plaintiff does not submit any evidence tending to show that Barry LePatner was later admitted as a member in accordance with the Limited Liability Company Law. See LLCL § 602. Further, even if Barry LePatner were to have established that he is a member of PIA, the plaintiff law firm did not establish its membership and, therefore, lacks standing to bring any action on the company's behalf. See Tzolis v Wolff, 10 NY3d 100 (2008). Moreover, the plaintiff failed to establish that PIA is a necessary or permissible party to this action, wherein the plaintiff alleges that the defendant breached a contract to which PIA is not a party.

See CPLR 1001, 1002. Accordingly, the plaintiff's motion to amend the complaint to add a cause of action for breach of fiduciary duty and to add PIA as a derivative plaintiff is denied.

Summary Judgment Dismissing the Complaint

In support of his cross motion for summary judgment dismissing the complaint, the defendant argues that the language of Agreement absolves the defendant of any responsibility for rent after he ceased employment with the plaintiff. The defendant further argues that the Agreement does not create any obligation for the defendant to assist in the recovery of receivables or to ensure payment of invoices submitted to PIA by its contractors.

In opposition, the plaintiff argues that because the defendant voluntarily resigned his position, in contrast to "withdraw[ing]" or being asked to resign, the Agreement entitles it to a pro rata share of the costs for the remaining term of the lease. The plaintiff argues that the defendant's failure to act for the benefit of the plaintiff was a breach of the defendant's fiduciary duty owed to the plaintiff. Specifically, the plaintiff argues that by incurring substantial receivables and liabilities on behalf of PIA and by refusing to assist in their satisfaction, the defendant breached its fiduciary duty to the plaintiff because Barry LePatner was left solely responsible for them.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010).

A contract is to be construed in accordance with the parties intent. See Greenfield v Philles Records, Inc., 98 NY2d 562, 569 (2002). An "agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Greenfield v Philles Records, Inc., 98 NY2d at 569; see MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640, 645 (2009); Ashwood Capital, Inc. v OTG Management, Inc., 99 AD3d 1 (1st Dept. 2012); 150 Broadway N.Y. Associates, LP v Bodner, 14 AD3d 1 (1st Dept. 2004).

"Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide." Greenfield v Philles Records, Inc., 98 NY2d at 569; see Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade, 98 AD3d 403 (1st Dept 2012); Jet Acceptance Corp. v Quest Mexicana S. A., 87 AD3d 850 (1st Dept 2011). The "[m]ere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact." Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade, 98 AD3d at 406, *quoting* Unisys Corp. v Hercules Inc., 224 AD2d 365, 367 (1st Dept 1996). Ambiguity is determined by looking within the four corners of the document and not to outside sources. See W.W.W. Assocs. v Giancontieri, 77 NY2d 157, 162-163 (1990).

In this case, the portion of the Agreement relevant to the payment of rent states:

> "LePatner shall be assuming new tenant space and will take additional space to accommodate you and the Business. To the extent that you voluntarily resign your position in the two entities prior to the expiration of said tenancy, you agree to assume the cost of the additional space for the pro rata portion of the remaining three year lease, (approximately $75,000 a year). At the end of each year a pro rata portion of this obligation shall be abated and at the end of three (3) years, provided you are still employed by the firm, this obligation shall be invalidated. If you withdraw from the firm and the LLC or are asked to resign from the entities by LePatner & Associates during this three-year period the above obligation shall not apply. Except that if you choose to stay on as a sub-subtenant and assume the cost of such additional space, no claim by the firm shall be made therefor."

The parties agree that the defendant departed the plaintiff law firm voluntarily. However, they disagree as to whether the provision pertaining to "voluntary resignation" or to "withdrawal" applies in this case. The Agreement provides no definitions and the terms are used only in the above-quoted paragraph. On its face, the Agreement provides for opposing outcomes depending on the meaning of two imprecise terms left undefined within the four corners of the Agreement. The terms do not become clear when read in connection with the whole contract. As the terms "voluntary resignation" and "withdrawal" are "reasonably susceptible of more than one interpretation," this specific provision of the Agreement is ambiguous and will be resolved against the party who drafted the Agreement. Natt v White Sands Condominium, 95 AD3d 848, 849 (2d Dept. 2012); see 151 West Associates v Printsiples Fabric Corp., 61 NY2d 732 (1984); Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade, 98 AD3d at 406. It is undisputed that the plaintiff law firm, rather than the defendant, drafted the

Agreement. Construing the ambiguity against the plaintiff, the provision pertaining to "withdrawal" applies to this case. Accordingly, the defendant's motion for summary judgment as to the plaintiff's first cause of action for breach of contract pertaining to unpaid rent is granted.

On the plaintiff's second cause of action for breach of contract pertaining to the recovery of receivables owing to PIA, the Agreement makes no provision for the responsibility of recovering of receivables. "An omission or mistake in a contract does not constitute an ambiguity [and]...the question of whether an ambiguity exists must be ascertained from the face of an agreement without regard to extrinsic evidence." Reiss v Financial Performance Corp., 97 NY2d 195, 199 (2001) quoting Schmidt v Magnetic Head Corp., 97 AD2d 151, 157 (2d Dept. 1983). The court is concerned "with what the parties intended...only to the extent that they evidenced what they intended by what they wrote." Akaska Holdings, LLC v Sweet, 115 AD3d 556 (1st Dept. 2014) quoting Ashwood Capital Inc. v OTG Mgt., Inc., 99 AD3d 1, 7 (1st Dept. 2012). "[I]t is not a court's function to imply a term to save [a party] from the consequences of an agreement that it drafted." Jade Realty LLC v Citigroup Commercial Mortgage Trust 2005-EMG, 83 AD3d 567, 568 (1st Dept. 2011), aff'd 20 NY3d 881 (2012).

Here, the plaintiff argues that the defendant was responsible for collecting on PIA receivables as a part of the fiduciary duties he owed to the plaintiff. Because the plaintiff alleges that Barry LePatner was a member of PIA along with the defendant, the plaintiff contends that, were it otherwise, Barry LePatner would be left solely responsible for PIA's receivables, which would, therefore, negatively impact the plaintiff law firm. The plaintiff, in essence, attempts to improperly convert its second cause of action for breach of contract into a breach of fiduciary duty claim. Contrary to the plaintiff's contention, the Agreement did not obligate the defendant to assist in the satisfaction of receivables and liabilities of PIA or of the plaintiff. The only references to receivables in the Agreement speak of amounts "collected by the firm," not by the defendant. The court will not imply an obligation where none previously existed. See Reiss v Financial Performance Corp., 97 NY2d at 199. Accordingly, the plaintiff's motion for summary judgment dismissing the plaintiff's second cause of action for breach of contract pertaining to the recovery of receivables and payment of contractors is granted.

Summary Judgment on Counterclaims

In support of his motion for summary judgment on his counterclaim to recover compensation allegedly owed to him, the defendant argues that the Agreement authorized Barry LePatner to reduce the salaries of any PIA employees, but not of the defendant, a governing member rather than an employee of PIA.

In opposition, the plaintiff argues that it paid the defendant all amounts owed under the agreement. The plaintiff further argues that the Agreement is clear that the parties intended to allow for adjustment of the defendant's compensation, up or down, based on revenue.

The section of the Agreement concerning compensation states:

> "Annual compensation of $400,000 per year shall be paid to you, as base compensation, with health and related benefits for you and up to three staff members to be identified by you. We currently anticipate that base compensation and associated benefits for employees to be retained shall approximate $350,000 to $400,000. The initial compensation of employees assigned to the LLC shall be based on projected annual collections for the twelve (12) months following your commencement of employment anticipated to be between $1.5 million and $2 million; if determined to be substantially less on an annual basis than initially projected (i.e. if there is a shortfall of 15% or more in collections), a pro rata adjustment to gross compensation may be made to reflect the revenues collected."

The Agreement is clear and unambiguous that the defendant was hired by the plaintiff law firm at an annual base salary of $400,000. The compensation provision is clear that the base salary projection of the initial employees that would be assigned to the limited liability company was based on the defendant's profitability projections and could be adjusted downward in the event that collections fell short. This provision pertains only to the employees assigned to the limited liability company. The compensation provision also states, "Annual salary adjustment increases based upon increasing levels of revenues beyond the base projected revenues shall be implemented subject to the discretion of Barry B. LePatner, in consultation with you." Other provisions in the Agreement address additional income and other benefits, however no provision is made with respect to the plaintiff's authority to reduce the defendant's salary below $400,000 annually. The Agreement could have provided for salary decreases based on decreasing levels of revenues, but it did not. Accordingly, the Agreement makes clear the parties' intention that the defendant's annual salary was to be no less than $400,000. As the plaintiff does not dispute that it failed to pay the defendant's salary in principal sum of $65,000 for the period between mid-July 2011 and the defendant's departure from the firm in March 2012, the plaintiff failed to raise a triable issue of fact in opposition. The defendant's motion for summary judgment on his counterclaim for unpaid compensation is granted. In the absence of a partnership agreement or other evidence of the defendant's status as a partner in the plaintiff law firm, the defendant's motion for summary judgment on his cross claim for an accounting is denied. See Partnership Law § 44; Chalasani v State Bank of India, New York Branch, 235 AD2d 449 (2d Dept. 1997).

Motion to Relieve Counsel for the Plaintiff

In view of the above, the defendant's contentions contained in the branch of its cross-motion to relieve the plaintiff's counsel have been rendered academic. See Wisholek v Douglas, 97 NY2d 740 (2002).

Accordingly, it is

ORDERED that the plaintiff's motion for leave to amend the complaint pursuant to CPLR 3025(b) is denied, and it is further

ORDERED that the defendant's motion for summary judgment dismissing the complaint is granted and the complaint is dismissed in its entirety, and it is further

ORDERED that the defendant's cross motion for summary judgment on his counterclaim for unpaid compensation is granted, and it is further

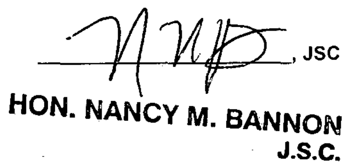
ORDERED that the defendant's cross-motion for summary judgment on his counterclaim for an accounting is denied, and it is further

ORDERED that the defendant's cross-motion for summary judgment on his motion to disqualify counsel is denied as academic, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: October 16, 2014



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HON. NANCY M. BANNON
J.S.C.