Unger v Ganci
2014 NY Slip Op 33761(U)
August 21, 2014
Supreme Court, Erie County
Docket Number: 803067-2013
Judge: Timothy J. Drury
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

BERNARD A. UNGER

Plaintiff

v.

MICHAEL A. GANCI

Defendant

DECISION
Index No. 803067-2013

Gary A. Ebersole, Esq.
Attorney for Plaintiff

Kevin Burke, Esq.
Attorney for Defendant, Michael A. Ganci

TIMOTHY J. DRURY, J.S.C.

Both parties are securities brokers and financial advisors. Pursuant to a Buyout Agreement effective October 1, 2010 the Plaintiff sold his book of business and client lists to the Defendant in return for payments of $25,000 due each calendar quarter for a total sum of $500,000 or a period of five years. The Plaintiff agreed not to compete or solicit his former clients or their immediate families nor act as a consultant, representative agent or advisor to any of his former clients. The Plaintiff also sold his tax preparation business and clients to the Defendant. The Agreement was embodied in a two-page written contract dated September 9, 2010.

The Plaintiff moved to Florida. The Defendant made regular payments to him pursuant to the contract. The Plaintiff returned from Florida in June of 2012 and set up an office as a financial advisor in Orchard Park soon thereafter. He began marketing through two seminars and though general mailings to the northtowns and southtowns. His parents, his sister and his daughter transferred their accounts from the Defendant's firm to his. Two others, named the Schencks and

Mary Palisano, also transferred their accounts to him because the Plaintiff claimed that they were dissatisfied with the Defendant's handling of their accounts. The Defendant apparently became aware of the Plaintiff's marketing and/or the return of some of his old clients to him. This fact occasioned the Plaintiff's "Don't Be Afraid" e-mail of July 24, 2013 to the Defendant.

In that e-mail the Plaintiff admitted that his family members and the Schencks and Ms. Palisano had returned to him as clients. He stated that there were 14 other clients he had run into that were potential clients. He said that he and the Defendant could fairly compete for these clients since the non-compete agreement was not enforceable for lack of a time frame. He stated that the Defendant had profited by their agreement and that he did not want litigation.

The Defendant made his last payment to the Plaintiff on April 15, 2013 for a total of 15 payments aggregating $275,000. The Defendant's position is that the Plaintiff breached the essential and material components of the Buyout Agreement. The Defendant has stated that the Plaintiff has established a rival firm, has repeatedly solicited clients of the Defendant's and had made it clear that he intended to continue this practice in the future.

The Plaintiff filed a Summons and Complaint against the Defendant on November 7, 2013 accusing him of breaching the Buyout Agreement by failing to make overdue payments totaling $50,000. He has also alleged that the Defendant had stated that he did not intend to make any additional payments. As a consequence, the Plaintiff has pled a cause of action for anticipatory breach of contract and has sought a further $175,000 in damages. Finally, the Plaintiff has sought a declaratory judgment, given the Defendant's alleged breach of the Buyout Agreement. In the declaratory judgment action he has sought terms to allow him to repurchase his book of business and customer lists.

The Defendant submitted an Answer and Verified Counterclaim dated July 25, 2014. In his counterclaim the Defendant has sought a judicial determination that the Buyout Agreement has been rescinded by the Plaintiff's breach of its non-compete provisions. The Defendant has also sought damages for breach of contract, for a permanent injunction, and has pled other related causes of action.

The Defendant has moved for partial Summary Judgment on the issue of liability stating that the Plaintiff's violation of the non-compete terms of the Buyout Agreement and his stated intention to continue to do so in the future is a material breach of the contract. He has stated that the terms of the Buyout Agreement are clear and that the Agreement is all-encompassing. He has stated that the Plaintiff has admitted violating the agreement and intending to continue to do so in his "Don't be Afraid" e-mail, which he has not disavowed. (See p209 of the Plaintiff's testimony and the statements of his counsel in his own oral argument.) The Defendant has stated that he has fulfilled his obligations under the Agreement by making regular payments to the Plaintiff. He has stated that he only suspended payments to the Plaintiff after he learned that the Plaintiff was servicing some of his old clients and after efforts to resolve this dispute were not successful.

The Plaintiff's position is first that the non-compete terms of the Buyout Agreement are null and void because those provisions lack a limiting period of time. The Plaintiff has stressed that he did not violate the non-compete terms of the Agreement because he did not solicit those clients but that they simply came to him on their own. He does not address the term of the Agreement that prohibits him from consulting, advising or representing any of his former clients.

The Plaintiff has stated that the breach of the Agreement, if there was one, was minor. He has stated that although the value of the investments of the clients that returned to him was $322,465,

the income he received from those was roughly $1,000 per year. He has stated that the total value of the book of clients he sold to the Defendant was in the $20 million dollar range. The Plaintiff has argued that the Defendant should have attempted to cure the breach, that he failed to negotiate, and by so doing he violated the Buyout Agreement.

The Plaintiff has argued that his general marketing to towns and areas in Erie County does not amount to solicitation of former clients as prohibited by the Buyout Agreement.

The Plaintiff has also argued that he has not deposed the Defendant, and his deposition would be probative as to the intent of the parties in making the Buyout Agreement. He has also stated that the Defendant's responses to his request for a Bill of Particulars are insufficient, as are his responses to requests for documents. The Plaintiff's position is that the Defendant's Motion for Summary Judgment is therefore premature.

Finally, the Plaintiff has argued that the Defendant has violated the Buyout Agreement by failing to show proof that he obtained life insurance as mandated by the Agreement.

As to whether the instant motion is premature, the Plaintiff has not identified any evidence that the Defendant's deposition or discovery could provide that is relevant to the questions at issue. (See *Brown and Brown, Inc. et al v Johnson*, 116 AD3d 162.) The Plaintiff has argued that the Defendant's testimony might bear on the circumstances surrounding the making of the Buyout Agreement and on the intentions of the parties. However, the Defendant has verified the cross-claim so that his testimony would not vary appreciably from the allegations contained in the cross-claim. In any case, the Buyout Agreement is complete on its face and any evidence submitted to vary it would not be admissible pursuant to the parol evidence rule.

Also, as the defense has noted, discovery is in abeyance once a Summary Judgment has been filed. The Plaintiff has not noticed the Defendant for a deposition. The Plaintiff's discovery is chiefly to obtain data on the issue of damages. The Defendant has agreed to supply this information but in the form of a confidentiality stipulation that Plaintiff's counsel would not agree to or did not understand. As the Defendant has pointed out, the Plaintiff has delayed in response to this offer until the Court ordered that the information be provided in this form;

Therefore, the Court will proceed to decide the Defendant's Motion for Summary Judgment. This Court agrees with the Plaintiff's position which is that the general marketing of his services to residents of various towns in Erie County did not alone constitute a violation of the non-compete provisions of the Buyout Agreement. However, the Plaintiff did more than that. He took charge of the investments of six prior clients whose business he had sold to the Defendant and who he had committed not to represent. His e-mail stated that the non-compete provisions were unenforceable and implied that he intended to compete for his old clients. He stated that the contract was unenforceable but somehow has sued for payments under the contract whose terms he did not intend to observe.

More to the point, the Court finds that the Buyout Agreement was valid and enforceable at least for the five year term of the payments to the Plaintiff if not longer, pursuant to the authority of *Mohawk Maintenance Co. Inc. v. Kessler* (52 NY2d 276). The Court finds that both parties acknowledged that they had an opportunity to contact lawyers before entering into the Agreement. As a matter of fact, according to the Plaintiff it was examined first by a lawyer.

The Court finds that the Plaintiff violated material terms of the contract by obtaining $322,465 worth of accounts from the Defendant with the intention of obtaining more and similar

accounts that he had sold to the Defendant. The Court finds that the Plaintiff's actions constituted a material and substantial breach of the Buyout Agreement and entitled the Defendant to rescind the Agreement.

Finally, in making these determinations, the Court also finds that the Defendant fulfilled his obligations to the Plaintiff under the Agreement by making timely payments to him. The Plaintiff has made a valid point as to the minor nature of the breach when compared to the overall value of the Plaintiff's book of customers he sold to the Defendant. Also, while the Defendant has claimed he attempted to resolve the instant issues with the Defendant (Paragraph 36 of the Verified Cross-Claim), the Plaintiff testified that the Defendant would not talk to him. However, the Defendant cannot be faulted for failing to attempt to cure a breach of contract that the Plaintiff has clearly repudiated as unenforceable. Are these statements in his e-mail only to be treated as his opening gambit? The possibility that the Plaintiff would have changed his position and attempted to enforce the Agreement does not create a question of fact. There is no indication that he would have done this except for his testimony in which he has stated that his potential clients are all of the people of Western New York except for his prior clients that were sold to the Defendant (195).

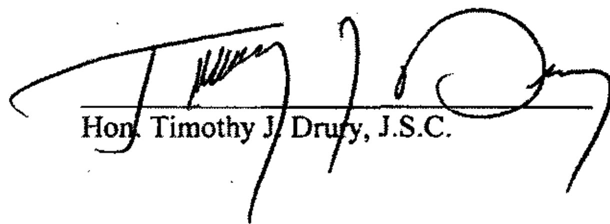
Further, the Court finds that the Defendant did not breach the Agreement by failing to show proof of insurance because insurance was only required to guarantee the periodic payments to the Plaintiff which were made.

Accordingly, the Court grants the Defendant's Motion for Summary Judgment on the issue of the Plaintiff's liability as alleged in the Defendant's counterclaim and denies Plaintiff's claims

as to the Defendant's liability as alleged in his Complaint. Therefore, the issue of the Defendant's damages will be resolved at a subsequent time and the Plaintiff's Complaint is dismissed.

SUBMIT ORDER.

Buffalo, New York
August 21, 2014



Hon. Timothy J. Drury, J.S.C.

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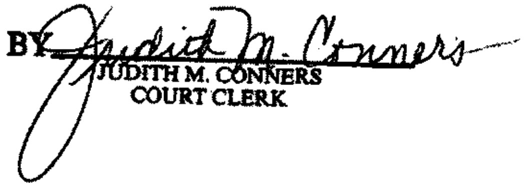

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BY JUDITH M. CONNERS
COURT CLERK