

Kolchins v Evolution Mkts. Inc.
2015 NY Slip Op 30284(U)
February 26, 2015
Supreme Court, New York County
Docket Number: 653536/2012
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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ANDREW KOLCHINS,

Plaintiff,

-against-

Index No. 653536/2012
Motion Date: 1/28/2015
Motion Seq. No. 006

EVOLUTION MARKETS INC.,

Defendant.

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BRANSTEN, J.

Defendant Evolution Markets Inc. (“EvoMarkets”) brings the instant motion, seeking relief from, and vacatur of, this Court’s March 5, 2013 Order granting Plaintiff Kolchins’ motion for a preliminary injunction. EvoMarkets seeks such relief pursuant to CPLR 5015(a)(2) and (a)(3), on the grounds that newly-produced documents purportedly reveal that Kolchins made material misrepresentations to the Court in support of his request for injunctive relief. For the reasons that follow, EvoMarkets’ motion is denied.

I. Background

This case arises from a dispute over an employment contract between Kolchins and his former employer, EvoMarkets. Kolchins worked for EvoMarkets from August 2005 until 2012.

In 2009, Kolchins entered into an Employment Agreement with EvoMarkets, which contained several restrictive covenants, including that, for a period of nine months

after leaving EvoMarkets, Kolchins was barred from performing services for, or having business dealings with, EvoMarkets' clients with whom Kolchins previously dealt over the preceding six months (the "non-compete clause"). The 2009 Employment Agreement was dated August 31, 2009 and covered the period from September 1, 2009 through August 31, 2012.

Kolchins was terminated by EvoMarkets on September 1, 2012. After his termination, Kolchins was hired by an EvoMarkets client – Nexant. In October 2012, Kolchins filed a motion for preliminary injunction, seeking to bar EvoMarkets from enforcing the non-compete clause to prevent Kolchins from working for Nexant. The Court granted the preliminary injunction motion on March 5, 2013.

II. Discussion

EvoMarkets now seeks to vacate the preliminary injunction entered in favor of Kolchins on March 5, 2013 based on the contention that Kolchins made fraudulent misrepresentations in support of the motion. Specifically, Defendant states that Kolchins misrepresented his job at Nexant. While Kolchins said that his work at Nexant "would not involve brokerage services, which is the business of EvoMarkets and what I did at EvoMarkets," EvoMarkets asserts that discovery produced in the litigation demonstrates that Kolchins is, in fact, a broker at Nexant. According to EvoMarkets, this

misrepresentation is significant since the Court highlighted in its March 5, 2013 opinion that Kolchins would not be a broker. This fact was cited by the Court to support the granting of the injunction.

CPLR 5015(a) allows the Court to vacate a decision for reasons including “newly-discovered evidence” and “fraud, misrepresentation, or other misconduct of an adverse part.” In order for “newly discovered evidence” to support vacatur of a decision, the evidence must be “material,” such that it would “probably change the result previously reached.” *Olwine, Connolly, Chase, O’Donnell & Weyher v. Valsan, Inc.*, 226 A.D.2d 102, 103 (1st Dep’t 1996). “[I]n order to demonstrate fraud on the court, the nonoffending party must establish by *clear and convincing evidence* that the offending party has acted knowingly in an attempt to hinder the fact finder’s fair adjudication of the case and his adversary’s defense of the action.” *CDR Creances S.A.S. v. Cohen*, 23 N.Y.3d 307, 320 (2014) (emphasis added).

Here, EvoMarkets has offered no direct evidence that Kolchins acted or is acting as a broker for Nexant. Instead, EvoMarkets invites the Court to surmise that Kolchins must have been acting as Nexant’s broker based on certain trade confirmations produced by Nexant in discovery. *See* Affidavit of Andrew O. Ertel Ex. F. These trade confirmations, however, do not demonstrate that Kolchins acted as a broker for Nexant during the pendency of the non-compete clause. In fact, these trade confirmations make no reference to Kolchins or to the payment of commissions to Kolchins for work as a

broker. Instead, Andrew Ertel – President and CEO of EvoMarkets – baldly states in his affidavit that “Nexant paid Kolchins a commission ... for brokering [these] trades.” *Id.* ¶ 22. This assertion, without accompanying evidentiary support, falls short of the demanding standards set forth in CPLR 5015(a)(2) and (a)(3). *See Callwood v. Cabrera*, 49 A.D.3d 394, 394-95 (1st Dep’t 2008) (“Conclusory allegations are not sufficiently indicative of ‘fraud, misrepresentation, or other misconduct’ to warrant vacatur of the order pursuant to CPLR 5015(a)(3).”)

EvoMarkets next attempts to point to bookkeeping entries produced by Nexant, which code certain payments made to Kolchins during the non-compete period as “prepaid commissions”; however, these computer entries do not establish, on their face, that Kolchins was paid commissions as a broker during this time. In fact, Kolchins offers evidence to the contrary, in the form of an affidavit from a former Nexant employee, who states that “prepaid commissions” was a catch-all code used by Nexant to code expenses that “do not neatly fit into any other bucket.” (Affidavit of Paul MacGregor ¶ 12.) Therefore, the computer entries cited by EvoMarkets do not offer clear and convincing evidence of fraud that Kolchins misrepresented his employment at Nexant nor would these entries “probably” change the Court’s prior ruling. *See Weinstock v. Handler*, 251 A.D.2d 184, 184-85 (1st Dep’t 1998) (affirming denial of CPLR 5015(a)(2) motion where “‘new evidence’ does not refute the essential findings of the trial court, and thus it cannot be said that had the ‘new evidence’ been introduced at trial, the trial’s outcome

would probably have been different.”); *see also* 101 Maiden Lane Realty Co., LLC v. Tran Han Ho, 88 A.D.3d 596, 596-97 (1st Dep’t 2011) (affirming denial of CPLR 5015(a)(3) motion where movant failed to demonstrate clear and convincing evidence of fraud).

Finally, EvoMarkets asks the Court to infer that Kolchins served as a broker since Nexant stopped using EvoMarkets’ services after Kolchins’ hiring. Nevertheless, the Court cannot vacate its March 5, 2013 Order based on speculation or an assumption. *See Callwood*, 49 A.D.3d at 394-95. Conjecture falls far short of the showing required under CPLR 5015(a)(2) or (a)(3).


III. Conclusion

Accordingly, for the foregoing reasons, it is

ORDERED that Defendant Evolution Markets Inc.’s motion seeking relief from, and to vacate, the Court’s March 5, 2013 Order pursuant to CPLR 5015(a)(2) and (a)(3) is denied.

Dated: New York, New York
February 26, 2015

ENTER



Hon. Eileen Bransten, J.S.C.