

**Execusearch Group, Inc. v Medex Diagnostics and Treatment Ctr., LLC**

2016 NY Slip Op 31237(U)

February 19, 2016

Supreme Court, New York County

Docket Number: 652084/2015

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

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THE EXECUSEARCH GROUP, INC.,

Plaintiff,

Index No.  
652084/2015

**DECISION and  
ORDER**

- against -

Mot. Seq. 001

MEDEX DIAGNOSTICS AND TREATMENT  
CENTER, LLC,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

This is an action for breach of contract. Plaintiff, The Execusearch Group, Inc. (“Execusearch” or “Plaintiff”), claims to have entered into an agreement (the “Agreement”) with defendant, Medex Diagnostics and Treatment Center, LLC (“Medex”), on May 14, 2014. Pursuant to the Agreement, Execusearch agreed to assist Medex in locating “suitable candidates for employment.” Defendant agreed to pay Plaintiff a fee equal to 25% of the first year annual base compensation of any candidate hired by Defendant that had been referred to Defendant through efforts of Plaintiff. The fees would be billed on the date the candidate commenced employment. The Agreement further provided that Defendant would be responsible for any attorney’s fees incurred by Plaintiff as a result of Defendant’s failure to pay any monies due under the Agreement.

Plaintiff claims that Execusearch performed under the Agreement. Medex hired non-party, Bruce Feldman (“Feldman”) on January 5, 2015, a candidate who had been referred to Defendant through the efforts of Plaintiff. Plaintiff claims it is entitled to \$46,250.00 for Feldman’s placement. Plaintiff claims that Defendant has failed to pay the outstanding sum due although demanded by Plaintiff.

Plaintiff commenced this action on July 12, 2015. Defendant interposed an answer on July 1, 2015.

Plaintiff now moves for an Order, pursuant to CPLR § 3212, granting summary judgment in its favor of Plaintiff. In support, Plaintiff submits: the attorney affirmation of Dennis D. Murphy (“Murphy”), dated October 8, 2015; the affidavit of Edward Fleischman (“Fleischman”), CEO of Execusearch, dated October 15, 2015; all pleadings herein; the Agreement; and an invoice dated January 9, 2015 directed to Mr. Greg Aronov, of Medex, seeking payment for services rendered regarding the placement of Feldman in the amount of \$46,250.00 (“Invoice”).

Defendant opposes Plaintiff’s motion for summary judgment. Defendant submits the attorney affirmation of Dewey Golkin (“Golkin”), dated October 27, 2015, and the affidavit of Oleg Aronov (“Aronov”), the Managing Partner of Medex, dated October 27, 2015.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

“The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage.” (*Flomenbaum v New York Univ.*, 71 A.D. 3d 80, 91 [1st Dep’t 2009]).

In the affidavit of Fleischman, Fleischman avers that the parties entered into the Agreement on May 14, 2014. Execusearch performed under the Agreement when Defendant hired Feldman on January 5, 2015, a candidate that had been referred to Defendant through Execusearch’s efforts. Fleischman further avers that Defendant failed to perform by failing to pay the amount due for Plaintiff’s placement of Feldman as reflected in the invoice, and to resulting damages,.

Here, Plaintiff adequately demonstrates an Agreement between Plaintiff and Defendant, Plaintiff's performance under the Agreement, Medex's failure to perform, and resulting damages. Accordingly, Plaintiff meets its burden of demonstrating prima facie entitlement to judgment as a matter of law on its claim for breach of the Agreement as against defendant Medex.

In opposition, Defendant provides Arnov's affidavit. Defendant states that the parties entered into the Agreement, that Execusearch "recommended Bruce Feldman for employment," and that Feldman was hired by Medex. Arnov claims that Execusearch "misrepresented and exaggerated" Feldman's "qualifications and salary history," Medex would not have hired Feldman "but for" the misrepresentation, and Feldman was terminated "[a]fter discovery these misrepresentations."

In connection with the qualifications of a candidate, the Agreement states, "Execu/Search Group makes every reasonable effort to ensure that candidates possess the skills required by the employer. The firm does not, however, waive or reduce the employer's responsibility to properly evaluate candidates to ensure that candidates have the credentials and the skills required." Here, Arnov makes no mention of any efforts Defendant made to diligently evaluate Feldman.

The Agreement provides that "for the first 90 calendar days of employment," if Defendant is not satisfied with the candidate hired through Plaintiff's efforts, Defendant is entitled to elect either a "replacement candidate" or "a refund of the remainder of the fee paid to [Execusearch] for the placement of the candidate." Defendant "must provide [Execusearch] with written notice within 30 days of the candidate's last date of employment" of Defendant's election. If Defendant fails to provide Plaintiff with "written notice of [its] election, [Defendant] will have waived [its] right to a free replacement candidate and/or to a refund of the fee paid." Nowhere in Defendant's opposition papers do they address this provision of the Agreement.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for summary judgment is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Plaintiff, and against defendant, Medex Diagnostics and Treatment Center, LLC, in the sum of \$46,250.00, with interest from January 5, 2015 at the statutory rate, as calculated

by the Clerk, together with costs and disbursements, as taxed by the Clerk; and it is further

ORDERED that the amount of reasonable attorneys' fees and costs is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendants, of the date of the hearing.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: February 19, 2016

**FEB 19 2016**



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EILEEN A. RAKOWER, J.S.C.