

Magnet Group LLC v Toymail, Inc.
2019 NY Slip Op 30830(U)
April 2, 2019
Supreme Court, New York County
Docket Number: 650284/2018
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

MAGNET GROUP LLC

Plaintiff,

- v -

TOYMAIL, INC.,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for

JUDGMENT - SUMMARY

DECISION AND ORDER

This is an action to collect a placement fee pursuant to an Employment Referral Agreement, (the **Referral Agreement**), dated June 17, 2017 between Magnet Group LLC (**Magnet**) and Toymail, Inc. (**Toymail**). Magnet now moves for summary judgment and dismissal of Toymail's counterclaim for breach of contract. For the reasons set forth below, Magnet's motion is granted in its entirety.

THE FACTS RELEVANT TO THE MOTION

Pursuant to the Referral Agreement, Magnet agreed to screen, review and refer candidates for employment in exchange for a placement fee (the **Placement Fee**), payable upon the employment of a referred candidate equal to 25% of the "total cash compensation (base salary *plus projected bonus*) for the first year" (emphasis added) (Ackerman Aff., Ex. I, § 2.1).

Pursuant to the terms of the Referral Agreement, past due amounts "accrue[d] interest at the rate

of 1% per month (12% annum) on any amount not paid when due” (*id.*). Pursuant to Section 3.1 of the Referral Agreement, in the event that a referred and hired candidate was terminated for cause within the first 90 days of employment, Magnet was required to provide an additional qualified replacement candidate within 90 days of termination if all fees due had been timely paid (*id.*, § 3.1). Section 3.2 of the Referral Agreement makes clear that other than providing an additional qualified replacement candidate as set forth in Section 3.1, the Referral Agreement did not provide any other guarantees or warranties. Finally, pursuant to Section 6.3 of the Referral Agreement, the prevailing party in an action seeking enforcement of the agreement is entitled to reasonable attorneys’ fees (*id.*, § 6.3).

Following execution of the Referral Agreement, Toymail prepared a job description sheet for Magnet to use in reviewing and referring candidates to Toymail (*id.*, Ex. 2, Nanda Dep., pp. 15-16; *id.*, Ex. 3). In total, Magnet referred seven candidates to Toymail and Toymail interviewed five of them, including Piper Parsley (*id.*, Ex. 2, Nanda Dep., pp. 20-22). After interviewing Ms. Parsley five times, on or about July 2, 2017, Toymail sent Ms. Parsely a letter (the **Offer Letter**) offering Ms. Parsley the position of Director of Digital Marketing with a base salary of \$145,500 per annum and a 20% bonus (*id.*, p. 22; *id.*, Ex. 5); (Ackerman Aff., ¶ 14). The Offer Letter stated:

We would like to extend to you an offer of employment. Your title would be VP, Digital Marketing, reporting to the CEO. Your base salary would be \$145,000 per year. You have the opportunity to earn an annual bonus at 20% of your salary, contingent on performance against your individual and company’s goals to be determined together at a later date...

* * *

We would like you to start on July 20, 2017.

(Ackerman Aff., Ex. 5, NYSCEF Doc No. 15)

Accordingly, Magnet sent Toymail an invoice (the **Invoice**), dated July 17, 2017 for \$43,750 (*i.e.*, 25% of \$145,000 plus 20% bonus) (*id.*, Ex. 8; Ackerman Aff., ¶ 14). Per the terms of the Offer Letter, Ms. Parsley began working for Toymail on July 20, 2017 (*id.*, Ex. 7). The court notes that at oral argument, plaintiff's counsel conceded that the invoice contained a scrivener's error in that it was \$250 higher than it should have been.

Toymail terminated Ms. Parsley's employment effective August 4, 2017 claiming that it was for cause because she was "ill-qualified for the job" and that "a week into Ms. Parsley's employment, it became clear across the board that Ms. Parsley was lacking the skills necessary for a VP-level marketing position" (Def. Memo in Opp., pp. 5, 7; August 4, 2017 Termination Email, NYSCEF Doc. No. 19). Toymail claims that following the termination of Ms. Parsley's employment, Toymail attempted to work with Magnet to find a suitable replacement, but Magnet was uncooperative. Finally, according to Toymail, Toymail was dissatisfied with Magnet's services and ultimately had to terminate the relationship with Magnet as Magnet did not timely respond to requests for assurances to provide a different screening procedure to ensure that a more acceptable candidate was referred. To wit, in an email dated September 13, 2017, Toymail's CEO, Gauri Nanda wrote:

I have made my position clear. Toymail reasonably relied on Magnet's assurances to be able to provide evaluation and screening for Piper Parsley. As previously discussed, Piper did not satisfy the requirements provided in our job description . . . Toymail believes Magnet's evaluation and screening procedures are insufficient. Magnet failed to provide the services it was hired to perform causing a breakdown of the relationship. Further, when I informed Magnet of the situation on August 4th, I attempted to find common ground. . . . Magnet chose to not respond to my email on August 10th until September 6th. Magnet did not provide steps to remedy the situation, nor adequate assurance that new procedure

would be implemented to improve results. As such, Toymail cannot move forward with Magnet in confidence.

The attempts I made were over a month ago. As you are aware, replacing an employee is a time sensitive matter. As a result of these failures, Toymail has not had the additional marketing help to grow, damaging the company's Q3/Q4 strategy.

Due to Magnet's failures, we are terminating the relationship.

(Ackerman Aff., Ex. 15).

DISCUSSION

Summary judgment is warranted when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212[b]). The burden is initially on the movant to make a *prima facie* showing of entitlement to judgment as a matter of law tendering sufficient evidence in admissible form to demonstrate the absence of any material fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a *prima facie* showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once the showing has been made, the burden of going forward with the proof shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a material issue of fact, which requires a trial (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, Magnet has met its *prima facie* burden of establishing its entitlement to summary judgment. The Referral Agreement is clear that the Placement Fee is due on “the date that the

[referred] Candidate is employed by [Toymail],” and it is undisputed that Toymail never paid Magnet’s fee (Referral Agreement, § 2.1). To the extent that Toymail argues that Magnet repudiated the Referral Agreement by failing to provide qualified candidates initially and then additional qualified replacement candidates following Ms. Parsely’s termination, the argument is without merit. The decision to hire Ms. Parsely was Toymail’s. Nothing prevented Toymail from rejecting each of the seven candidates that Magnet provided and requesting that other candidates be provided. Toymail reviewed Ms. Parsely’s credentials, interviewed her on five separate occasions and made a decision to hire her. In addition, per Section 3.2 of the Referral Agreement, Magnet in no way guaranteed any candidate for any particular purpose. Having made the decision to hire Ms. Parsely, Toymail cannot now argue that Magnet did not provide a suitable candidate. With respect to Toymail’s argument that Magnet repudiated the Referral Agreement by failing to find additional qualified replacement candidates, the plain terms of the Referral Agreement only require Magnet to do so “*if and only if*, all fees due to [Magnet] have been paid in full on time [emphasis added]” (*id.*, § 3.1). As Toymail concedes that it never paid Magnet’s fees, it cannot claim that Magnet repudiated the agreement by failing to provide Toymail with additional candidates.

To the extent that Toymail argues that its breach of contract counterclaim should not be dismissed, it relies on the same unavailing argument. Even accepting Toymail’s claim that Ms. Parsely was terminated for cause, Toymail’s breach of contract claim cannot survive. As described above, pursuant to Section 3.1 of the Referral Agreement, Toymail’s obligation to pay Magnet was triggered by Toymail’s hiring of Ms. Parsley. Pursuant to Section 3.2 of the Referral Agreement, Magnet did not guarantee or warranty referred candidates for any particular

purpose or otherwise, and Magnet's obligation to provide a replacement candidate would have been triggered only by Toymail's timely payment of the Invoice (which timely payment was indisputably not made).

Finally, and for the avoidance of doubt, it is of no moment that Ms. Parsley's 20% bonus was contingent on performance goals. Per the terms of the Referral Agreement, Magnet's Placement Fee is calculated based on both the base salary **and the projected bonus** and such Placement Fee is payable upon the employment of a referred candidate. The Referral Agreement does not provide that any portion of the Placement Fee calculated upon a bonus is due only when earned.

Accordingly, it is now

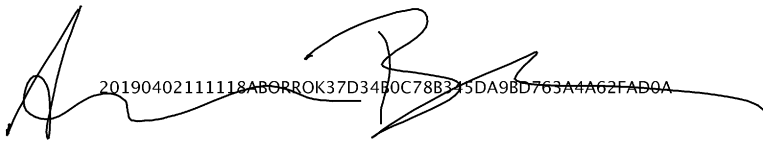
ORDERED that the plaintiff Magnet Group LLC's motion for summary judgment is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against the defendant Toymail, Inc. in the amount of \$ 43,500, together with interest at the rate of 12% per annum from the July 20, 2017 (the date of employment) until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the plaintiff Magnet Group LLC's 's motion for summary judgment dismissal of defendant Toymail, Inc.'s counterclaim is granted, and the counterclaim is dismissed; and it is further

ORDERED that that portion of the action that seeks the recovery of attorney’s fees is severed and the issue of the amount of reasonable attorneys’ fees that the plaintiff Magnet Group LLC may recover against the defendant Toymail, Inc. is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk’s Office (Room 119), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).



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4/2/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE