

SC Intl. Inc. v Coleman Research Group, Inc.

2020 NY Slip Op 30271(U)

January 6, 2020

Supreme Court, New York County

Docket Number: 653736/2018

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

SC INTERNATIONAL, INC.

Plaintiff,

- v -

COLEMAN RESEARCH GROUP, INC.,

Defendant.

-----X

INDEX NO. 653736/2018

MOTION DATE 03/26/2018

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for

JUDGMENT - SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant's cross motion for summary judgment is also denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 331, 60 Centre Street, on March 3, 2020, at 9:30 a.m.

DECISION

Plaintiff staffing agency SC International, Inc. (SCI or plaintiff), moves, pursuant to CPLR 3212, to recover monies arising out of the referral and subsequent hiring of Kevin Thornton (the candidate or Thornton) by defendant Coleman

Research Group, Inc. (Coleman or defendant). The verified complaint alleges two causes of action, to wit, for breach of contract and for an account stated. Defendant cross-moves, pursuant to CPLR 3212, seeking summary judgment on both causes of action.

For the reasons set forth below, plaintiff's motion and defendant's cross motion must be denied.

I. Standard of Law

The principle is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The motion shall be granted if neither party has shown "facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]). However, "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986], citing Winegrad, 64 NY2d at 853; People v Grasso, 50 AD 3d 535, 545 [1st Dept 2008]).

II. Background and Timeline

The record shows that Thornton engaged two recruiting agencies, namely non-party Selby Jennings as well as SCI, and

that his resume was submitted twice for a sales management position with Coleman.

Indeed, Thornton alleges that he first retained the services of Selby Jennings, another recruiter, “[i]n or around December of 2017” (NYSCEF Doc. No. 18, Thornton aff, ¶ 2) and that he provided that recruiter his resume.

Selby Jennings emailed Thornton’s resume on December 8, 2017 to John Vander Venet (Vander Venet), Coleman’s Head of Sales & Client Management, (NYSCEF Doc. No. 15; Vander Venet aff, ¶ 4). Thornton asserts that “just prior to the Christmas break” he had a call with Selby Jennings regarding a possible position with Coleman (NYSCEF Doc. No. 18, ¶ 3).

Thornton further relates that, “[s]hortly thereafter,” he retained the services of SCI and that SCI’s Managing Partner, Matthew Siekierka (Siekierka) contacted him about a possible job opportunity “[i]n or around early January 2018” (id., ¶ 4-5). Thornton provided Siekierka his resume “on or around January 8, 2018” (id., ¶ 5).

On January 9, 2018 Siekierka informed Vander Venet by email that Thornton expressed an interest in the position to be filled with Coleman (NYSCEF Doc. No. 11). The next day, on January 10, 2018, Vander Venet replied that he believed that he had already seen Thornton’s resume through another recruitment firm (NYSCEF Doc. No. 17). When Siekierka reached out to

Thornton to inquire whether Thornton had provided his resume to another recruiter, Thornton replied in the negative (NYSCEF Doc. No. 18, ¶ 6). However, upon reviewing his notes, Thornton discovered his mistake. Thornton clarified the issue with Selby Jennings on or about January 12, 2018 by email and advised that staffing agency that he "should be represented by Selby Jennings" (NYSCEF Doc. No. 19). He also alleges that he explained the issue to SCI in a voicemail message on or about January 17, 2018 (NYSCEF Doc. No. 20).

III. Contentions

In support of its motion, Plaintiff submits Siekierka's affidavit wherein Siekierka attests that the parties entered into a contract, which provided that "Defendant would pay the plaintiff a contingent fee of twenty percent (20 %) of the first year annual base salary for any candidate placed with the Defendant for employment by the Plaintiff" (NYSCEF Doc. No. 7, ¶ 3). Annexed to the affidavit are exhibits consisting of the summons and verified complaint, the answer, the contract (NYSCEF Doc. No. 10), and an e-mail exchange between Siekierka and Vander Vennet (NYSCEF Doc. No. 11).

Siekierka asserts that, on or about January 9, 2018, SCI referred Thornton for employment to Coleman by email (NYSCEF Doc. No. 7). Siekierka further alleges that, subsequent to SCI's referral, the candidate was hired by Coleman for a

starting annual base salary of \$150,000. Siekierka asserts that SCI is entitled to a fee in the sum of twenty (20%) for the placement of the candidate in the total sum of \$30,000 (*id.*).

In opposition, turning first to the breach of contract claim, defendant argues that plaintiff was not the procuring cause of the candidate's employment and that plaintiff fails to show a condition precedent.

Defendant contends that the "procuring cause" test is analogous to a real estate broker's entitlement to a commission. Defendant argues that plaintiff did not show that SCI did anything more than make a bare introduction without taking any further steps to consummate the final transaction or demonstrating that it was the procuring cause of the candidate's job placement.

In contrast, defendant points out that it was working with several other recruiters and that one such staffing agency, Selby Jennings, was the procuring cause of the candidate's employment. Defendant submits an email from Selby Jennings dated December 8, 2017 submitting the name of the candidate for placement with Coleman (NYSCEF Doc. No. 16).

Defendant also submits Vander Vennet's affidavit confirming that account (NYSCEF Doc. No. 15). Vander Vennet alleges that it contacted Selby Jennings to schedule interviews and remained in constant communication with the agency following interviews to

facilitate the final placement whereas SCI merely submitted the candidate's resume (id.).

Vander Vennet further attests that Coleman determined to "wait until after the New Year to schedule [the candidate's] interview" (id., ¶ 5). He further relates that he received an email from Siekierka referring the candidate on or around January 9, 2018 and that he notified Siekierka shortly thereafter that the candidate was already under consideration (id., ¶ 8).

Defendant points out that the contract provided that plaintiff's fee is "contingent upon . . . [Coleman's] hiring on a full-time basis within six months of the date that a candidate for full-time employment is referred in writing to you directly and first by SCI prior to any other party including the candidate" (NYSCEF Doc. No. 1, ¶ 1). Defendant claims that SCI made no showing that it met this condition precedent.

Finally, defendant argues that plaintiff made no effort to show an account it purportedly rendered to Coleman, that Coleman made a partial payment on it or failed to object to it within a reasonable period of time.

In reply and in opposition to defendant's cross motion, plaintiff claims that the parties entered into an exclusive agency contract. Plaintiff argues that SCI fulfilled all conditions precedent and that it was not required to be the

procuring cause because the contract grants exclusive agency rights.

Plaintiff argues that the first sentence of the fourth paragraph of the contract modifies the condition precedent of being the first to directly present the subject candidate with exclusive agency provisions (NYSCEF Doc. No. 10, ¶ 4).

Plaintiff claims that it created an exclusive agency whereby defendant agreed to pay plaintiff the contingency fee even if the candidate was received from another source prior to plaintiff's referral.

Furthermore, plaintiff claims that the 4th paragraph of the contract limits the exclusive agency, requiring four conditions to be met, including a condition requiring the defendant to have received communication from the recruiter who referred the candidate during the 30-day period prior to plaintiff's referral.

Plaintiff also points out that defendant received its referral 32 or 33 days after Selby Jennings' referral and thus defendant's prior receipt of the subject candidate's referral from another recruiter did not alter defendant's obligation to pay the exclusive agency fee because the prior referral fell outside of the contract's 30-day period.

II. Analysis

A. Account Stated Cause of Action

1. Standard of Law

An account stated is an "account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance'" (Morrison Cohen Singer & Weinstein, LLP v Ackerman, 280 AD2d 355, 355-356 [1st Dept 2001], quoting Interman Ind. Prods. v R.S.M. Electron Power, 37 NY2d 151, 153 [1975]).

The receipt and retention of itemized bills for a sum certain without objection within a reasonable time gives rise to an actionable account stated (see Zanani v Schwimmer, 50 AD3d 445, 446 [1st Dept 2008]; Morrison Cohen Singer & Weinstein, LLP, 280 AD2d 355; Shea & Gould v Burr, 194 AD2d 369 [1st Dept 1993]). By failing to object, the recipient of the bill signifies that it agrees with the sender concerning the amount owed (id.).

2. Application

At the outset the court notes that plaintiff does not submit any invoices relating to the purported referral fee. Neither does plaintiff allege that it regularly sent invoices to defendant and that defendant retained said invoices without

objection. Nor does plaintiff allege that defendant made any payment upon such account.

Accordingly, the allegations of the verified complaint together with Siekierka's affidavit and the evidence in the record are insufficient to make out the requisite elements of a cause of action for an account stated.

B. Breach of Contract Cause of Action

1. Standard of Law

In order to sustain a breach of contract action, plaintiff must establish the existence of a valid agreement, plaintiff's performance of its obligations thereunder, defendant's breach of its obligations and resulting damages (Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445, 445-46 [1st Dept 2016]; see also Flomenbaum v New York Univ., 71 AD3d 80, 91 [1st Dept 2009], affd 14 NY 3d 901 [2010]).

When interpreting its terms, "[a] contract should be 'read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be interpreted as to give effect to its general purpose'" (Insurance Corp. of N.Y. v Central Mut. Ins. Co., 47 AD3d 469, 471 [1st Dept 2008], quoting Empire Props. Corp. v Manufacturers Trust Co., 288 NY 242, 248 [1942]). Furthermore, provisions of contracts "should be construed to give force and effect . . . and not in a manner so

as to render them meaningless." (Yoi-Lee Realty Corp. v 177th St. Realty Assoc., 208 AD2d 185, 190 [1st Dept 1995]).

Here, the question is whether the contract includes language expressly conferring an exclusive right to collect a referral fee upon SCI notwithstanding another agency's role as the procuring cause for the placement.

A recruiter's purported right to a referral fee stemming from a staffing contract is akin to that of a brokers' right to a commission stemming from an exclusive agency or exclusive right of sale contract. In this respect, consideration of legal precedent relating to brokers is useful (see Morpheus Capital Advisors LLC v UBS AG, 23 NY2d 528, 535 [2014] "[w]ithout an unequivocal expression of intent by its own terms or by necessary implication from its terms, the . . . contract is at most considered to create an exclusive agency, not excluding the owner's inherent right to sell his or her own property'" (11 NY Jur 2d, Brokers § 169)"]; see also Century 21 A.L.P. Realty v Doller, 170 AD2d 941, 941-942 [3d Dept 1991]:

"three elements: (1) that it had a valid exclusive agency agreement with defendant, (2) that it performed its part of the agreement, and (3) that defendant agreed to sell the property to the ultimate purchasers prior to the expiration of the exclusive agency agreement" and "if the property is sold through another broker during the listing period, a commission is due to the broker who was given the exclusive agency" and "The issue distills to whether there was sufficient evidence at trial from which the jury could rationally conclude that the purchasers to whom defendant sold the property were procured by another broker before

July 2, 1984, the date on which the exclusive listing expired"; "The agreement itself, taken together with testimony from the witnesses, demonstrated that during the exclusive listing period and while plaintiff was attempting to sell the property, defendant agreed to sell the property to the ultimate purchaser who was produced by another broker").

2. Application

At the outset, the court notes that the term "refer" is defined in the contract as "the written introduction by SCI to you of candidates" (NYSCEF Doc. No. 10) and that there is no dispute that SCI referred Thornton to Coleman.

As pointed out by defendant, the contract's first paragraph provides that plaintiff is entitled to a fee if it "directly and first" refers a candidate to Coleman, which the latter subsequently hires on a full-time basis within six months (*id.*).

However, this requirement is modified by several exceptions spelled out in the fourth paragraph, which demonstrate that there is an "unequivocal expression of intent by its own terms or by necessary implication from its terms" creating an exclusive staffing contract if certain conditions are met (*Morpheus Capital Advisors LLC*, 23 NY3d at 535). Indeed, the contract provides that plaintiff would be entitled to a referral fee even if defendant received and considered the candidate's resume or other materials from another source, including from another staffing agency in the following circumstances:

"Your prior receipt of a candidate's resume or other materials from the candidate or any other source (including another recruiter, electronic job boards or social network sites) and your prior consideration of the candidate for employment shall not affect your obligation to pay our service fee, unless (a) the candidate was under active consideration by you for the position for which he or she was referred by us at the time of our referral; (b) you had direct oral, written, or electronic communication with such candidate (or with the recruiter who referred the candidate if the candidate was referred by another recruiter other than SCI International) relating to the position during the 30 day period prior to our referral (c) you informed us of the candidate's consideration within 10 business days after your receipt of our referral, and (d) you do not continue to use our services relating to such candidate after informing us of such consideration"

(*id.*).

Plaintiff specifically homes in on the exception set forth in section (b), which would entitle SCI to a referral fee if Coleman was not in direct communication with Selby Jennings or Thornton about the position within 30 days of SCI's January 9, 2018 referral.

Furthermore, there exists legal precedent holding that a recruiter may be entitled to a referral fee, pursuant to an exclusive staffing contract, in the event of a placement of a candidate notwithstanding another recruiter's prior referral of the same candidate (see e.g. Mercury Partners, Inc. v White Eagle Partners, LLC, 74 AD3d 412, 413 [1st Dept 2010]):

"Plaintiff, a placement agency, referred a candidate to defendant for employment. Even though defendant's principal told plaintiff's principal that the candidate had already been referred to him by another source, plaintiff, with defendant's consent, set up the initial employment interview of the candidate. Defendant's principal admittedly had a

further discussion with plaintiff's principal wherein he allegedly gave some weight, albeit minimal, to the latter's opinion. This presented an issue of fact as to the client employer's understanding, at the time of the referral, whether a fee might be owed were it to hire the candidate. The contract is ambiguous as to whether plaintiff did actually refer a candidate, within the meaning of the contract, to a client already familiar with that candidate, and can be parsed in two different, equally logical ways.")

Here, the record shows that Selby Jennings introduced Thornton to Coleman on December 8, 2017. At first blush, it might appear that there is no indication of any communication which would exempt Coleman from paying the referral fee. Indeed, Vander Vennet avers in his affidavit that "[at] the time we considered Mr. Thornton to be a promising candidate for the position. However, with the forthcoming holiday season, we determined it would be better to wait until after the New Year to schedule Mr. Thornton's interview, as we had done with other candidates we were considering" (NYSCEF Doc. No. 15, ¶ 5).

However, Thornton asserts in his affidavit that he had a call with Selby Jennings "just prior to the Christmas break" about the position with Coleman (NYSCEF Doc. No. 18, ¶ 3). Selby Jennings eventually scheduled Thornton's interview with Coleman after the holiday break and Thornton accepted the job in late February or early March 2018 (*id.*, ¶¶ 11-14). This suggests that Coleman or Vander Vennet communicated with Selby Jennings regarding Thornton sometime between December 8, 2017

and "just prior to the Christmas break," which date may fall within the aforementioned 30-day period.

Based on the foregoing account, there is an issue of fact as to whether Coleman had any communication relating to the position with Thornton or Seby Jennings within the 30-day period leading up to SCI's January 9, 2018 referral as contemplated in the contract, which, as it implicates credibility, must be determined by a factfinder at trial.

<u>1/6/2020</u> DATE					<u><i>Debra A. James</i></u> DEBRA A. JAMES, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE
				<input type="checkbox"/>	FIDUCIARY APPOINTMENT