Route Brokers, Inc. v Wilhemy
2024 NY Slip Op 35630(U)
April 4, 2024
Supreme Court, Nassau County
Docket Number: Index No. 613500/19
Judge: James P. McCormack
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JAMES P. MCCORMACK,
Supreme Court Justice

---X	**TRIAL/IAS, PART 8**
ROUTE BROKERS, INC.,	**NASSAU COUNTY** **INDEX NO.: 613500/19**
Plaintiff(s),	**MOTION SEQ.: 004**
-against-	**MOTION SUBMITTED: 2/8/24**
RON WILHEMY,	
Defendant(s).	
---X	

The following papers read on this motion:

Notice of Motion/Supporting Exhibits/Memorandum of Law.....................X
Affirmation in Opposition/Supporting Exhibits..X
Memorandum of Law in Reply..X

Defendant, Ron Wilhemy (Wilhemy), moves this court pursuant to CPLR §3212, for an order granting him summary judgment against Plaintiff, Route Brokers, Inc. (RBI), dismissing the complaint, and in granting judgment on his counterclaims for conversion, tortious interference with business relations and, in essence, sanctions.

RBI commenced this action sounding in breach of contract by summons and complaint dated September 24, 2019. Issue was joined by service of an answer with counterclaims dated November 18, 2019. RBI served and filed an amended complaint dated December 5, 2019 and Wilhemy served and filed an answer with counterclaims to the amended complaint dated December 24, 2019. RBI served and filed a second amended complaint, but by short form order dated December 15, 2020 this court, *inter alia*, dismissed the second amended complaint, finding it was a nullity because it was served and filed without leave of court, but granted RBI's cross motion for leave to serve and file a second amended complaint. Wilhemy served and filed a Third Amended Verified Answer & Counterclaim to the second amended complaint. The case certified ready for trial on June 21, 2023, and a note of issue was filed on July 18, 2023.

Though the papers on the within motion may make it seem otherwise, the relevant facts of this case are relatively straightforward and largely undisputed. The parties entered into a contract whereby RBI, as"finder", would try to find a Federal Express route for Wilhemy to purchase. RBI connected Wilhemy with Witchey Enterprises (Whitchey) who was looking to sell a FedEx Ground and Home route, also known as a pickup and delivery route. Wilhemy and Witchey agreed to terms, and as a result Wilhemy paid a deposit of $111,100.00 to RBI to be held in escrow. Prior to closing, Wilhemy's business, The Fairview Group (TFG), agreed to give Witchey a loan that was equal to the purchase price minus the deposit given to RBI. Witchey would repeatedly default on the terms of the agreement and the loan. Witchey would eventually file for a Ch.11 Bankruptcy in the Middle District of Pennsylvania. Witchey named TFG as a secured creditor in the bankruptcy, and TGF would eventually acquire a line haul route that

Witchey owned through the bankruptcy. FedEx would also offer TFG other routes in the same area as the Witchey routes which TFG accepted. However, as a result of the bankruptcy filing, Wilhemy demanded his deposit back from RBI since the closing would not take place through no fault of Wilhemy's. RBI has refused to return the deposit. Wilhemy argues that the deposit was for the Ground and Home route, and TFG acquiring the line haul route was unrelated. RBI argues that Wilhemy used TFG and the bankruptcy proceeding to acquire the routes in a way to avoid having to pay RBI its fee.

It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once the moving party has made a *prima facie* showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form which establishes the existence of a material issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

A defendant seeking summary judgment bears the burden of establishing its *prima facie* entitlement to judgment as a matter of law by affirmatively demonstrating the merit of its defense, rather than merely by pointing out gaps in the plaintiff's case (*Alizio v Feldman*, 82 AD3d 804 [2d Dept 2011]; *Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]). Where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers (*Lee v Second Ave. Vil. Partners*, 100 AD3d 601 [2d Dept 2012], citing *Winegrad v New York Univ. Med. Center, supra*, at p. 852). The motion court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Giraldo v Twins Ambulettes Serv., Inc.,* 96 AD3d 903 [2d Dept 2012]).

Further, "[t]he courts function on a motion for summary judgment is 'to determine whether material factual issues exist, not to resolve such issues (citations omitted)' " (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

A cause of action for breach of contract requires showing that a contract existed, that the plaintiff performed under the contract, that the defendant did not perform under the contract and the failure to perform resulted in damages. (*Palmetto Partners, L.P. v. AJW Qualified Partners, LLC,* 83 AD3d 804 [2d Dept. 2011]).

To prove conversion, a party must establish it had legal ownership or an immediate right of possession of the item(s) in controversy. (*Giardini v. Settanni*, 159 AD3d 874 [2d Dept 2018]). A specifically identifiable sum of money may be the subject of a conversion cause of action. (*Scifo v. Taibi*, 198 AD3d 704 [2d Dept 2021]).

"To prevail on a cause of action to recover damages for tortious interference with business relations, a plaintiff must prove that it had a business relationship with a third party, that the defendant knew of that relationship and intentionally interfered with it, that the defendant's actions were motivated solely by malice or otherwise constituted illegal means, and that the defendant's interference caused injury to the plaintiff's relationship with the third party...". (*684 E. 222nd Realty Co., LLC v Sheehan*, 185 AD3d 879, 880 [2 Dept 2020])(cites omitted).

There are two contracts at issue herein, but initial contract between RBI and Wilhemy is most relevant. Paragraph "2" of that contract states:

> I [Wilhemy] will not conclude or close any transactions or sale *with respect to any part* of the BUSINESS/ES listed below, or give a deposit thereon or enter into a contract for the purchase thereof, *directly or indirectly*, or take possession thereof and will not enter into any negotiations for the purchase thereof in whole or in part, for a period of two (2) years from the date hereof, without first informing the FINDER, at their below address, by Registered Mail, and making provision for the Immediate payment to them for their compensation at the rate prescribed below. (Emphasis added).

In terms of compensation, paragraph "5: of the contract holds:

> The commission due to FINDER is the greater of (i) twenty five thousand ($25.000) dollars. (ii) fifteen (15%) percent of the entire purchase price paid for each of the BUSINESS/ES listed below, or (iii) such other commission amount as may be set out In any agreement between FINDER and seller. Should I purchase in whole or part any of the BUSINESS/ES listed herein, said commission shall be paid by the seller, unless I breach this Contract in any way in which event I agree to pay to FINDER an amount equal to the greater of (i) the commission earned or that would have been earned had the sale been consummated (ii) twenty five thousand ($25,000) dollars, (iii) fifteen (15%) percent of the entire purchase price paid for any BUSINESS/ES listed below. I, only, to protect

> the FINDER's right to receipt of any commissions due or to become due hereunder, grant to the FINDER a security interest in any business acquired by me (as a result of any breach by me of this Contract) and the right to file appropriate financing statements without my signature thereon.

The courts finds that Wilhemy has failed to establish entitlement to summary judgment as a matter of law, at least as related to so much of his motion that seeks to dismiss the complaint. Paragraph "2" states that Wilhemy will not conclude or close business with "any part" of the business with whom RBI connected him. It is undisputed that RBI connected Wilhemy with Witchey. There is, at the very least, an issue of fact as to whether the line haul route that TFG acquired was "any part" of Witchey's business. Further, while Wilhemy, individually, signed the RBI contract, there is an issue of fact as to whether as President of TFG, Wilhemy used the information he learned from RBI to benefit TFG while preventing RBI from collecting a fee.

That being said, the court does find that part of the counsel provision of the contract is unenforceable. According to the contract, should Wilhemy breach the contract and RBI needs to hire counsel, RBI will be entitled to 50% of any recovery as counsel fees. A liquidated damages clause in a contract is enforceable as long as it is rationally related to the party's damages, and is not a penalty for breaching the contract. (*Truck Rent-A-Ctr. v. Puritan Farms 2nd*, 41 NY2d 420 [1977]). The counsel fee clause herein in problematic for a number of reasons. First, by being based upon the amount of the award, it clearly is a punishment for the default and not for attorney work performed. Second, as far as the court can tell, this is not a contingency fee case where the lawyers are risking not getting paid at all should their client not recover. If that is the case, it should have been explained. Third, it appears that this clause is merely a vehicle to enlarge the amount of money RBI seeks to recover, and there is no indication it will actually go toward counsel fees. However, that part of the contract that states that Wilhemy will pay RBI's counsel fees should RBI be successful in a lawsuit is enforceable, assuming that RBI's counsel can establish their fees.

As for the counterclaims, summary judgment must be denied on them as well. Based upon the terms of the contract, Wilhemy has not established that he has an immediate right to possession of the entire deposit because it is remains unclear whether or not Wilhemy breached the contract. If he breached the contract, then at least some of the down payment belongs to RBI. Similarly, the third counterclaim has not been proven either as Wilhemy has not established that RBI's lawsuit is frivolous.

Finally, the court finds Wilhemy is unable to establish entitlement to summary judgment as a matter of law on the cause of action for tortious interference with business relations because the cause of action, as pled, is insufficient. The counterclaims does not allege that RBI acted out of malice or illegal means, and does not allege that Wilhemy's relationship with Witchey was negatively impacted. (*684 E. 222nd Realty Co., LLC v Sheehan, supra.*).

Accordingly, it is hereby

ORDERED, that Wilhelmy's motion for summary judgment is mostly DENIED, except for so much of the counsel fee provision that bases counsel fees on the amount of money RBI recovers.

This constitutes the Decision and Order of the Court. The court has considered the remaining arguments of the parties and finds them to be without merit.

Dated: April 4, 2024
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.

ENTERED
Apr 11 2024
NASSAU COUNTY
COUNTY CLERK'S OFFICE