

Infinity Fin. Partners, Inc. v Cypress Fin. Research, LLC
2012 NY Slip Op 33324(U)
January 24, 2012
Supreme Court, New York County
Docket Number: 650623/2010
Judge: O. Peter Sherwood
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PRESENT: O. PETER SHERWOOD
JusticePART 49INFINITY FINANCIAL PARTNERS, INC.
a/k/a INFINITY FINANCIAL PARTNERS
CORPORATION,

Plaintiff,

-against-

CYPRESS FINANCIAL RESEARCH, LLC., *et al.*

Defendants.

INDEX NO. 650623/2010MOTION DATE Jan. 17, 2012MOTION SEQ. NO. 008

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes ☒ No

Upon the foregoing papers, it is ordered that the defendant's motion for summary judgment is decided in accordance with the accompanying decision and order.

Dated: January 24, 2012

O. PETER SHERWOOD, J.S.C.
Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITIONCheck if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49**

-----X
**INFINITY FINANCIAL PARTNERS, INC. a/k/a
INFINITY FINANCIAL PARTNERS CORPORATION,**

Plaintiff,
-against-

**DECISION AND
ORDER**

**CYPRESS FINANCIAL RESEARCH, LLC, and
FLICKER HOLDINGS CORPORATION,**

Index No. 650623/2010

Defendants .

-----X
Hon. O. Peter Sherwood, J.

Defendants, Cypress Financial Research LLC and Flicker Holdings Corp. (“Cypress”), move pursuant to CPLR 3212, for summary judgment to dismiss the complaint.

BACKGROUND

Third-party, Class Action Services (“CAS”), is in the business of assisting institutional investors claim financial recoveries of already decided or settled securities class action suits. Cypress is in the business of identifying and referring institutional investors to become clients of CAS. On or about August 12, 2003, Cypress entered into a referral agreement pursuant to which Cypress would receive a percentage of amounts CAS collected for any “Cypress Client” as defined in the agreement (“Cypress/CAS Agreement”). Cypress developed its own contacts to refer Cypress Clients to CAS. It also entered into referral agreements with subcontractors, including plaintiff, Infinity Financial Partners, Inc. (“Infinity”), who performed services that led to the introduction or referral of clients to Cypress. Cypress would then refer such clients to CAS and share a percentage of the fees Cypress received from CAS. The percentage share paid to subcontractors ranged from 40% to 80%. Under the terms of the Infinity/Cypress contract (the “Infinity Referral Agreement”), Infinity agreed to provide Cypress referrals of clients and Cypress agreed to pay Infinity 80% of any resulting fees received from CAS.

Paragraph 1 of the Infinity Referral Agreement provides:

(a) From time to time, Infinity intends to refer its current clients, potential clients and other parties (“Infinity Referrals”) to Cypress, who will then refer clients to CAS under the CAS Agreement.

(b) In consideration of Infinity’s referrals, Cypress shall pay Infinity the following: eighty percent (80%) of any net proceeds and other sums paid by CAS to Cypress for any of the Infinity Referrals

Infinity alleges that Cypress made payments to Infinity totaling at least \$ 588,079 between the execution of the Infinity Referral Agreement on September 21, 2004 and May 2008, when relations between the principals of Infinity (Jeff Doria–“Doria”) and Cypress (Mark Zinn– “Zinn”) broke down. The evidence plaintiff offers in support shows copies of checks drawn by Cypress and made payable to Infinity in amounts that total less than \$20,000 (Bradford Aff, Ex. 14) and payments made by Cypress on behalf of other Cypress subcontractors (*see* Bradford Aff, Ex 13). Infinity alleges that some of the money allegedly received was passed on to other entities for whom Infinity was merely acting as a conduit. Infinity also alleges that it has rightfully retained \$447,176 in referral fees from Cypress but the record does not establish that Infinity received or retained such amounts. Infinity nevertheless alleges that Cypress has refused to pay Infinity at least \$150,000 of referral fees resulting from referrals made to Cypress by third parties Infinity introduced to Cypress (so called “referrals of referrals”). Cypress claims that Infinity did not refer the referral agents identified by Infinity to Cypress and CAS and that a number of the proceeds generated were payable to Infinity and, in any event, the Infinity Referral Agreement does not provide for compensation to Infinity out of revenues arising from such third-party referrals.

The complaint alleges five causes of action for breach of contract (Count 1), accounting (Count 2), unjust enrichment (Count 3), quantum meruit (Count 4), and declaratory judgment (Count 5).

DISCUSSION

The Referral Agreement does not explicitly provide that Infinity shall receive payment for referring referral agents to Cypress Citing Section 202(4) of the Restatement (Second) of Contracts, Infinity bases its claim on the assertion that the parties engaged in a course of conduct whereby Cypress compensated Infinity for referral of referrals. Section 202(4) states as follows:

Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.

The First Department similarly stated in *Federal Ins. Co. v. Americas Ins. Co.*, 258 AD2d 39, 45, 691 (1st Dep't 1999) :

[T]he parties' course of performance under the contract is considered to be the most persuasive evidence of the agreed intention of the parties.' [] Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence

Cypress responds that the Infinity Referral Agreement is clear and that Infinity's argument petitions the court to consider inadmissible extrinsic evidence. "[A] written agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous." *Riverside South Planning Corp. v. CRP/Extell Riverside, L.P.*, 60 AD3d 61 (1st Dept 2008). A "'contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.'" (*Triax Capital Partners v Rudder*, 83 AD3d 490, 492, 492-93, 921 NYS2d 54 [1st Dept 2011]). Evidence outside the four corners of the contract "cannot be used to create an ambiguity where the words of the parties' agreement are otherwise clear and unambiguous" (*id.*).

The Infinity Referral Agreement unambiguously restricts Infinity's right to compensation to direct referrals only. It provides that "*Infinity* intends to refer its current clients, potential clients and *other parties* ... to Cypress." Arguably "other parties" encompass referrals who were referred by an Infinity client. However, the clause provides for referrals to be made *by Infinity*. It does not provide for referrals made by another entity.

Even if the court were to conclude that the language of the Infinity Referral Agreement is ambiguous and thus admit extrinsic evidence, the motion must be granted because a search of the record has uncovered no admissible evidence that would raise a material issue of fact requiring a trial. The record shows that Doria, plaintiff's principal who negotiated the contract, had a copy of the Cypress/CAS referral agreement which expressly provides for referral of referrals. The relevant clause states that "Cypress clients shall be any clients referred to CAS by ... (d) any person ... that learns about CAS through an existing Cypress Client." The Infinity Referral Agreement has no comparable language and the court has found no admissible evidence in the record tending to show that the parties intended Infinity to be paid for referrals made to Cypress or CAS by third parties who were Infinity clients. Moreover, of the 47 identified third-party referrals for which Infinity seeks credit, thirty-six (36) never became clients of CAS or Cypress and thus do not qualify as referrals of referrals. All of the remaining eleven (11) were referred by entities that like Infinity, were subcontractors of Cypress¹ (see Statement of Material Facts, ¶¶35-48).

Infinity's assertion that there was a course of conduct that shows the parties intended Infinity to be paid pursuant to the Infinity Referral Agreement for referral of referrals is belied by evidence

¹As to the OnSite referral, the CEO of OnSite states in an affidavit that OnSite was referred to CAS by Mark Zinn of Cypress.

demonstrating that such an arrangement is economically untenable. Under the terms of the contracts between Cypress and the various third party subcontractors, subcontractors Infinity claims are referral sources for which it is entitled to recover fees, Cypress agreed to pay them 40% to 80% of the referral fees Cypress received. These contractual obligations leave no resources for payment of the 80% of Cypress' referral fee which Infinity claims it is owed under its interpretation of the Referral Agreement. Moreover, Century Trading Group, the principal third party subcontractor Infinity asserts it referred had already entered into a subcontract with Cypress by the time Infinity signed the Infinity Referral Agreement with Cypress.

Pursuant to CPLR 3212(b), Infinity urges that the motion be denied and that it be granted further discovery to enable it to establish its claim based on an alleged course of conduct of the parties. CPLR 3212(f) allows the Court to deny the summary judgment motion “[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot be stated.” Under this rule, “[t]he party invoking the section must provide a proper evidentiary basis supporting its request for further discovery.” (*Global Minerals and Metals Corp. v Holme*, 35 AD3d 93, 103; 824 N.Y.S.2d 210 [1st Dep't 2006]. “However, the mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion (*Cortes v Walen*, 83 A.D.3d 763, 764; 922 N.Y.S.2d 419 [2d Dep't 2011]). Infinity has not shown that it has not been accorded sufficient discovery to enable it to uncover facts that would enable it to oppose the motion. The additional discovery Infinity seeks would not address the proof Cypress has presented in support of the motion in any material way nor is it likely to supply on any alternative ground denial of the motion.

Infinity's claim for an accounting must be dismissed because it has not shown the existence of a fiduciary relationship with Cypress, an essential element of a cause of action for an accounting (*see*

Adam v Cutner & Rathkoph, 238 AD2d 234, 242 [1st Dept 1997]). The unjust enrichment, quantum merit and declaratory judgment claims must be dismissed because there is a written contract between the parties that bars such claims (see *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [unjust enrichment]; *Avid Constn., Inc. v Antiquarium, Ltd.*, 259 AD2d 445 [1st Dept 1999][quantum merit]; *Artech Information Sys., LLC v Tee*, 280 AD2d 117, 125 [1st Dept 2001][declaratory judgment]). Accordingly, the motion must be granted. It is hereby,

ORDERED that defendants' motion for summary judgment is GRANTED and the complaint is dismissed in its entirety against the defendants with costs and disbursements to defendants as taxed by the Clerk of the Court and the Clerk is directed to enter judgment in favor of defendants.

This constitutes the decision and order of the court.

DATED: January 24, 2012

ENTER,


O. PETER SHERWOOD J.S.C.