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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER PART 15

Justice

Index Number : 105462/2011
KLEINBERG KAPLAN WOLFF
vs.
NORTH CASTLE RECRUITING, LLC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 105462/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5, 6, 7

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

FILED

SEP 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 9/14/11

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

Check one: [X] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check 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 15

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KLEINBERG, KAPLAN, WOLFF & COHEN, P.C.,

Plaintiff,

Index No.
105462/11

Seq No.: 001

- against -

Decision and
Order

NORTH CASTLE RECRUITING, LLC,

Defendant.

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

Plaintiff law firm, Kleinberg, Kaplan, Wolff & Cohen, P.C. ("KKWC"), brings this action seeking the return of fees paid pursuant to a recruiting agreement with North Castle Recruiting, LLC ("North Castle"). KKWC and North Castle entered into a business relationship whereby North Castle found suitable candidates for employment with KKWC. Agreements executed on September 9, 2009 provided the terms governing payment for candidates employed. Plaintiff hired one candidate, paid a $41,250.00 fee, but such candidate resigned within nine months. Plaintiff demanded return of the fees. Plaintiff now moves for summary judgment. North Castle opposes and cross-moves for summary judgment dismissing the action.

KKWC, in support of its motion, submits: the pleadings; a copy of a fee agreement; correspondence between KKWC and North Castle, regarding the fee reimbursement; a document titled "Limited Liability Company Annual Report;" and a printout from North Castle's website. KKWC argues that North Castle is contractually obligated to reimburse the fee as Ms. Peterson resigned before she had been employed for 18 months.

North Castle, in opposition and support of its cross-motion, submits a copy of a second fee agreement governing a distinct class of employees, also executed on the same date as the first agreement provided by KKWC.

The two agreements diverge primarily in fee structure as defined in paragraph 2, and applicability of the agreement in paragraph 3. In all other respects, the agreements are identical.

Paragraph 2 of the first agreement, in relevant part, provides that a finder's fee will be fully earned upon completion of 18 months of the candidate's continuous full-time employment; the fee is payable in three installments; and the fee is refundable in full if the candidate resigns or is terminated before completing the 18th month.

Paragraph 2 of the second agreement, in relevant part, provides that a finder's fee will be fully earned upon completion of 12 months of the candidate's continuous full-time employment; the fee is payable in full in one payment; and the fee is refundable in full if the candidate resigns or is terminated before completing six months of employment. Thereafter, the fee will be prorated pursuant to a stated structure, and only partially refundable if the candidate is terminated or resigns during the 7th through 12th months of employment.

Paragraph 3 of the first agreement states: "[t]his agreement does not apply to the placement of an attorney who has been out of law school for four (4) years or less."

Paragraph 3 of the second agreement states: "[t]his agreement does not apply to the placement of Partner, Of Counsel or other attorney hires who are out of law school more than four (4) years."

Here, KKWC asserts that the subject placement falls under the first agreement. North Castle urges that the placement falls under the second agreement.

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]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

It is undisputed in the evidence presented that the candidate placed had been out of law school for more than four years when she was placed . Thus, by the terms of the contracts, the first agreement is the operative agreement. It is also undisputed that KKWC paid a finder's fee to North Castle in the amount of $41,250.00. Finally, it is not disputed that the candidate resigned from her job before completing eighteen months of employment.

Where the language is clear, unequivocal and unambiguous, [a] contract is to be interpreted by its own language . . .when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." (*R/S Associates v. New York Job Development Authority*, 98 NY2d 29[2002]). The fee agreements here are unequivocal, and applicability hinges on how long a potential candidate has been out of law school. Since the candidate at issue graduated from law school in 2005, and her placement began in July 2010, her placement was governed by the first agreement.

North Castle claims that the first agreement is "one-sided and unconscionable. . . .that is squarely outside the bounds of custom in this industry," and that the motion is premature because further discovery may reveal that the agreement "contains language that is far outside what is customary in the industry." It is settled that "extrinsic evidence may not be introduced to create an ambiguity in an otherwise clear document."(*Jet Acceptance Corp. v. Quest Mexicana S.A. de C.V.*, 2011 WL 3847435[1st Dept. 2011]).

"The doctrine of unconscionability has little applicability in the commercial setting because it is presumed that businessmen deal at arm's length with relative equality of bargaining." (*Gilman v. Chase Manhattan Bank N.A.*, 135 AD2d 488[2nd Dept. 1987] citing to *Equitable Lbr Corp. v.I.P.A. Land Development Corp.*, 38 NY2d 516[1976]).

Wherefore it is hereby

ORDERED that the motion for summary judgment on the complaint herein is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant North Castle Recruiting LLC, in the sum of $41,250.00, together with interest at the rate of 9% per annum, from March 1, 2011 until the date of this decision, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion is denied.

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

DATED: September 14, 2011

EILEEN A. RAKOWER, J.S.C