LEXSEE 2006 U.S. DIST. LEXIS 52076

Analysis
As of: Jan 31, 2007

**MANAGEMENT RECRUITERS OF BOULDER, Plaintiff, v. NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC., Defendant.**

**02 Civ. 3507 (BSJ)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

*2006 U.S. Dist. LEXIS 52076*

**July 24, 2006, Decided**
**July 25, 2006, Filed**

**PRIOR HISTORY:** *Mgmt. Recruiters v. Nat'l Econ. Research Assocs., 2005 U.S. Dist. LEXIS 494 (S.D.N.Y., Jan. 11, 2005)*

**COUNSEL:** [*1] For Management Recruiters of Boulder, Plaintiff: Barry J. Friedberg, Trachtenberg, Rodes, and Friedberg, NY, NY.

**JUDGES:** Barbara S. Jones, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** Barbara S. Jones

**OPINION:**

**Decision and Order**

**BACKGROUND**

Plaintiff Management Recruiters of Boulder ("MRB") is a national executive recruiting firm. Defendant National Economic Research Associates, Inc. ("NERA") is an economics consulting firm. In this diversity action, MRB sued NERA for breach of contract, n1 alleging that a contract existed between the parties by virtue of the actions of James Levin ("Levin"), who was at the time a recruiter at MRB, and Susan Hodas ("Hodas"), who is the director of recruiting and professional development at NERA. MRB contends that a contract was formed which obligated NERA to compensate MRB for hiring Victor Miesel ("Miesel") and five members of his support staff at A.T. Kearney ("ATK"), another economics consulting firm. Levin had first represented these individuals to Hodas as candidates for employment at NERA, but they were eventually hired after a different recruiting firm brokered NERA's hiring of substantially all of the ATK practice group of which they were members. [*2]

n1 In its complaint, MRB also pled quantum meruit and promissory estoppel. However, these claims were not argued at trial, nor were they maintained in MRB's pre- or post-trial submissions. Accordingly, the Court now considers them abandoned.

I presided over a bench trial in this matter on January 30, 2006. Levin, Miesel and Hodas were the only witnesses who testified. Having considered the evidence presented at trial, and having considered all pre- and post-trial submissions, I find that no contract was formed between the parties, and therefore MRB cannot recover for breach. My findings of fact and conclusions of law, pursuant to *Rule 52(a) of the Federal Rules of Civil Procedure*, follow.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On March 12, 2001, Levin made an unsolicited call to NERA. He was put in touch with Hodas, to whom he said in sum and substance that he was representing a transfer-pricing "practice" that had "a $ 2.6 million book of business," and that "the [*3] candidate [he] was representing was not an officer and his company was not bound by a noncompete [agreement]." (Trial transcript

("Tr.") at 37 (Levin direct)). Levin recalled that Hodas responded to the effect that "[w]e have to have a contract before I can look at the resumes." *Id.* Hodas recalled that she specifically told Levin that she didn't accept "any candidates from anyone or names from anyone until I have a *signed* contract," (Tr. at 93 (Hodas direct) (emphasis added)), in accordance with her usual practice (Tr. at 89 (Hodas direct)). I accept Hodas's testimony as the more credible on this point, and find that she told Levin she required a signed contract before she would consider any candidate.

Later that day, Levin sent Hodas an email to which he attached MRB's standard form of contract, the Contingency Fee Agreement ("CFA"). As sent by Levin, the CFA reads in pertinent part:

> Our service fees are on a contingency basis and are payable if you engage the services of a candidate or candidates that have been referred to you, directly or indirectly, through our efforts. A fee is payable for each candidate engaged by you or your affiliate for any position [*4] within one year after our most recent communication relating to such candidate.
>
> Our service fees are thirty (30%) [*sic*] of the total estimated annual compensation to be earned by the candidate that you employ during such candidate's first twelve (12) months of employment.
>
> * * *
>
> Your acceptance of referrals from us shall be conclusive evidence of your acceptance of our fee policy, terms and conditions. * * *

Hodas suggested revisions on the phone, and Levin sent her a revised CFA the following day, March 13. The revised CFA reads, again in pertinent part:

> Our service fees are on a contingency basis and are payable if you engage the services of a candidate or candidates that have been referred to you, directly or indirectly, through our efforts. A fee is payable for each candidate engaged by you or your affiliate for any position within one year after our most recent communication relating to such candidate.
>
> For candidates hired in primary positions (defined as rainmakers responsible for producing one million dollars or more of business in the first twelve (12) months of employment): the service fee is thirty percent (30%) of the total annual compensation [*5] earned by each candidate during the candidate's first twelve (12) months of employment.
>
> For candidates hired in supporting positions (defined as individuals who are not expected to be significant rainmakers as stated above): the service fee is twenty-five percent (25%) of the first year's base salary.
>
> * * *
>
> Your acceptance of referrals from us shall be conclusive evidence of your acceptance of our fee policy, terms and conditions. * * *

Thus, the revisions created a distinction between rainmakers and support personnel, and changed the basis for the computation of MRB's "rainmaker" fee from "the total estimated annual compensation to be earned" to the "total annual compensation earned." No other revisions were made. It is undisputed that Hodas did not return an executed copy of either the original or the revised CFA to Levin.

Levin testified that he called Hodas on March 14, and that in that phone conversation she said, in substance, "Jim, that looks good, and I can accept the resumes now." (Tr. at 41 (Levin direct)). On cross-examination, however, it was revealed that, at his pretrial deposition, Levin did not remember any conversation with Hodas between the sending [*6] of the CFA and the sending of the resume (*see* Tr. at 61 (Levin cross)).

For her part, Hodas testified that she did not communicate with Levin in any way between his sending of the revised CFA on March 13 and his sending of Miesel's resume, which he did on March 15 (*see* Tr. at 97 (Hodas direct)). She testified that she did not tell him that the revised CFA was acceptable, and that she did not authorize him to send the resume. *Id.* I find that Hodas's testimony was the more credible on this point. Accordingly, I find that she never told Levin that the revised CFA was acceptable or that she would accept a resume from him.

Documentary evidence at the trial revealed that Hodas, acting in accordance with her intent to formulate a

written contract, on March 14 emailed the revised CFA to Dana Bolton, NERA's in-house counsel, for his review. Her email reads, "Dana, could you please review the attached. It's a short fee agreement with another headhunter. I negotiated some of the terms in the contract and I think it's OK, but I would like your trained and eagle eye to approve it." (Email, Hodas to Bolton, March 14, 2001, Defendant's Trial Exhibit 14). Bolton was on vacation until [*7] March 21, and did not reply to Hodas's email until April 4. *Id.*

It is undisputed that Levin sent Miesel's resume to Hodas by email on March 15, and that no other recruiter or firm presented Miesel to NERA before this.

Miesel had begun a business relationship with Levin in September 2000, when he sent Levin his resume (Tr. at 151 (Miesel direct)). It is undisputed that by March 2001 Levin had previously referred Miesel to at least one other potential employer, and that he and Miesel had at some point discussed approaching NERA. Levin testified that, during such a discussion sometime in early March, Miesel had told him to "go for" NERA (Tr. at 36 (Levin direct)). n2 I find that, when Levin sent Miesel's resume to Hodas, the two men had an ongoing business relationship.

n2 At trial, Miesel did not recall whether such discussion had occurred (Tr. at 144 (Miesel direct)). He testified that some time in or after January 2001 he had felt it necessary to change his home phone number and "get a special system put in" in order to screen for Levin's phone calls (Tr. at 143 (Miesel direct)). However, he admitted that he had never told Levin to stop working on his behalf (Tr. at 157 (Miesel cross)). I do not find Miesel's testimony specific enough to discredit Levin's proof that the two had an ongoing business relationship at the time Levin offered his candidacy to NERA.

[*8]

At trial, Levin testified that he and Hodas spoke on the phone after he sent Miesel's resume. He testified that in that conversation she confirmed receipt of the resume and requested, in Levin's words, "a little while in-house to take a look at it." (Tr. at 43 (Levin direct)). He testified that Hodas also asked for the names of Miesel's five-member support staff at ATK and for information about the current salaries of all six individuals in that same conversation, *id.*, and that she did not raise any concerns about the CFA. *Id.* at 45. Hodas denies any such conversation took place (*see* Tr. at 99 (Hodas direct)). I credit Hodas's testimony on this point, and find that she never confirmed receipt of Miesel's resume, never requested time to review it, and never requested that Levin send her information about the support personnel.

Levin nevertheless did send Hodas the names and current salaries of the support personnel by separate email on March 15. It is undisputed that Levin never had a business relationship with, nor had he even spoken with, any of these five individuals before sending their names to Hodas.

Documentary evidence at trial showed that beginning on March 16, [*9] Hodas forwarded Miesel's resume to various people at NERA for their review, including both the President of NERA and the head of NERA's Intellectual Property practice, to whom Miesel would report if hired (email dated March 16, 2001 from Hodas to Marion Stewart, Senior Vice President and head of NERA's Intellectual Property practice, Plaintiff's Trial Exhibit 13). It is undisputed that she did *not* similarly circulate the names of Miesel's support staff. It is also undisputed that, on March 20, Hodas told Levin by telephone and by email that NERA would not hire Miesel.

Some months later, NERA finalized an agreement to hire substantially all of the transfer-pricing group at ATK, after negotiations between NERA and the director of that group, Dr. Harlow Higinbotham. Those negotiations were brokered by a different recruiting firm (*see* Tr. at 100-06 (Hodas direct)). The group included Miesel and the same five support personnel whose names had been submitted by Levin on March 15 (Tr. at 106-08 (Hodas direct)). It is undisputed that they began their employment in December of 2001, which was of course within a year of the last communication Levin and Hodas had about them.

In its [*10] offer of employment NERA guaranteed Miesel an annual base salary of $ 300,000 and a performance bonus based on the amount of annual revenues he generated n3 (letter from Richard T. Rapp, President of NERA, to Miesel, dated September 12, 2001, Plaintiff's Trial Exhibit 20). He was also to receive a signing bonus of $ 75,000, and an additional $ 75,000 in deferred stock units in his first year. n4 *Id.*

n3 The offer provided for a performance bonus of at least $ 700,000 if Miesel generated annual revenues of $ 3 million or more; a bonus of at least $ 400,000 for generating annual revenues of $ 2 million or more; and a minimum bonus of $ 100,000 "in any event." (Letter from Richard T. Rapp, President of NERA, to Miesel, dated September 12, 2001, Plaintiff's Trial Exhibit 20).

n4 There is no evidence before the Court as to what compensation Miesel actually received for his first year of employment at NERA.

MRB bases its claim as to Miesel on the amount of compensation that he was guaranteed for his first year [*11] of employment: his base salary of $ 300,000, his signing bonus of $ 75,000, and the minimum performance bonus of $ 100,000, for a total of $ 475,000. Plaintiff's Statement of Claims, Pre-Trial Memorandum of Law and Pre-Marked Trial Exhibits, at 6. Thirty per cent of this sum is $ 142,500.

The aggregate of the base salaries of the five support personnel for the first twelve months of their employment at NERA was $ 630,000. Twenty-five per cent of this sum is $ 157,500. *Id.* at 7. NERA has not paid MRB in connection with the hirings of Miesel or of his support staff. Thus, MRB's total claim is for $ 300,000.

MRB proceeds under the theory that a contract was formed when Hodas "accepted" Miesel's resume by receiving and circulating it for in-house review. MRB contends that that contract, the CFA, is unambiguous on its face and requires NERA to compensate MRB because NERA "engaged the services" of Miesel and the five members of his support staff within the contract period after those individuals were "referred to [NERA], directly or indirectly, through [MRB's] efforts."

NERA contends that, because Hodas stated that she required a signed contract before proceeding and never subsequently [*12] executed a contract with MRB on behalf of NERA, there was never a meeting of the minds and no contract was formed, regardless of Hodas's other actions. NERA also argues that, because Levin represented "a practice" and not just Miesel as an individual, any agreement would be barred by section (a)(10) of New York's Statute of Frauds, which requires that any agreement to purchase or sell a "business opportunity" be evidenced by a signed writing. Finally, NERA argues that even if a contract existed, MRB cannot recover as a matter of law because it was not the "procuring cause" of the hiring of Miesel and his support staff.

Before trial both parties moved for summary judgment. The motions were denied by the Hon. Kevin T. Duffy, *see Management Recruiters of Boulder v. National Economic Research Associates, Inc., No. 02 Civ. 3507 (BSJ), 2005 U.S. Dist. LEXIS 494 (S.D.N.Y. Jan. 13, 2005).*

***Hodas Clearly Stated that NERA Required a Signed Contract Before Proceeding. Therefore, Her Subsequent Actions Cannot Serve as Acceptance. Accordingly, No Contract was Formed.***

MRB argues that a contract must be implied here, because of Hodas's actions.

Under New York law, [*13] a party will be bound to an agreement if its actions, gauged by an objective standard, support the conclusion that it accepted the agreement. *See Pollitz v. Wabash R. Co., 207 N.Y. 113, 129, 100 N.E. 721 (1912)* (plaintiff estopped from denying existence of contract when its conduct "justifies and supports the normal and reasonable conclusion that he . . . has accepted and adopted it"). Here, by receiving and circulating Miesel's resume, Hodas fulfilled the acceptance term of the CFA. Moreover, those same actions also served as acceptance of MRB's performance under the CFA, and the acceptance by one party of the other party's performance is ordinarily a strong indicator that both parties understand that they have a contract. *R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69 (1984), 75-76 (2d Cir. 1984)* ("[P]artial performance is an unmistakable signal that one party believes there is a contract; and the party who accepts performance signals, by that act, that it also understands a contract to be in effect.").

However, New York law also holds that a contract may *not* be implied from a party's conduct where that party expressly reserves the right [*14] to be bound only by an executed written agreement. *Missigman v. USI Northeast, Inc., 131 F.Supp.2d 495, 513 (S.D.N.Y. 2001)* (citing *Valentino v. Davis, 270 A.D.2d 635, 638, 703 N.Y.S.2d 609, 612 (3d Dep't 2000)*); *see also Stetson v. Duncan, 707 F.Supp. 657, 665 (S.D.N.Y. 1988)* (noting that "if any party to an agreement does not intend to be bound until that agreement is in writing and signed, there is no contract until then even if the parties have orally agreed upon all the terms"); *Scheck v. Francis, 26 N.Y.2d 466, 469-70, 260 N.E.2d 493, 311 N.Y.S.2d 841 (1970)* ("It is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed."). n5

n5 *John William Costello Assocs. v. Standard Metals Corp., 99 A.D.2d 227, 472 N.Y.S.2d 325 (1st Dep't 1984)*, a case cited by MRB in support of its theory of acceptance-by-conduct, is not to the contrary. In *Costello,* a plaintiff employment agency alleged that the defendant prospective employer had accepted its offer of a contract similar to the one at issue here. A letter which stated the fees for the plaintiff's services "[i]n the event . . . an employment agreement is consummated with [the candidate]" was held to have offered a contract, which plaintiff claimed

> was accepted orally. The Appellate Division stated that "[t]he defendant never rejected that letter. Instead, defendant accepted the benefits of the plaintiff's services. By this conduct, the defendant assented to the terms set forth in the letter." *Id. at 230, 231*. This would be precisely analogous to the circumstances of the matter before me, were it not for the fact that in *Costello* the defendant never expressed an intention not to be bound absent an executed contract, as Hodas did here.

[*15]

MRB argues that by her conduct, Hodas in effect revoked *sub silencio* her earlier insistence on a signed contract:

> Even if Hodas initially expressed an intention to get a contract signed before proceeding, Hodas nonetheless promptly abandoned any such intention and accepted plaintiff's offer of terms without insisting on it. In fact, Hodas admitted that she did not even attempt to contact Levin after she received the [CFA] and started receiving the information about the candidates.

Plaintiff's Proposed Findings of Fact and Conclusions of Law at 13 n.2. (citing Tr. at 113-14 (Hodas cross)). This argument is unpersuasive, and ignores the import of the sequence of events here. Levin sent the candidates' information *after* Hodas had insisted on a signed contract. His sending of that unsolicited information cannot obligate her to reiterate that insistence, nor can her receipt of the information serve as a revocation of that insistence. *See RESTATEMENT (SECOND) OF CONTRACTS § 69 comment (a)* (1981) ("The mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction."). Levin was properly [*16] on notice that a signed contract was required, and he disregarded that notice at his own peril and that of his employer.

Accordingly I find that, because Hodas clearly stated that NERA would not be bound without an executed contract, no contract was ever formed between MRB and NERA with regard either to Miesel or his support staff.

***Further Findings of Fact and Conclusions of Law***

For the sake of a complete record I note my findings of fact and conclusions of law as to two other aspects of this case. In defense, NERA argued that any agreement to consider hiring Miesel and his support staff would necessarily be subject to section (a)(10) of New York's Statute of Frauds as concerning a "business opportunity." That section reads:

> Every agreement, promise or understanding is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or understanding * * * is a contract to pay compensation for services rendered . . . in negotiating the purchase, sale, [or] exchange . . . of a business opportunity . . . including the procuring of an introduction to a party [*17] to the transaction . . .

*N.Y. Gen. Oblig. Law § 5-701(a)(10)* (McKinney 1989). NERA argues that Levin introduced Miesel and his support staff to NERA as a "business opportunity" and that therefore Hodas could not have obligated NERA without signing the CFA.

Courts interpreting section *(a)(10)* have generally held that where the transaction results in the acquisition of an existing enterprise or the formation of a new one, it is a business opportunity. *See, e.g., Hunt Personnel, Ltd. v. Hemingway Transport Inc., 105 Misc. 2d 626, 432 N.Y.S.2d 585, 587 (N.Y. Civ. Ct. 1980)*. Conversely, where an agreement contemplates the hiring of individual employees, it does not concern a business opportunity. *Id.; see also Howard-Sloan Legal Search, Inc. v. Todtman, Young, Tunick, Nachamie, Hendler & Spizz, P.C., 193 A.D.2d 404, 597 N.Y.S.2d 64, 65 (App. Div. 1993)*; *Arrow Employment Agency Inc. v. Tom Rice Buick-Pontiac-GMC Truck Inc., 185 Misc. 2d 811, 714 N.Y.S.2d 408, 409 (App. Div. 2000)*.

Here, although there was conflicting testimony on the point, the preponderance of the evidence proved that the parties [*18] understood their discussions to be about the hiring of, at most, Miesel and his staff and not a business opportunity. Indeed, there was substantial evidence that the staff was barely part of either party's considerations. Hodas testified that she did nothing at all with the list of their names, and in fact never even printed the email containing that list (Tr. at 98-99 (Hodas direct)). That testimony was unrebutted. Miesel testified that he was never authorized by any of the members of his support staff to represent them in employment searches (Tr. at 139 (Miesel direct)), and that he never discussed with any of them the idea of approaching NERA, *id.* at 145. These facts indicate that it was Miesel's individual hiring that was actually being considered,

by both parties, and that his support staff was incidental to that.

Moreover, nowhere in its papers does NERA claim that Miesel and his staff comprised a stand-alone business, nor did any witness testify to that effect. Also, no one claims that, had Miesel and his support staff been hired when MRB presented them, that hiring would have created a new enterprise, or that it could reasonably have been called a merger of two existing [*19] enterprises, so as to bring it in line with the examples of "business opportunities" found in the caselaw. There was, for instance, no discussion whatsoever of assets and liabilities such as would ordinarily attend the merger of two businesses or the acquisition of one by another.

Accordingly, I find by a preponderance of the evidence that the transaction contemplated under the CFA did not involve a "business opportunity," and so an agreement on the terms of the CFA would not have been subject to section (a)(10) of New York's Statute of Frauds.

NERA also argued that MRB could not recover because it was not the proximate or "procuring" cause of the hirings at issue. As Judge Duffy noted, "New York courts have held that an employment placement agency must have been the procuring cause of an employer's hiring of its referred candidate before it may be compensated. While there is no precise definition of procuring cause, there must be a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation." *2005 U.S. Dist. LEXIS 494, at *15* (citations and internal quotations omitted).

Here, no evidence was presented [*20] at trial that could support a contention that MRB was the proximate cause of the hirings at issue. It is undisputed that MRB was the first recruiting firm to present Miesel and his staff to NERA; however, it is unrebutted that their actual hirings were part of the package brokered by the second recruiting firm. I therefore find that MRB was not the proximate or procuring cause of NERA's hiring of Miesel or of his staff; that role clearly belongs to the second recruiting firm.

I note however that, had the parties actually entered into the contract, the terms of the CFA *would* have bound NERA to compensate MRB. The CFA required payment when, within the contractual period, NERA hired any candidate or candidates referred to it "directly or indirectly, through [MRB's] efforts," i.e., regardless of whether MRB was the procuring cause. *Cf. id.* ("an employer may agree to compensate an employment placement agency for its services even if the agency was not the procuring cause of the hiring of an employee") (citing *Barrister Referrals, Ltd. v. Windels, Marx, Davies & Ivies, Esqs., 169 A.D.2d 622, 564 N.Y.S.2d 759, 760 (App. Div. 1991)*).

**CONCLUSION**

Plaintiff [*21] MRB has not proved that a contract was formed, and so it is not entitled to recover on its breach of contract claim.

**SO ORDERED:**

**Barbara S. Jones**

**UNITED STATES DISTRICT JUDGE**

Dated: New York, New York

July 24, 2006