

DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT - CIVIL PART 3

ARROW EMPLOYMENT AGENCY INC.

Index No. 5651/03

Plaintiff(s),

-against

Present:

Hon. Fred J. Hirsh

WAYMAR CENTRAL STATION ALARMS INC.

Defendant(s).

DECISION AFTER TRIAL

Arrow Employment Agency, Inc. ("Arrow") sues to recover the placement fee it claims it earned by placing Howard V. Blatt ("Blatt") with Waymar Central Station Alarms Inc. ("Waymar").

Arrow is an employment agency. On March 13, 2003, Judith London a/k/a Judith Shapp ("Shapp") of Arrow received a call from Wayne Wahrsager ("Wahrsager") of Waymar seeking a sales representative. Arrow advised Waymar that Blatt was looking for a job and had the appropriate qualifications for the position.

After speaking with Wahrsager, Shapp faxed and sent a letter indicating the fee Arrow would charge if Waymar hired Blatt. The letter states the fee would be "...1% for each thousand dollars of the starting salary (see attached Fee Schedule). In addition, we provide a 30 day no charge guarantee period"

The letter further indicates that in return for prompt payment, Arrow will accept a maximum fee of 20%.

The Fee Schedule shows how the fee will be calculated. According to the fee schedule, the fee is not 1% of each thousand dollars of starting salary. According to the fee schedule, the percentage of the fee increases by 1% for each thousand dollars of starting salary. The Fee Schedule contains examples indicating that if an employee placed by Arrow received a starting salary of \$15,600 per week the fee would be 15.6%

of the starting salary or \$2,433,60.¹

Wahrsager acknowledges receipt of the fax but denies receipt of the Fee Schedule. He further denies receipt of the copy of the letter and the Fee Schedule that were mailed to Waymar. The address on the letter was not the address at which Waymar operated its business in March 2003.

Wahrsager interviewed Blatt. After the interview, Blatt was hired by Waymar. Blatt's starting salary was \$50,000 per year plus commissions of 15% of sales. Blatt commenced his employment with Waymar on March 31, 2003.

After Blatt started his employment with Waymar, Arrow sent Waymar a bill demanding payment of a placement fee of \$25,000. The fee was 50% of Blatt's starting salary.

The invoice indicates Arrow will accept \$10,000 (20% of Blatt's starting salary) if payment was made on or before April 30, 2003. The invoice further indicated there would be no charge if the employee resigned or the employee's performance was unsatisfactory resulting in termination within 30 days of commencement of employment provided Waymar advised Arrow in writing within 7 days of termination of the termination date, the reasons for termination and the employees gross earnings while employed.

Shapp called Waymar several times after the invoice was sent to inquire about Blatt's performance and to request payment of the placement fee. Wahrsager testified that he spoke with Shapp in mid-April 2003 and advised her Waymar had not received the invoice. The invoice was addressed to the same incorrect address to which the March 13, 2003 letter and Fee Schedule were mailed.

Wahrsager was flabbergasted when he received the invoice. He claims Waymar had never used an employment agency to hire personnel prior to its hiring of Blatt through Arrow. Wahrsager testified he believed the Arrow's fee would be \$10 per \$1000 of Blatt's initial annual salary, which in this case would be \$500. (\$50,000 ÷

¹The Fee Schedule has two other examples. One indicates if the starting annual salary was \$18,200 per year, the fee would be 18.2% or \$3,312.40. The other indicates if the starting salary was \$20,800 per year, the fee would be 20.8% or \$4,326.40.

1000 x 10).

Wahrsager further testified Blatt's job performance was unacceptable. Wahrsager alleges he terminated Blatt within 30 days of the commencement of his employment. Despite the claim Blatt was terminated within 30 days of the commencement of employment, Waymar's records reflect Blatt was paid through the end of May 2003. Wahrsager testified that he "kept Blatt around to finish up loose ends."

Arrow sues to recover the placement fee which it alleges is 20% of Blatt's initial salary, \$10,000.

DISCUSSION

This is an action for breach of contract.

Plaintiff proves a cause of action for breach of contract by establishing the existence of a contract between the plaintiff and the defendant, performance by the plaintiff, breach by the defendant and damages. Furia v. Furia, 116 A.D.2d 694 (2nd Dept. 1986); and Sylmark Holdings Ltd. v. Silicone Zone International, Ltd., 5 Misc.3d 285 (Sup.Ct. N.Y. Co. 2004).

A contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement. Greenfield v. Philles Records, Inc., 98 N.Y.2d 562 (2002); and Katina, Inc. v. Famiglietti, 306 A.D.2d 440 (2nd Dept., 2003). The terms of an agreement are to be interpreted in accordance with their plain meaning. Greenfield v. Philles Records, Inc., *supra*; and Tikotzky v. New York City Transit Auth., 286 A.D.2d 493 (2nd Dept., 2001). The court is to give "...practical interpretation to the language employed and the parties' reasonable expectations." Slamow v. Del Col, 174 A.D.2d 725, 726 (2nd Dept., 1991), *aff'd*. 79 N.Y.2d 1016

A written agreement that is clear, complete and unambiguous should be enforced in accordance with its terms. South Road Assocs., LLC v. International Business Machines Corp., 4 N.Y.3d 272 (2005); and Greenfield v. Philles Records, Inc., *supra*; and W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157 (1990).

The question of whether an agreement is ambiguous is a question of law to be determined by the Court. W.W.W. Assocs. v. Giancontieri, *supra*; and JJFN Holdings,

Inc. v. Monarch Investment Properties, Inc., 289 A.D.2d 528 (2nd Dept. 2001).

Ambiguity exists where the terms of the agreement are susceptible to two reasonable interpretations. See, Uribe v. Merchants Bank of New York, 92 N.Y.2d 336 (1998); and Around the Clock Delicatessen, Inc. v. Larkin, 232 A.D.2d 514 (2nd Dept., 1996). Ambiguity does not exist simply because the parties urge different interpretations of its terms. Bethlehem Steel Co. v. Turner Construction Co., 2 N.Y.2d 456 (1957); and Elletson v. Bonded Insulation Co., Inc., 272 A.D.2d 825 (3rd Dept., 2000).

Parol evidence will not be considered in interpreting a contract unless the contract is ambiguous. South Road Assocs., LLC v. IBM Corp., 4 N.Y.2d 272 (2005); and 767 Third Avenue, LLC v. Orix Capital Markets, LLC, 26 A.D.3d 216 (1st Dept. 2006).

Any ambiguity in the agreement must be construed against the drafter of the agreement. Jacobson v. Sassower, 66 N.Y.2d 991 (1985); and Quality King Distributors, Inc. v. E & M ESR, Inc., 36 A.D.3d 780 (2nd Dept. 2007).

Ambiguity exists between the March 13, 2003 letter and the Fee Schedule. The plain meaning of the March 13, 2003 letter is that Arrow is entitled to a placement fee of 1% of annual starting salary of any person it places. Arrow's interpretation of this language is that the placement fee will increase 1% for each \$1000 of salary. This is not what the agreement says nor is it the interpretation the court should adopt.² To the extent the agreement is ambiguous it must be construed against Arrow.

Arrow's claim it is entitled to \$10,000 or 20% of Blatt's annual salary in full payment its placement fee is without merit. This amount is payable only if the customer paid the fee promptly or by April 30, 2003. Waymar did not pay the fee by that date and most certainly pay the fee promptly.

For the foregoing reasons, Arrow is awarded damages in the sum of \$500.

²The court notes that if it adopts Arrow's interpretation, Arrow would receive a placement fee equal to one year's salary for the placement of an employee earning \$100,000. For any placement where the salary was in excess of \$100,000 per year, Arrow would receive a placement fee in excess of 100% of the annual salary.

The clerk is directed to enter judgment in favor of the plaintiff and against the defendant in the sum of \$500 together with interest at the legal rate from March 31, 2003 to the date of entry of judgment together with costs and disbursements as taxed by the clerk.

Submit judgment.

SO ORDERED:

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line at the end, positioned above the printed name of the judge.

Hon. Fred J. Hirsh
District Court Judge

Dated: April 8, 2009

cc: Marylou A. Paolucci, Esq.
Kirschenbaum & Kirschenbaum