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Bank of N.Y. v. Michael P. Maloney Consulting, Inc.

Superior Court of New Jersey, Appellate Division

October 22, 2007, Argued; November 9, 2007, Decided

DOCKET NO. A-0714-06T3

Reporter
2007 N.J. Super. Unpub. LEXIS 949 *; 2007 WL 3306715

THE BANK OF NEW YORK, Plaintiff-Respondent, v. MICHAEL P. MALONEY CONSULTING, INC., a/k/a MICHAEL P. MALONEY, INC., Defendant-Appellant, MICHAEL P. MALONEY, INC., Third-Party Plaintiff-Appellant, v. JOE MANNELLO, ADAM KRAUSHAAR AND BNY CAPITAL MARKETS, INC., Third-Party Defendants-Respondents.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Essex County, L-521-06.

Core Terms

employees, employment agency, licensed, out-of-state, agencies, resident, corresponded, parties

Counsel: Jeffrey R. Youngman argued the cause for appellant (Feitlin, Youngman, Karas & Youngman, attorneys; Mr. Youngman, on the brief).

James H. Forte argued the cause for respondents (Saiber, Schlesinger, Satz & Goldstein, attorneys; Mr. Forte, on the brief).

Judges: Before Judges WEISSBARD, S.L. REISNER and GILROY.

Opinion

PER CURIAM

This case arises from a dispute over fees that a New York-based agency charged for placing employees at a New Jersey subsidiary of a New York bank. Defendant Michael P. Maloney Consulting, Inc. (Maloney) appeals from an August 25, 2006 trial court order, granting summary judgment dismissing Maloney's counterclaim for fees against the Bank of New York (BONY) and dismissing Maloney's third party complaint against other related parties. [1] We affirm.

I

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[1] Plaintiff Bank of New York sought a declaratory ruling that it did not owe Maloney any fees; Maloney counterclaimed for the fees. Realizing that the August order dismissing the fee claim was interlocutory, but that the court's August ruling made inevitable the grant of judgment for BONY, the parties "consented" to the entry of an order, filed November **[*2]** 17, 2006, concluding the case by granting BONY a declaratory ruling that it did not owe Maloney any fees. Ordinarily, a party cannot appeal from a consent order. However, without addressing the propriety of this somewhat unorthodox approach to finalizing the disposition of a case, we will address the merits of the appeal.

Maloney is an agency specializing in the placement of fixed income bonds salespersons, analysts, traders, and other financial specialists. On February 2, 2001, BONY sent a letter agreement from its New York office to Maloney's New York office. The agreement recited that if BONY "or one of its affiliates employs an applicant as a direct result of a referral from" Maloney, then either BONY or its affiliate would pay Maloney a fee for the referral. The amount of the fee and any other conditions would be "determined by a separate written agreement" between BONY and Maloney.

The February 2, 2001 letter stated that "[t]his letter and the aforementioned agreement we enter into with [Maloney] will constitute our entire arrangement with respect to the hiring of applicants referred to the Bank by [Maloney] and supercede any and all prior oral or written . . . agreements." The **[*3]** February agreement did not indicate that it was to be construed in accordance with New York law. Maloney signed the letter agreement. [2]

Thereafter, Maloney repeatedly corresponded with the New Jersey Fixed Income Division of BNY Capital Markets Inc. (BNY-NJ or Roseland office), a BONY subsidiary located in Roseland, New Jersey, attempting to place New Jersey residents as employees at BNY-NJ.

On December 20, 2001, Michael P. Maloney wrote a letter to Chris Harrison of BNY-NJ in Roseland. The letter enclosed the resume of John Economos, indicated that Economos lived in New Jersey, and suggested that Economos and another New Jersey resident who worked with him could both be good employees for BNY-NJ. On October 30, 2002, Mr. Maloney wrote to Joe Manello at BNY-NJ, again trying to place Economos, who lived "about twenty minutes from [the Roseland] office."

In a letter to the Roseland office dated October 9, 2002, Mr. Maloney attempted to place another New Jersey **[*4]** resident named Scott Kephart. The letter also indicated that Mr. Maloney was trying to recruit two other candidates for BNY-NJ, one of whom lived in New Jersey and one who was about to move to New Jersey. A follow-up letter dated December 9, 2002, again sought to place Kephart at BNY-NJ.

On October 25, 2002, Maloney sent a letter to BNY-NJ seeking to place another New Jersey resident named Lou Russo.

In 2003, the parties had a disagreement about a New Jersey resident named Adam Kraushaar, whom Maloney had attempted to recruit for BNY-NJ. Expressing regret over the disagreement, Michael P. Maloney sent a letter to Joe Manello at the BNY-NJ Roseland office indicating that "I have plenty of good people to send you but at this point I am afraid to send them. Over the last couple of years I have talked to a great number of different people about your firm . . . and a lot of these people are working there right now."

There is no dispute that BNY-NJ did at some point hire Kraushaar, Kephart, and Economos. However, the parties disagreed as to whether these employees came to BNY-NJ as a result of Maloney's efforts. BNY-NJ claimed Maloney was not entitled to fees for placing these employees. When **[*5]** the parties could not resolve their differences, BONY filed a declaratory judgment action in New Jersey, seeking a ruling that it did not owe Maloney any fees for these employees because they were not hired as a result of the parties' agreement. Maloney counterclaimed seeking the fees from BONY, and also filed a third party complaint against BNY-NJ, its head Joseph Manello (a New Jersey resident), and Kraushaar. Maloney also contended that BONY owed additional fees for the placement of Russo in the Roseland office. In answering the counterclaim, BONY for the first time invoked the New Jersey Private Employment Agency Act, contending that Maloney could not collect its fees pursuant to *N.J.S.A. 34:8-45*, because it was not licensed in New Jersey as required by *N.J.S.A. 34:8-52*. [3]

In an oral opinion placed on the record on August 25, 2006, Judge Honigfeld concluded that the transactions between BNY-NJ and Maloney "were in this particular case dealing with New Jersey employment, particularly for a New Jersey office of B.N.Y." He found "[i]t's quite clear in this case that **[*6]** employees were being hired for a New Jersey office. Correspondence was being directed there. There was talk of at least one of the employees expressing a willingness to relocate from Toronto to New Jersey. But it's clear that these were New Jersey employments."

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[2] An April 14, 2003 agreement addressing the hiring of Lou Russo did indicate that the agreement would be construed in accordance with New York law. However, the agreement also clearly stated that Russo was being placed in New Jersey.

[3] At oral argument, Maloney's counsel conceded that BONY was not forum-shopping when it filed its lawsuit in New Jersey.

Relying on *Accountemps Div. of Robert Half, Inc. v. Birchtree Group, Ltd., 115 N.J. 614, 560 A.2d 663 (1989)*, Judge Honigfeld concluded that New Jersey had a strong public policy interest in regulating the activities of employment agencies, "with respect to New Jersey employments," and that allowing Maloney to circumvent the Act would violate public policy. Accordingly, he held that the Act did apply to Maloney's activities in placing employees in New Jersey and that its failure to obtain a license mandated that summary judgment be granted to BONY.

II

Our review of a trial court's grant of summary judgment is de novo, using the same *Brill* standard employed by the trial court. *Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167, 704 A.2d 597 (App. Div.)*, *certif. denied*, *154 N.J. 608, 713 A.2d 499 (1998)*; *Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995)*. Having reviewed the record, we conclude that the trial court properly concluded that **[*7]** no material facts were in dispute, and correctly determined that Maloney was not entitled to collect fees because it was not licensed as an employment agency in New Jersey.

The dispute in this case arises because New York does not require a placement firm to be licensed so long as it does not charge the prospective employees a fee. *See N.Y. Gen. Bus. Law §§ 171* and *191*; *Career Blazers Inc. v. Comtech Telecommunications Corp., 187 Misc. 2d 492, 723 N.Y.S. 2d 314, 315 (App. Term 2000)*; *Linwood Consultants v. Frank Assocs., 161 Misc. 2d 546, 614 N.Y.S. 2d 863, 864 (City Civ. Ct. 1994)*. On the other hand, New Jersey does require those agencies to be licensed. [4] *N.J.S.A. 34:8-52*.

The Private Employment Agency Act, *N.J.S.A. 34:8-43 to-66*, [5] requires employment agencies to be licensed in order to operate in this State. *N.J.S.A. 34:8-52*. By its terms, it applies to agencies with principal **[*8]** offices outside the State and it precludes any unlicensed agency from using this State's courts to collect its fees:

> a. The provisions of this act shall apply to any person engaging in any of the activities regulated by this act including persons whose residence or principal place of business is located outside of this State.
>
> b. A person shall not bring or maintain an action in any court of this State for the collection of a fee, charge or commission for the performance of any of the activities regulated by this act without alleging and proving licensure or registration, as appropriate, at the time the alleged cause of action arose.
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> [*N.J.S.A. 34:8-45*.]

After reviewing the undisputed evidence in this case, we conclude that Maloney's activities fell within the purview of the Act. Whether its contract was with BONY or with BNY-NJ, Maloney was clearly placing, or attempting to place, New Jersey residents with a New Jersey employer in Roseland. Further, this was not a one-time transaction. *See Saks Theatrical Agency v. Mentine, 24 N.J. Misc. 332, 48 A.2d 644 (Dist. Ct. 1946)*(One **[*9]** placement of an entertainer at a New Jersey venue did not subject a Philadelphia booking agency to the New Jersey Act). Maloney repeatedly corresponded with BNY-NJ's Roseland office in order to place employees, and Mr. Maloney confirmed in correspondence that he had placed "many" employees with the New Jersey subsidiary.

We conclude that *Accountemps Div. of Robert Half, Inc. v. Birchtree Group, Ltd., 115 N.J. 614, 560 A.2d 663 (1989)*, is controlling here. In *Accountemps*, the Supreme Court held that the Act applies to out-of-state employment agencies that supply employees to New Jersey employers. In that case, the Court recognized the transformation of the employment agency industry from a purely local business to a national industry:

> Electronic communication, increased mobility, and national advertising have transformed what was once a local industry into one that operates across state lines. Thus, it is not surprising that an Act passed in 1907 did not specifically address the question whether the licensing requirements apply to out-of-state employment agencies conducting business in New Jersey.
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> [*Id. at 622*.]

After reviewing the long history of the Act, dating back to

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[4] Defendant's contention that the New Jersey statute does not cover executive search agencies is without merit. The Act defines "employment agency" as including an agency that "procures or obtains . . . or assists in procuring or obtaining employment for a job seeker or employees for an employer" or "[a]cts as a placement firm." *N.J.S.A. 34:8-43*.

[5] The Act is also known as the "Employment and Personnel Services Act." *Data Informatics v. Amerisource Partners, 338 N.J. Super. 61,64 n. 1, 768 A.2d 210 (App. Div. 2001)*.

the late 1800's, and the abuses **[*10]** at which the Act was aimed, the Court concluded that it was intended to apply to out-of-state agencies.

> It becomes abundantly clear to one examining the entire statutory scheme, *see* 2A *Sutherland Statutory Construction, supra*, at § 46.05, that the Legislature's primary purpose in adopting the Private Employment Agency Act was to regulate the conduct of *all employment agencies providing services to New Jersey employees and employers*. It would frustrate that purpose to construe the Act to require agencies physically located in the state to be subject to comprehensive regulation, while allowing out-of-state agencies to carry on business in this State completely unregulated . . . . Guided by these principles, we conclude that the scope of the Private Employment Agency Act includes those out-of-state agencies doing business in this State.
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> [*Id. at 623* (emphasis added).]

Thus, the Court recognized that the Act would apply to out-of-state employment agencies whose services were conducted across state lines.

Recognizing that *N.J.S.A. 34:8-45(b)* could have a harsh result, in that the out-of-state agency may have provided a service yet be denied its fee, the Court determined to apply its ruling prospectively. **[*11]** The Court did not indicate that an agency such as Maloney which plied its trade in New Jersey without a license would be entitled to any future leniency. *Id. at 626-27*. *See Data Informatics, Inc. v. AmeriSource Partners, 338 N.J. Super. 61, 79-80, 768 A.2d 210 (App. Div. 2001)*("The Act has been applicable to in-state agencies since its inception in 1951, and to out-of-state agencies since 1989. While we appreciate plaintiff's argument that enforcement of the Act should not benefit alleged wrongdoers, ultimately, we must balance that concern against a legislative mandate which precludes otherwise possibly meritorious causes of action in order to insure enforcement of a statutory scheme which serves the greater good.")(citation omitted).

We find no merit in Maloney's argument that we should apply New York law to this dispute. New Jersey clearly has the dominant interest in enforcing its own law, as a New York court has recognized in a similar case. In *Fanning Technical Search v. 100% Girls Brand, Inc., 292 A.D.2d 301, 740 N.Y.S.2d 28 (App. Div. 1st Dep't 2002)*, a New York court concluded that the New Jersey Act should apply where a New York employment agency contracted, with a New Jersey employer, to send employees **[*12]** to the employer's business in this State. "While plaintiff conducted all of its search efforts in New York, it is more significant that it sent the candidates it found to New Jersey." *Id. at 29*. The court concluded that "New Jersey has a more significant relationship to the transaction than New York," and that "New York public policy does not require application of its law exempting employment agencies such as plaintiff from licensing requirements." *Ibid.* We conclude this result is equally correct here under the governmental-interest test. *See Gantes v. Kason Corp., 145 N.J. 478, 484, 679 A.2d 106 (1996)*.

While the master contract was with BONY in New York, the agreement was carried out in New Jersey. Maloney corresponded with BNY-NJ to place employees, and it placed New Jersey residents with BNY-NJ. Moreover, when BONY filed its action in New Jersey, Maloney did not limit itself to defending against the lawsuit; rather it filed a third party complaint against one of the New Jersey employees it allegedly placed at BNY-NJ, against BNY-NJ at whose New Jersey office Maloney placed the employee, and against BNY-NJ's New Jersey-resident manager. Thus, Maloney was clearly attempting to use the courts of **[*13]** this State to collect its fees, which *N.J.S.A. 34:8-45(b)* prohibits because Maloney is not licensed here.

Even if some of the agreements with BONY provided that New York law would govern the agreements, the courts of New Jersey need not enforce that aspect of the agreements if to do so would permit Maloney to circumvent New Jersey law. We conclude that, to the extent any of the relevant contracts provided that New York law would govern the contracts, those provisions are unenforceable here as against public policy. The parties cannot contract to let Maloney do what this State's law forbids, i.e., to place employees with New Jersey employers without being licensed. *See Data Informatics, supra, 338 N.J. Super. at 78-79*. To hold otherwise would permit any out-of-State employment agency to circumvent the Act by contracting with a third party in New York to send employees to a New Jersey subsidiary. This case happens to involve highly-paid financial analysts. The next case could involve low-paid sweat shop employees.

Affirmed. [6]

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[6] To the extent not otherwise addressed here, Maloney's appellate contentions are without sufficient merit to warrant discussion in a written opinion. ***R. 2:11-3(e)(1)(E)***.

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