

Nardelli, J.P., Andrias, Sullivan, Rosenberger, Wallach, JJ.

961 Fox News Network, L.L.C.,
Plaintiff-Appellant,

Steven G. Mintz

-against-

N.S. Bienstock, Inc.,
Defendant-Respondent.

Frederic S. Newman

Order, Supreme Court, New York County (Ira Gammerman, J.),
entered March 21, 2002, which granted defendant's motion to
dismiss the complaint, unanimously affirmed, with costs.

The complaint, alleging that defendant talent agency
tortiously interfered with the contract between plaintiff news
network and one of its newscasters by communicating to the
newscaster an offer of employment from a competing news network,
was properly dismissed since defendant induced no breach of the
underlying contract (see NET Bancorp v Fleet/Norstar Fin. Group,
87 NY2d 614, 620-621). The subject contract, which did not
contain a provision affording plaintiff a right of first
negotiation (cf. Am. Broadcasting Co. v Wolf, 52 NY2d 394), did
not bar the newscaster from entertaining an offer of employment
from a competing network, and while the contract's right-of-
first-refusal clause restricted the right of the newscaster to

"enter into an agreement or arrangement," it is not pleaded that the newscaster accepted employment with the rival network before plaintiff terminated her contract by dismissing her.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 29, 2003

CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; 1AS PART 27

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FOX NEWS NETWORK, L. L. C.

Index No. 604420/01

Plaintiff,

- against -

N.S. BIENSTOCK, INC.,

Defendant.

P. C. No. 17467

FILED
MAR 21 2002

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GAMMERMAN, J.:

Defendant N.S. Bienstock, Inc. ("Bienstock") moves for an order pursuant to CPLR 3211(a)(7), dismissing the complaint for failure to state a cause of action.

In the complaint, plaintiff Fox News Network ("Fox") alleges that Bienstock, a talent agent, tortiously interfered with the contract between Bienstock's own client, Paula Zahn, and Fox.

Zahn worked for Fox as a news anchor pursuant to a three-year contract ("Fox Contract") commencing February 23, 1999. The contract was set to expire on February 28, 2002. Paragraph 9 of the Fox Contract provided as follows:

RIGHT OF FIRST REFUSAL Performer [Zahn] hereby accords Fox a right of first refusal on Performer's services following the end of the term hereof. *Performer shall not at any time (either within or during 3 months following the end of the term hereof) enter into an agreement...with any person...for Performer's services following the term hereof, unless Performer has first given Fox written notice of the terms and conditions of said offer ("Offer") acceptable to performer...and an opportunity for at least 5 business days to meet those terms and conditions.* If Fox accepts said offer, Fox shall not be required to meet any provisions contained therein which cannot be satisfied by the payment of money and offer of a similar position to Performer. In the event

that Fox does not meet the Offer within the above- referenced time frame, then Performer shall be free to accept the Offer. In the event Performer does not accept the Offer, Fox's right of first refusal shall continue for the remainder of the 3-month period as set forth above [emphasis supplied].

On August 28, 2001, Zahn transmitted to Fox an offer she had received from a competing network, CNN, to employ Zahn starting on March 1, 2002. (i.e. after the expiration of the Fox Contract). Zahn's letter gave Fox until September 5, 2001 to decide whether or not to match the CNN offer. On September 5, 2001, Fox sent Bienstock a letter which purportedly terminated the Zahn Contract for "Cause," indicating that "effective September 5, 2001, Fox shall have no further obligations to [Zahn] under the [Fox Contract] including, without limitation, any obligations to pay you further Compensation." Zahn began employment with CNN after receiving the above letter.

On September 6, 2001, Fox brought this action against Bienstock for tortious interference with contract. Fox has not sought any injunctive or legal relief against either CNN or Zahn.

To establish a case of tortious interference, Fox must first initially show that the underlying contract has been breached, NBT Bancorp., Inc. v Fleet/Norstar Fin. Group, Inc., 87 NY2d 614 (1996). Thus, it is necessary to consider the legal effect of the underlying Fox Contract. Interpretation of an unambiguous contract provision is a function for the court, and matters extrinsic to the agreement may not be considered where the intent of the parties can be gleaned from the face of the instrument, Chimart Assocs. v Paul, 66 NY2d 570 (1986).

Moreover, extrinsic and parol evidence are not to be considered in deciding whether a contract is ambiguous.

According to Fox, the Fox Contract prohibited Zahn from entertaining offers from rival networks on negotiating with any rival network until there were less than three months to run on her contract. In other words, Fox claims that by entertaining an offer from CNN six months before the Fox Contract was set to expire, Zahn was in breach, and that by assisting Zahn in obtaining an offer from CNN, Bienstock tortiously induced Zahn's breach. The Fox Contract, however, contains no such restriction. It is a "first refusal" clause rather than a "first negotiation" clause. The "three months" refer to a period after the expiration of the contract terms and the contract provides that if Zahn *at any time* received an offer from a third party, Zahn would give Fox an opportunity to match the offer. Thus, Zahn was free to negotiate with rival networks at any time, so long as she gave Fox the opportunity to decide whether or not to match any offers obtained.

Fox seizes upon a letter agreement, made prior to the execution of the Fox Contract, which read:

Fox will be accorded a right of first refusal for 3 months following the end of the term. Fox will have five business days to match any subsequent offers made to Ms. Zahn."

Even if the letter agreement were incorporated as part of the Fox Contract, which it was not, the above letter language merely means that Fox has the right to match offers received by Zahn as late as the end of May 2002. It does not contain any time limit on Zahn's consideration of proposals from rival networks.

Fox could have sought a "first negotiation" clause which would have prevented Zahn from even discussing with rival networks her possible employment after February 28, 2002, but never did so.

Fox complains that if Bienstock's interpretation of the contract were adopted, Ms. Zahn could have received an offer from a rival network as early as March 1999, and Fox would have had to decide, on the basis of very limited ratings data, whether it was worth matching the rival's offer. However, this was precisely what the contract permitted Zahn to do. As it turned out, Fox had more than two years to assess Zahn's performance and to determine whether or not it was financially advisable to match an offer she received from a rival network.

In light of the above, I find that Zahn was in compliance with the first refusal clause of the Fox Contract, thus, Bienstock cannot be said to have induced Zahn to breach the contract,

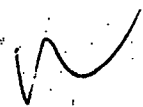
Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed, with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 14, 2002

ENTER:



FILED
MAR 21 2002
NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.
IRA GAMMERMAN