

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

PRESENT: B. TOLUB

PART 15

Index Number : 108812/2009

TOCCO, PETER

vs.

WALTER J. DOWD, INC.

SEQUENCE NUMBER : 002

COUNSEL FEES, EXPENSES

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

In this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is consolidated with and decided in accordance with motion seq. 001

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 11/20/09

B. TOLUB

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

PETER TOCCO

INDEX NO. 108812/09

Petitioner,

-v-

WALTER J. DOWD, INC.,

MOTION DATE _____

MOTION SEQ. NO. 001

Respondent.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is consolidated with motion sequence 002 and decided in accordance with the accompanying memorandum decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 11/20/09

WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
PETER TOCCO,

Petitioner,

Index No.
108812/2009

-against-

WALTER J. DOWD, INC.,

Respondent

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1412).

Walter B. Tolub, J.:

Motion sequence 001 and 002 are hereby consolidated for disposition.

By motion sequence 001, Mr. Tocco petitions the court for an order confirming a Financial Industry Regulatory Authority (FINRA) arbitration award, dated June 9, 2009, and directing that judgment be entered thereon. Respondent, Walter J. Dowd, Inc. (Dowd), Tocco's former employer, cross-moves for an order vacating the award on the ground that the arbitrators manifestly disregarded the law. Tocco also moves (application 002) for an order pursuant to 22 NYCRR 130-1.1, imposing costs, attorneys' fees and sanctions against Dowd, on the ground that its cross motion to vacate the award is allegedly frivolous.

Background

Mr. Tocco, who was employed as a managing director and head of equity trading for a hedge fund, was approached by Dowd's consultant and was thereafter offered employment to expand Dowd's

rudimentary upstairs trading (NASDAQ) operation. He began working for Dowd on March 12, 2007, and was subsequently terminated on February 14, 2008. A March 12, 2008 U-5 form, essentially a securities industry uniform termination notice, which Dowd was required to file with FINRA within 30 days of Mr. Tocco's termination, recited that Mr. Tocco was terminated for "FAILURE TO MEET FIRM'S PRODUCTION REQUIREMENT." (Brecher reply aff., ex. K).

Mr. Tocco's counsel then filed a statement of claim, dated June 4, 2008, with the director of FINRA's director of arbitration to assert claims against Dowd, pursuant to FINRA's arbitration procedure. In that statement, Mr. Tocco's counsel asserted that Mr. Tocco had a written two-year employment contract with Dowd, which commenced on March 12, 2007 and concluded on December 31, 2008, which contract provided for a monthly salary of \$30,000, a first-year fixed bonus of \$235,000, and a second-year fixed bonus of \$420,000.¹ Mr. Tocco's statement alleged that, between September 2007 and January 2008, Dowd failed to pay him his salary and fixed bonuses in accordance with the contract, that when he sought the amounts due him, Dowd tried to pressure him to restructure his contract, and that, when

¹ The alleged contract, which was appended to the statement, also provided for an additional bonus of \$235,000 for the first year and \$420,000 for the second year if certain gross revenues were generated.

he refused, Dowd fired him, without cause, in breach of the contract. The statement further alleged that, although Mr. Tocco performed services for Dowd, it shortchanged him. Mr. Tocco claimed that Dowd violated New York's Labor Law by failing to pay him his earned salary and bonus. As a result, Mr. Tocco sought an award from the arbitrators directing respondent to pay him, among other things, \$1,030,000, the amount of the outstanding salary and fixed bonuses, which was allegedly due over the course of the two-year contract.

Dowd then filed an answer and counterclaim. As is pertinent, the answer asserted that, since the contract, which was for a two-year period, and thus was not by its terms to be performed within a year of its making, was never signed by it, the contract was barred by the statute of frauds under General Obligations Law § 5-701. Dowd therefore maintained that Mr. Tocco was simply an at-will employee, who could be terminated at any time. Dowd asserted that Mr. Tocco was hired based on his representations and projections about earnings and about clients he could bring to Dowd. Dowd further claimed that, based on these representations, it invested significant funds to develop the upstairs trading operation. When it allegedly became clear to Dowd in February 2008, that nothing close to the projections could be met, and that Dowd was in a precarious financial situation, it terminated Mr. Tocco. Dowd asserted a counterclaim

against Mr. Tocco, based on his alleged deceit and misrepresentations regarding his business contacts and relationships and his ability to generate upstairs trading operation revenues.

In September 2008, Mr. Tocco supplemented his statement of claim by indicating that he had been offered employment, which he accepted, to start on October 6, 2008 with another firm, Loop Capital LLC (Loop) (an entity located in Illinois) at a base salary of \$175,000 with a minimum guaranteed bonus of \$150,000 in March 2010. However, when that entity conducted a background check and viewed the filed U-5 form, it rescinded the offer based on the reason for termination set forth in that form. Loop advised Mr. Tocco that, if he prevailed in the arbitration and had his U-5 expunged, it would consider extending employment to him. Based on these allegations, Mr. Tocco sought, among other things, to have the U-5 expunged and to be awarded compensatory damages based on Dowd's alleged defamation of his character. Mr. Tocco's amended statement recited that he had been told on the date of his termination that no negative comment would be placed in the U-5, and that the U-5 was false and known to be false, because he did not have a production requirement.

In response, Dowd asserted that the U-5 accurately reflected the grounds for Mr. Tocco's termination. Additionally, Dowd maintained that, in New York, broker-dealers have absolute

immunity in defamation cases regarding the content of U-5 filings.

The arbitration hearing was held over five days in June 2009 before three arbitrators. As is relevant, Mr. Tocco testified that at the end of February 2007, before his employment started, there were discussions that included at least him, Dowd's CEO, Gordon Charlop (Charlop), and Dowd's compliance officer, Brett Logan, who was also an attorney. Mr. Tocco did not want to start at Dowd until April because he had a scheduled family vacation in March, but, since Dowd wanted to get the ball rolling, he agreed to start earlier. 6/8/09 hearing transcript (T), at 46-47. Mr. Tocco expressed his interest to Mr. Charlop that he wanted a contract and that it should have both fixed and variable bonus components. Mr. Charlop did not believe that an agreement was necessary before Mr. Tocco started his employment at Dowd, but that it was something Mr. Tocco desired, so that everyone would be clear about expectations (6/3/09 Tr, at 186). According to Mr. Tocco, the fixed bonus component was allegedly to account for the work he did in creating and building up the upstairs operation (6/1/09 Tr, at 87-88). So, that was "how we came up with the ... \$235,000 figure." (*Id.* at 91-92). Mr. Charlop allegedly suggested that Mr. Tocco's salary would be \$30,000 per month and that he would get the bonus of \$235,000. (*Id.* at 93). Mr. Tocco testified that the financial arrangements were worked

out at a February 28 meeting, and that there was a meeting of the minds on that subject (6/8/09 T, at 47-49). Mr. Logan then sent Mr. Tocco an e-mail on March 5, 2007, which attached a proposed contract, containing the salary and bonuses as previously discussed. Mr. Logan conceded at the hearing that the figures contained in the proposed contract were those which were discussed at a February meeting, but asserted that those were not agreed to, but were only what Mr. Tocco desired (6/5/09 T, at 56-62). According to Dowd's witnesses, the only thing to which Dowd agreed was that Mr. Tocco would get \$30,000 a month. Mr. Logan claimed that after Mr. Tocco was satisfied with the terms of the proposed contract, he was then to have Mr. Charlop go over them and put in any terms he wanted. Notwithstanding this assertion, the Monday, March 5 e-mail from Logan to Mr. Tocco recited, "Please find attached the employment agreement for your review. I will have two copies on letterhead for you and Gordon to sign on Thursday when you come in." (*Id.* at 90; Brecher reply aff., ex. E).

Upon receipt of the March 5 e-mail, which was appended to the proposed contract, Mr. Tocco had it reviewed by his attorney and made some proposed minor changes, none of which altered the salary/bonus terms. Mr. Logan incorporated some of the suggested changes, but according to Mr. Tocco, not all of them, and gave him an amended version, dated April 30, 2007, on Dowd letterhead.

The agreement, which was in letter format, recited that the letter constituted an offer of employment, which, when executed by Mr. Tocco, constituted a binding employment agreement. (*Id.*, ex. D). Both the April agreement and the March draft provided that Dowd could terminate Mr. Tocco for cause, which termination might result in the forfeiture of any remaining bonus or salary owing. The agreement defined cause as fraud and theft from Dowd, material violations of NASD, NYSE or SEC rules or state and federal law, material violations of Dowd's supervisory procedures manual, willful violations of the agreement, willful disregard or neglect of Mr. Tocco's duties under the agreement, and willful and demonstrated unwillingness to perform his duties as head of the upstairs trading operation. The agreement set forth the salary and the guaranteed and earned bonuses through the end of 2008, and stated that the terms for the third year would be based on good faith negotiations.

Mr. Tocco asserted that he had the April agreement reviewed, signed it and gave it back to Logan in early June 2007. Mr. Tocco testified that Logan told him that he would make sure that Charlop got it and would have a copy put in Mr. Tocco's file (6/1/09 T, at 107-108). Mr. Tocco thought that the contract was a *fait accompli* (6/8/09 T, at 43-44). He further testified that no one ever came to him and said that there was a problem with the contract, or that it had to be discussed with Mr. Charlop.

(*Id.* at 44). Mr. Logan and Mr. Charlop concede that they never told Mr. Tocco that the contract had not been executed by Mr. Charlop, nor did Mr. Logan tell Mr. Tocco that Charlop had any problem with the contract. Indeed, while Logan testified that Charlop told him that he was not happy with either the March or April versions, he did not specify what troubled him.

Meanwhile, Mr. Tocco continued to develop the upstairs operation, including seeing to it that it had the necessary equipment and operating systems, and that it was appropriately staffed. The upstairs trading floor was not operational until August 2007 and was not fully staffed until some time in the fall of 2007, owing in part to a restrictive covenant issue that one prospective staff member had to resolve with another employer. It cost about \$600,000 to set up the upstairs operation, and during 2007, it made very little money. It had to be funded from Dowd's downstairs operation, which, due to declining market conditions, was not doing as well as usual.

Beginning in September 2007, Dowd failed to pay all of Mr. Tocco's monthly \$30,000 salary. Mr. Tocco testified that he had agreed to work with Dowd and defer some of his compensation, until its financial picture improved, but Mr. Tocco was beginning to have doubts about Dowd's ability to pay him. He began to secretly tape meetings and conversations. In one such conversation, on October 29, 2007, Michael Berger, a shareholder

and Dowd partner, informed Mr. Tocco that the company had experienced some good months and some bad months and that, as the firm looked toward the end of the year, "the terms of a contract that -- or an agreement that we had written up before, its getting clear that some of those terms are prohibitive ... No one is trying to walk away from anything ... No one is trying to renege on anything." (Brecher reply aff., ex. H, at 5-6). Mr. Berger, when confronted by that statement, testified that he was not aware that Mr. Tocco had signed an agreement, but that he "was aware that there was an agreement though, that there was something on paper." (6/5/09 T, at 208-209).

Mr. Tocco testified that, thereafter, he had some e-mail correspondence with Mr. Charlop on November 12, 2007, in which he asked Mr. Charlop to bring a copy of his employment contract to a meeting to be held that day, so that they could discuss, among other things, the bonus provisions (*Id.*, ex. I). Mr. Charlop then responded that he would have Berger and another individual bring copies of the draft that Mr. Tocco had been working on with Mr. Logan. Mr. Tocco then responded "Draft? I am referring to the contract I signed and gave to Brett. He said he would file it ... " (*Id.*). According to Mr. Tocco's testimony, this was the first time that he was aware that respondent was claiming that there was no contract.

Thereafter, Mr. Berger attempted to have Mr. Tocco sign a

letter agreement, dated December 26, 2007, in which he agreed that, after December 31, 2007, instead of getting \$30,000 a month, Mr. Tocco would be getting \$10,000, and that any further compensation would be based on Mr. Tocco meeting commission goals. Mr. Tocco ultimately declined to sign that agreement, and was terminated on February 14, 2008 by Berger, who at the hearing acknowledged that he had informed Mr. Tocco that the U-5 would not contain anything deleterious. (6/5/09 T, at 203). In addition to his own testimony, Mr. Tocco had a Loop partner testify, via telephone, as to the facts underlying Mr. Tocco's defamation claim, including that Mr. Tocco had been verbally offered a salary of about \$175,000, assuming everything checked out, and that he was likely told that bonuses were "a minimum of probably [\$]50,000." (6/2/09 Tr, at 153-155).

At the hearing, Dowd's counsel, relying on GOL § 5-701, urged that there was no valid written contract, because the April 2007 agreement could not by its terms be completed within a year and because the agreement was never signed by the party to be charged, Dowd. Dowd's counsel also asserted that any taped conversation could not obviate the statute of frauds problem, because it did not constitute a signed writing. Dowd's counsel further asserted that, because the alleged agreement violated the statute of frauds, a Labor Law violation could not be predicated on that agreement's terms. Dowd also urged that, under the

