New York Law Journal

In Law Firm Battles Over Placement Fees, 2 Courts Side With Recruiters

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By Christine Simmons | October 08, 2018

Taking legal recruiters to court is a risky proposition for law firms, as evidenced by a pair of recent court decisions in which judges have awarded payments to recruiters after firms initially refused to pay their placement fees.

On Sept. 27, a New York federal judge ordered midsize firm Meltzer, Lippe, Goldstein & Breitstone to pay a judgment that will total about $500,000 to recruiter James Malfetti of Management Recruiters of Union County, New Jersey, which had introduced a health care group to the Long Island-based firm.

The next day, on Sept. 28, a California appellate court upheld a $335,000 jury verdict (http://www.law.com/sites/almstaff/2017/08/31/la-recruiter-scores-litigation-win-against-manatt-over-laterals/) against Manatt, Phelps & Phillips (http://www.law.com/law-firm-profile/?id=197&name=Manatt) in favor of Gregg Ziskind, a legal recruiter at Gregg Ziskind & Associates, on his breach of oral contract claim.

While litigation between law firms and recruiters is nothing new (http://amlawdaily.typepad.com/amlawdaily/2011/05/binghammiles.html), the recent decisions show that courts are continuing to enforce recruiter contracts with firms, even if those contracts are oral or do not include a signature.

"If the court finds there is a valid contract, the courts will enforce it," said Marina Bogorad, a partner at Gerard Fox Law who represented Ziskind on appeal.

Oftentimes, such disputes don't even go to trial. Last month, Simpson Thacher & Bartlett settled a recruiter's suit (http://www.law.com/newyorklawjournal/2018/09/19/simpson-thacher-settles-with-recruiter-over-sullivan-cromwell-hire/) that claimed the firm failed to pay a placement fee for recruiting a former Sullivan & Cromwell partner (http://www.law.com/americanlawyer/sites/americanlawyer/2017/11/02/simpson-thacher-recruits-sullivan-cromwell-restructuring-partner/). The attorney for the recruiter, Boston Executive Search Associates, said the action was "settled on confidential terms."

No Required Signature

In the New York case, Meltzer Lippe had asked Joshua Ben-Asher, a recruiter at Malfetti's agency, in 2015 to search for a health care boutique or department to add to the Mineola, New York-based firm. Under the parties' fee agreement, Meltzer Lippe would pay 25 percent of the placed attorney's first-year base compensation, while there was a separate group fee schedule for placing at least two attorneys from the same firm.

According to a decision (http://www.documentcloud.org/documents/4995945-MeltzerLippe-Malfetti-Decision.html) by U.S. District Judge Denis Hurley of the Eastern District of New York, Ben-Asher introduced Kern Augustine Conroy & Schoppmann, a health care law firm with its main office in New Jersey and a second office in Westbury, New York, to Meltzer Lippe. Meltzer Lippe initially met in November 2015 with Kern Augustine's sole shareholder, Michael Schoppmann, who planned to leave and wished to sell the firm.

Ultimately, Meltzer Lippe determined that, as a New York limited liability partnership, it was prohibited by New Jersey statute from owning Kern Augustine, a New Jersey professional corporation, Hurley said in his decision. David Heymann, Meltzer Lippe's managing partner and an attorney admitted in New Jersey, bought Schoppmann's shares of Kern Augustine for $40,000.

The deal closed in February 2016 and all 13 Kern Augustine attorneys, whose salaries totaled nearly $2.1 million, stayed. The firm announced they had "formed an alliance (http://www.facebook.com/348450398560415/posts/kern-augustine-has-formed-an-alliance-with-meltzer-lippe-for-immediate-release/1031596543579127/)" with Meltzer Lippe. The firms' attorneys were introduced to each other and encouraged to collaborate and to refer business to each other, Hurley said.

Meltzer Lippe suggested to Ben-Asher that the firm pay him as a "business broker," as the Kern Augustine deal was a sale, not a placement, and that an appropriate "business broker" fee might be eight to 10 percent of the purchase price.

But Ben-Asher told the firm he was not a "business broker" and that Management Recruiters' fee would be determined under the "group placements" provision in the fee agreement.

In his Sept. 27 decision in the dispute, Hurley said evidence establishes there was an enforceable contract—the fee agreement—between Meltzer Lippe and Management Recruiters. Under the fee agreement, Heymann's acquisition of Kern Augustine and its

law practice was a "group placement" with Meltzer Lippe or an affiliate, obligating Meltzer Lippe to pay the placement fee, the judge ruled.

While Meltzer Lippe argued its CFO did not sign the fee agreement, Hurley said there was no requirement for the CFO to sign it for it to be held enforceable. The judge noted that the CFO worked with Ben-Asher on various attorney searches resulting in Meltzer Lippe hiring two attorney candidates, and that Meltzer Lippe accepted its invoices and paid the placement fees under the fee agreement, without objection.

Hurley said also the fee agreement expressly contemplated that Management Recruiters might place a group of attorneys from the same law firm, including through an "affiliate," rather than hiring them directly. The judge ordered that Management Recruiters is entitled to $413,820, as well as interest from March 2016.

Management Recruiters' attorney, Randall Rasey, a commercial litigation partner at Barton LLP in New York, said with interest, the judgment totals about $500,000. "If there's a lesson to be learned, it's to write a tight contact," Rasey said.

In an interview, Heymann called the dispute with the recruiter "a unique circumstance" for the firm. In the end, Meltzer Lippe's managing partner said no attorneys with Kern Augustine, which ceased operations last year, remained working with Meltzer Lippe. "We feel that the case was wrongfully decided, and we're assessing our options," he said.

'Substantial Evidence'

In the California case involving Manatt Phelps, the court affirmed a 2017 jury verdict (http://www.law.com/americanlawyer/sites/americanlawyer/2017/08/31/la-recruiter-scores-litigation-win-against-manatt-over-laterals/) for breach of an oral contract.

That dispute dates back to 2013, when at the request of Manatt Phelps partner Barbara Polsky, Ziskind approached Donna Wilson, then a partner at Buckley Sandler, to determine whether she would like to move her practice to the firm. Ultimately, Manatt

Phelps hired Wilson (http://www.law.com/americanlawyer/almID/1202612098658/) and her "right-hand man," former Buckley Sandler counsel John McGuinness (http://www.law.com/americanlawyer/almID/1202616315048/). (In June, Manatt Phelps named Wilson (http://www.law.com/therecorder/2018/06/12/manatt-taps-cybersecurity-chair-donna-wilson-as-next-firm-leader/) as its next managing partner.)

Manatt Phelps didn't compensate Ziskind but paid Roberta "Bobbie" McMorrow, a legal recruiter not associated with Ziskind's firm, about $335,000 for placing the attorneys. Manatt Phelps claimed that Ziskind had to obtain Wilson's consent to work with him as a condition for the formation of a contract between the firm and the recruiter, and when she did not give her consent, "the contract ceased to exist."

But the California Court of Appeal, in its Sept. 28 decision (http://www.documentcloud.org/documents/4995946-Ziskind-Manatt-Appeallate-Decision.html), said there is "is substantial evidence that Wilson's consent was not a condition" for the formation of a contract. The appeals court also said there was "substantial evidence" that Manatt Phelps prevented, hindered or unfairly interfered with Ziskind's ability to perform under the contract.

"When Polsky learned that Manatt had hired Wilson, she displayed a guilty conscience—she believed Ziskind would be hurt that Wilson had been placed at Manatt by someone else," the appeals court said. "When Polsky informed Ziskind of Wilson's hiring at Manatt through another recruiter, she said it was her fault, further displaying a guilty conscience."

Roman Silberfeld and Bernice Conn, a pair of Robins Kaplan (http://www.law.com/law-firm-profile/?id=256&name=Robins-Kaplan-LLP) partners representing Manatt Phelps, did not return an email seeking comment.

Bogorad, the lawyer for Ziskind, said the total award with interest is about $385,000. She said it was "baffling" that Manatt Phelps chose to litigate for five years against a semi-retired legal recruiter now in his mid-70s.