



Judge allows tort claims over rescinded job offer

Investment analyst alleged intentional misrepresentation

By: Pat Murphy ◉ August 4, 2016



A Hong Kong investment analyst pleaded fraud with sufficient particularity to proceed with an intentional misrepresentation claim against a Massachusetts company that rescinded a job offer shortly after he left the employment he had, a U.S. District Court judge has found.

The plaintiff, Vishal Bhammer, alleged that before he quit his job with global financial services firm Macquarie Group, he received repeated assurances there would be a position for him in the

launch of a new hedge fund by the defendant, Loomis, Sayles & Co.

The defendant contended that the plaintiff failed to plead fraud with particularity as required by the Federal Rules of Civil Procedure. Specifically, the defendant argued that the plaintiff's allegations failed to show its employees made statements they knew to be false during the recruitment process, before the company cancelled the launch of the fund and rescinded the plaintiff's job offer.

But Judge F. Dennis Saylor IV, in denying a motion to dismiss, concluded that the allegations in the plaintiff's complaint were sufficient to proceed with a claim for intentional misrepresentation.

"Loomis's alleged frequent representations that it was 'committed' to the fund, and that there was 'no reason' for Bhammer to delay taking steps to leave Macquarie and Hong Kong are contradicted by Loomis's abandonment of the fund shortly thereafter," Saylor wrote. "Thus, although there may well be other plausible explanations for Loomis's conduct, the complaint adequately pleads that one such explanation is that the statements were, in fact, false at the time that they were made."

The judge further allowed claims for negligent misrepresentation, tortious nondisclosure and tortious interference to proceed.

The 14-page decision is Bhammer v. Loomis, Sayles & Company, Inc., Lawyers Weekly No. 02-271-16. The full text of the ruling can be found here.

Circumstantial case

The plaintiff was represented by Boston attorneys Patrick J. Hannon and Barbara A. Robb. Hannon said the difficulty in bringing these types of claims is that the plaintiff is typically at a disadvantage with regard to access to information regarding the inner workings of the defendant.

"We did a good job of pulling together all the facts that we did have in presenting for the court a pleading that met the heightened pleading standard, and also provided a compelling circumstantial case of what we thought was actually going on with the defendant," he said.

The defendant was represented by Boston attorneys James W. Bucking, Allison L. Anderson and Robert A. Fisher.

"What the court did was essentially hold that conclusory, generic summaries of statements are sufficient to allege fraud with particularity," Bucking said. "We think the law is to the contrary."

According to Bucking, the plaintiff's complaint was insufficient because the alleged representations by the defendant's employees in the recruitment process, rather than being untrue statements of fact, were "summary conclusions and generic opinions."

Bucking also took issue with Saylor's decision to allow the plaintiff's tortious interference claim in the absence of any allegation that the defendant's conduct was directed at a third party.

“The only facts of this case are that there was an effort to recruit this person,” Bucking said. “It’s pretty revolutionary to suggest that the recruitment of an employee away from another company can be tortious interference.”



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— James W. Bucking, Boston

Springfield employment attorney Susan G. Fentin said the plaintiff clearly pleaded sufficient facts to withstand dismissal.

“He goes into quite excruciating detail,” Fentin said. “Sometimes in these cases all you get is, ‘Somebody told me I had a job, and then somebody told me I didn’t have a job.’ That obviously doesn’t meet the standard.”

The case stands as a warning to employers in terms of how they approach recruitment, she added.

“Employers need to be cautious when they make affirmations in strong language like that,” she said.

Employment attorney Ryan C. Siden agreed with the judge’s treatment of the alleged representations by the defendant’s employees during the plaintiff’s recruitment.

“The court said that the distinction between fact and opinion is often blurry,” the Boston lawyer said. “Judge Saylor does a great job of explaining to any plaintiffs’ attorney what that threshold is of alleging facts that are going to withstand this type of attack.”

Siden also commended the plaintiff’s attorneys for including the relatively novel claim for tortious nondisclosure.

“It gives them another tool in the tool box,” he said. “It’s not just the fact that there was an active misrepresentation; it’s the fact that the defendant was actively not disclosing its concerns.”

Boston employment attorney Rebecca G. Pontikes said the plaintiff’s claims were rightly allowed to go forward based on alleged statements making the defendant’s job offer sound like a “solid proposition” for which the plaintiff could leave a secure position.

“That’s plenty of particularity,” Pontikes said. “The plaintiff can’t plead what’s in someone’s head. You need to give the plaintiff a little bit of leeway to plead what he’s heard and put it in a context where his conclusions are plausible. He did that.”

International recruitment effort

In 2014, the defendant began planning for the launch of a new hedge fund. The Angleton Capital Fund was expected to have a heavy presence in Singapore with a primary focus on investment in Asian-Pacific markets.

The plaintiff alleged that the defendant began recruiting him in January 2015 to join the Angleton Fund. At the time, the plaintiff worked for Macquarie Group in Hong Kong where he lived with his wife and two children.

The plaintiff’s recruitment began with a Skype conference during which the defendant’s employees allegedly told the plaintiff that “the Angleton Fund had an appropriate and well-defined investment process, strategy, and philosophy.”

During a second Skype conference in February 2015, the plaintiff allegedly received assurances that the defendant was committed to the Angleton Fund for the long term.

On May 1, 2015, the plaintiff accepted the defendant’s offer to join the Angleton Fund as a senior analyst. The offer was contingent on his passing a background check. The plaintiff alleged that, after his background check was completed in early June 2015, he was told by employees of the defendant that there was no reason to delay giving notice to Macquarie in anticipation of his starting work with the defendant on July 20.

The defendant’s resignation from Macquarie became effective on July 5, 2015.

However, on July 16 the defendant told the plaintiff his job no longer existed because it had decided to abandon the Angleton Fund.

According to the plaintiff, he was told that the defendant had decided it lacked the necessary support systems to do

a proper launch of the fund.

In addition, the plaintiff alleged he was informed that the defendant's senior management ultimately lacked confidence in the underlying investment strategy for the fund.

The plaintiff filed a complaint in U.S. District Court asserting claims for intentional and negligent misrepresentation, tortious nondisclosure and tortious interference.

According to the plaintiff, the defendant never gave him an indication that it was considering abandoning the Angleton Fund or any other reason to think that he should not go ahead with his resignation from Macquarie.

Pleading standard met

Federal Rule of Civil Procedure 9(b) provides that, for claims alleging fraud or mistake, "a party must state with particularity the circumstances constituting fraud or mistake."

Saylor first found that the plaintiff's complaint was sufficiently specific with regard to the content of the alleged misrepresentations, citing alleged statements by the defendant's employees that the Angleton Fund had "an appropriate and well-defined investment process, strategy and philosophy," that the fund "met the criterion used by Loomis Sayles in determining whether to launch a new fund," and that the defendant was "committed" to the fund.

In rejecting the defendant's argument that the alleged misrepresentations were mere opinion rather than actionable statements of fact, Saylor noted that a statement in the form of an opinion may constitute a statement of fact "if it may reasonably be understood by the recipient as implying that there are facts to justify the opinion."

Therefore, the judge concluded, "although [the alleged] representation that the fund's investment strategy was 'appropriate and well-defined' would seem to be a matter of opinion or judgment, those descriptors imply, at a minimum, the fact that Loomis held the belief that the strategy had those characteristics. The difference is slight, but it is relevant here where the complaint alleges that Loomis's purported reason for discontinuing the fund was because it did not approve of the strategy; in other words, that Loomis did not, in fact, believe the Angleton Fund's strategy was 'appropriate.'"

In denying the motion to dismiss with respect to intentional misrepresentation, Saylor concluded that "the complaint adequately alleges facts and circumstances from which it can plausibly be inferred that Loomis's employees knew the statements were false at the time they were made."

The judge likewise found that the plaintiff could proceed with his negligent misrepresentation claim.

In allowing the plaintiff's claim for tortious nondisclosure, Saylor wrote that "the complaint plausibly describes circumstances in which Loomis had a duty to disclose 'matters ... necessary to prevent [its] partial or ambiguous statement of facts from being misleading,' or 'subsequently acquired information that [it knew would] make untrue or misleading a previous representation that when made was true or believed to be so.'"

Saylor further interpreted Massachusetts law on tortious interference to dispense with the requirement that a defendant's conduct must be directed at a third party, meaning the plaintiff was not required to show that Loomis's conduct was directed at his former employer for his claim to withstand a motion to dismiss.

Bhammer v. Loomis, Sayles & Company, Inc.

THE ISSUE: Did a Hong Kong money manager plead fraud with sufficient particularity to proceed with an intentional misrepresentation claim against a Massachusetts investment firm that withdrew an offer of employment shortly after the money manager quit the job he had?

DECISION: Yes (U.S. District Court)

LAWYERS: Patrick J. Hannon and Barbara A. Robb, of Hartley, Michon, Robb, Boston (plaintiff)

James W. Bucking and Allison L. Anderson, of Foley Hoag, Boston; Robert A. Fisher of Seyfarth Shaw, Boston (defense)

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