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MacKay v Paesano
2018 NY Slip Op 50212(U)
Decided on February 6, 2018
Supreme Court, Suffolk County
Emerson, J.
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Decided on February 6, 2018

Supreme Court, Suffolk County

Frank MacKay, Plaintiff,

against

Michael Paesano and Jeffrey N. Cadan, Defendants.

68232-14

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Elizabeth H. Emerson, J.

Upon the following papers read on this motion *to dismiss* ; Notice of Motion and supporting papers

6-17 ; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers *24-27* ; Replying Affidavits and supporting papers *29* ; Other*32; 33-35* ; and after hearing counsel in support of and opposed to the motion; it is,

ORDERED that the branch of the motion by the defendant Michael Paesano which is for [*2]an order staying this action and compelling arbitration is withdrawn; and it is further

ORDERED that the branch of the motion by the defendant Michael Paesano which is for an order dismissing the complaint insofar as it is asserted against him is granted; and it is further

ORDERED that the plaintiff is granted leave to replead the sixth cause of action for breach of contract; and it is further

ORDERED that the plaintiff is directed to serve and file an amended complaint within 45 days after service upon him of a copy of this order with notice of entry.

Facts

The following facts, which are taken from the complaint and the plaintiff's brief, do not constitute findings of fact by the court:

The plaintiff, Frank MacKay, hosts a nationally syndicated radio program, *Turning Point with Frank MacKay*, and owns a talent agency with his wife, Frank MacKay Talent, Inc. ("Frank MacKay Talent"). He has a wealth of personal contacts in the business and entertainment worlds. The defendants are financial advisors currently affiliated with Morgan Stanley. The defendant Michael Paesano was formerly affiliated with the United Bank of Switzerland ("UBS"). In 2007, while still employed by UBS, Paesano was introduced to the plaintiff by a mutual acquaintance. According to the plaintiff, he and Paesano agreed to form a joint venture in which the plaintiff would refer potential investors to Paesano, who would provide them with financial consulting services and investment opportunities for which Paesano would receive fees and commissions. Paesano agreed to pay the plaintiff an annual referral fee in the amount of .5% on any initial investments made by individuals referred to him by MacKay, plus .5% on any accrued or compounded interest. The plaintiff and Paesano agreed that each one would exercise control over his own sphere of the endeavor. Thus, the plaintiff would decided whom to refer to Paesano, and Paesano would decide what investments to recommend to them. The plaintiff and Paesano also agreed that each one would be responsible for his own overhead and expenses. They did not anticipate losses in the traditional sense.

Between 2007 and 2010, the plaintiff referred approximately 200 investors to Paesano. While Paesano represented to the plaintiff that their venture was making money, MacKay did not receive any referral fees. In May 2010, Kenneth Starr, with whom Paesano had made a number of investments, was indicted for running a Ponzi scheme. After Starr was indicted, Paesano stopped communicating with the plaintiff for several months. In October 2010, Paesano contacted him to discuss the future of their arrangement. By then, Paesano had moved from UBS to Morgan Stanley with the defendant Jeffrey Caden ("Caden"). The defendants, Paesano and Caden, assured the plaintiff that they were unaware of Starr's illegal activities and that all of their investments had been completely legitimate. They explained to him that they moved to Morgan Stanley to be able to pursue both financial and entertainment investments, something they were not able to do at UBS. They advised the plaintiff that they had formed two funds, an investment fund and an entertainment fund, and that he would be compensated at

the previously agreed-upon rate of .5% for any investment that he brought to either fund. Paesano and Caden estimated that the plaintiff's referrals had generated fees for MacKay in the amount of approximately $1 million a year. They agreed to pay him $1 million a year with annual reassessments based on fluctuations in referrals and revenues. Any losses would be born by whoever was responsible for that aspect of the transaction.

While the plaintiff agreed to continue to refer investors to the defendants, he demanded that he be compensated for his referrals. Initially, Paesano and Caden claimed that they could not pay him because of their recent move to Morgan Stanley. Then they told him that he had to become a Registered Investment Advisor, which required him to take and pass an examination known as the Series 65 Exam. The plaintiff passed the Series 65 Exam in October 2012. Paesano then told him that he had to merge his corporation, Frank MacKay Talent, with P.C. Wealth Management, the subdivision of Morgan Stanley that employed Paesano and Cadan, thereby enrolling in Morgan Stanley's business-affiliate program.[FN1] The plaintiff contends that he took all of the necessary steps to enroll in the program, but that the defendants failed to follow through and complete the affiliation.[FN2] They also failed to compensate him for his contributions to their venture despite his continued referrals and numerous demands for payment.

In 2014, the plaintiff commenced this action to recover the compensation that he claims the defendants owe him. The complaint contains seven causes of action for breach of a joint-venture agreement, breach of fiduciary duty, fraudulent misrepresentation, unjust enrichment, quantum meruit, breach of contract, and promissory estoppel. The defendant Michael Paesano moved for an order compelling arbitration of the plaintiff's claims or, alternatively, for dismissal of the complaint. The matter was referred to a conference and then to oral argument, which was held on June 27, 2017. At oral argument, the branch of the motion which was to compel arbitration was withdrawn.

It is well settled that, on a motion to dismiss pursuant to CPLR 3211, the court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see* **Leon v Martinez,** 84 NY2d 83, 87-88). Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the

asserted claims as a matter of law (**Id.** at 88). In assessing a motion under CPLR 3211(a)(7), however, the court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and the court's inquiry then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one (**Id.**). Allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by the evidence, are not presumed to be true and are not accorded every favorable inference (**Biondi v Beekman Hill House Apt. Corp.**, 257 AD2d 76, 81, *affd* 94 NY2d 659).

The Joint Venture and Breach of Fiduciary Duty

The first cause of action alleges that the parties had a joint-venture agreement, which the defendants breached by failing to compensate the plaintiff in accordance with its terms. Paesano seeks dismissal of this cause of action, inter alia, on the ground that the plaintiff has failed to plead facts that, if true, would establish a joint venture.

A joint venture is an association of two or more persons to carry out a single business enterprise for profit (**Kaufman v Torkan**, 51 AD3d 977, 979). The essential elements of a joint venture are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill, or knowledge), some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses (**Id**.). A joint venture is more than a simple contractual relationship. Thus, it is insufficient for a plaintiff to allege mere joint ownership, a community of interest, or a joint interest in profitability (**Kidz Cloz, Inc. v Officially for Kids, Inc.**, 320 F Supp 2d 164, 171). The ultimate inquiry is whether the parties have so joined their property, interests, skills, and risks that their contributions have become as one and the commingled property and interests of the parties have been made subject to each of the others' actions on the trust and inducement that each will act for their joint benefit (**Id**., *see also* **Steinbeck v Gerosa**, 4 NY2d 302, 317).

The absence of any one element is fatal to the establishment of a joint venture (**Kidz Cloz, Inc. v Officially for Kids, Inc.**, *supra*). An agreement to distribute the proceeds of an enterprise on a percentage basis does not give rise to a joint

venture if the enterprise does not represent a joinder of property, skills, and risks (**Steinbeck v Gerosa**, *supra*). Thus, there must be a mutual promise or undertaking by the parties to share in the profits of the business as well as to submit to the burden of making good the losses (**Id**.).

The plaintiff's referral fees were based on a percentage of the investments made by the individuals referred to Paesano and Caden by MacKay. Assuming that the plaintiff's referral fees were a percentage of the profits generated by the parties' enterprise, the plaintiff's claim for breach of a joint-venture agreement fails as a matter of law because there was no provision for the sharing of losses (**Kaufman v Torkan**, *supra*). The plaintiff alleges that he and Paesano agreed that each one would be responsible for his own overhead and expenses and that they did not anticipate losses in the traditional sense. The plaintiff does not allege that he and Paesano even discussed what would occur in the event of a loss (*see* **Kidz Cloz, Inc. v Officially for Kids, Inc.**, *supra* at 175).

The plaintiff contends that he incurred individual losses in furtherance of the joint venture because he incurred expenses for travel, entertainment, and the Series 65 Exam. The computation of profits, however, necessarily entails the addition of income and the subtraction of expenditures (**Vitale v Steinberg**, 307 AD2d 107, 109). Thus, only in the broadest sense are losses "shared" (**Id**.). The plaintiff's expansive interpretation of losses renders meaningless the distinction between "sharing profits" and "sharing losses," a difference that has never been treated as academic (**Id**.). While the parties may have risked losing their own individual expenses, the plaintiff does not allege that each party intended to submit to the burden of making good the losses of the others (*see* **Am. Talent Agency, Inc. v Joe Fletcher Presents**, US Dist Ct, SDNY, Sept. 9, 2008, Sweet, J. [2008 WL 4155654] at *5). Rather, the plaintiff alleges that he, Paesano, and Caden agreed that any losses would be born by whoever was responsible for that aspect of the transaction.

In addition, the plaintiff does not allege some degree of joint proprietorship or control over the parties' enterprise. He alleges that he and Paesano, and later Caden, agreed that each one would exercise control over his own sphere of the endeavor. Thus, the plaintiff decided whom to [*3]refer to Paesano and Caden, and they decided what financial or entertainment investments to recommend. An individual who has no proprietary interest in a business except to share profits as compensation for his services is not a joint venturer (**Scott v Rosenthal**, US Dist Ct, SDNY, Dec. 20, 2000, Stanton, J.

[2000 WL 1863542] at *3, *citing* **Impastato v De Girolamo**, 117 Misc 2d 786, 789, *affd* 95 AD2d 845). Accordingly, the first cause of action for breach of the alleged joint-venture agreement is dismissed.

The second cause of action alleges that, as joint venturers, the defendants breached their fiduciary duties to the plaintiff. Since the plaintiff has failed to allege the existence of a joint venture as a matter of law, there was no fiduciary relationship between the parties, and their agreement created no more than a contractual obligation (**Steinbeck v Gerosa**, *supra* at 317-318, *see also* **Kidz Cloz, Inc. v Officially for Kids, Inc.**, *supra* at 176). Accordingly, the second cause of action is also dismissed.

Breach of Contract, Unjust Enrichment, and Quantum Meriut

The sixth cause of action alleges that the parties had an enforceable agreement, which the defendants breached by failing to compensate the plaintiff in accordance with its terms. Paesano seeks dismissal of this cause of action on the ground that it is barred by the statute of frauds.

Contrary to the plaintiff's contentions, the statute of frauds, specifically General Obligations Law § 5-701 (a) (10), is applicable to the facts of this case. General Obligations Law § 5-701 (a) (10) bars the enforcement of an oral agreement to pay compensation for services rendered in negotiating, inter alia, a business opportunity. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. An agreement to compensate a plaintiff for procuring customers for a defendant falls squarely within the broad language of General Obligations Law § 5-701 (a) (10) **(Priolo Communications v MCI Telecommunications Corp.**, 248 AD2d 453, 454; *see also* **Meyer v Shearson Lehman Bros.**, 211 AD2d 541, 542).

The plaintiff contends that the part-performance exception takes this matter out of the statute of frauds. The doctrine of part performance is purely an equitable doctrine, unrecognized at law. It, therefore, does not apply when the action is pleaded as one at law and seeks only money damages, without any specific prayer for equitable relief (**MSL Productions, Inc. v**

IMR Group LLC, 41 Misc 3d 649, 654, *citing* **Zito v County of Suffolk**, 106 AD3d 814, 816). While the plaintiff does not seek specific performance of the alleged oral agreement, he has asserted a cause of action for promissory estoppel.

Promissory estoppel eludes classification as either entirely legal or entirely equitable (**Merex A.G. v Fairchild Weston Sys., Inc.**, 29 F3d 821, 825 [2nd Cir.]). When a plaintiff sues for contract damages and uses detrimental reliance as a substitute for consideration, the analogy is to an action at law. On the other hand, when a plaintiff uses promissory estoppel to circumvent application of the statute of frauds, the claim is more equitable in nature (**Id**.). To invoke the power that equity possesses to trump the statute of frauds, a plaintiff must demonstrate an "unconscionable" injury (**Id**. at 826), which the plaintiff has not done in this case (*see infra*). In the absence of a claim for equitable relief, the doctrine of part-performance is not applicable (**Sparks Assoc. LLC v North Hills Holding Co. II, LLC**, 94 AD3d 864, 865).

Moreover, part-performance may be invoked only if the plaintiff's actions can be characterized as "unequivocally referable" to the alleged agreement (**Anostario v Vicinanzo**, 59 [*4]NY2d 662, 664). It is not sufficient that the oral agreement gives significance to the plaintiff's actions. Rather, the actions alone must be unintelligible, or at least extraordinary, and explainable only with reference to the oral agreement (**Id**.). In sum, the plaintiff's actions must be inconsistent with any other explanation (*see,* **Richardson & Lucas**, **Inc. v New York Athletic Club of City of NY**, 304 AD2d 462, 463).

The actions upon which the plaintiff relies (studying for and passing the Series 65 Exam and his efforts to affiliate Frank MacKay Talent with Morgan Stanley) are not unequivocally referable to the alleged oral agreement. There are a myriad of reasons why the plaintiff may have become a Registered Investment Advisor and sought to affiliate with Morgan Stanley, including that he was acting on his own behalf. As previously noted, the record reflects that Frank MacKay Talent and Morgan Stanley executed a Professional Alliance Agreement in early 2013. Neither the defendants nor P.C. Wealth Management, which employs the defendants, are referred to anywhere in that agreement. Accordingly, the sixth cause of action for breach of contract is dismissed as barred by the statute of frauds.

The statute of frauds also bars the plaintiff's unjust-enrichment and quantum-meruit claims. General Obligations Law § 5-701 (a) (10) specifically provides that it applies to bar enforcement of a contract implied in fact or law covering the same subject matter as an oral agreement to pay compensation for services rendered in negotiating, inter alia, a business opportunity (**Camhi v Tedesco Realty, LLC**, 105 AD3d 795, 797; *see also* **JF Capital Advisors, LLC v Lightstone Group, LLC**, 115 AD3d 591, *affd as mod* 25NY3d 759). Accordingly, the fourth and fifth causes of action for unjust enrichment and quantum meriut are dismissed.

Fraudulent Misrepresentation

The third cause of action alleges that the defendants fraudulently induced the plaintiff to enter into the alleged oral agreement even though they had no intention of compensating him in accordance with its terms. Paesano seeks dismissal of this cause of action, inter alia, on the ground that it is duplicative of the plaintiff's breach-of-contract claim.

It is well settled that a cause of action to recover damages for fraud may not be maintained when the only fraud alleged relates to a breach of contract (**Lee v Matarrese**, 17 AD3d 539, 540). In a fraudulent-inducement claim, the alleged misrepresentation should be one of a then-present fact, extraneous to the contract, and involving a duty separate from or in addition to the one imposed by the contract (**Hawthorne Group v RRE Ventures**, 7 AD3d 320, 323). A mere misrepresentation of an intent to perform under the contract is insufficient to sustain a cause of action to recover damages for fraud (**Gorman v Fowkes**, 97 AD3d 726, 727). The plaintiff must allege the breach of a duty that is collateral or extraneous to the contract between the parties (**Weitz v Smith**, 231 AD2d 518, 519).

The plaintiff's fraud claim is duplicative of his breach-of-contract claim. All of the misrepresentations upon which the plaintiff relies relate to the alleged oral agreement that forms the basis of his breach-of-contract claim and are not collateral or extraneous thereto. They amount to nothing more than misrepresentations of the defendants' intent or ability to perform under the alleged agreement (**Gorman v Fowkes**, *supra*). The plaintiff cannot avoid the bar of the statute of frauds by labeling his breach-of-contract claim as one for fraud (**Bernbach v Camp Wah-nee in the Berkshires**, 176 AD2d 304,

305). A mere refusal to perform an oral agreement [*5]within the statute of frauds is not such a fraud as will justify the court in disregarding the statute (**Nasso v Bio Reference Lab., Inc.**, 892 F Supp 2d 439, 449 [EDNY]). Accordingly, the third cause of action is dismissed.

Promissory Estoppel

The seventh cause of action alleges that the plaintiff has been damaged by his reliance on the defendants' promise to compensate him for his efforts in procuring investors for their funds. Paesano seeks dismissal of this cause of action on the ground that the plaintiff has failed to allege an unconscionable injury.Promissory estoppel is reserved for a limited class of cases in which it would be unconscionable not to enforce the agreement (**IMG Intern. Marketing Group, Inc. v SDS William Street, LLC**, 32 Misc 3d 1233[A] at *4 [and cases cited therein]). Unconscionability has little applicability in a commercial setting (**Master Lease Corp. v Manhattan Limousine, Ltd.**, 177 AD2d 85, 90; *see also* **Dallas Aerospace v CIS Air Corp**., US Dist Ct, SDNY, Oct. 31, 2002, Jones, J. [2002 WL 31453789] at *3, *affd* 352 F3d 775 [2nd Cir] [unconscionability is rarely found in a wholly commercial setting]). It is primarily a means with which to protect the commercially illiterate consumer beguiled into a grossly unfair bargain by a deceptive vendor or finance company (**Master Lease Corp. v Manhattan Limousine, Ltd.**, *supra*).

The plaintiff is a sophisticated businessman, and the setting is clearly commercial. Other than in the most exceptional cases, courts have consistently held that lost fees do not constitute a sufficient injury to invoke the doctrine of promissory estoppel (**IMG Intern. Marketing Group, Inc. v SDS William Street, LLC**, *supra*). The other injuries upon which the plaintiff relies (such as sitting for the Series 65 Exam, giving up Super Bowl tickets, and taking business trips) are not so outrageous as to warrant a finding of unconscionability and application of the doctrine (*see* **Nasso v Bio Reference Lab., Inc.**, *supra* at 450 [and cases cited therein]). Moreover, like the fraud claim, the promissory-estoppel claim is duplicative of the breach-of-contract claim (*see* **Celle v Barclays Bank, PLC**, 48 AD3d 301, 303). Accordingly, the seventh cause of action is dismissed.

Leave to Replead

The plaintiff seeks leave to replead any of the causes of action that are dismissed.

In view of the CPLR's liberal pleadings practice (*see generally* CPLR 3025 [b]; **Whalen v Kawasaki Motors, Corp., U.S.A.**, 92 NY2d 288, 293), the court grants the plaintiff leave to replead the sixth cause of action for breach of contract.

Although it is clear that no written agreement was executed by the parties, it is well established that the statute of frauds does not require the writing to be contained in a single document. It may be furnished by piecing together other, related writings (**William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh**, 22 NY3d 470, 477 [and cases cited therein]). Signed and unsigned writings can be read together to satisfy the statute of frauds, provided they clearly refer to the same subject matter or transaction and contain all of the essential terms of a binding contract. At least one writing establishing a contractual relationship between the parties must be signed by the party to be charged. Moreover, parol evidence may be used to connect the separate documents and to show that there was assent by the party to be charged to the contents of the unsigned writings (**Crabtree v Elizabeth Arden Sales Corp.**, 305 NY 48, 55-56; *see also*, **William J. Jenack Estate Appraisers & Auctioneers, Inc. v [*6]Rabizadeh**, 99 AD3d 270, 274, *revd on other grounds* 22 NY3d 470; **Post Hill, LLC v E. Tetz & Sons, Inc.**, 122 AD3d 1126).

An email sent by a party, under which the sending party's name is typed, can constitute a writing for purposes of the statute of frauds (**Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty LLC**, 80 AD3d 476, 477). The plaintiff contends that there are "innumerable e-mails, phone calls, trips, meetings and other transactions between [himself], Paesano, and Cadan that...that clearly evince an agreement between the parties." The court finds that, under these circumstances, the plaintiff should be given an opportunity to satisfy the statute of frauds. Accordingly, the plaintiff is granted leave to replead the sixth cause of action for breach of contract.

Any attempt to replead the remaining causes of action, however, would be futile. As discussed in detail above, the plaintiff's claim of a joint venture fails as a matter of law; and, without it, there is no breach of fiduciary duty. The fraud and promissory-estoppel claims are duplicative of the breach-of-contract claim; and, if the plaintiff is able to establish the existence of a valid and enforceable written agreement, any recovery in quasi-contract will be precluded (*see* **Clark-Fitzpatrick, Inc. v Long Island R.R. Co.**, 70 NY2d 382, 388). Thus, none of the plaintiff's remaining claims will be cured by better pleading. Accordingly, the plaintiff's request to replead is denied as to the first, second, third, fourth, fifth, and seventh causes of action.

DATED: February 6, 2018

Hon. Elizabeth H. Emerson

J.S.C.

Footnotes

Footnote 1: The record reflects that becoming a Registered Investment Advisor is a condition precedent to enrollment in Morgan Stanley's business-affiliate program.

Footnote 2: The record reflects, however, that Frank MacKay Talent and Morgan Stanley executed a Professional Alliance Agreement in early 2013.

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