

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART THREE

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ALM UNLIMITED, INC.,

Plaintiff,

-against-

Index No.: 603491/08  
Trial Date: April. 9, 10, 11,  
12, 15, 16, 17, 18, 19, 2013

DONALD J. TRUMP,

Defendant.

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EILEEN BRANSTEN, J.

**OPINION OF THE COURT**

**I. BACKGROUND**

The facts of this case have been discussed at length by this court in various decisions. Familiarity is therefore assumed, and the court herein only discusses those facts relevant to defendant's oral motion for a directed verdict.

Plaintiff ALM Unlimited, Inc., as successor-in-interest to ALM International, Inc. ("ALM") brings this action to recover the fees it allegedly earned by assisting Defendant Donald J. Trump ("Trump") in entering into a business relationship with Phillips-Van Heusen Corporation ("PVH") to license Trump's name upon a line of men's apparel. Trump counterclaims for a return of the monies he paid to ALM in connection with the business arrangements between the parties.

ALM entered into a Memorandum of Understanding with Trump on September 25, 2003 (the “Memorandum of Understanding”). *See* Pl. Ex. 1.<sup>1</sup> Therein, ALM agreed to serve as Trump’s exclusive agent in attempting to license the “Trump” brand for the production of men’s apparel. *Id.* at ¶ 1. Trump agreed to “utilize ALM as his sole and exclusive licensing agent” from September 25, 2003 until March 30, 2004 (the “Exclusive Period”). *Id.*

The Memorandum of Understanding stated that, should ALM secure for Trump a license agreement meeting certain criteria which the Memorandum of Understanding defines as an “Acceptable License,” namely a term of seven years and a minimum guaranteed license fee to Trump during that term of \$25,000,000, ALM would receive a 22.5% commission upon any license fees paid to Trump pursuant to that license. *Id.* at ¶ 2.

The parties further agreed, subject to one exception, that should no Acceptable License be entered into during the Exclusive Period, Trump and ALM had no further obligations to each other. The exception stated that ALM was to receive a commission upon any Acceptable License for which “significant negotiations” were carried out during the Exclusive Period, but which Trump did not enter into until up to three months after the Exclusive Period. This three-month period was defined as the “Tail Period.” *Id.* at ¶ 3.

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<sup>1</sup> All exhibits references are to trial exhibits entered into evidence outright or into evidence with an exception as to relevance.

ALM and Trump entered into an Extension of the Memorandum of Understanding on January 13, 2004 (the “Extension”). *See* Pl. Ex. 2, p. 1. Therein, the parties extended the Exclusive Period to end on June 30, 2004. *Id.* The Tail Period was thus extended to September 30, 2004.

ALM contends that on or about August 23, 2004, contemporaneous with its ongoing assistance to Trump in securing a license with clothing manufacturer Phillips-Van Heusen (“PVH”), ALM and Trump entered an agreement modifying the terms of the Memorandum of Understanding, as amended by the Extension (the “Modification”). *See* Pl. Exs. 25, 26 & 31 (e-mails by ALM employee Jeff Danzer (“Danzer”) to Trump employee George Ross (“Ross”) setting forth the purported terms of the Modification).

ALM contends, and submits evidence that it argues supports, that the Modification was confirmed by Trump or his agents in various e-mails, invoices and checks signed by Trump paid to ALM for their efforts in securing the PVH license. *See* Pl. Ex. 51 (handwritten note by Trump employee Cathy Glosser (“Glosser”) stating “10% for ALM–George [Ross] made the deal w/ Jeff [Danzer]”); Pl. Ex. 39 (handwritten note by Glosser that “George [Ross] OK’d on 7/20/05” on a printed copy of an e-mail exchange Glosser had with Danzer requesting the first royalty commission check); Pl. Exs. 45 & 46 (Glosser’s e-mail to Danzer providing a PVH royalty figure so that Danzer could use it to

calculate ALM's commission); Pl. Ex. 54-64 (p. 2 of each) (ALM's quarterly invoices sent to Trump demanding payment of 10% commission of Trump's PVH royalties); Pl. Exs. 54-64 (eleven quarterly checks dated October 7, 2005 through March 19, 2008 signed by Trump and payable to ALM for the amounts invoiced by ALM).

On or about June 30, 2007, Ross e-mailed ALM stating Trump's intent to cease paying ALM the royalties allegedly due to it under the purported Modification. Since that date, Trump has not made any payments to ALM.

ALM's remaining claims in this action are: (1) breach of contract and anticipatory breach of contract; (2) quantum meruit; and (3) declaratory judgment. Trump counterclaims that there was no Modification agreement between Trump and ALM and that it made its payments to ALM in error. Trump is accordingly seeking the return of the monies it paid to ALM between October 7, 2005 through March 19, 2008.

## **II. ANALYSIS**

Trump moves, pursuant to CPLR 4401, for a directed verdict<sup>2</sup> on ALM's causes of action for: breach of contract and anticipatory breach of contract; and for a declaratory judgment on the ground that the Modification does not meet the Statute of Frauds, and thus there is no enforceable contract between the parties under which Trump is required to pay ALM.

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<sup>2</sup> The case went to a jury trial commencing on Tuesday, April 9, 2013 and ending with the parties resting on Thursday, April 18, 2013.

**1. Standard of Law**

CPLR 4401 provides that “[a]ny party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue[.]” Where there is no proof at trial sufficient to meet the Statute of Frauds when the contract at issue is subject to the Statute of Frauds, a verdict is properly directed for defendants. *Lumen Bearing Co. v. Mosle*, 221 A.D. 572 (1st Dep’t 1927).

**2. Statute of Frauds - ALM’s First and Fourth Causes of Action**

New York General Obligations Law § 5-701 provides, in pertinent part, that “[e]very agreement, promise or undertaking” constituting “a contract to pay compensation for services rendered in negotiating . . . a business opportunity”<sup>3</sup> is void “unless it or some note or memorandum thereof be in writing and subscribed by the party to be charged therewith, or by his lawful agent[.]” An oral modification of a written agreement must also comply with the Statute of Frauds. *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 380 (1969).

“[I]n a contract action, a memorandum sufficient to meet the requirements of the Statute of Frauds must contain expressly or by reasonable implication all the material terms of the agreement, including the rate of compensation if there has been agreement on that

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<sup>3</sup> GOL § 5-701(a)(10) further provides that “[n]egotiating includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.”

matter.” *Morris Cohon & Co. v. Russell*, 23 N.Y.2d 569, 575 (1969) (internal citations omitted). The terms of an agreement between the parties may be established by a combination of signed and unsigned documents, letters or other writings provided that “at least one writing, the one establishing the contractual relationship between the parties must bear the signature of the party to be charged, while the unsigned document must on its face refer to the same transaction as that set forth in the one that was signed.” *Intercontinental Planning*, 24 N.Y.2d at 379 (quoting *Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 56 (1953)). Although the terms of an agreement may be established by a combination of signed and unsigned documents, “[t]o permit [an] unsigned document prepared by the plaintiff to serve as a portion of the requisite memorandum would open the door to evils the Statute of Frauds was designed to avoid.” *Solin Lee Chu v. Ling Sun Chu*, 9 A.D.2d 888, 888-89 (1st Dep’t 1959).

A writing fails to satisfy the Statute of Frauds where it does not indicate material terms, including, *inter alia*, the contract duration, rate of compensation or any of defendant’s promises given in exchange for plaintiff’s services. *Signature Brokerage Inc. v. Group Health, Inc.*, 5 A.D.3d 196, 197 (1st Dep’t 2004). Checks and check stubs signed by the parties to be charged with a contract do not fulfill the Statute of Frauds’ writing requirement if they do not indicate the material terms of the agreement. *Walker v. Knowles*, 15 Misc.3d 1124(A) (Sup. Ct., N.Y. Cty. 2007).

Although there was an established contractual relationship between the parties as evidenced in the Memorandum of Understanding and the Extension, any modification of those agreements must also meet the requirements of the Statute of Frauds. *Intercontinental Planning*, 24 N.Y.2d at 280. The Court finds that here, the material terms are not evidenced in a writing sufficient to meet the Statute of Frauds.

Even if the Court were to permit the invoices and e-mail draft agreements prepared by ALM to serve as a portion of the requisite memorandum, as the First Department cautioned against in *Solin Lee Chu*, the court finds that the combined writings do not fulfill the Statute of Frauds because they do not include all of the material terms of the parties' agreement. *See Signature Brokerage*, 5 A.D.3d at 197 (finding that a writing fails to satisfy the Statute of Frauds where it does not indicate, *inter alia*, the contract duration, rate of compensation or any of defendant's promises given in exchange for plaintiff's services).

The e-mail draft agreements sent by Danzer to various people at the Trump Organization (*see* Pl. Exs. 25, 26 & 31 ) very generally provide that ALM would receive 10% of the royalties earned by Trump on any license and subsequent renewal that ALM brings to Trump. Nowhere does this draft agreement, nor any other document in evidence, including the checks signed by Trump, address any other terms, let alone material terms, of the modification. The Court finds that there is a general lack of material terms present in the documents set forth by ALM to satisfy the Statute of Frauds, but herein focuses on two.

First, both the Memorandum of Understanding and its Extension address the duration of each respective agreement. The Exclusive Period under the Memorandum of Understanding terminated on March 30, 2004. (Pl. Ex. 1, ¶ 1.) Under the Memorandum of Understanding, provided ALM introduced a potential licensee to Trump prior to March 30, 2004, ALM would still be entitled to its fee if Trump entered into an “Acceptable License” with that licensee within 3 months of March 30, 2004 (the “Tail Period”). *Id.* at ¶ 3. ALM’s right to earn any fee under the Memorandum of Understanding thus terminated on June 30, 2004. The Extension amended the Memorandum of Understanding to provide that the exclusive agency period expires on June 30, 2004. (Pl. Ex. 2, p. 1) Accordingly, under the Memorandum of Understanding, as amended by the Extension, ALM’s right to earn any fee terminated as of September 30, 2004. The license agreement with PVH was not executed until November 29, 2004, after the expiration date of the Tail Period.

ALM claims that, as a part of the Modification, Trump waived the end date of the Tail Period. This requires an assumption that Trump agreed to extend the tail period indefinitely, which is nowhere evidenced in a writing. The writings provided by ALM to take the alleged Modification out of the Statute of Frauds, even those drafted by ALM, are entirely silent as to the end date of the Tail Period. Therefore, particularly in light of the parties’ inclusion of a termination date in both the Memorandum of Understanding and the Extension, contract duration is here a material term that is nowhere contained in the writings provided by ALM. On this basis alone, the alleged Modification does not meet the Statute of Frauds.

Second, under both the Memorandum of Understanding and the Extension, ALM was only entitled to its fee if Trump entered into an “Acceptable License.” *See* Pl. Ex. 1, ¶ 2. The Memorandum of Understanding provides that an Acceptable License shall mean a license that meets certain criteria, *inter alia*, a term of seven years and a minimum guaranteed license fee to Trump during the term of \$25,000,000. *Id.* It is undisputed that the PVH License did not meet the “Acceptable License” criteria.

ALM contends that, as part of the Modification, Trump waived the “Acceptable License” requirement. As with the expiration date, this is neither implied nor evidenced in a writing. A modification of an agreement subject to the Statute of Frauds must also meet the Statute of Frauds. *Intercontinental Planning*, 24 N.Y.2d at 280. Because the PVH license was not an Acceptable License, and the writings put forth by ALM as evidencing the waiver of this provision nowhere state that this requirement was waived, the Modification does not meet the Statute of Frauds on this additional basis.

Even if the Court were to consider the Modification to be an agreement completely separate and apart from the Memorandum of Understanding and Extension, and thus not subject to the “Acceptable License” or “Tail Period” requirements, the court finds that the agreement still does not meet the Statute of Frauds. The terms of an agreement between the parties may be established by a combination of signed and unsigned documents, letters or other writings, provided that “at least one writing, the one establishing the contractual

relationship between the parties must bear the signature of the party to be charged, while the unsigned document must on its face refer to the same transaction as that set forth in the one that was signed.” *Intercontinental Planning*, 24 N.Y.2d at 379 (quoting *Crabtree* 305 N.Y. at 56 (1953)). The only document bearing the signature of Trump or an agent of Trump are the eleven signed checks. These checks do not establish the contractual licensing agent relationship between the parties, nor do they contain the material terms of the agreement. *See Walker*, 15 Misc.3d 1124(A). Accordingly, the agreement does not meet the Statute of Frauds on this basis.

The Court has considered ALM’s argument that Trump is equitably estopped from raising the statute of frauds.

In order for estoppel to exist, three elements are necessary: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts. The party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position.

*BWA Corp. v. Altrans Express U.S.A., Inc.*, 112 A.D.2d 850, 853 (1st Dep’t 1985).

The Court reiterates its position that the only evidence that ALM has provided in support of its estoppel claim is the payments Trump made to ALM and the invoices that

accompanied those payments. ALM has not fulfilled the elements of a claim for equitable estoppel.

The Court has also considered ALM's argument that Trump admitted to the existence of the oral modification, thereby taking the case out of the Statute of Frauds. Indeed, a defendant's admission of the existence and essential terms of an oral agreement is sufficient to take the agreement outside the scope of the Statute of Frauds. *Concordia Gen. Contracting v. Peltz*, 11 A.D.3d 502, 503 (2d Dep't 2004). However, where essential terms are not admitted by the defendant and are in dispute, the agreement must meet the Statute of Frauds. *Tallini v. Business Air, Inc.* 148 A.D.2d 828, 829-30 (3d Dep't 1989) (reviewing the trial court's decision granting a summary judgment motion dismissing a case for failure to meet the Statute of Frauds where defendant admitted there was an employment contract but disputed the essential terms).

In this Action, Trump disputes that he waived the end date of the tail period, that he agreed to pay ALM commissions on any renewals of the PVH license, that he agreed to a flat ten percent commission and that he waived the Acceptable License provision in the Memorandum of Understanding and Extension. As this court held both in its Decision and Order dated May 19, 2010 and its Decision and Order dated July 24, 2012, part performance does not apply to this case. Therefore, the fact that Trump made payments to ALM does not remove this case from the Statute of Frauds.

At oral argument on Trump's motion for directed verdict, ALM argued that a November 8, 2005 e-mail from Glosser to Ross constitutes an admission which would remove this case from the Statute of Frauds. In that e-mail, Glosser addressed the fact that a written agreement was not in place between ALM and PVH. Glosser advised Ross, after the PVH license had been consummated and upon request from ALM for payment, that when drafting a proposed agreement relevant to ALM's services, he should use narrow language and "probably specify in the letter that they get a percentage of dress shirt and neckwear royalties" in light of Trump's having entered an additional sportswear license with PVH subsequent to the shirt and neckwear deal Pl. Ex. 122. Although this e-mail supports an inference that there may have been some agreement that Trump would pay compensation to ALM for its services rendered in connection with the PVH license, as discussed above, it is not an admission as to all of the essential terms of the agreement. *Concordia Gen. Contracting*, 11 A.D.3d at 503.

Accordingly, Trump's motion for a directed verdict on ALM's causes of action for breach and anticipatory breach of the Modification (count one) and for a judgment declaring that ALM is entitled to receive 10% of all amounts paid by PVH to Trump pursuant to the Modification (count four) is granted and ALM's first and fourth causes of action are dismissed.

### 3. Quantum Meruit

Defendant's motion for a directed verdict on ALM's quantum meruit claim is denied. As this Court determined in this action in its Decision and Order dated on May 19, 2010, if, at trial the Modification is found unenforceable by virtue of the Statute of Frauds, ALM "may still recover the reasonable value of services rendered." May 19, 2010 Decision and Order, p. 15.

New York General Obligations Law § 5-701 applies to contracts "implied in fact or in law to pay reasonable compensation." ALM's quantum meruit claim thus falls under the Statute of Frauds. However, in an action for quantum meruit for the reasonable value of services rendered, if it does not appear there has been agreement as to a material term, "a sufficient memorandum need only evidence the fact of plaintiff's employment by defendant to render the alleged services. The obligation of the defendant to pay reasonable compensation for the alleged services is then implied." *Morris Cohon*, 23 N.Y.2d at 575-76 (analyzing a memorandum which failed to include the parties' agreement as to compensation).

Several of ALM's documents evidence the fact of ALM's employment by Trump to secure the PVH license. *See e.g.*, Pl. Ex. 38 (November 30, 2004 letter from Glosser to Danzer enclosing the PVH license and thanking Danzer for his efforts). The obligation of Trump to pay reasonable compensation for ALM's services may therefore be implied. Accordingly, ALM's claim for quantum meruit is not barred by the Statute of Frauds.

**3. Fifth Cause of Action for Breach of Contract and Trump's Counterclaim**

At oral argument on Trump's motion for a directed verdict, ALM agreed to withdraw its fifth cause of action for breach of contract. *See* Record of April 18, 2013 (Karen Mennella, S.C.R.). Additionally, Trump agreed to withdraw his counterclaim. *Id.* ALM's fifth cause of action and Trump's counterclaim are thus dismissed.

*The order of the Court follows on the next page.*

**ORDER**

Accordingly, it is hereby

**ORDERED** that defendant's motion for a judgment dismissing plaintiff's cause of action for breach of contract and anticipatory breach of contract (count one) and dismissing plaintiff's cause of action for a declaratory judgment (count four) is granted; and it is further

**ORDERED** that defendant's motion for a judgment dismissing plaintiff's cause of action in quantum meruit (count two) is denied; and it is further

**ORDERED** that defendant's motion for a judgment dismissing plaintiff's cause of action for breach of contract (count 5) is granted; and it is further

**ORDERED** that defendant's counterclaim is dismissed; and it is further

**ORDERED** that the parties are directed to submit a memorandum in support or in opposition to the quantum meruit cause of action by May 17, 2013.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
April 22, 2013

ENTER:



Hon. Eileen Bransten, J.S.C.