[*1]

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

PRESENT: HON. PAULA J. OMANSKY PART 47

0604617/2001

BLOOM, JACK
VS
PLATINUM FITNESS LIFESTYLE

SEQ 2

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 10/4/04

MOTION SEQ. NO. _____

MOTION CAL. NO. 17

The following papers, numbered 1 to _____ were read on 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 and cross motion are decided in accordance with the accompanying memorandum decision

FILED

NOV 26 2004

COUNTY CLERK'S OFFICE

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

Dated: 11/22/04

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

----------X

JACK BLOOM Index No. 604617/01

Plaintiff,

DECISION AND ORDER

-against-

PLATINUM FITNESS LIFESTYLE, LTD.

Defendant.

---------- X

PAULA J. OMANSKY, J.:

In this action to enforce an alleged stock transfer agreement, defendant Platinum Fitness Lifestyle, LTD. moves, pursuant to CPLR 3212, for summary judgment in its favor and to dismiss plaintiff's complaint in its entirety. In addition, defendant moves, pursuant to 22 NYCRR § 130-1.1, for sanctions, including attorneys' fees, for bad faith conduct and frivolous claims.

Plaintiff Jack Bloom, pro se, cross moves for an order directing entry of partial summary judgment against defendant in the amount of $285,000, plus interest, fees, costs and disbursements of this action.

FACTS

In his complaint, plaintiff alleges that defendant was engaged in the business of preparing and delivering diet meals marketed under the name of "Zone Home Delivery." Defendant's business started in 1998 when Kathleen Lohmann, as vice president, Edward Fasano, as president, and his wife Jo Ann, personally prepared and delivered meals to customers located in the Nesconset and the Suffolk County area. Defendant claims that it now operates in major metropolitan markets like New York and Los Angles, generating

millions of dollars in annual sales. Defendant has over 300 employees and/or consultants nationwide and services several thousand separate and individual customers on a daily basis.

Initially, defendant used two methods to market and sell its products and services. The first method employed print media and a web site to appeal directly to potential purchasers. The second method employed outside sales representatives who were paid a commission for each customer they referred to defendant. Defendant alleges that in some cases, individual sales representative earned over $100,000 in commissions a month.

Plaintiff claims that he and his partner[1] signed a written marketing and sales agreement dated May 2, 2000 with defendant (wrongly denominated as Platinum Fitness Lifestyle, Inc.). Under this agreement, Bloom and his partner agreed to act as agents for defendant to introduce defendant's products to sports clubs and gyms for purposes of selling defendant's diet meal program. In turn, Bloom and his partners were entitled to certain specified commissions. The agreement allegedly provided that defendant consented to jurisdiction of the Supreme Court of the State of the New York, New York County.

A copy of this agreement has not been submitted. Plaintiff does submit (plaintiff's exhibit 1) a document signed by Edward Fasano which outlined the parties' telephone conversation whereby the parties agreed to establish plaintiff and Mariana Rossano as a

[1]The initial partner was allegedly Mariana Rossano who was followed later by Charles Lipton. Neither person is a party to this action

sales representatives of Zone Perfect Fresh Food Delivery. Plaintiff and Rossano agreed that they would pay a $25.00 entry fee. In turn, defendant agreed to pay them a commission of $8.50 per client per day as long as client remained on the program. Defendant also agreed that it would start advertising in the LA market as soon as plaintiff and Rossano were ready to begin work and that it would add other markets as they expanded. No mention was made concerning an agreement to accept the jurisdiction of the New York Courts.

Formation of VAJ Management Group

Plaintiff also alleges that he entered an agreement with defendant to participate in an entity called the "VAJ Management Group" ("VAJ"). Plaintiff alleges that the "entry fee" was raised to $125,000 and that this sum was paid by plaintiff to defendant.

Defendant acknowledges that it renegotiated its method of distribution but disputes plaintiff's claim that the company agreed to buy out plaintiff's shares. Defendant's vice president Lohmann states that the outside sales representatives were unhappy with defendant's use of independent sales representatives, believing that the present arrangement was uneconomical since representatives duplicated efforts.

According to defendant, plaintiff and other sales representatives agreed in November 2000 to consolidate their sales and marketing efforts by forming a separate entity known as VAJ which was incorporated on November 28, 2000. The name "VAJ" was derived from the three founders of the company Victor Daniel ("V"),

Arthur Gunning ("A") and John Philips ("J") a/k/a "John Fillipakis"[2]. Fillipakis/ Philips is now employed by defendant.

Lohmann states that the sales representatives entered into negotiations with defendant and that defendant agreed that VAJ would be paid a commission for every sale made by any member of the sales force. Lohmann further acknowledges that the owners of VAJ paid the sum of $125,000 as a participation fee to her company for the right to continue to act as the outside sales/marketing representatives. She also states that from November 2000 onwards, defendant paid VAJ commissions for its shareholders who formerly worked as independent sales representatives.

Defendant also states that many of the sales representatives entered into VAJ with partners and other investors. Thus sales representatives, partners, and investors would form individual holding companies which would actually own the VAJ stock. Plaintiff's commissions were directed to a holding company, MJ Zone, Inc.[3] As a result, Lohmann alleges, the initial distribution arrangement, whereby sales representatives received commissions directly (and in their personal capacity), was terminated.

In turn, VAJ agreed to follow certain guidelines concerning the sales and marketing of defendant's product, which were consistent with defendant's business mode. VAJ allegedly kept defendant informed of its business operations by sending written

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[2]John Philips uses that name in business but his legal name is John Fillipakis.

[3]Rossano and Charles Lipson also invested in MJ Zone.

correspondence or copies of e-mails to Lohmann, or Fasano. According to defendant, VAJ needed to earn at least $10,000 per week per member to cover marketing expenses, plus additional sums of money ($3,000 to $5,000 per week) for operating and overhead expenses. These expenses would be paid from weekly cash calls to be contributed by the members of the sales force.

Stock Transfer Negotiations

Plaintiff became disillusioned with the way VAJ was being managed and made it clear to the other VAJ partners that he was unhappy with the business venture and wanted to sell his company's (MJ Zone's) one-ninth interest in VAJ. Fillipakis/Philips informed defendant of plaintiff's intentions and asked defendant whether it would purchase MJ Zone's equity interest in VAJ.

In an e-mail to Fillipakis/Philips dated May 18, 2001, plaintiff asked "Would you like me to write up the agreement for the buyout at cost (that is $290,000 assuming the $43,000 comes in today)." Fillipakis/Phillips responded the same day stating that he spoke to Fasano and that defendant rejected the offer because plaintiff was late and defaulting on his responsibilities.

Despite this rejection, plaintiff persisted in his negotiations by trying to obtain better terms. In a later e-mail to Fillipakis/Phillips (dated June 1, 2001), plaintiff stated

> My investment is $355,000, not counting the use of money. The interest alone over 2 years would add $50,000 to $70,000 and bring the loss to $405,000 to $425,00
>
> Your offer is $250,000 payable over two years. This is substantially below the cost to build the business. It is also far too long. I remember when Ed wanted $125,000 and made it payable in 30 days. The payment of

> approximately $300,000 was in less than 6 months.
>
> If you can come up to the [sic] quite near the cost and make it payable over a short period, ($125,000 up front and the balance over 6 months), I think we can come to a mutually acceptable and closable transaction without significant headaches.

Plaintiff alleges that defendant accepted his terms and that defendant's acceptance was confirmed by an e-mail dated June 5, 2001 and sent by Fillipakis/Philips (the "June 5, 2001 e-mail") which stated

> Platinum Fitness will pay Jack Bloom 23,750.00 [sic] per month for the next 12 months as a full buyout with no interest of his full sales entity (1/9th part of the overall VAJ Marketing Group), Jack or any one from Jacks' office will have no other input or contract with anyone in our whole organization. Jack will receive no Commission going forward or any other additional compensation.

Defendant claims that the June 5,2001 e-mail merely presents additional terms. According to Lohmann, her company only participated in negotiations to purchase MJ Zone's shares in VAJ because defendant initially believed that the shares had value. Lohmann states that defendant never entered into any written contract and never finalized any stock transfer/buyout agreement because defendant later learned that VAJ was mismanaged by its shareholders and that entity ceased operations in July, 2001. Defendant withdrew its purchase offer without ever coming to terms with plaintiff.

Lohmann further states that defendant neither guaranteed plaintiff's investment nor the future success of the venture with VAJ. Moreover, Lohmann alleges that her company never agreed that

the participation fee paid by sales representatives gave plaintiff or the other members of VAJ the exclusive right to market defendant's diet products. According to Lohmann, plaintiff's expenditures were not for defendant's benefit but to establish and grow VAJ's business.

Fillipakis/Philips supports defendant's version of the facts, stating that he and other sales representatives never entered into a written contract to permit defendant to buy out MJ Zone's shares or to reimburse plaintiff for money he lost in his investment with MJ Zone/VAJ. Fillipakis/Philips states that his June 5, 2005 e-mail to plaintiff was not a binding contract but only meant to outline the proposed terms which would form the basis for a final, memorialized written contract. Moreover, Fillipakis/Philips states that, at best, plaintiff and defendant simply engaged in an extended period of negotiations concerning whether to purchase MJ Zone shares in VAJ.

Fillipakis/Philips also notes that e-mails received after June 5, 2001 clearly indicate that no agreement had been reached by the parties on the remaining terms and that the proposed contract was never signed. For example, plaintiff e-mailed "John Phillips" to ask him about the former's check. In response, Fillipakis/Phillips sent an e-mail to plaintiff dated July 24, 2001 (the July 24, 2001 e-mail) which read:

> [t]he status is: I am working with our attorney to get a formalized legal document outlining your release for our deal; this way we are both protected going forward. Sorry about the delay here, but it is the most efficient way to proceed.

Plaintiff then sent an e-mail back to Fillipakis/Phillips on July 27, 2001 (the "July 27, 2001 e-mail") which indicates that he accepted the need for a writing:

> [m]y lawyer has drafted a simple agreement which will fit your request regarding a release. He sent it to me by e-mail this morning, and it needed a little cleaning up, so I expect to send you a clean copy later today or Monday.

Defendant further maintains that, even if the buyout contract were finalized, defendant would not have entered an agreement with plaintiff individually. Rather, defendant was required to deal directly with MJ Zone, the holding company. Fillipakis/Philips further states that plaintiff clearly understood that he was not to be a party to the contract. In an e-mail, dated June 9, 2001, plaintiff advised Fillipakis/Phillips that he (plaintiff) believed that checks should continue to be made payable to MJ Zone and not to him since MJ Zone was the entity that paid "Platinum and VAJ."

In further support of its position, defendant submits a copy of plaintiff's e-mail to Fillipakis/Philips (also dated July 5, 2001), which states that plaintiff wishes to confirm that on July 15, he will "receive a check from Platinum Fitness for $23,750 made out to MJ Zone, Inc. as first of the 12 monthly buyout payments." The record does not contain a confirming e-mail sent by defendant or on defendant's behalf.

Plaintiff's spread sheets also indicate that MJ Zone received commission income directly from defendant (see, Defendant's Ex. G). Plaintiff also testified in his deposition that MJ Zone, Inc. made a total of $106,800.50 payments to VAJ (Bloom 7/29/03, EBT, at 50). Plaintiff also stated that MJ Zone paid defendant an additional

$10,000 (id. at 51).

Plaintiff has not presented any copies of checks or other documentary proof which supports his claim that he, in his individual capacity, paid defendant money.

DISCUSSION

Plaintiff's complaint alleges two causes of action. The first seeks damages pursuant to an alleged stock purchase agreement in the amount of $285,000. The second cause of action seeks damages of $330,000 based upon defendant's alleged promise to reimburse of capital investment and other expenses allegedly paid in connection with the business venture.

Defendant argues that this lawsuit is improper since plaintiff lacks standing as he has no rights in his individual capacity. In addition, Fillipakis states that plaintiff has failed to join other shareholders, investors, and creditors of MJ Zone, Inc. as parties.

Standing

Only a corporation has standing to sue for breach where it, as opposed to the individual, is the party to a contract (Stan Winston Creatures, Inc. v Toys "R" Us, Inc., 4 Misc3d 1019(A), 2004 WL 1949071, *6 [Sup Ct, NY County 2004], citing Laing Logging Inc. v International Paper Co., 228 AD2d 843 [3d dept 1996] and Del Castillo v Bayley Seton Hosp., 172 AD2d 796 [2d Dept 1991]).

Although plaintiff presents written evidence of his agreement to act as a individual sales representative, he presents no evidence that he retained his right to do business in his individual capacity as a sales representative after November 2000. On the contrary, the

record shows that plaintiff and his partner joined other representatives to form MJ Zone, which was the entity which entered in the contract with VAJ. In turn, VAJ, acted on behalf of all the sales representatives and entered into an agreement with defendant. As a result of the change in status, capital investments, expenditures and liability were accrued by MJ Zone and not plaintiff individually.

However, plaintiff has not commenced this action to enforce his rights as a sales representative with VAJ. Instead, the gravamen of this action is whether plaintiff, in his individual capacity, entered into direct negotiations with defendant to buy out his personal shares in MJ Zone. Plaintiff's standing is therefore a function of whether a valid agreement exists between plaintiff (in his individual capacity) and defendant. Since plaintiff has alleged privity of contract as the basis for his claim, that branch of defendant's motion to dismiss the complaint for lack of standing is denied (Laing Logging Inc. v International Paper Co., supra, 228 AD2d, at 845).

Statute of Frauds

Sales of stocks in a corporation were governed in New York by section 8-319(a) of the Uniform Commercial Code which expressly contemplated execution of a formal stock purchase agreement (Steinberg v DiGeronimo, 255 AD2d 204 [1st Dept 1998]; see, Fallon v McKeon, 230 AD2d 629 [1st Dept 1996] [plaintiff failed to show that part performance of partnership agreement removed it from the Statute of Frauds]).

However, section 8-319 of the Uniform Commercial Code was repealed in 1997 and replaced by section 8-113(a) of the Uniform Commercial Code which was later amended in 2001 to provide that

> a contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year of its making.

The adoption of section 8-113 and its addition into the Uniform Commercial Code reversed prior State law. The basis for this change is stated in the Official Comments which provide:

> [w]ith the increasing use of electronic means of communications, the statute of frauds is unsuited to the realities of the securities business. For securities transactions, whatever benefits a statute of frauds may play in filtering out fraudulent claims are outweighed by the obstacles it places in the development of modern commercial practices in the securities business

(Official Comment, McKinney's Cons. Laws of New York, Uniform Commercial Code, vol 62½, § 8-113, at 179). Furthermore, the United States Supreme Court has held that "oral contacts for the sale of securities are sufficiently common that the Uniform Commercial Code and the statutes of fraud in every State now consider them enforceable" (Wharf (Holding) Ltd. United Intl. Holding, Inc., 532 US 588, 596 [2001]).

The Southern District of New York has held that it is "not likely that those sufficiently common oral contracts for the sale of securities to which the Supreme Court was referring, were intended to encompass a complex transaction" (Spencer Trask Software and Information Servs, LLC v R. Post Intern. Ltd., 2003 WL 169801, *9 [SD NY 2003]). Yet, despite the aforementioned reservation, the

Southern District in Spencer (supra) found that the transaction before that forum which involved investing in a venture capital corporation, could be considered a sale of securities under section 8-113 of the Uniform Commercial Code and hence not subject to the Statute of Frauds (Spencer Trask Software and Information Servs, LLC v R. Post Intern. Ltd., supra, 2003 WL 169801, at *14-*16[4]). Since the plain wording of section 8-113 of New York Uniform Commercial Code does not limit its scope to the purchase of shares from a licensed broker, this court finds that the statute is applicable to the present case (see, Uniform Commercial Code § 8-113 [b] [sale/purchase of cooperative interest must be in writing]; cf., United Intl. Holdings, Inc. v Wharf [Holdings] Ltd., 210 F3d 1207, 1224 [10th Cir 2000], affd 532 US 588 [2001] [Colorado State law defined the term "securities" differently than that found in Federal Law]). Accordingly, that branch of defendant which relies on the Statute of Frauds to dismiss the claim is denied.

Preliminary Agreement v Preliminary Commitment

However, the adoption of section 8-113[a] of the Uniform Commercial Code does not require this court to grant automatically plaintiff's request for summary judgment. The Southern District in Spencer held that courts must still review the record to determine whether the facts support a finding that the parties evinced a mutual intent to be bound (Spencer Trask Software and Information

[4]The Southern District, noting the lack of case law concerning the definition of security under section 8-113[a] of New York's Uniform Commercial Code, found that the court needed more discovery before it could determine whether the transaction was, as a matter of law, an actual sale of securities.

Servs, LLC v R. Post Intern. Ltd., supra, 2003 WL 169801, at *10).

The Southern District in Spencer differentiates between "binding preliminary agreements" and "binding preliminary commitments." In a preliminary agreement, the parties agree on all essential terms but agree to memorialize their agreement. The existence of a preliminary agreement depends upon

> (1) whether the parties have expressly reserved the right not to be bound without a written contract; (2) whether there has been partial performance of the contract; (3) whether the parties have agreed to all terms of the alleged contract and (4) whether the alleged agreement is the type that is usually committed to writing

(Spencer Trask Software and Information Servs, LLC v R. Post Intern. Ltd., supra, 2003 WL 169801, at 7, citing Winston v Mediafare Entertainment Corp., 777 F2d 78, 80 [2d Cir 1985]).

In contrast, a "preliminary commitment" refers to a situation where the parties agree on certain terms but leave other terms open for negotiation. A preliminary commitment "'does not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issue in good faith in an attempt to reach the ... objective within the agreed frame work'" (Spencer Trask Software and Information Servs, LLC v R. Post Intern. Ltd., supra, 2003 WL 169801, at * 5, quoting Teachers Ins. & Annuity Assn. of America v Tribune Co., 670 F Supp 491, 548 [SD NY 1987]. Factors which show that the parties have made a preliminary commitment include:

> (1) the language of the agreement; (2) the context of the negotiations; (3) the existence of open terms; (4) any partial performance; and (5) the necessity of putting the agreement in final form, as indicated by the customary form of such transactions.

(Spencer Trask Software and Information Servs, LLC v R. Post Intern. Ltd., supra, 2003 WL 169801, at * 10, citing Teachers Ins. & Annuity Assn of America v Tribune Co., supra, 670 F Supp, at 499-503).

New York state courts do not specifically adopt the terms "preliminary contract" and "preliminary commitments." However, the factors outlined by the Southern District for determining the existence of a binding agreement are consistent with New York Law. This State's Court of Appeals has held that in order for a binding contract to be created "there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (Express Indus. and Terminal Corp v New York State Dept of Transportation, 93 NY2d 584, 589, rearg denied 93 NY2d 1042 [1999]). An oral contract is complete despite the lack of a writing unless the parties specifically agree that the agreement is not binding until reduced to a writing and formally executed (Municipal Consultants Publishers, Inc. v Town of Ramapo , 47 NY2d 144, 148 [1979]). Moreover, "if parties to an agreement do not intend it to be binding upon them until it has been reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed" (Scheck v Francis, 26 NY2d 466, 469 [1970]).

Courts in New York are required to look "to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract" (Express Indus. and Terminal Corp v New

York State Dept of Transportation, supra, 93 NY2d, at 589). The court must first determine "whether there is a sufficiently definite offer such that its unequivocal acceptance will give rise to an enforceable contract" (id. at 589-590). Although New York law does not require that all terms of a contract be fixed with absolute certainty, there must still be sufficient evidence that both parties intended the arrangement (id. at 590).

The present record does not support plaintiff's claim that the parties entered into a "binding preliminary agreement" to purchase stock. The emails are not signed by defendant (see, 15 USC § 7001 et seq. [electronically signed transmission constitutes a writing]). None of the submitted documents indicate that the parties agreed to the major terms of a stock transfer. In particular, the June 5, 2001 e-mail does not state that parties agreed upon the terms or that they finalized an agreement to purchase plaintiff's interest in MJ Zone (cf., Medical Self Care, Inc. ex rel. Development Specialists, Inc. v National Broadcasting Co., Inc., 20003 WL 1622181, at *6 [e-mail considered a writing for the purpose of enforcing a written consent clause of contract]).

Instead, the record supports defendant's position that the June 5, 2001 e-mail was merely an offer. In the first instance, this e-mail did not originate with defendant officers. Instead, the June 5, 2001 e-mail was sent to plaintiff by Fillipakis/Philips, who was a principal in VAJ. Although it is true that June 5, 2001 e-mail was carbon copied to Edward and Joann Fasano, and Lohmann, the record does not indicate that Fillipakis/Phillips had the authority

to bind defendant to the terms listed in the e-mail. More importantly, the June 5, 2001 e-mail did not even mention that defendant agreed to plaintiff's terms.

Plaintiff has also not submitted testimony or documentary evidence which refutes Fillipakis/Philips' statement that he only sent the June 2001 e-mail to inform plaintiff of proposed terms.

As the subsequent e-mails in July 2001 indicate, defendant was not willing to send any money to plaintiff unless a written release was prepared and signed. Subsequent e-mails also show that plaintiff acquiesced to defendant's demand that a written release be a prerequisite for any transaction, since plaintiff acknowledged in his July 27, 2001 e-mail that he had asked his attorney to prepare a document and was awaiting a corrected version (see, Schwartz v Greenberg, 304 NY 250, 254 [1952] [parties did not intend to be bound to stock purchase agreement until a written agreement had been signed and delivered]). No such release is presented on this application.

The request for a formal release is also consistent with defendant's prior course of dealings with its sales representatives where all agreements were memorialized in writing (Spencer Trask Software and Information Servs, LLC v R. Post Intern. Ltd., supra, 2003 WL 169801, at *7). It is unlikely that realignment of stock ownership in MJ Zone and the resulting change in obligations would be effectuated without some form of writing.

As to the remaining issues, the June 5, 2001 e-mail does not even raise an issue of fact as to whether the parties had entered

a "preliminary commitment" (Wallabout Community Assn. v City of New York, 2004 WL 2480017, at *2-*3) [e-mails failed to establish existence of written lease agreement]; see, Rodger Edwards, LLC. v Fiddes & Sons, Ltd., 387 F3d 90, 94 [1st Cir 2004]). Although the parties may have engaged in lengthy discussions, none of the submitted emails suggests that the parties arrived at an agreement on any single material term. Plaintiff's subjective interpretations of the preliminary discussions do not raise an issue of fact as to the formation of an oral joint venture (S.L.S.M.C. V Bruce S. Brickman & Assocs., Inc., 277 AD2d 184 [1st Dept 2000]). Furthermore, there is no evidence of partial performance by either litigant. Defendant did not tender any payment and plaintiff did not turn over any stock. In fact, defendant rejected plaintiff's transfer offer based on plaintiff's failure to tender payments due on the VAJ agreement.

Equitable Theories

Here, plaintiff cannot sustain a claim that e-mails evinced a future intention to enter into a contract. There is no evidence that the parties entered into an implied contract where "[t]he relevant inquiry is whether the party to be charged 'has conducted himself in such a manner that his assent may be fairly inferred'" (Spencer Trask Software and Information Servs, LLC v R. Post Intern. Ltd., supra, 2003 WL 169801, at *12, quoting Miller v Schloss, 218 NY 400, 407 [1916]). Defendant did not tender any payment nor did it do anything to indicate that it was party to a stock transfer, ie. take control of plaintiff's shares in MJ Zone.

The record also does not support a finding that defendant made a clear and unambiguous promise to purchase plaintiff's shares in MJ Zone and there is no evidence that defendant had been unjustly enriched since the only evidence of payment relates to those made by MJ Zone in furtherance of the defendant's contract with VAJ's sales representatives (Tsabbar v Auld, 289 AD2d 115, 116 [1st Dept 2001], lv denied, 98 NY2d 613 [2002]; Spencer Trask Software and Information Servs, LLC v R. Post Intern. Ltd. , supra, 2003 WL 169801, at *13). Even if plaintiff had presented evidence that he expended funds in furtherance of the proposed stock buyout/transfer, that would still not sustain his claims since unjust enrichment is not an appropriate remedy for the recovery of expenditures of a failed negotiation (Chatterjee Fund Mgt., L.P. v Dimensional Media Assocs., 260 AD2d 159, 160 [1st Dept 1999]).

Plaintiff has also failed to show that defendant had any obligation, contractual or otherwise, to indemnify or reimburse plaintiff for money he allegedly lost in the VAJ business venture. An obligation to pay another's debt is still subject to the Statute of Frauds in this State (see, Rosenheck v Calcam Assocs., Inc., 233 AD2d 553, 554; General obligations Law §5-701[a][2]).

Accordingly, plaintiff has not shown that the parties entered into a final agreement, oral or written. Defendant's motion for summary judgment and to dismiss the complaint in its entirely is granted. Plaintiff's cross motion for summary judgment in his favor is therefore denied.

The court denies that branch of defendant's motion which seeks

sanctions.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the branch of defendant's motion for sanctions, including attorney fees, and plaintiff's entire cross motion are denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: November 22, 2004 ENTER:

PAULA J. OMANSKY
J.S.C.