[* 1]

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

PRESENT: BERNARD J. FRIED J.S.C. PART 60

0601566/2004

MCCAGG, BRIN
VS
SCHULTE ROTH & ZABEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 1

DISMISS ACTION

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

FILED
SEP 26 2005
COUNTY CLERK'S OFFICE
NEW YORK

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

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

Dated: 9/23/05

BERNARD J. FRIED 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 60

----------x

BRIN McCAGG

Plaintiff,

Index No. 601566/04

-against-

SCHULTE ROTH & ZABEL LLP, MARC WEINGARTEN, HARRY S. DAVIS and ALAN CLINGMAN,

Defendants.

----------x

FRIED, J.:

Defendant Alan Clingman, in this motion sequence 001, moves for an order pursuant to CPLR 3211 (a) (5), granting his motion to dismiss the complaint on the ground that the action is barred by the statute of frauds. For the following reasons, the motion is granted to the extent of dismissing the first cause of action, and is otherwise denied.

Plaintiff Brin McCagg (McCagg) seeks damages against defendant Alan Clingman (Clingman) for breach of contract, breach of fiduciary duty, and common-law fraud in connection with a failed start-up business. Plaintiff also seeks damages against the defendant law firm and two of its partners. Only defendant Clingman has moved to dismiss.

In August 2002, defendant Clingman was terminated as chief executive officer of Marquis Jet Partners, Inc. (Marquis). Clingman was a founder of Marquis, which sold charters on non-commercial jet airplanes to mostly corporate customers. At the time of his termination, Clingman owned approximately 12% of the common stock of Marquis, which

he retained. He had not entered into any non-compete agreement with Marquis at the time of his termination.

Both Clingman and McCagg are sophisticated businessmen who have served in senior executive positions. Each has launched several businesses in his career, some successful and some not. Clingman now works in a field unrelated to aviation.

In November 2002, Clingman invited plaintiff to attend a meeting with him in Florida with a company called Flexjet/Bombardier. They met with senior management and explored the possibility of starting a business that would utilize jets manufactured by Bombardier to compete with Marquis in the fractional jet ownership business. The Clearjets venture proposed to have a competitive advantage over Marquis by offering the use of jet airplanes in smaller blocks of time.

According to the complaint, on December 9, 2002, McCagg and Clingman agreed to launch Clearjets as a joint venture. On December 17, 2002, Clearjets, Inc., was incorporated under the laws of Delaware, with Clingman owning 60% of the shares and McCagg owning 40% of the stock. The complaint alleges that Clingman was to be chairman and chief executive officer of the corporation, while McCagg was to serve as president, and also that Clingman was to be "managing partner of the venture." The complaint alleges that Clearjets rented office space in Manhattan, hired a staff of four, including a general counsel and a vice-president for business development, and developed a business plan, which it used to solicit investors.

While drafts of proposed agreements between McCagg and Clingman have been submitted, the only executed agreement before the court is a Letter of Agreement, dated

January 1, 2003, which refers to both Clingman and McCagg as "partners," in which each agreed "to contribute the fractional private jet business into a mutually owned LLC," which is not named in the agreement, and provides that each will contribute his pro rata share to expenses. That agreement provides that both "partners" agree to work full-time for the LLC and contribute their best efforts to develop the fractional jet charter business.

For reasons that are disputed, negotiations with Flexjet/Bombardier did not result in a contract. Clingman states in his affidavit that he decided in March 2003 that Clearjets was "going nowhere," and that Bombardier would never sign the agreement with Clearjets. At that time, Bombardier was negotiating with Delta Air for a similar arrangement that was ultimately executed. Clingman also states that he did not want to continue working with McCagg because of disputes over expenses and his view that McCagg was distracted by matrimonial problems. Thus, in March 2003, while Clingman was apparently still chief executive officer of Clearjets, Inc., he engaged in negotiations with Marquis for Marquis to repurchase his shares in Marquis. On April 8, 2003, according to Clingman's reply affidavit, he sold his shares in Marquis back to the company at $.85 per share, for a total payment of $3,157,512. A document annexed to that affidavit shows such a sale, but does not identify the seller.

Clingman acknowledges in his reply affidavit that he subsequently entered into an agreement not to compete with Marquis. The submissions do not include a copy of this agreement not to compete; nor is the court advised of the date of this agreement. In his verified answer, Clingman had denied entering into a non-competition agreement with Marquis, and acknowledged it, according to McCagg, only after its existence was revealed

in papers filed by the Schulte defendants.

The complaint contains five causes of action against Clingman. The first charges breach of a claimed oral partnership agreement by Clingman selling his shares back to Marquis and entering into a non-compete agreement. The second cause of action charges breach of fiduciary duty allegedly owed to McCagg by the same actions. The third cause of action charges misrepresentation and common-law fraud based on the allegation that Clingman orally represented to McCagg that he had "no intention" of selling his stock back to Marquis, and that Clingman fraudulently induced McCagg to become a joint venturer as part of a scheme to use Clearjets as a ruse and a lever or a "Trojan horse" to induce Marquis to buy back Clingman's shares. It charges that as soon as Clingman reached an agreement with Marquis for the repurchase of his shares at an inflated price, reflecting the value of his agreement not to compete, Clingman "pulled the plug" on Clearjets. The fourth cause of action charges misappropriation of a corporate opportunity and unjust enrichment. The fifth cause of action seeks a constructive trust based on Clingman's alleged unjust enrichment.

Clingman moves to dismiss the complaint solely on the ground that the action is barred by the statute of frauds, in that there is no signed writing in which he agreed with McCagg not to sell his shares back to Marquis or not to enter into an agreement not to compete with Marquis. He denies the existence of any such oral agreement. Inasmuch as McCagg acknowledges in his affidavit that the sale of Marquis stock by Clingman back to Marquis was never a concern, it is only the non-competition agreement that is in issue.

The applicable provision of the statute of frauds (G.O.L. §5-701 [a] [1]) provides: "(a) Every agreement, promise or undertaking 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, if such agreement, promise or undertaking:

1. By its terms is not to be performed within one year from the making thereof . . .."

The allegation in the complaint that Clingman agreed with McCagg that he "absolutely would never sign a non-compete with Marquis" (¶15), on its face comes within the above-stated one-year requirement of the statute of frauds, and thus would have to be in writing to be enforceable.

Contracts of indefinite duration, which by their terms an obligor can neither perform nor unilaterally terminate without breach or death within one year of making, require a writing to be enforceable (see D&N Boening, Inc. v Kirsch Beverages, Inc., 63 NY2d 449 [1984]; Strasser v Prudential Sec., Inc., 218 AD2d 526 [1st Dept 1995]; McCoy v Edison Price, Inc., 186 AD2d 442 [1st Dept 1992]). Therefore, the alleged agreement never to enter a non-competition agreement with Marquis had to be in writing.

An oral agreement to create a joint venture does not violate the statute of frauds, but it only creates a partnership at will (see Prince v O'Brien, 234 AD2d 12 [1st Dept 1996]). The complaint charges that Clingman, by entering the non-competition agreement with Marquis, violated the partnership agreement. Other than the agreement to split ownership and share profits and losses on a 60% to 40% basis, no terms of the alleged oral joint venture agreement are stated in the parties' submissions. Nor were the parties forthcoming at oral argument in response to as to the contents of the alleged oral joint venture agreement.

To the extent that plaintiff argues that partial performance results in the alleged

agreement being enforceable, the argument is unpersuasive. The act of doing nothing – Clingman not entering into a non-competition agreement with Marquis – is not unequivocally referable to the existence of the claimed oral agreement, as would be required to avoid the consequences of not reducing the agreement to writing (see Messner Vetere Berger McNamee Schmetterer Euro RSCG INC. v Aegis Group, PLC, 93 NY2d 229 [1999]). Nor am I persuaded by plaintiff's argument that the January 1, 2003 agreement can be supplemented to satisfy the statute of frauds. Plaintiff has not come forward with any additional writing that reflects the claimed oral agreement. Thus, the first cause of action is dismissed on the ground that the statute of frauds bars proof of the claimed oral agreement by Clingman not to enter a non-competition agreement with Marquis.

The statute of frauds is not a ground for dismissal of the second cause of action for breach of fiduciary duty because the precluded oral agreement is not the only possible basis for the existence of a fiduciary duty not to enter a non-competitive agreement with a principal competitor. The existence of factual questions concerning the events and the nature of the venture and the relation of the parties after the incorporation of Clearjets, Inc. (see Weisman v Awnair Corp. of Am., 3 NY2d 444 [1957]; Interset Group, Inc., v Rosenzweig, 225 AD2d 402 [1st Dept 1996]), precludes dismissal of the second cause action on this motion (see Schwartz v Kozak, 85 AD2d 507 [1st Dept 1981]).

The third cause of action charges common-law fraud and misrepresentation. Specifically, the verified complaint alleges that Clingman fraudulently induced him to join the venture, which, unbeknownst to him, was in furtherance of Clingman's scheme to "secretly alarm and threaten Marquis with the prospect of a well financed, viable and

successful competitive challenge to Marquis . . . and upon extraction of a significant payment from Marquis [Clingman would] immediately pull out of the Clearjets venture (complaint ¶ 105)." It charges further that Clingman was engaged in secret negotiations with Marquis "from the very start," that Clingman falsely represented to McCagg that he "had no intention of selling his shares and entering a non-competition agreement with Marquis," that McCagg relied on this to his detriment (complaint ¶ 102), and that Clingman represented that he "absolutely never would sign a non-compete with Marquis (complaint ¶ 15)." Fraudulent inducement arising solely from a breach of contract, is not actionable (see Gordon v Dino De Laurentiis Corp., 141 AD2d 435 [1st Dept 1988]). However, these allegations that Clingman was involved in secret negotiations with Marquis "from the very start and inception of the partnership" (¶ 105) in December 2002, involve concealment of material facts existing before the formation of the joint venture (see Urban Holding Corp. v Haberman, 162 AD2d 230 [1st Dept 1990]). Thus, these are not allegations which would be subsumed within a breach of contract claim, because the allegations are not that Clingman merely had an intention not to perform under the contract. In light of the foregoing allegations, the alleged oral agreement is not necessary to the cause of action as a pleading matter, and the statute of frauds does not require dismissal.

The fourth cause of action alleges misappropriation of a corporate opportunity and unjust enrichment. The fifth seeks a constructive trust. Whatever the viability of the fourth and fifth causes of action, the statute of frauds is not a ground on which dismissal may be granted. The enforceability of the alleged oral agreement not to enter into a non-competition agreement with Marquis is not essential to either of these causes of action, irrespective of

other potential deficiencies.

Accordingly, it is

ORDERED that the motion is granted to the extent of dismissing the first cause of action, and is otherwise denied.

DATED: 9/23/05

ENTER:

J. S. C.

BERNARD J. FRIED