[* 1]

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

PRESENT: PART 61

Index Number : 601225/2005

TIME INC

VS

PETROSKI, DANIEL

Sequence Number : 001

DISMISS ACTION

INDEX NO. 601225/05

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3, 4
Answering Affidavits — Exhibits	5
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

This motion was decided in accordance with the attached decision, dated November 21, 2005

FILED
DEC - 9 2005
COUNTY CLERK'S OFFICE
NEW YORK

SO ORDERED

ROLANDO T. ACOSTA J.S.C.

Dated: 11-21-05

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61

Time Inc. and Time Consumer Marketing, Inc.

Plaintiffs,

– against –

Daniel Petroski,

Defendant.

DECISION/ORDER

Index No. 601225/05

Motion Seq. 1

Present:
Hon. Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing defendant's motion to dismiss pursuant to Section 3211(a)(5) of the Civil Practice Law and Rules:

Papers	**Numbered**
Notice of Motion, Affidavit in Support of Motion,	**1 (Exh. A)**
Memorandum of Law in Support of Motion	
Memorandum of Law in Opposition to Motion	**2**
Affidavit in Opposition	**3 (Exh. A-B)**
Affidavit in Opposition	**4 (Exh. A-E)**
Reply Affirmation	**5**

Based on the foregoing papers, defendants motion to dismiss plaintiffs' complaint pursuant to CPLR § 3211(a)(5) is denied.

Time Inc. and Time Consumer Marketing, Inc. ("plaintiffs") bring this

action against their former employee, defendant Daniel Petroski ("Petroski") for his alleged failure to repay $98,600.00 due and owing to them, which represents the funds expended on Petroski's behalf under plaintiffs' Executive MBA Repayment Program ("Program"). Pursuant to the program, plaintiffs claim they agreed to pay Petroski's cost of attending graduate business school on company time on the condition that Petroski would reimburse plaintiffs for their cost if he voluntarily left his employ with plaintiffs within three years after achieving his graduate degree.

Petroski was admitted into New York University's Leonard N. Stern School of Business ("NYU") Executive MBA Program, beginning September 2002 to on or about June 26, 2004. Plaintiffs paid Petroski's NYU tuition and other fees totaling $98,600. After achieving his graduate degree in June 2004, Petroski subsequently resigned from his employment with plaintiffs on April 1, 2005, less than one year after achieving his graduate degree. Plaintiffs thus claim that pursuant to the terms of its Executive MBA Repayment Program, they are entitled to full reimbursement. According to the terms of the program, an employee who achieves an Executive MBA degree at the expense of plaintiffs will be responsible for fully reimbursing plaintiffs if that employee voluntarily departs from the company within one year of achieving his degree. Moreover, the employee will be responsible for reimbursing plaintiffs two-thirds of the cost if he voluntarily

departs from the company within two years after achieving his degree, and one-third of the costs if the employee departs from the company within three years after achieving his degree.

Defendant does not deny that plaintiffs did pay his tuition expenses for the MBA program. He argues, however, that he never entered into any agreement with plaintiffs to reimburse them should he voluntarily leave the company within three years after achieving his graduate degree. Defendant places significance on the absence of any written evidence of the alleged agreement between plaintiffs and himself. Based on the absence of any written agreement, defendant moves to dismiss plaintiffs' cause of action as being barred by the Statute of Frauds.

Section 3211(a)(5) of the CPLR states that a party may move for a judgment dismissing one or more causes of action if the cause of action is barred by the statute of frauds. An agreement, promise or undertaking which by its terms is not capable of being performed within one year falls within the statute of frauds, and is void unless it is memoralized in some form of writing, and signed by the party to be charged. *See* GOL § 5-701(a)(1). In deciding a motion to dismiss based on statute of frauds grounds, the Court must deem plaintiff's allegations to be true. *See* Calo v. Chui, 254 A.D.2d 191 (1st Dept. 1998).

In the instant case, deeming plaintiffs' allegations as being true, it cannot be said as a matter of law that plaintiff's cause of action is barred by the statute of

frauds. Defendant's contention to the contrary, the absence of a written agreement between the parties is not dispositive. There needs to be a factual resolution as to whether or not plaintiffs detrimentally relied on an oral agreement with Petroski with regards to his tuition payment, inasmuch as the doctrine of promissory estoppel is an exception to the statute of frauds. Rose v. Spa Realty Associates, 42 N.Y.2d 338 (1977). "The elements of promissory estoppel are: a clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his reliance." Ripple's of Clearview, Inc. v. Le Havre Associates, 88 A.D.2d 120 (2nd Dept. 1982). Promissory estoppel is only available where one party reasonably relies on the promise of another and it would be unconscionable to deny enforcement of the oral agreement. James v. Western New York Computing Systems, Inc., 273 A.D.2d 853 (4th Dept. 2000).

Petroski contends that he was never aware of plaintiff's intention that he either remain at the company for a minimal period of time, or reimburse the company should he voluntarily leave. Petroski, however, does acknowledge that prior to being admitted in NYU's MBA program, he applied to Columbia Business School and was e-mailed plaintiff's company re-pay policy for paying its employees MBA tuition fees. Petroski was denied admission to Columbia and was later admitted to NYU. Petroski contends that he was never advised of the

company's re-payment policy regarding his admission to NYU, which the company decided to sponsor in February 2002, just four months after Petroski concedes he received the repayment policy e-mail should he have been accepted to Columbia Business School.

Notwithstanding the fact that plaintiffs' Executive MBA Program re-payment policy is posted on the company's intranet website and Petroski's concession that he was further made aware of such a policy when he was applying to Columbia Business School, once Petroski completed his degree at NYU and decided to leave his employ with plaintiffs, there was a dispute between the parties as to whether Petroski was required to repay his tuition paid on his behalf. Significantly, a March 10, 2004 e-mail by Petroski to the president of Time Magazine stated that he met with the vice president of Human Resources to discuss his "obligation to the company pertaining to my education".

The e-mail further stated that he made "a fair proposal under the circumstances." Particularly important is that despite Petroski's awareness of the company's repayment policy when he applied to Columbia Business School, he never voiced an objection to such policy; nor did his e-mail written after to obtaining his MBA and deciding to leave plaintiff company, affirmatively disavow his previous acknowledgment of the policy.

Thus, although there may not be a writing signed by Petroski that

acknowledges that he had a binding contract with plaintiffs to repay his tuition fee should he leave their employ within three years after achieving his MBA, there is still a factual dispute as to whether or not there was an oral agreement between plaintiff and Petroski in which plaintiffs reasonably relied on Petroski to adhere to the terms of the Executive MBA program. Hence, plaintiff's performance in paying for Petroski's tuition can be invoked to remove the oral agreement between the parties from the statute of frauds if it is found that plaintiffs' actions were in fact directly referable to that agreement, and defendant's refusal to abide by its terms would be unconscionable. *See* Steele v. Delverde S.R.L., 242 A.D.2d 414 (1st Dept. 1997); Futia Realty Co. v. QLC Associates Ltd. Partnership, 228 A.D.2d 913 (3rd Dept. 1996) ("Estoppel may be imposed by law in the interest of justice where one party, justifiably relying upon the word or deed of another, changes its position to its detriment."). Taking all the prior correspondences between the parties related to plaintiffs' repayment policy, plaintiff's performance of paying Petroski's tuition, and the communications between the parties subsequent to Petroski achieving his degree, it cannot be said that plaintiffs' conduct was inconsistent with an oral agreement between the parties for repayment of plaintiffs' expenditures should Petroski leave plaintiffs employ within three years after gaining his MBA; such an agreement would not be barred by the statute of frauds.

Moreover, the doctrine of promissory estoppel could only be invoked if it is found that Petroski's refusal to repay plaintiffs was unconscionable, a factual determination which must be resolved at trial. Joseph P. Day Realty Corp. v. Jeffrey Lawrence Assocs., 270 A.D.2d 140 (1st Dept. 2000).

If it is found that plaintiffs justifiably relied on Petroski's words and actions to its detriment, then plaintiffs' will have satisfied the minimal requirements of stating a cause of action against defendant, irrespective of the statute of frauds. *See* Armstrong v. Simon & Schuster, 85 N.Y.2d 83 (1995). Here, plaintiffs spent $98,000 in tuition on Petroski's behalf which enabled him to earn a MBA and the benefits, skills, prestige, and earning capacity such a degree carries. Petroski in turn left Time less than a year after achieving his degree. Therefore, if plaintiffs can establish that Petroski's "conduct induced their significant and substantial reliance, the defense of equitable estoppel may preclude [Petroski] from disputing whether [he] made oral assurances, notwithstanding the Statute of Frauds." European American Bank v. Mr. Wemmick, Ltd., 160 A.D.2d 905 (2nd Dept. 1990). While the Statute of Frauds is designed to prevent the enforcement of unfounded fraudulent claims, the Statute can not be used as a sword to evade just obligations nor as a bar to fairly and admittedly made contracts. McCormack v. Grumman American Aviation Corp., 111 A.D.2d 2 (1st Dept. 1985) citing,

Morris Cohon & Co. v. Russell, 23 N.Y.2d 569 (1969) and (4 Williston Contracts [3d ed.], § 567A, pp. 19-20).

Thus, without deciding whether or not plaintiffs' claim is barred by the statute of frauds, there are legitimate factual disputes between the parties, including whether Petroski is estopped from denying an oral agreement with plaintiffs, whether plaintiffs justifiably relied on defendants actions to their detriment, and whether Petroski's conduct was unconscionable. Such factual issues are sufficient to withstand defendant's motion to dismiss at this juncture. *See* Shapiro v. Shorenstein, 157 A.D.2d 833 (2nd Dept. 1990) (Whether defendant's conduct is so egregious to prevent defendant from invoking statute of frauds required full determination of facts after trial and should not have been determined on pleadings). Accordingly, it is hereby

ORDERED defendant's motion to dismiss pursuant to CPLR § 3211(a)(5) is DENIED.

This Constitutes the Decision and Order of the Court.

Dated: November 21, 2005

ENTER:

SO ORDERED

ROLANDO T. ACOSTA
J.S.C.