

D'Esposito v Gusrae, Kaplan & Bruno, PLLC

2006 NY Slip Op 30003(U)

December 18, 2006

Supreme Court, New York County

Docket Number: 0106893/2003

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----X
JAMES J. D'ESPOSITO,

Plaintiff,

INDEX NO. 106893/2003

-against-

MOTION DATE _____

GUSRAE, KAPLAN & BRUNO, PLLC, GUSRAE,
KAPLAN & BRUNO, a Partnership, MARTIN H.
KAPLAN and LAWRENCE G. NUSBAUM, III,

MOTION SEQ. NO. 012

MOTION CAL. NO. _____

Defendants.
-----X

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

Notice of Motion/ Order to Show Cause — Affidavits

Answering Affidavits — Exhibits _____

Replying Affidavits _____

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

PAPERS NUMBERED _____

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying
Decision and Order.

Dated: December 18, 2006

Karla Moskowitz
KARLA MOSKOWITZ J.S.C.

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: IAS PART 3

-----X
JAMES J. D'ESPOSITO,

Index No. 106893/2003

Plaintiff,

-against-

DECISION and ORDER

GUSRAE, KAPLAN & BRUNO, PLLC,
GUSRAE, KAPLAN & BRUNO, a Partnership
MARTIN H. KAPLAN and LAWRENCE G.
NUSBAUM, III,

Defendants.
-----X

UNFILED JUDGMENT
This judgment has not been filed for the County Clerk and notice of entry shall be given to the parties by the County Clerk's Office.

MOSKOWITZ, J.:

Motion sequence numbers 012, 013, 014 and 015 are consolidated for disposition.

In this action, plaintiff James J. D'Esposito ("D'Esposito") seeks money damages and equitable relief resulting from his discharge as an alleged partner from the defendant law firm Gusrae Kaplan & Bruno, PLLC ("GKB"). At the heart of this lawsuit is the parties' dispute concerning D'Esposito's status as a member of GKB. The seven-count amended complaint asserts causes of action for a declaratory judgment determining D'Esposito's interest in GKB, an accounting, breach of contract, promissory estoppel, specific performance and fraud.

In their answers to the amended complaint, defendants assert counterclaims for breach of the implied covenant of good faith, fraud, breach of fiduciary duty, tortious interference with contract, constructive trust, conversion, trespass and injunctive relief.

In motion sequence number 012, defendants Gusrae, Kaplan and Bruno, a partnership ("Gusrac"), Lawrence G. Nusbaum III ("Nusbaum") and GKB (together, "GKB Defendants") move for summary judgment dismissing the amended complaint. The GKB Defendants also request that the court refer this matter to the Departmental Disciplinary Committee for the Second Department for investigation and prosecution of disciplinary conduct that D'Esposito

allegedly engaged in when he left GKB.

In motion sequence number 013, defendant Martin H. Kaplan (“Kaplan”) moves for summary judgment dismissing the amended complaint. Kaplan incorporates by reference the papers submitted by the GKB Defendants in support of motion sequence number 012. In motion sequence number 014, Kaplan moves to strike certain denials by D’Esposito of undisputed material facts, pursuant to Commercial Division Rule 19-a. In motion sequence number 015, the GKB Defendants also move to strike D’Esposito’s denials of certain undisputed facts.

I stated the facts of this case in detail in this court’s decision and order dated February 6, 2004 and presume familiarity with them. (*See D’Esposito v Gusrae, Kaplan & Bruno, PLLC*, Sup. Ct., NY County, Feb. 6, 2004, Index No. 106893/2003). Stated below are any necessary, additional facts.

Discussion

GKB Defendants - Motion Sequence Number 012

First & Second Causes of Action for Declaratory Judgment & Accounting

The GKB Defendants move for summary judgment dismissing D’Esposito’s first and second causes of action, that seek an accounting and a declaratory judgment determining his interest in GKB and declaring that he is a member of GKB not subject to discharge or forfeiture of his membership interest. In support of their argument, the GKB Defendants cite *Mazur v Max E. Greenberg, Cantor & Reiss* (110 AD2d 605 [1st Dept], *affd* 66 NY2d 927 [1985]). In opposition, D’Esposito argues that *Mazur* is not applicable.

In *Mazur*, the defendant law firm partnership made the plaintiff attorney a new partner. The original partners remained partners pursuant to a written partnership agreement. As a

partner, the plaintiff shared in the firm's annual profits, but did not receive an interest in the firm's capital account. The plaintiff was not responsible for the firm's rent or losses, he did not become a signatory to the written partnership agreement and he had no other written agreement with the firm. The firm permitted plaintiff to call himself a partner, listed him as a partner of the firm in Martindale-Hubbell and on the firm's letterhead and tax returns and granted him net profits from the firm at a fixed percentage rate.

When the plaintiff withdrew from the firm, he sued the firm for an accounting and a declaration that the partnership was to dissolve upon his withdrawal. The trial court awarded the plaintiff's requested relief. The First Department reversed and dismissed the complaint, stating that the plaintiff shared in profits, but only at a fixed rate of 5% of the net rate, he did not share losses, and, while he exercised some control in the firm, he had no capital investment and possessed no ownership interest. The Court held that there was no partnership involving the plaintiff, stating that:

[t]he arrangement seems to be a precursor to today's law firm practice of two-tiered partnerships. Plaintiff was compensated by a fixed percentage of net income and had no other financial involvement. It is especially worth noting that when the 1967 partnership agreement, executed only by the original five partners, was amended in 1976, only the surviving original partners signed it.

(*Mazur*, 110 AD2d at 606 [internal citation omitted]).

The parties do not dispute that Gusrae made D'Esposito a partner in April or May 2000, while the firm was a general partnership, but D'Esposito admits that he was never an equity partner of Gusrae. (D'Esposito Dep., at 259-60). D'Esposito testified that he made no capital contributions to Gusrae or GKB. (*Id.* at 80-81). As shown in the affidavit of Samuel Herzog ("Herzog"), GKB's accountant, and the Schedule K-1's, D'Esposito's capital account at the

beginning of each year was either zero or negative. D'Esposito testified that he was not aware of where the firm's capital came from or of any of GKB's obligations or liabilities. (D'Esposito Dep., at 167, 304-05). He had no access to GKB's general ledger or check books. (*Id.* at 310). He never signed a check on behalf of GKB and had no authority to sign a check or authorize the wiring of funds from GKB's bank accounts. (*Id.* at 144, 148). D'Esposito had no access to the computer software system that retained the firm's books and records. (*Id.* at 149).

D'Esposito did not participate in setting the firm's hourly attorney rates for Kaplan, Nusbaum, or non-parties Cirino Bruno ("Bruno"), Robert Perez ("Perez") or Melvyn Falis. (*Id.* at 149). Nor did D'Esposito participate in preparing the firm's tax documents. (*Id.* at 150). D'Esposito has no knowledge of GKB's rent charges, the costs of support staff or malpractice premiums, or what factors the firm considered when determining whether GKB should make distributions. (*Id.* at 419-20, 423-24).

D'Esposito does not know what GKB paid in rent and never reviewed the firm's lease. (*Id.* at 419-20). He never participated in a determination as to whether GKB should make distributions or investments and was not aware that GKB had brokerage accounts. (*Id.* at 422, 144, 147). He did not participate in choosing the firm's medical coverage or other benefits, discussions concerning the firm's office lease or signing equipment purchase agreements. (*Id.* at 145). He never extended an offer of employment to anyone at GKB, terminated a GKB employee or set a salary for anyone whom he participated in hiring. (*Id.* at 145, 147).

This evidence establishes that, while GKB permitted D'Esposito to hold himself out as a partner, listed him as a partner on GKB's tax forms and allowed him to share in the firm's annual profits, as the plaintiff in *Mazur*, D'Esposito shared in the firm's profits only at a fixed rate, and GKB did not give him an interest in the firm's capital account. Nor was D'Esposito responsible

for the firm's rent or losses. D'Esposito had no involvement in the firm's financial, administrative or business decisions. While the plaintiff in *Mazur* was not a partner even though he "did exercise some control in the firm" (110 AD2d at 606), D'Esposito exercised no control at all. Thus, under *Mazur*, D'Esposito is not an equity partner of GKB.

Moreover, D'Esposito does not dispute that the other so-called "members" of GKB concede that they have no equity interest. Nusbaum, Percz and non-party David Gchn ("Gehn"), like D'Esposito, are identified as "members" on GKB's Martindale-Hubbell listing, but each of these individuals submits an affidavit stating that he is a holder of only an economic participation interest in GKB, that he did not have an equity interest in the firm, and that he never contributed capital to the firm and has not been responsible for the firm's losses. They state that Kaplan has at all times determined these partners' continued participation and has the full power to determine the amount and allocation of their compensation. In addition, these "partners," as economic participation holders, are employed at will. These individuals also state that D'Esposito had the same arrangement with respect to his employment as a "partner" of GKB and Gusrae.

Based upon the foregoing evidence, including, to a great extent, D'Esposito's own deposition testimony, the GKB Defendants have established that D'Esposito was never an equity partner of Gusrae or a true member of GKB as a limited liability company.

While the defendants do not submit a certificate of conversion in connection with section 1006 (e) of New York's Limited Liability Company Law, according to Kaplan, the new entity, GKB, is the successor of Gusrae and uses the same tax identification number for business purposes. (Kaplan Dep., at 68). The firm became a limited liability company on February 23, 2000, upon its initial filing with New York's Department of State and later adopted an operating

agreement that was deemed effective as of this date (“Operating Agreement”).

The GKB Defendants’ summary judgment motion does not rely on the terms of the Operating Agreement. However, the terms of that document support their prima facie showing that D’Esposito never became an equity member of GKB. D’Esposito does not dispute that he neither created nor signed the Operating Agreement. Nor does D’Esposito claim any impropriety in backdating the Operating Agreement to February 2000. Rather, D’Esposito argues that, under the parties’ agreement, he was entitled, but denied the opportunity, to “participate in the discussions concerning the terms of the operating agreement for the [GKB.]” However, for the reasons discussed in the next section of this decision, the agreement that D’Esposito relies upon is void under the statute of frauds. Therefore, to the extent that D’Esposito opposes the contents of the Operating Agreement, or his lack of participation in discussing its terms, that opposition is unpersuasive.

The Operating Agreement defines “Member” as “each of the parties who executes a counterpart of this Operating Agreement as a Member and each of the parties who may hereafter become Members.” Only Kaplan and Bruno have signed the Agreement as Members. Under the Operating Agreement, D’Esposito had no voting rights and never voted on any firm matter. The Operating Agreement allocates 100% of the firm’s profits and losses to Kaplan (GKB’s Manager) and Bruno: 99% of profits and losses to Kaplan and 1% of profits and losses to Bruno, consistent with their respective proportionate initial capital contributions. Each January from 2000 to 2002, Kaplan and Bruno resolved that D’Esposito would be a “Holder of Economic Interest” in GKB for that year only.¹ The Operating Agreement defines “Economic Interest

¹ During this time period, the other economic interest holders were Kaplan, Nusbaum, Bruno, Perez and Gehn.

Owner” as “the owner of an Economic Interest who is not a Member.” The definition of “Economic Interest” explicitly excludes “any right to participate in the management or affairs of the Company, including the right to vote on, consent to, or otherwise participate in any decision of the members or Managers.”

Thus, the Operating Agreement confirms that D’Esposito was not an equity member of GKB and that he was an economic interest holder subject to a percentage distribution that Kaplan determined. The Operating Agreement also confirms that D’Esposito had no right to participate in the management or business affairs of GKB. D’Esposito fails to rebut this showing.

D’Esposito argues that *Mazur* is not applicable, because it deals with partnership law rather than New York’s Limited Liability Company Law. In essence, D’Esposito argues that a limited liability company cannot admit non-equity members and that the law does not recognize economic interest owners. However, D’Esposito’s claim is belied by his admission that, at his previous firm, Franzino & Rosenberg, P.C. (“F&R, P.C.”), he was a contract, non-equity partner, who had the title of partner but no ownership interest in the firm. (D’Esposito Dep., at 23, 87). F&R, P.C. was a professional corporation (not a partnership), but D’Esposito admits that he held himself out as a partner and that Martindale-Hubbell listed him as a partner. Thus, D’Esposito admits that entities other than partnerships can establish multi-tiered compensation arrangements. (*See e.g. Rosenblatt v Bivona & Cohen, P.C.*, 969 F Supp 207, 214-15 [SDNY 1997] [defendant law firm identified employee as “partner,” even though firm was a professional corporation]).

D’Esposito argues that GKB was issued Schedule K-1s that identify him as a “limited liability company member.” However, the plaintiff also enjoyed this type of tax treatment in *Mazur*, but the First Department held that the plaintiff was not an equity partner. (*Mazur*, 110 AD2d 605, *supra*; *see also Silverman v Keller*, Sup Ct, New York County, March 9, 2006, Lowe,

J., Indcx No. 601913/04 [citing *Mazur*, court determined that individual was not a partner, even though the firm listed him as a partner, issued a Schedule K-1 for four years, and, together with other defendants, granted him a share in 50% of firm's profits for up to two years; court recognized that tax forms do not account for all taxpayer types and that an individual's receipt of a Schedule K-1 does not constitute status of equity owner]). Therefore, this argument is unpersuasive.

D'Esposito argues that when GKB's accountant, Herzog, sent him the schedule K-1s, he addressed D'Esposito as "Dear Member." However, Herzog submits an affidavit stating that he does "not purport to know the economic arrangements between the partners/members at GKB" None of the evidence concerning Herzog establishes that D'Esposito was an equity member of the firm.

D'Esposito next argues that, even if partnership law cases apply, there is sufficient evidence that defendants agreed to make him a member of GKB. D'Esposito cites two cases in support of this argument: *Rosen v Efras* (258 AD2d 333 [1st Dept 1999]) and *Lynn v Corcoran* (219 AD2d 698 [2d Dept 1995]).

In *Rosen*, the plaintiff sought an accounting. The First Department held that issues of fact existed "as to whether plaintiff was made a partner of the subject firm," including questions concerning "the various ways he participated in the management of the firm, including the hiring and firing of firm employees and dealing with brokers in connection with the firm's relocation, and the absence of a written partnership agreement." (*Rosen*, 258 AD2d at 333, comparing *Mazur*, 110 AD2d 605, *supra*). Here, conversely, as discussed above, the evidence establishes that D'Esposito did not participate in the management of the firm in any way, he did not hire or fire employees and he did not in any other way participate in running the business of the firm.

D'Esposito fails to rebut this showing. Thus, there are no issues of fact.

D'Esposito argues that GKB's Operating Agreement did not exist in 2000, 2001 or 2002, making his case more like *Rosen*, where there was no written agreement, than like *Mazur*, where there was a written agreement. However, this argument is unpersuasive, because, as discussed above, D'Esposito submits no evidence showing that he participated in any way in the business or management of Gusrac or GKB or that he had any financial involvement other than receiving compensation with a fixed percentage of income. Nor has D'Esposito shown that he made any capital investment or that he had any responsibility for losses. By all accounts, Gusrac appears to have functioned as a two-tiered partnership, of which D'Esposito admits he was not an equity partner. (D'Esposito Dep., at 259-60). Nothing contained in the evidence that the parties submitted supports the conclusion that D'Esposito became an equity member of GKB. Accordingly, *Rosen* is distinguishable.

In *Lynn*, the defendant's counterclaims survived summary judgment, because he submitted proof that he signed an agreement to indemnify his two former partners for all liability that they might have had in connection with the lease of the office, and the financial statements reflected that he made a capital contribution to the firm. The Second Department affirmed the denial of summary judgment, because there was a dispute as to whether an oral partnership agreement existed concerning the ownership of partnership assets, the parties' profit-sharing arrangements and the exercise of management and control over the partnership. As discussed above, D'Esposito did not make capital contributions and he is not a signatory to the Operating Agreement or any other governing document of GKB. In addition, D'Esposito did not participate in the management of GKB. Therefore, *Lynn* is distinguishable on its facts.

As discussed above, D'Esposito shared only in the firm's profits and those only at a fixed

percentage. He never participated in management or shared in the firm's losses, thereby negating his assertion that he was a partner of Gusrac or a Member of GKB. (*See Baker v Kohler*, 28 AD3d 375, 376 [1st Dept 2006] [plaintiffs failed to show "customary indicia" of a partnership, where they "made no showing as to an agreement to share losses or to share ... in management decisions"]). For the foregoing reasons, I grant the GKB Defendants' motion to dismiss D'Esposito's first and second causes of action for a declaratory judgment and an accounting.

Third, Fourth, Fifth & Sixth Causes of Action
Based Upon Promised Membership in GKB

The third, fifth and sixth causes of action are all based upon D'Esposito's claim that he "entered into an agreement with Gusrac/GKB, acting through Kaplan and Nusbaum, under which D'Esposito would be made a partner/member of Gusrac/GKB in exchange for D'Esposito continuing to provide services to Gusrac/GKB." (Amended Complaint, ¶¶ 52, 57-58, 64, 66). The fourth cause of action, for promissory estoppel, is also based upon this alleged agreement and upon D'Esposito's rescinding the acceptance of an offer of employment with another firm, non-party Parker Chapin, in order to continue working for GKB under the assumption that he was a member of the firm. Specifically, the fourth cause of action seeks to estop defendants from denying that he is a member of GKB and claims that D'Esposito "should receive the draws, distributions, rights and benefits conferred upon the partners/members of GKB in accordance with his interest therein." (*Id.*, ¶ 59). The GKB Defendants move to dismiss these causes of action, arguing that these claims violate the statute of frauds, because they are all based upon promises that cannot be performed within one year and are based on writings that GKB did not sign.

Section 5-701 (a) of New York's General Obligations Law (GOL) provides that:

[e]very 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

Here, according to D'Esposito's testimony, his claim is that his interest in GKB was to continue indefinitely, from May 1, 2000 until GKB no longer existed. (D'Esposito Dep., at 74-75). He also testified that he could not identify any writing conferring this right on him that anyone at GKB had signed. (*Id.* at 75). Thus, "[t]he agreement, by its terms, was to last for as long as [GKB] remained in business, and thus was incapable of performance within one year, rendering it voidable absent a writing signed by the party to be charged or his duly authorized agent." (*McCoy v Edison Price, Inc.*, 186 AD2d 442, 443 [1st Dept 1992]). Therefore, the GKB Defendants have made a prima facie showing that the agreement is void under the statute of frauds.

In opposition, D'Esposito argues that the Agreement to Terms, the Memorandum of Terms and his affidavit show that the parties' agreement in April 2000 was that, upon GKB's formation and admission of members, D'Esposito would be admitted as a member of GKB "during or prior to October 2000, but in no event later than December 31, 2000." (D'Esposito Aff., Exs. 19 and 21). According to D'Esposito, the agreement that he seeks to enforce is the agreement to make him an equity member, that was to be performed within one year. He also argues that GKB's tax returns, the Schedule K-1s sent to him, Martindale-Hubbell and GKB's firm letterhead all list D'Esposito as a member, and are all writings that satisfy the statute of frauds. D'Esposito cites no legal authority in support of his argument.

In substance, this argument assumes that GKB was to make D'Esposito a partner within

one year, but that, once a member in GKB, his membership would continue in subsequent years indefinitely, even if he left GKB and joined another firm. D'Esposito testified that, even if he left GKB for a job at another firm, he would continue to receive a weekly draw of \$1,800, plus a percentage of GKB's profits, regardless of whether or not he worked at GKB. (D'Esposito Dep., at 159-60).

However, under the statute of frauds, the time period is measured from the date that the agreement was made to the completion date of the agreement. (*Whitehill v Maimonides School*, 53 AD2d 568, 568 [1st Dept 1976] [oral agreement violated statute of frauds where it "was made on July 6, 1973, with performance to commence on August 1, 1973 and be completed on July 31, 1974"]). While D'Esposito's alleged change in status to become a member of GKB in October 2000 could be performed within one year from the time that GKB allegedly made the agreement with D'Esposito (in April 2000), enforcement of this alleged promise, including membership status and related monetary benefits, extended well beyond one year, indefinitely for the life of the firm. This agreement is therefore impermissible under the statute of frauds. (*See Sheehy v Clifford Chance Rogers & Wells LLP*, 3 NY3d 554, 561-62 [2004] [the statute of frauds bars law firm's alleged oral promise of future retirement benefits where partner's actual retirement occurred within one year, but firm could not complete the alleged payment obligations within one year from date of agreement]).

Moreover, D'Esposito prepared the Agreement to Terms and Memorandum of Terms that purport to memorialize the terms of Gusrac and GKB's offer and D'Esposito's acceptance of a membership interest. However, no one at Gusrac or GKB signed these documents. Thus, neither of these documents, nor any other documents D'Esposito identifies, are writings "subscribed by the party to be charged therewith," under section 5-701 (a) (1) of the GOL. For the foregoing

reasons, these claims are based upon an agreement that violates the statute of frauds.

D'Esposito argues that a showing of unconscionable injury avoids the statute of frauds with respect to his promissory estoppel claim.

“An oral promise cannot be relied upon to estop a plea of Statute of Frauds unless the circumstances are such as to render it unconscionable to deny the oral promise upon which the promisee has relied.” (*Ginsberg v Fairfield-Noble Corp.*, 81 AD2d 318, 320-321 [1st Dept 1981] [citation and internal quotation marks omitted]; *see also Coleman v CMI Transportation, Inc.*, 222 AD2d 285, 285 [1st Dept 1995] [First Department affirmed dismissal of claim based upon an oral agreement that the statute of frauds barred, stating that, “[a]ssuming that plaintiff was promised an equity interest in defendant corporation in exchange for his services on its behalf, he suffered no unconscionable injury as evidenced by the substantial weekly compensation he received”]).

D'Esposito does not cite any law to support a showing of unconscionable injury. The evidence demonstrates that the firm paid D'Esposito for the services that he rendered and then terminated his employment. None of the pleadings or documentary evidence that D'Esposito submits shows unconscionable injury. For the foregoing reasons, D'Esposito fails to rebut the GKB Defendants' prima facie showing. Accordingly, the court grants the GKB Defendants' motion for summary judgment dismissing the third, fourth, fifth and sixth causes of action.

Seventh Cause of Action for Fraud

The GKB Defendants next move for summary judgment dismissing D'Esposito's seventh cause of action for fraud, arguing that D'Esposito did not justifiably rely on the alleged misrepresentation, that the representation was too indefinite to permit enforcement, and that there was no intent to deceive D'Esposito.

A fraud claim requires the plaintiff to prove the following elements: “(i) a material misrepresentation of fact, (ii) made with knowledge of its falsity, (iii) with the intent to deceive, (iv) justifiable reliance and (v) damages.” (*Desideri v D. M. F. R. Group [USA] Co.*, 230 AD2d 503, 505 [1st Dept 1997]). “To show reliance, [the plaintiff] must demonstrate that he was induced to act [or] refrain from acting to his detriment by virtue of the alleged misrepresentation or omission.” (*Shea v Hambros PLC*, 244 AD2d 39, 46-47 [1st Dept 1998] [citation and internal quotation marks omitted]).

“The law is established that [w]here a party has means available to him for discovering, by the exercise of ordinary intelligence, the true nature of a transaction he is about to enter into, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.” (*Ittleson v Lombardi*, 193 AD2d 374, 376 [1st Dept 1993] [citation and internal quotation marks omitted]; see also *Stuart Lipsky, P.C. v Price*, 215 AD2d 102, 103 [1st Dept 1995] [dismissal of fraud claim affirmed where “plaintiffs, (who) had the means available to ascertain the truth, nevertheless chose to rely solely upon the alleged oral representations without any effort to verify that information via financial statements”]). This is particularly true where the plaintiff is a sophisticated party with experience and expertise. (See *Marine Midland Bank, N.A. v Green*, 261 AD2d 340, 341 [1st Dept 1999] [sophisticated party’s reliance on oral representation, based upon “a word and a handshake,” was not justifiable]).

Here, D’Esposito testified that he presented the Agreement to Terms to Kaplan the week of April 10, 2000, after Kaplan allegedly offered the membership interest in GKB. (D’Esposito Dep., at 263-64). Sometime the following week, he met with Kaplan to discuss the document. (*Id.* at 265). D’Esposito subsequently crossed out the signature lines in the Agreement to Terms, because Kaplan indicated that he did not want to enter into an agreement, but instead preferred an

informal arrangement. (*Id.* at 281, 261-62). D'Esposito thereby implicitly admitted that Kaplan refused to sign the Agreement to Terms. Thereafter, D'Esposito marked up the draft by hand, turning the document from an "Agreement" into a "Memorandum of Terms." (*Id.* at 261-62). Both the marked up Agreement to Terms and the Memorandum of Terms are dated April 20, 2000. D'Esposito claims that he handed the Memorandum of Terms to Kaplan (D'Esposito Dep., at 285), but Kaplan testified that he does not recall D'Esposito giving him the document (Kaplan Dep., at 110-11).

D'Esposito is admittedly an attorney with expertise in the areas of partnerships, corporations and limited liability companies. (D'Esposito Dep., at 89-90, 96-97). Significantly, D'Esposito testified that he rescinded his offer of employment from Parker Chapin *after* preparing the Agreement to Terms and Memorandum to Terms, neither of which Kaplan, Nusbaum or anyone else at Gusrac or GKB signed. (D'Esposito Dep., at 558-59). Therefore, D'Esposito must have known that Kaplan had not committed to D'Esposito's terms in writing at the time that he rescinded Parker Chapin's offer.

D'Esposito also admits that he conducted no due diligence of GKB or its organizational documents, even after the firm changed its letterhead to reflect doing business as a limited liability company. (Amended Complaint, ¶ 14; D'Esposito Dep., at 156, 513-16). Had D'Esposito conducted any investigation into the formation of GKB, such as a search of New York's public records, he would have discovered that the firm formed GKB on February 23, 2000 and not subsequent to the meeting held in April 2000, as D'Esposito alleges. For the foregoing reasons, D'Esposito's reliance was unjustified. (*See Shea*, 244 AD2d at 47 [dismissing fraud claim on summary judgment, Court reasoned that there was "dissension among the parties," and that the plaintiff "can hardly claim with any credibility that he, a savvy

businessman, entered into the resulting agreements lulled by faith or trust in the parties across the bargaining table”]).

Moreover, other than the Agreement to Terms and Memorandum of Terms, neither of which D’Esposito can enforce against GKB, D’Esposito fails to state precisely what his interest in GKB would be. D’Esposito’s reliance upon the representation from Kaplan and Nusbaum that he would receive an unspecified equity interest is too indefinite to be enforceable. (*Glanzer v Keilin & Bloom L.L.C.*, 281 AD2d 371, 372 [1st Dept 2001] [allegations of “false promises of substantial compensation ..., including an equity interest in the firm” were “too indefinite to permit enforcement”]).

Citing Nusbaum’s deposition testimony, D’Esposito claims that Nusbaum received and reviewed the Agreement to Terms and the Memorandum of Terms, without objecting to either document. However, Nusbaum’s testimony clearly states that, upon receiving the document, he informed D’Esposito that “[t]his doesn’t accurately reflect what we agreed to.” (Nusbaum Dep., D’Esposito Aff., Ex. U, at 38 [referring to D’Esposito receiving a five percent equity interest]). Therefore, D’Esposito’s claim that Nusbaum intended to deceive him by not telling him that anything in the documents was inaccurate is belied by Nusbaum’s testimony and fails to raise an issue of fact.

For the foregoing reasons, the GKB Defendants have established that D’Esposito cannot satisfy the elements of his fraud claim. Accordingly, the court grants the GKB Defendants’ motion for summary judgment dismissing the seventh cause of action for fraud.

Violations of the Code of Responsibility

The GKB Defendants request that the court refer D’Esposito’s conduct to the grievance committee of the Second Department for investigation and prosecution pursuant to section 291.4

(c) of the Rules of the Second Department. Defendants base this request on allegations that, upon leaving GKB, D'Esposito raided Gusrae and GKB's word processing system, taking copies of Gusrae and GKB client documents without permission and without removing confidential information from those documents. Specifically, the GKB Defendants claim that D'Esposito violated the following Disciplinary Rules: 4-101 (b) (3), 4-101 (d), 1-102 (a) (1), 1-102 (a) (5), 1-102 (a) (7) and 2-110 (a) (2).

D'Esposito admits that, prior to leaving GKB, without permission, he copied various legal documents, including documents of clients that he did not introduce to the firm. D'Esposito also admits that he did not delete sensitive information from those documents, such as transfer amounts, addresses, social security numbers, and bank account and escrow references. (D'Esposito Dep., at 328). However, the GKB Defendants fail to show how D'Esposito's conduct violates any of Disciplinary Rules of the Code of Professional Responsibility. Therefore, the court denies GKB Defendants' request that the court refer D'Esposito's conduct to the disciplinary authorities.

Kaplan - Motion Sequence Number 013

Kaplan moves for summary judgment dismissing the amended complaint. Kaplan's motion is based upon the same legal arguments contained in the GKB Defendants' motion for summary judgment. In addition, Kaplan incorporates by reference the papers that the GKB Defendants submit in support of motion sequence number 012. D'Esposito's opposition papers respond to both the GKB Defendants', and Kaplan's, summary judgment motions. The court grants Kaplan's motion for summary judgment for the same reasons set forth above with respect to the GKB Defendants' motion.

Kaplan & GKB Defendants -
Motion Sequence Numbers 014 & 015

In motion sequence numbers 014 and 015, Kaplan and the GKB Defendants move to strike certain denials contained in D'Esposito's responses to these defendants' statements of undisputed material facts, submitted pursuant to Commercial Division Rule 19-a. Both motions are based upon defendants' assertion that, in his responses, D'Esposito denied information that he had already admitted in his deposition testimony.

This decision does not consider the parties' 19-a statements. Rather, as discussed above, the court has granted summary judgment dismissing the amended complaint, based upon the underlying evidence the parties submitted, including, to a large extent, D'Esposito's deposition testimony, his affidavit and the attached documents. Therefore, the 19-a statements are irrelevant and the court thus denies defendants' motions to strike plaintiff's denials as moot.

Accordingly, it is hereby

ORDERED that the motion (motion sequence number 012) for summary judgment is granted to the extent that the amended complaint is dismissed as against defendants Gusrac, Kaplan & Bruno, PLLC, Gusrac, Kaplan & Bruno, a partnership, and Lawrence G. Nusbaum III, and the Clerk is directed to enter judgment in favor of these defendants, and the motion is otherwise denied; and it is further

ORDERED that the motion (motion sequence number 013) for summary judgment is granted and the amended complaint is hereby dismissed as against defendant Martin H. Kaplan, and the Clerk is directed to enter judgment in favor of this defendant; and it is further

ORDERED that motion sequence numbers 014 and 015 are denied as moot; and it is further


ORDERED, ADJUDGED and DECLARED that plaintiff James J. D'Esposito is not a partner or member of Gusrae, Kaplan & Bruno, PLLC; and it is further

ORDERED that the remainder of the action shall continue with respect to defendants' counterclaims.

The parties are directed to contact the Part Clerk for a conference date.

Dated: December 18, 2006

ENTER:



J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be carried based hereon. To obtain entry, counsel or other legal representative must appear in person at the County Clerk's Desk (Room 1417A).