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

SHIRLEY WERNER KORNREICH

PRESENT: _____ J.S.C. PART 54

Index Number : 603352/2003

GOTTESMAN CO.

VS

KEYSTONE ENTERPRISES

Sequence Number : 009

TRIAL DE NOVO

INDEX NO. _____

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	5,6
Replying Affidavits	7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED

AUG 15 2006

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 8/10/06

SHIRLEY WERNER KORNREICH J.S.C.

_____ 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: PART 54

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GOTTESMAN COMPANY

Plaintiff,

-against-

KEYSTONE ENTERPRISES, INC., and
KEYSTONE HOLDINGS, LLC

Defendants.

----------X

Index No.: 603352/03

DECISION & ORDER

KORNREICH, SHIRLEY WERNER, J.:

This action seeks a finder's fee in connection with the purchase of a business. The action as against Keystone Enterprises, Inc. ("Enterprises") was based upon a written contract and was dismissed after plaintiff's direct case for failure to demonstrate Enterprise's involvement in the subject transaction. Keystone Holdings, LLC ("Holdings") conceded liability, and the value of plaintiff's services was the focus of trial as against it. The jury rendered a verdict in plaintiff's favor against Holdings, based upon *quantum meruit*, in the amount of $870,000. Holdings now moves to set aside the verdict, arguing, *inter alia*, that the evidence as to the value of plaintiff's services was insufficient as a matter of law.

I. Factual Background

In September 2000, plaintiff and Paul Palmeri ("Palmeri"), acting on behalf of the dotcom company of which he was CEO, SilverZipper.com Inc. ("SilverZipper"), entered into a finder's fee agreement (the "SilverZipper Agreement"). Palmeri eventually left SilverZipper and formed a new company, Keystone Enterprises Inc. ("Enterprises"), a Delaware company created for the sole purpose of acquiring a specific apparel company. On behalf of Enterprises, Palmeri executed a new December 2000 finder's fee agreement (the "Enterprises Agreement") with plaintiff.

In July 2001, Palmeri organized a new company in New York State, named Keystone Holdings LLC ("Holdings"), for the purpose of acquiring fashion apparel businesses. In or about September 2002, nearly two years after executing the Enterprise agreement, Palmeri contacted plaintiff in the hope of locating acquisition opportunities. No writing was signed by the parties memorializing an agreement between plaintiff and Holdings.

Through communication with one of its contacts, plaintiff identified Royce Hosiery Mills ("Royce") as a candidate for acquisition. As a result, plaintiff sent a confidentiality agreement to Palmeri which was signed by him on October 3, 2002, in the name of Holdings. Plaintiff, then, introduced Royce to Holdings. Subsequently, on November 1, 2002, Royce's broker wrote to Mr. Palmeri, addressing him as the chief executive officer of Holdings. That letter was also sent to Marvin Rosenbaum, the individual at plaintiff-company who was involved in the transaction. Then, on November 10, 2002, plaintiff wrote to Royce's broker, repeatedly referring to Holdings, not Enterprise, as the entity it represented.

On January 30, 2003, plaintiff faxed a proposed Non-Exclusive Buyer/Finder's Fee Agreement to Holdings. The form again named Holdings as the entity with which plaintiff was doing business and included a fee schedule that was identical to those set forth in the SilverZipper and Enterprises Agreements. Holdings refused to sign the agreement, demanding that the fee be reduced given how large the deal was. No agreement had been reached regarding the fee when Holdings and Royce entered into a written Asset Purchase Agreement on March 31, 2003 (the "First Royce Agreement"). Schedule 5.5 of the First Royce Agreement, entitled "Brokers' Fees and Commissions" listed plaintiff, but did not specify an amount to be paid. Nonetheless, at the closing, the officers and directors of Holdings wired an $150,000 fee to plaintiff for its services, at

closing. On September 17, 2003, plaintiff faxed Holdings an invoice for its fees, which it calculated to be $1,014,000 according to the schedule included in the rejected January 30 proposal.

Holdings subsequently entered into an October 9, 2003 Credit Agreement (the "Second Royce Agreement") in regard to a loan for the Royce purchase. The Disclosure Schedule 3.14 of the Credit agreement listed plaintiff under "Finder's or Brokerage Fees" and indicated a fee of $500,000. The meaning of this entry was the subject of extensive dispute at trial. Mr. Palmeri and Mr. Bruderman, an experienced Banker, testified that it was a representation to the lender that the fee would not exceed $500,000. On October 22, 2003, plaintiff faxed Holdings an updated invoice reflecting a fee of $1,051,000. This invoice used the same schedule as the prior invoice, but was calculated according to a revised purchase price.

Richardson testified that plaintiff obtained information from Palmeri regarding the parameters of the type of company Palmeri wished to acquire, did research regarding prospective companies, identified about 150 such companies, sent letters out to the companies, followed up with phone calls, reached out to other finders and inquired of its contacts. He did not testify to the nature and extent of the research or to the number of hours spent on the above tasks. He testified that plaintiff participated in two meetings with Royce and Holdings, the first of which was the introduction meeting.

Neither Mr. Rosenbaum nor Mr. Gottesman testified as to what was done in the Royce-Holdings transaction. Although Mr. Gottesman did testify that plaintiff's invoice was based on a sliding scale fee schedule, he gave no testimony as to what was commonly charged in his industry and admitted that Gottesman had never before worked on as large a transaction as occurred here.

Royce was sold for $48,500,000, $3,500,000 in employment contracts were executed with Royce's principals and plaintiff's commission was calculated on $52,000,000.

No expert testimony was offered to establish the value of the services performed by plaintiff in its search and brokerage. Instead, plaintiff relied on Mr. Richardson's outline of what was done, the invoices that had not been honored by Holdings, and the SilverZipper and Enterprises Agreements, which this Court ruled were not evidence of how much was owed, but were allowed in as some evidence of what plaintiff typically charged, as well as evidence against Enterprise, the contract action which was dismissed at the end of plaintiff's direct case.[1] The jury awarded a verdict in favor of plaintiff that matched the amount arrived upon by using the disputed fee schedule, minus the $150,000 already paid -- $870,000.

II. Conclusions of Law

The plaintiff's central argument in this case is that it is entitled to compensation for the value of the services it performed in finding a business opportunity for Holdings, despite the lack of an executed contract. The Statute of Frauds, codified by General Obligations Law §5–701(a)(10), requires that an agreement to pay compensation for services rendered by a party in the position of a broker or finder must be in writing. *Minichiello v. Royal Business Funds Corp.*, 18 N.Y.2d 521, 526 (1966)(explaining that Legislature intended GOL § 5–701(a)(10) to require a written agreement for "the compensation of a business broker for acting as a 'finder,' 'originator' or 'introducer.'"(internal quotations omitted)). Addressing *quantum meruit* as to a finder's fee, the Court of Appeals in *Morris Cohon & Co. v. Russel*, 23 N.Y.2d 569, 575-76 (1969), explained: "In

[1] Before opening statements, the Court heard argument on this issue and ruled that plaintiff could not use the Enterprise contract as proof of the value of the services ti provided for Holdings on a *quantum meruit* theory.

an action in *quantum meruit* . . . for the reasonable value of brokerage services, if it does not appear that there has been an agreement on the rate of compensation, a sufficient memorandum need only evidence the fact of plaintiff's employment by defendant to render the alleged services." In *Morris*, the plaintiff claimed to have brokered a sale of stock and sought compensation for its efforts, despite a lack of any written finder's or broker's fee agreement. The record did contain the contract of sale between the defendant seller and third-party buyer, which included a reference to the plaintiff as the sole "broker or finder" connected to the seller in the transaction. *Id.* at 573. The Court found that that reference constituted a memorandum sufficient to serve as an admission by the defendant that the plaintiff had "in fact rendered services in connection with the sale of stock." *Id.* at 575.

Here, the "Broker's Fees and Commissions" page (Schedule 5.5) of the First Royce Agreement (in addition to the similar schedule to the Second Royce Agreement) contained an admission by defendant that plaintiff performed brokerage services and is entitled to a fee. This satisfied the requirement of "a writing subscribed by defendant or his lawful agent evidencing the fact of [plaintiff's] employment by defendant," which allows a business broker to recover under *quantum meruit*. *Gilman v. Hilfiger*, 169 A.D.2d 485 (1st Dept 1991), citing *Morris*, *supra* at 575-76. Indeed, Holdings has never denied that plaintiff acted as a finder or that plaintiff deserved some fee; it only disputes the amount. Plaintiff, thus, is entitled to recover under *quantum meruit* for the value of its services. *Morris*, *id.* at 574.

Ultimately, a plaintiff seeking an award by *quantum meruit* is responsible for producing evidence sufficient to enable a jury to determine the actual extent and value of the services performed. *Precision Foundations v. Ives*, 4 A.D.3d 589, 591-92 (3rd Dept. 2004)(*quantum meruit*

requires performance of services in good faith, acceptance of those services, expectation of compensation and proof of reasonable value of services performed); *Charles Mackall & Co., Inc. v. Carlyle Construc. Corp.*, 215 A.D.2d 251 (1st Dept. 1995)(in order to make out claim for *quantum meruit*, plaintiff must prove reasonable value of services). *Accord Bauman Assocs., Inc. v. H & M Int'l, Inc.*, 171 A.D.2d 479, 484 (1st Dept. 1991).

Here, plaintiff failed to do so. The transcript contains no testimony establishing the customary fee charged in plaintiff's industry for the work performed by plaintiff or, for that matter, the time spent and the specifics of what was done. Instead, plaintiff's argument at trial amounted to the claim that defendants were obliged to pay it according to the fee schedule in the Enterprises Agreement. But the Court had already ruled that the Enterprises Agreement did not cover the transaction in question, and, in fact, the evidence demonstrated that Holdings had rejected that fee schedule. Consequently, the Enterprises Agreement could not, as it apparently did, provide the sole basis for the jury verdict. *See Parver v. Matthews-Kadetsky Co., Inc.*, 242 A.D. 1 (1st Dept. 1934); *McAveney v. Pasquini*, 23 A.D.120 (2nd Dept. 1897); *aff'd* 163 N.Y. 575 (1900). Similarly, the SilverZipper agreement could not properly dictate the compensation to which plaintiff was entitled, since its terms were negotiated by Mr. Palmeri on behalf of a separate entity and contemplated deals differing greatly in scope. These written contracts were no substitute for proof of value of the services required under *quantum meruit*.[2]

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[2] The cases cited by plaintiff for the proposition that the jury could rely upon the Enterprise contract or the invoices based thereon, as evidence of the reasonable value of its services, are factually distinguishable from this case. As the court ruled at the start of trial, *United Bldg. Maint. Assocs., Inc. v. 510 Fifth Ave. LLC*, 18 A.D.3d 333 (1st Dept. 2005), is not on point. There, unlike here, a cleaning and maintenance service continued to provide services to a commercial building after the building was bought by defendant. Defendant was aware of this, never informed plaintiff that it would not pay for its services and accepted the same services. There, the reasonable value

This case is substantially similar to *Mary Matthews Interiors, Inc. v. Levis*, 208 A.D.2d 504 (2nd Dept. 1994). In *Mary Matthews*, an interior decorator and a customer had entered into a business relationship, but the parties had failed to agree upon the rate of compensation when the agreement between them had been orally modified. The court found that the amount awarded by the jury to the plaintiff was unjustified because, among other reasons, "the plaintiff failed to produce detailed proof sufficient to permit the assessment of the reasonable value of its services...." *Mary Matthews*, 208 A.D.2d at 506-07. Correspondingly, it is clear in this case that defendant disputed plaintiff's calculation of the fee from the time that plaintiff provided defendant with an invoice, which reflected a fee based on the schedule in the Enterprises Agreement. No compensation term was ever agreed upon, and the defendant cannot be held to an agreement never made.

A judgment notwithstanding the verdict is proper where there is "simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion

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of the services properly was based on the billing rate prior to change of ownership. Here, the facts differ. There was no continuous service. It cannot be argued that the services provided to SilverZipper and Enterprise were the same as those provided to Holdings. There was no testimony as to what specific services were provided to each in order to compare the services. On the other hand, there was testimony that the Royce acquisition was much larger than any work done for SilverZipper, Enterprise, or, for that matter, any other client serviced by plaintiff. Similarly, *Vitale, Inc. v. Parkers' Grille, Inc.*, 23 A.D.3d 1147 (4th Dept. 2005), and *Frank v. Feiss*, 266 A.D.2d 825 (4th Dept. 1999), are distinguishable. Both cases involved construction work. *Frank* involved a contract with a negotiated price where the court found 90% of the work had been completed.. There, unlike here, the contract used as evidence was negotiated with the defendant sued. *Vitale* involved an alleged oral contract for the services where the court considered both the bill of the contractor and the subcontractor's bill upon which that was based. In *Vitale*, the bills were not based on contracts fees negotiated with another entity for another job. In a like manner, the other cases cited by plaintiff for the proposition that a contract may be used as evidence of value in a *quantum meruit* case, involve contracts between the parties or alter egos, for the work performed. As noted above, here, the contracts relied upon were not contracts to which Holdings was a party.

reached by the jury on the basis of the evidence presented at trial." *Cohen v Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499 (1978). *Accord Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556 (1997); *Kim v. N.Y.C. Trans. Auth.*, 27 A.D.3d 332, 338 (1st Dept. 2006); *1/5th L.P. v. HL One, LLC*, 23 A.D.3d 170, 171 (1st Dept. 2005). Here, no valid line of reasoning based on the trial evidence could lead the jury to the damages it awarded. The jury could not rightly impose a fee based on a contract which did not cover the transaction. Although given the opportunity and on notice from the start that the Enterprise contract could not serve as the value of *quantum meruit,* plaintiff failed to present evidence sufficient to make out reasonable value. Since *quantum meruit* was not established, defendant's motion for a judgment notwithstanding the verdict is granted. Accordingly, it is

ORDERED that defendant's motion pursuant to CPLR 4404 for a judgment notwithstanding the verdict is granted, the verdict of the jury entered the 17th day of February 2006, is set aside and the complaint is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

ENTER:

Dated: August 10, 2006

SHIRLEY WERNER KORNREICH