

**Sheets v Liberty Alliances, LLC**

2007 NY Slip Op 30836(U)

April 18, 2007

Supreme Court, New York County

Docket Number: 0600487/2005

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Justice

SHEETS, ROBERT L.

INDEX NO. 600487/05

MOTION DATE 4/17/07

- v -

MOTION SEQ. NO. 004

LIBERTY ALLIANCES LLC

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**  
APR 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

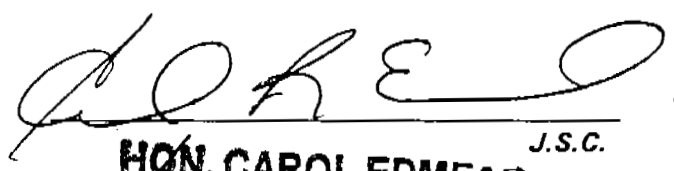
Motion sequence 004 and 005 are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the summary judgment motion (004) by Robert L. Sheets and Mary A. West, is denied; and it is further

ORDERED that the summary judgment motion (005) by Liberty Alliances, LLC is granted only to the extent that the second, third and fourth causes of action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

Dated: 4/17/07



HON. CAROL EDMEAD J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 35

ROBERT L. SHEETS and MARY A. WEST,

Plaintiffs,

-against-

LIBERTY ALLIANCES, LLC,

Defendant.

Index No. 600487/05

**DECISION/ORDER**

Carol R. Edmead, J.:

**MEMORANDUM DECISION**

Motion sequence numbers 004 and 005 are consolidated for disposition.

This is an action to recover consulting fees allegedly due plaintiffs for services that they performed in connection with a project to assist a Native American tribe to reclaim land located in Illinois. The complaint asserts causes of action for breach of contract, quantum meruit, unjust enrichment, and promissory estoppel.

Plaintiffs Robert L. Sheets (Sheets) and Mary A. West (West) (collectively plaintiffs) move (004) for summary judgment (CPLR 3212 [e]). Defendant Liberty Alliances, LLC (Liberty) moves (005) for summary judgment (CPLR 3212).

**Background**

Under the 1829 Treaty of Prairie du Chien, the United States government reserved two sections of land (Land) in Northern Illinois to the Potawatomi Chief Shab-eh-nay and his tribe. In 1995, plaintiffs were retained as consultants by the Prairie Band of the Potawatomi Indians (Tribe), on a project to establish that the Tribe is the successor-in-interest to Potawatomi Chief Shab-eh-nay and his tribe and thus, the beneficiary of the Land.

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NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiffs formed the Skyline Group, Inc. (Skyline), which executed the Memorandum of Agreement (MOA) with the Tribe (Exhibit E, Annexed to the Affidavit of Richard I. Solomon). Pursuant to the MOA, Skyline was to conduct historical research to submit to the Department of the Interior (DOI) to prove that the Tribe was the rightful owner of the Land, and to assist in the economic development of the Land following reclamation, which included a proposed casino, at Skyline's expense.

Additionally, Skyline was obligated to fund a land purchase option (Option) on a segment of the Land in order to preserve the land's availability for acquisition by the Tribe pending DOI approval. As part of this obligation, the MOA stated that upon the DOI's opinion recognizing the Tribe as successor-in-interest to the Land, and that the Tribe is the current beneficiary of the Land reserved for Chief Shab-eh-nay and his tribe, Skyline was to donate and convey the Option to the Tribe, and continue to fund all outstanding Option payments (MOA at § III [A][3]). Additionally, upon a DOI decision rendering that part of the Land to be either "Reservation Land" or taking it into trust, Skyline was to fund the purchase of the Option for the Tribe (*id.*). As compensation for its services, the MOA obligated the Tribe to pledge to Skyline 15% of the revenue derived from any future commercial development of the Land.

At some point in the course of the project, Sheets and West exhausted the funds available to conduct the research and fund the Option. Accordingly, they sought a financial partner, and ultimately found Liberty, to invest in the project.

In February of 2002, Liberty and plaintiffs executed two separate agreements whereby Skyline assigned the MOA to Liberty (Acquisition Agreement), and Liberty retained plaintiffs as consultants (Consulting Agreement) (collectively, Agreements).

Under the Acquisition Agreement, in exchange for Liberty's acquisition of Skyline's rights, title and interests under the MOA, including funding the Option, Liberty agreed to pay Skyline \$75,000, grant it a 10% interest in Liberty upon a resolution by the Tribe (Tribal Resolution) approving the transfer of the MOA to Liberty, and execute the Consulting Agreement (Acquisition Agreement at § 2.1).

Additionally, it stated that Liberty's obligations to perform under both Agreements were subject to two conditions precedent. The first condition precedent was "DOI Action," defined as the DOI issuing its "official written opinion approving to Liberty's satisfaction the Tribe's successor in interest claim to the . . . [Land] . . . or, in the alternative, the [DOI] issuing its official written request to the Department of Justice to institute litigation on behalf of the Tribe for the reclamation of the . . . [Land]" (Acquisition Agreement at § 6.1). The second condition precedent was the Tribal Resolution authorizing the transfer of the MOA to Liberty (Acquisition Agreement at § 6.1 [b]).

Under the Consulting Agreement, Liberty was obligated to pay plaintiffs consulting fees and several subsequent bonuses "upon DOI Action," upon the transfer of the MOA to Liberty, and upon commencement of casino operations (Consulting Agreement at § 2). The term of the Consulting Agreement did not commence until the day following the Tribal Resolution and DOI Action (*id.* at 3).

On April 12, 2000, the Tribe issued the Tribal Resolution approving the assignment of the MOA to Liberty (Solomon Affidavit at ¶ 25; Exhibit O, annexed to the Affidavit of Richard I. Solomon; Plaintiffs' Rule 19-a Statement at ¶ 22). Thereafter, and with plaintiffs' assistance, the Tribe submitted a petition to the DOI seeking a determination that it was the successor in interest

to the Land.

On January 18, 2001, the then DOI Solicitor, John Leshy, wrote a letter to United States Congressmen Dennis Hastert and the then Governor of Illinois, George H. Ryan (Leshy Letter) (Exhibit D, Annexed to the Affidavit of Richard I. Solomon). The Leshy Letter states: “we [the DOI] have determined that the Prairie Band [the Tribe] has a credible claim for unextinguished Indian title to this land . . . we [the DOI] believe the U.S. continues to bear a trust responsibility to the Prairie Band [the Tribe] for these lands” (*id.*).

Subsequently, Badger Wahwasuck, Chairman of the Tribe, wrote to Liberty’s principal, Richard Solomon, and requested that Liberty donate and convey to the Tribe the land purchase option, pursuant to the MOA. Wahwasuck stated that the “conditions of Part III.A.3 are fulfilled by the issuance of the . . . [Leshy Letter] recognizing the Tribe as the successor in interest to the . . . [Land]” (Exhibit K, annexed to the Exhibit of Richard I. Solomon).

Solomon responded by stating: “Please accept my congratulations on the recent letter of support from the Solicitor of the DOI . . . I am confident that . . . the Tribe will succeed in reclaiming its Northern Illinois reservation” (Exhibit L, annexed to the Affidavit of Richard Solomon). Solomon also states that Liberty will comply with the request to donate and convey the land purchase options to the Tribe (*id.*).

Subsequently, plaintiffs demanded payment from Liberty for consulting fees under the Consulting Agreement. Liberty refused, however, and this lawsuit followed, wherein plaintiffs seek to recover compensation allegedly due them.

**Discussion**

On a motion for summary judgment, the movant must demonstrate by admissible

evidentiary proof that no disputed issues of fact remain that would warrant a trial (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). For the reasons stated below, neither side has done so.

#### I. Breach of Contract

Plaintiffs move for summary judgment on their breach of contract claim on the ground that Liberty breached the Consulting Agreement by failing to pay plaintiffs their fees. Plaintiffs allege that the condition precedent to Liberty's obligation to perform under the Consulting Agreement has occurred, because the Leshy Letter constitutes DOI approval of the Tribe's Land claim within the meaning of the Acquisition Agreement, which defines the condition to Liberty's performance under both Agreements. Further, plaintiffs contend that Liberty's alleged dissatisfaction with the occurrence of the condition was exercised in bad faith, and submits documentary and testimonial evidence purporting to establish that, subsequent to transmittal of the Leshy Letter, Liberty behaved as if the condition - DOI approval - had occurred. Alternatively, plaintiffs assert that Liberty waived the condition precedent by performing under the Acquisition Agreement.

Liberty moves for summary judgment dismissing the claim for breach of contract on the ground that the condition precedent to its obligation to perform under the Consulting Agreement - DOI Action - has not occurred. Liberty contends that the parties intended the term DOI Action to mean the completion of a two-step DOI approval process, beginning with the DOI's recognition of the Tribe as the successor-in-interest to the Land, and culminating in the DOI's final regulatory approval of the Land claim by a declaration that the Land is a reservation or taking it into trust. According to Liberty, MOA § III (A)(3), which contemplates this two-step

DOI approval process, is indicative of what the parties intended the term DOI Action to entail in the Agreements. Liberty asserts that the Leshy Letter is not an official opinion of the DOI, and merely constitutes the completion of the first step in this process. Finally, Liberty argues that the Agreements authorize it to reject the occurrence of the condition as unsatisfactory.

#### A. Condition Precedent

Where a party's performance is conditioned upon the happening of a specified event, unless the condition is excused or rendered an impossibility, the contractual obligation to perform does not arise if the event does not occur (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]; *Cauff, Lippman & Co. v Apogee Fin. Group, Inc.*, 807 F Supp 1007, 1021 [SD NY 1992]). Thus, the failure of a condition precedent to occur excuses non-performance (*Oppenheimer & Co.*, 86 NY2d 690). Additionally, a party seeking to enforce a contract containing a condition precedent to the other party's obligation to perform must establish fulfillment of that condition precedent (*Navilia v Windsor Wolf Rd. Props. Co.*, 249 AD2d 658, 659 [3d Dept 1998]). Therefore, it is plaintiffs' burden to establish that DOI Action has occurred.

Further, where the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and to the parties' reasonable expectations (*W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

Applying these principles here, the parties' language in the Acquisition Agreement unequivocally reflects their intent to create a condition precedent to Liberty's performance under both Agreements, by use of the term "conditions precedent" (*see Oppenheimer & Co.*, 86 NY2d

at 691). It states: “The obligation of Liberty to perform its obligations hereunder and to consummate the transactions provided for herein shall be subject to the prior fulfillment of the following conditions” (Acquisition Agreement at § 6.1, “Conditions Precedent).

The first condition precedent is defined as DOI Action. The parties offer divergent interpretations of what that condition precedent entails. The Acquisition Agreement defines DOI Action as the “[DOI] issuing its official written opinion approving to Liberty’s satisfaction the Tribe’s successor in interest claim to the . . . [Land]” (Acquisition Agreement at § 6.1 [a]). For the reasons stated below, the court determines that the term DOI Action is unambiguous, its meaning can be determined as a matter of law, and that the Leshy Letter qualifies as the “DOI issuing its official written opinion” approving the Tribe’s Land claim within the meaning of the Agreements, because it concludes that the Tribe is the lawful successor-in-interest to the tribe that holds title to the Land, Chief Shab-eh-nay and his Band.

The plain and ordinary meaning of “official” is “authorized or approved by a proper authority” (Black’s Law Dictionary 1114 [7<sup>th</sup> ed 1999]). Further, the phrase “written opinion” is a written statement explaining the drafter’s understanding of the law as applied to the facts (Black’s Law Dictionary at 1120 [7<sup>th</sup> ed 1999] [definition of “legal opinion”]). Thus, the phrase “DOI issuing its official written opinion” is readily ascertainable as an opinion from the Solicitor of the DOI, who is authorized to perform the legal work for the United States DOI, whose “primary client” is the Secretary of the Interior, and who provides “advice, counsel and legal representation to the Immediate Office of the Secretary, the Assistant Secretaries, and all other bureaus and offices overseen by the Secretary” (Office of the Solicitor, U.S. Department of the Interior <<http://www.doi.gov/solicitor/about.html>> [last updated November 2, 2006]; Shulstad

Aff. at ¶ 4). Amongst the bureaus overseen by the Secretary of the Interior is the Bureau of Indian Affairs, which manages relationships with 561 American Indian tribes and administers 56 million acres of land belonging to Native American tribes and individuals (DOI Quick Facts, U.S. Department of the Interior <<http://www.doi.gov/facts.html>> [last updated November 1, 2006]).

Therefore, the court finds that the Leshy Letter, authored by the Solicitor of the DOI, the chief legal officer of the DOI, who is authorized to perform legal work for the DOI, including rendering legal opinions on matters concerning Native Americans (Shulstad Affidavit at ¶ 5), and directed to the Speaker of the U.S. House of Representatives, Dennis Hastert, and the Governor of the State of Illinois, George H. Ryan, is “official,” within the meaning of section 6.1 [a] of the Acquisition Agreement.

The Leshy Letter clearly qualifies as a “written opinion,” because the Solicitor is explaining and advising as to the legal position of the DOI with respect to the Tribe’s Land claim. Moreover, the Leshy Letter approves the Tribe’s Land claim. It clearly states the DOI’s favorable position regarding the legal merits of the Tribe’s Land claim, ultimately concluding that the Tribe is the lawful successor-in-interest to the tribe that holds title to the Land, Chief Shab-eh-nay and his Band. In the Leshy Letter, the Solicitor states: “The Prairie Band [Tribe] has a credible claim for unextinguished Indian title to this land . . . . Our research has led us to the conclusion that the Prairie Band [Tribe] is the lawful successor in interest to Chief Shab-eh-nay and his Band . . . [and] we believe the U.S. government continues to bear a trust responsibility to the Prairie Band for these lands” (Exhibit D, annexed to the Affidavit of Richard Solomon).

Liberty's argument, that the Leshy Letter is not an "official" opinion of the DOI because it is not an M-Opinion published in the Federal Register, fails. The Agreements did not specify that the DOI opinion was required to be an M-Opinion, as Liberty contends. Additionally, while the Solicitor of the DOI has the authority to issue legal interpretations in the form of M-Opinions published in the Federal Reporter (*see e.g. Southern Ute Indian Tribe v Amoco Prod. Co.*, 119 F 3d 816, 833 [10<sup>th</sup> Cir 1997], *revd on other grounds* 526 US 865 [1999]), the Solicitor of the DOI additionally issues written legal opinions in other formats, including legal recommendations to the Secretary of the DOI as to whether to take land into trust for a Native American tribe, and recommendations as to whether certain land constitutes a reservation for purposes of the Indian Gaming Regulations Act<sup>1</sup> (*Sac and Fox Nation of Missouri v Norton*, 240 F 3d 1250, 1256 [10<sup>th</sup> Cir 2001], *cert denied* 534 US 1078 [2002]). The format of these legal opinions may come in the form of a written letter to interested parties (*Citizens Against Casino Gambling in Erie County v Dirk Kempthorne*, 471 F Supp 2d 295 [WD NY 2007]; *see also Miami Tribe of Oklahoma v U.S.*, 198 Fed Appx 686, 688, 2006 WL 2392194 [10<sup>th</sup> Cir 2006]; *Shawnee Tribe v U.S.*, 423 F 3d 1204, 1211 [10<sup>th</sup> Cir 2005]), or a memorandum (Shulstad Aff. at ¶ 5). Thus, the fact that the Leshy Letter is in a letter format addressed to interested parties does not detract from its official nature.

Additionally, Liberty's argument that the parties intended DOI approval to mean the completion of a two-step DOI process culminating in final regulatory approval by the DOI of the Tribe's Land claim, as provided for in MOA § III (A)(3), stretches the term DOI Action to

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<sup>1</sup> The Secretary of the Department of the Interior has authority to take land into trust for a Native American tribe, subject to certain notice requirements (CFR § 151.12 [b]).

include requirements that the parties expressly excluded from the Agreements. It is not the province of the court to interpret the Agreements as impliedly requiring final administrative action by the DOI nor an M-Opinion as constituting DOI Action where the parties specifically neglected to utilize such terms (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). If the parties wished to make final agency approval on the part of the DOI the condition precedent to Liberty's obligations under the Agreements, they would have specified this crucial detail in the definition of DOI Action. Courts may not add contractual terms under the guise of interpretation (*id.* at 475).

Furthermore, introducing extrinsic evidence, such as the text of other agreements which impose different obligations on the parties, or the Tribe's conduct subsequent to receipt of the Leshy Letter, or to consider the parties' oral representations, as Liberty urges, is improper where the parties' intent can be gleaned from the unambiguous face of the Agreements (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]). Mere disappointment in a party's expectations does not permit the court to insert protective conditions into a contract which the parties failed to provide for themselves (*id.*).

#### B. Satisfaction Clause

In addition to the DOI "issuing its official written opinion" approving the Tribe's Land claim, the Acquisition Agreement specifies that the occurrence is subject to Liberty's "satisfaction," in order to constitute DOI Action (Acquisition Agreement at § 6.1 [a]).

Satisfaction clauses typically condition a party's performance of a contractual obligation on that party's satisfaction with the performance of the obligee, or with something else not within the control of the obligee (*Greenwood v Koven*, 880 F Supp 186, 198-199 [SD NY 1995]).

These clauses often require courts to determine whether the parties intended a subjective or objective standard to apply to the obligor's exercise of discretion (*id.*).

Where the contract involves individual preference or discretion, a party may reject that the condition precedent has occurred based upon its subjective dissatisfaction (*Sol Fursmidt v Hotel Abbey Holding Corp.*, 10 AD2d 447, 450 [1<sup>st</sup> Dept] *rearg denied* 11 AD2d 649 [1960]). In contrast, where the nature of performance is functional, and does not cater to individual judgment, the party's dissatisfaction must be objectively reasonable (*id.*). Whether the standard for contract performance is objective or subjective is a matter of intent, and is generally determined by the court as a matter of law, in the absence of ambiguity (*J.D. Cousins & Sons, Inc. v Hartford Steam Boiler Inspection and Ins. Co.*, 341 F3d 149, 153 [2d Cir 2003]).

Here, section 6.1 (a) of the Acquisition Agreement is subject to a subjective standard of care, because it authorizes Liberty to exercise its discretion to determine whether to accept or reject the DOI's approval of the Tribe's Land claim. However, Liberty's right to exercise its discretion is subject to the implied covenant of good faith and fair dealing (*Rus, Inc. v Bay Indus., Inc.*, 322 F Supp 2d 302, 310 [SD NY 2003]; *Greenwood*, 880 F Supp at 199; *see also Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). If the exercise of judgment were not bound by the duty of good faith and fair dealing, the agreement would be illusory (*id.*).

To demonstrate bad faith, plaintiffs rely on references by Liberty's principal, Richard Solomon, to the Leshy Letter as the DOI's "determination . . . that the research and analysis confirm that . . . the Tribe is the lawful successor in interest to Chief Shab-eh-nay and his Band," in materials used in connection with fund-raising efforts (Exhibit 9, annexed to the Affidavit of Nancy E. Brasel, Esq.). Plaintiffs allege that Liberty ultimately raised \$2 million from investors

for the plan to build a casino on the Land on the strength of the Leshy Letter. According to plaintiffs, Liberty's bad faith rejection of the Leshy Letter stems from its disappointment with the progress of the project, rather than a good faith belief that the DOI did not actually approve the Tribe's Land claim. Plaintiffs cite the deposition testimony of Robert Book, another Liberty principal, wherein he stated: "as I sit here today and I look at these terms [set forth in the Agreements] . . . in the clarity of hindsight, I'd say these terms stink. But at that point in time, these terms were O.K. to me based on my understanding of the deal at that time" (Book Deposition Transcript at 101:9-16).

In contrast, Liberty submits affidavit testimony from Solomon, who stated that Liberty's rejection of the Leshy Letter as unsatisfactory was done in good faith, because the Leshy Letter is "inconclusive," "tentative," and because "it was not an official opinion of the DOI approving the claim" (Solomon Aff. at ¶ 41, 44). Further, Liberty attempts to demonstrate that its communications to potential investors about the viability of the Tribe's Land claim is not inconsistent with its rejection of the Leshy Letter as unsatisfactory, because it still believed that the project had a "high probability of success" despite the equivocal nature of the Leshy Letter (*id.* at ¶ 45).

A factfinder could reasonably credit Liberty's representations that its favorable advocacy of the Leshy Letter to potential investors as the DOI's "determination" is not inconsistent with its rejection of the Leshy Letter as unsatisfactory as constituting DOI Action under the Agreements. However, a factfinder could also reasonably conclude that such rejection was done in bad faith because it was disappointed with the slow progress of the project and did not want to incur more financial costs, as plaintiffs contend. Resolving these competing assertions as to Liberty's state

of mind requires the resolution of disputed issues of fact, which is improper on a motion for summary judgment (*Rus, Inc.*, 322 F Supp 2d at 310; *see also Coan v Estate of Chapin*, 156 AD2d 318, 319 [1<sup>st</sup> Dept 1989]).

Alternatively, plaintiffs contend that even if Liberty was reasonably dissatisfied with the DOI's approval of the Tribe's Land claim, Liberty waived the condition precedent by performing under the Acquisition Agreement in transferring to plaintiffs a 10% interest in Liberty. This contention is unavailing, however, because section 2.1 (b) of the Acquisition Agreement, which obligates Liberty to transfer to plaintiffs a 10% interest in Liberty, is predicated upon "receipt by Liberty of the Tribal Resolution approving the transfer of the Company [Skyline] Tribal Agreement Interest [MOA] to Liberty," and does not condition this transfer upon DOI Action. Neither party disputes that the Tribal Resolution approving the assignment of the MOA to Liberty occurred (*see* Solomon Affidavit at ¶ 25; Exhibit O, annexed to the Affidavit of Richard I. Solomon; Plaintiffs Rule 19-a Statement at ¶ 22).

Accordingly, because disputed issues of fact remain as to whether Liberty's dissatisfaction with the DOI's approval of the Tribe's Land claim was exercised in good faith, plaintiffs' and Liberty's motions for summary judgment on the claim for breach of contract are denied.

## II. Equitable Claims

Liberty seeks dismissal of plaintiffs' equitable claims on the ground that a valid contract governing plaintiffs' performance of consulting services exists. Plaintiffs assert that they are permitted to plead equitable claims of quantum meruit, unjust enrichment and promissory estoppel in the event that the court determines that the Consulting Agreement is unenforceable

because the condition precedent (DOI Action) did not occur.

Under New York law, the existence of a valid agreement governing a particular subject matter generally precludes recovery in quasi-contract for events arising out of the identical subject matter (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 23 [2005]).

Here, plaintiffs seek to recover for consulting services that they performed for Liberty, which entitles them to consulting fees and additional amounts. The Consulting Agreement fully details the terms and conditions of the parties' obligations to one another in connection with the performance of consulting services, including expressly providing that until the condition precedent - DOI Action - occurs, the term of the agreement does not commence, and neither are plaintiffs to perform nor receive compensation for the performance of consulting services. Because a valid agreement exists governing plaintiffs' compensation for the performance of consulting services, plaintiffs' quasi-contractual claims for unjust enrichment, quantum meruit and promissory estoppel fail (*EBC I, Inc.*, 5 NY3d at 23).

Plaintiffs incorrectly argue that in the event that the factfinder determines that the condition precedent (DOI Action) did not occur, the Consulting Agreement will be rendered unenforceable, permitting the assertion of equitable claims, and citing *Kapson Constr. Corp. v ARA Plumbing & Heating Corp.* (227 AD2d 484 [2d Dept 1996]). There, the agreement stated that the failure of the condition precedent rendered the agreement "null and void," and thus, the agreement was unenforceable because a condition precedent to its formation had not been fulfilled (*id.*; see also *Oppenheimer & Co.*, 86 NY2d at 690). Such a situation is conceptually distinguishable from a condition precedent which must occur before a party is obliged to perform pursuant to an existing agreement (*id.*). Under the latter type, the condition precedent merely

qualifies the duty of performance by either party, but does not make the existence or validity of the agreement hinge on the occurrence of the condition, because a valid agreement has already been formed (*id.*). Thus, failure of a condition precedent does not necessarily render the agreement invalid or otherwise null and void (*id.*).

In contrast to the agreement at issue in *Kapson Constr. Corp. v ARA Plumbing & Heating Corp.* (227 AD2d at 484), cited by plaintiffs, which explicitly provided that the failure of the condition precedent rendered the agreement null and void, the failure of the condition precedents contained in the Agreements do not affect the Agreements' validity or existence. The Acquisition Agreement, that defines the conditions precedent (DOI Action and Tribal Resolution) under both Agreements, states: "This [Acquisition] Agreement and the . . . Consulting Agreement . . . have been duly executed and delivered by Liberty and constitute valid and binding obligations of Liberty enforceable in accordance with their respective terms" (Acquisition Agreement at § 7.1). Moreover, the Consulting Agreement contains a severability clause, that states: "The invalidity or unenforceability of this Agreement shall not affect the validity or enforceability of any other provision" (Consulting Agreement at § 9). Therefore, even if a provision of the Consulting Agreement were rendered invalid and unenforceable for failure of a condition precedent to occur, the remainder of the agreement remains expressly valid and enforceable. The language of these provisions establishes the parties' intent that while the conditions precedent must occur before either party is obliged to perform, the Agreements themselves are valid, binding and enforceable irrespective of the fulfillment of the conditions.

Thus, a determination by the factfinder that DOI Action has not occurred means that the term has not commenced, and plaintiffs' obligation to perform consulting services and Liberty's

obligation to pay plaintiffs' consulting fees has not arisen pursuant to sections 2 and 3 of the Consulting Agreement. However, the Consulting Agreement will remain otherwise valid, binding and enforceable pursuant to section 7.1 of the Acquisition Agreement and section 9 of the Consulting Agreement.

Thus, because plaintiffs allege full performance under a written agreement whose validity is not effected by the failure of a condition precedent, and the scope of which clearly covers the parties' dispute, quasi-contractual remedies are unavailable (*compare Aniero Concrete Co. v New York City Constr. Auth.*, 2000 WL 863208, \*2, 7 [SDNY 2000] [failure of a condition precedent contained in agreement which stated that agreement was in effect only if condition was fulfilled rendered agreement invalid and unenforceable, permitting the assertion of equitable claims]).

Therefore, Liberty's motion to dismiss the causes of action for unjust enrichment, quantum meruit and promissory estoppel are granted, and the second, third and fourth causes of action are dismissed.

Accordingly, it is

ORDERED that the summary judgment motion (004) by Robert L. Sheets and Mary A. West, is denied; and it is further

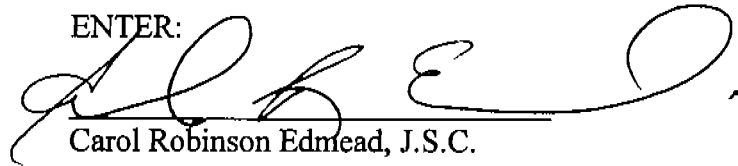
ORDERED that the summary judgment motion (005) by Liberty Alliances, LLC is granted only to the extent that the second, third and fourth causes of action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

This constitutes the decision and order of this court.

Dated: April 17, 2007

ENTER:



Carol Robinson Edmead, J.S.C.

**FILED**  
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