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

PRESENT: BERNARD J. FRIED PART 60
Justice

FBEM

Bress, IAN Y. PLAINTIFF

-v-

Weiser, LLP

DEFENDANT

INDEX NO. #604527-2006

MOTION DATE

MOTION SEQ. NO. #001

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

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

SO ORDERED

FILED
MAY 25 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/24/07

J.S.C. BERNARD J. FRIED J.B.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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 60

FBEM

----------X

IAN Y. BRESS,

Plaintiff,

Index No. 604527/05

- against -

WEISER LLP,

Defendant.

----------X

APPEARANCES:

For Plaintiff:

Hollander & Strauss, LLP
40 Cutter Mill Rd., Suite 203
Great Neck, NY 11021
(Michael R. Strauss)

For Defendant:

Greenberg Traurig, LLP
Met Life Bldg.
200 Park Ave.
New York, NY 10166
(Leslie D. Corwin)

FRIED, J.:

On July 1, 2003, plaintiff Ian Y. Bress became an income partner at Weiser LLP (Weiser), an accounting firm. On August 16, 2004, Weiser terminated Bress's employment. Bress brought this action against Weiser, claiming breach of the covenants of good faith and fair dealing in the Partnership Agreement and Admission as Income Partner Agreement (Admission Agreement), and breach of fiduciary duty. Weiser counterclaimed for fraud, breach of contract, and breach of fiduciary duty.

Bress moves, pursuant to CPLR 3211 (a) (7), to dismiss the first, third, fourth, fifth, and sixth counterclaims. Weiser cross-moves for summary judgment dismissing the complaint. Each side asks for leave to amend its claims, in the event the other sides' motion

is granted.

Weiser has approximately 600 employees, including 75 partners. Under the Admission Agreement, Bress, unlike an equity partner, had no ownership rights in Weiser, no voting rights, no obligation to share in profits or losses, and no obligation to make contributions. His compensation was set regardless of any profits, debts, or assets owned by the firm. Under Article 12 of the Partnership Agreement, any partner may be terminated with or without cause by the vote of the firm's governing committee.

Turning first to Weiser's motion for summary judgment. A motion for summary judgment is decided on the version of the facts most favorable to the opponent of the motion (*Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]). The following relates what is essentially Bress's version of events.

The gist of the complaint is that Bress caused Weiser to acquire a profitable real estate business, Landauer Realty, and that Weiser promised to give Bress credit for the acquisition. If Weiser had done so, Bress alleges, he would have become an equity partner in the firm. Bress alleges that he suggested the purchase to Weiser's managing partner, Douglas Phillips. Bress prepared a complete business plan with projections regarding the purchase, and also planned the actual acquisition and subsequent integration of Landauer into Weiser. Bress negotiated salaries with Landauer's employees and provided orientation for the change.

Weiser created Weiser Realty Advisors (WRA) for the purpose of continuing the Landauer business. For the nominal amount of $10,000, Weiser acquired Landauer's entire customer base, all of its employees, and work in process/billings of $800,000. Bress alleges

that the Landauer business was worth $3 million and that it proved a profitable purchase for Weiser. Bress says that Phillips told him on several occasions that Bress would be the partner responsible for and credited with the Landauer practice portfolio. Instead, Weiser separated Bress from the new business, conducted meetings about it without telling Bress, and finally terminated his partnership by letter dated August 16, 2004. The letter gave no reason for the termination.

The first cause of action alleges that the failure to credit Bress with the Landauer acquisition prevented him from becoming equity partner, and was in breach of the covenant of good faith and fair dealing in the parties' agreements. The second cause of action alleges breach of fiduciary duty on the same grounds. In the event that Weiser's motion to dismiss is granted, Bress asks for leave to amend to include causes of action for fraud and misrepresentation.

Weiser claims that Bress, as an income partner in the firm, was an employee-at-will. The law recognizes the distinction between equity partners and income partners in law firms (*see Mazur v Greenberg, Cantor & Reiss,* 110 AD2d 605, 606 [1st Dept], *affd* 66 NY2d 927 [1985]; *Lynn v Corcoran,* 1994 WL 123519, *1 [Sup Ct, Nassau County, February 17, 1994], *affd* 219 AD2d 698 [2d Dept 1995]; *see also* Krauss, *Partnership Roles Vary Widely From Firm to Firm,* NYLJ, January 27, 2003, at 7, col 1). The customary indicia of equity partnership include profit and loss sharing, control over the partnership affairs, contribution to capital, and possession of an ownership interest (*see M.I.F. Sec. Co. v R.C. Stamm & Co.*, 94 AD2d 211, 214 [1st Dept], *affd* 60 NY2d 936 [1983]). Income partners do not possess ownership and control. They are more akin to salaried employees than actual partners.

Bress's position in the accounting firm was analogous to that of an income partner in a law firm.

Bress and Weiser did not agree on a fixed duration for Bress's employment. Unless the parties have agreed on a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party (*Sabetay v Sterling Drug, Inc.*, 69 NY2d 329, 333 [1987]). Indeed, in his reply affidavit, Bress does not refute Weiser's allegations that his employment was at-will. Clearly, Bress's position was that of an employee-at-will

New York neither recognizes a tort of wrongful discharge nor requires good faith in an at-will employment relationship (*Ingle v Glamore Motor Sales, Inc.*, 73 NY2d 183, 188 [1989]; *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 297 [1983]). "[A]n employee at will cannot reasonably rely on an employer's representation of continued employment" (*Smalley v The Dreyfus Corp.*, __AD3d__, 832 NYS2d 157, 160 [1st Dept 2007]; *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). While partners owe each other a fiduciary duty to consider each other's welfare and not act for purely private gain (*Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180, 184 [1st Dept 2000]), generally, no fiduciary duties exist between an employer and an at-will employee (*see Vitale v Steinberg*, 307 AD2d 107, 109-10 [1st Dept 2003]; *Ingle v Glamore Motor Sales*, 140 AD2d 493, 494 [2d Dept 1988], *affd* 73 NY2d 183 [1989]).

The implied covenant of good faith and fair dealing found in every agreement means that neither party will do anything to prevent the other from carrying out the agreement as the parties intended or to injure the right of the other party to receive the fruits of the contract

(*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]; *Wieder v Skala,* 80 NY2d 628, 637 [1992]). The covenant protects a party's reasonable expectations under the contract (*Dalton,* 87 NY2d at 389). At the same time, the implied covenant is limited, as it is read in aid and furtherance of the other terms of the agreement (*see Wexler v Newsweek, Inc.,* 109 AD2d 714, 715-716 [1st Dept 1985]). No obligation can be implied that is inconsistent with the other terms of the agreement (*id.*).

The Partnership Agreement here provides that Bress may be terminated for no reason or any reason. Therefore, he cannot claim that the termination was in breach of an implied term of the contract. As for the allegation that Weiser wrongly failed to credit him with the Landauer acquisition, assuming that this claim can be separated from the wrongful termination claim, it cannot be sustained either. Phillips' promise that Bress would be in charge of the Landauer portfolio amounts to no more than an unenforceable promise of continued employment. A claim for breach of the implied covenant cannot substitute for a non existent breach of contract claim (*Skillgames,* 1 AD3d at 252). The claim that Weiser breached its fiduciary toward Bress is also without merit. Bress does not allege any facts tending to show a fiduciary relationship between the parties.

As the proponent of summary judgment, Weiser succeeds in showing that no material issues of fact exist (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]), and that Bress's allegations do not establish any causes of action. Bress fails to produce proof of an issue of fact that would require a trial (*see Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986]). Thus, Weiser's motion dismissing both causes of action is granted.

To establish a prima facie claim of fraudulent inducement, a plaintiff must allege that the defendant made a material representation, knowing that it was false, with the intention of inducing the plaintiff's reliance on the misstatement, and that, as a result of its reliance, the plaintiff sustained damages (*First Nationwide Bank v 965 Amsterdam, Inc.*, 212 AD2d 469, 470-471 [1st Dept 1995]). The fraud may consist of a misrepresentation of present fact (*First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 292 [1st Dept 1999]), or a promise to perform an act with no intention of performing it, provided that the alleged fraud does not also form the basis of a breach of contract claim (*Wiscovitch Assoc. v Philip Morris Cos.*, 193 AD2d 542, 543 [1st Dept 1993]).

Bress alleges that Phillips falsely told him that he would be credited with the Landauer business. Regarding fraudulent inducement in the context of at-will employment, the employee may have such a cause of action if the misrepresentation involves an existing fact and not a promise of continued employment and is not related to termination (*Smalley*, 832 NYS2d at 160). In *Smalley*, the false representations induced the employees to join the employer and to refrain from leaving it (*id.* at 161). Nothing of the sort is alleged here. Nor does Bress claim, for instance, that the representations caused him to take on extra tasks that he was not originally hired to perform. The conclusory allegations of deceit do not establish scienter, reliance, and damages. Given the clear insufficiency and lack of merit of the proposed amendments, leave to replead is denied (*see Channel Chiropractic, P.C. v Country-Wide Ins. Co.*, 38 AD3d 294, 294 [1st Dept 2007]).

Discussion now turns to Bress's motion. In the context of a CPLR 3211(a) (7) motion, directed at the sufficiency of the pleadings, the court must accept the allegations as

true, according the plaintiff the benefit of every reasonable inference to determine whether they come within the ambit of any cognizable legal theory (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]). A CPLR 3211 motion should be granted only when, even viewing the allegations as true, the plaintiff still cannot establish a cause of action.

Douglas Phillips, the managing partner of Weiser, alleges that Bress obtained his position of income partner by representing that he possessed the contacts and the expertise to attract middle market owner-managed business clients to Weiser. Phillips states that Bress misrepresented the nature of his experience and contacts and failed to bring in even one middle market owner-managed client. Bress thus fraudulently induced Weiser into making him an income partner. The first counterclaim sounds in fraudulent inducement.

CPLR 3016 (b) requires that "the circumstances constituting the [fraud] shall be stated in detail." Although this rule is relaxed where the circumstances constituting the fraud are peculiarly within the knowledge of the party against whom the defense is being asserted (*Bernstein v Kelso & Co.*, 231 AD2d 314, 320-321 [1st Dept 1997]), a mere recitation of the elements of fraud will not state a cause of action (*National Union Fire Ins. Co. of Pittsburgh, Pa v Christopher Assoc.*, 257 AD2d 1, 9 [1st Dept 1999]).

Weiser's statements amount to a mere recitation of the elements of fraud. Allegations that Bress promised to bring along a particular client, and failed to do so, or that Bress said that he had a specific skill or degree, that he later turned out not to possess, might possibly present a case for fraud, but not the vague and conclusory allegations here.

Bress was applying for a position and he said that he could do the work. His statements could be categorized as expressions of opinion, of future expectation, or of hope, but however regarded, they are not actionable as fraud (*see Sidamonidze v Kay*, 304 AD2d 415, 416 [1st Dept 2003]; *Sheth v New York Life Ins. Co.*, 273 AD2d 72, 74 [1st Dept 2000]). Also, Weiser does not sufficiently allege that Bress had an intent to deceive when he made his statements.

A fraud claim cannot be sustained when all it does is duplicate a breach of contract claim (*Coppola v Applied Electric Corp.*, 288 AD2d 41, 42 [1st Dept 2001]; *First Bank of Ams.*, 257 AD2d at 291). Here, the same allegations form the basis of the fraud and breach of contract claims. The first counterclaim for fraudulent inducement must be dismissed.

Shortly after Bress joined Weiser, he and Phillips began discussing Weiser's acquisition of Landauer. Bress represented to Phillips that he possessed enough knowledge of the realty business to take a leadership role in developing Landauer. Bress allegedly omitted from his projections "significant operating expenses" which were required to run the Landauer business (Answer, ¶ 59).

In reliance upon Bress's projections and representations, Weiser purchased Landauer. If Bress had been truthful about the expenses, Weiser alleges, it would not have purchased Landauer. The third counterclaim alleges that Bress's false financial statements induced Weiser to purchase Landauer Realty. The fourth counterclaim sounds in negligent misrepresentation relating to the same.

As Bress points out, Weiser says no more about the omitted figures than what is quoted above. Even if Weiser need not name specific dollar amounts, there must be more

than these conclusory allegations to establish a cause of action for fraud. Weiser does not allege that only Bress has access to the misleading projections. It gives no reason for not making more particularized allegations. So the purpose of CPLR 3016 (b), which is to give the defendant notice of the wrong he or she allegedly committed, is not served (*see Knight Sec., L.P. v Fiduciary Trust Co.*, 5 AD3d 172, 173-174 [1st Dept 2004]; *Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 97 [1st Dept 2003]). Weiser also falls short on alleging reliance and damages. The third counterclaim for fraudulent inducement must be dismissed.

Negligent misrepresentation arises when the speaker has no intent to deceive but negligently imparts incorrect information. The negligence is actionable because of a special relationship between speaker and listener that make the former duty bound to be careful when imparting information (*Hudson Riv. Club v Consolidated Edison Co. of N.Y.*, 275 AD2d 218, 220 [1st Dept 2000]). This fourth counterclaim suffers from the same deficiency as the third. Also, Weiser does not allege any facts tending to show a special relationship between it and Bress. Indeed, Weiser denies that they had a fiduciary relationship. The fourth counterclaim cannot be sustained.

In August or September 2003, Bress suggested to Phillips that Weiser hire Leonard Rudolph and Judson M. DeCew, Jr. to establish a business consulting practice. Bress represented that Rudolph and DeCew had knowledge of the consulting business and contacts, and that Bress had the skills and experience necessary to be the liaison partner between the consultancy and Weiser. Bress said that he had the ability to take a leadership role in developing the consulting practice. In reliance on Bress, Weiser created Weiser Enterprise Advisors LLC (WEA), which signed agreements with Rudolph and DeCew.

WEA was never profitable and Weiser terminated it early in 2005. Weiser alleges that Bress's representations about the skill and experience of Rudolph and DeCew were false. The fifth counterclaim sounds in fraud in the inducement relating to Weiser's creation of the WEA. The sixth counterclaim sounds in negligent misrepresentation as to the same.

Again, these allegations are vague and nonspecific. Weiser does not allege that Bress made any particular representations about Rudolph's and DeCew's qualifications, assuming that such could constitute fraud. What Bress allegedly said can be described as opinion or puffery. In addition, Weiser does not clearly allege that Bress knew the statements were false when he made them. Nor does Weiser clearly allege that Rudolph and DeCew lacked the experience that Bress claimed for them. The fifth and sixth counterclaims may not be maintained.

Bress's motion to dismiss the first, third, fourth, fifth and sixth counterclaims is granted. Remaining are the second counterclaim for breach of the Admission Agreement, the seventh for breach of fiduciary duty based on all of Bress's alleged wrongdoing, and the eighth counterclaim for breach of the implied covenant of good faith and fair dealing. Bress is not moving to dismiss these. The court invites him to do so. Given that Weiser states that no fiduciary duty existed between the parties, it can hardly maintain a cause of action for breach of the same. Nor, from the facts alleged here by both sides, does it appear that Weiser has a claim for breach of contract or for breach of the implied covenants.

In conclusion, it is

ORDERED that plaintiff's motion to dismiss the dismiss the first, third, fourth, fifth, and sixth counterclaims is granted, and said counterclaims are hereby severed and dismissed,

and the remaining counterclaims shall continue; and it is further

ORDERED that defendant's cross-motion for summary judgment dismissing the complaint is granted, and the complaint is hereby dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

No costs.

Dated: 5/24/07

ENTER:

J.S.C.

BERNARD J. FRIED
J.S.C.

FILED
MAY 25 2007
NEW YORK
COUNTY CLERK'S OFFICE