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

PRESENT: SOLOMON Justice PART 55

GELB, PETER

- v -

MYLES, GLENN

INDEX NO. 600069/2007

MOTION DATE 4-30-07

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion to dismiss action

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	5-6
Replying Affidavits	7

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

N.B. Preliminary conference is scheduled for Monday 9/24/07 @ 12:00 noon in Part 55.

FILED
AUG 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/16/07

JANE S. SOLOMON J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55
----------X

PETER GELB,

Plaintiff,

-against-

INDEX NO. 600069/2007

GLENN MYLES, FIRST WALL STREET CAPITAL INTERNATIONAL, LLC, FIRST WALL STREET CAPITAL BROKERAGE CORPORATION, FIRST WALL STREET CAPITAL INTERNATIONAL, INC., FIRST WALL STREET CAPITAL, FIRST WALL STREET PARTNERS, INC., FIRST WALL STREET PARTNERS, LLC, FIRST WALL STREET CAPITAL INTERNATIONAL I and JOHN DOES "1" through "10" being and intended to be those unknown persons and entities in concert with Defendants,

DECISION AND ORDER

Defendants.

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JANE S. SOLOMON, J.

In this breach of contract action, defendants Glenn Myles ("Myles"), First Wall Street Capital International, LLC ("FWS"), and all of the other defendants, each of which except for the John Does has "First Wall Street" in its name (collectively, "Defendants"), move to dismiss the Complaint. For the reasons described herein, the motion is granted in part.

Plaintiff Peter Gelb ("Plaintiff") is a resident of New Jersey and a financial services consultant. Myles is a New York resident and principal and chief executive officer of defendant FWS, a merchant and investment banking limited liability company involved in mergers and acquisitions, debt/equity financing, advisory management and asset recovery. FWS is organized under the laws of Delaware and has its principal place of business at

445 Park Avenue, 9th Floor in Manhattan. The other named defendant companies are all owned and/or controlled by Myles, are registered under New York law, and also have their principal places of business at 445 Park Avenue, 9th Floor in Manhattan. Plaintiff alleges that Myles often used these companies interchangeably in his business dealings. The "Doe" defendants are described in the Complaint as "unknown persons or entities who acted in concert with the other defendants and/or are controlled by them and are liable for the claims asserted by Plaintiff."

Plaintiff alleges that he began working for Defendants in 2003 "as an independent contractor" under the title "Managing Director." He contends that he had an oral contract to be paid a percentage of the gross fees collected by Defendants on the projects for which he worked. Plaintiff states that he provided extensive services on various projects for Defendants between 2003 and 2006 for which they received substantial fees, but that they did not pay him what he was owed.

Five such projects are alleged in the Complaint:

1. *Minacs*: Plaintiff alleges that he is owed a balance of $147,650. He contends that Defendants paid him the agreed 20% of revenue received on the deal for the initial and monthly retainers, but paid him only $33,750 at the conclusion because Defendants falsified the final amount received, which he alleges to be $907,000.

2. *MyDNA*: Plaintiff alleges he still is owed $40,000,

representing 20% of the $200,000 in fees paid to Defendants, for which he only was repaid his $35,000 share of a $100,000 bridge loan and reimbursed for out of pocket expenses.

3. *Hard Rock*: Plaintiff alleges that FWS entered into a joint consulting agreement for a client seeking a controlling interest in the Hard Rock Casino and Hotel in Biloxi, Mississippi; that when the client became dissatisfied with Myles, it asked Plaintiff to concentrate on the deal. Rather than the 20% described for the other transactions, he further claims that Myles agreed to split the fee here equally between the two of them and another individual, but that Defendants falsified the final amount received so that Plaintiff received only $10,000 and is owed a balance of $73,333.

4. *Chub Cay*: Plaintiff alleges when Defendants assisted in raising $40-$50 million for the development of a private resort and were paid $450,000, he is entitled to 20%.

5. *Riviera*: Plaintiff alleges that he advanced $25,000 for expenses on a proposed acquisition of an interest in the Riviera Hotel and Casino in Las Vegas, evidenced by a written agreement signed by Myles individually and as CEO of FWS. It provides that "[s]hould the proposed acquisition not be completed, FWS will return to [Plaintiff his] pro rata share of any unused funds as determined by . . . [an] accounting of the transaction expenses." The deal was never completed and Plaintiff claims that Myles has not returned any unused funds despite his repeated requests.

In January 2007 Plaintiff commenced this action for the

recovery of $375,983 and an accounting. Defendants now move under CPLR § 3211(a)(7) to dismiss the Complaint.

Discussion

Breach of Contract

Defendants, in the first instance, rely on General Obligations Law § 5-701(a)(10), which renders void and unenforceable, if not in writing, any contract

> to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including the majority of the voting stock interest in a corporation and including the creating of a partnership interest. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman.

They point out that of the five transactions, only the Riviera claim is supported by a writing.

Plaintiff argues that the Statute of Frauds does not apply because he is not suing a principal for a fee, but rather is suing his "co-finder" on transactions in a relationship "closely akin to that of a joint venture." Dura v. Walker, Hart & Co., 27 N.Y.2d 346 (1971). He contends that the correct inquiry is into who he was working for, and from whom he now seeks a fee. However, unless the parties have a relationship akin to being co-finders or joint venturers, the relevant inquiry concerns the

nature of Plaintiff's alleged services. *See* Dura, 27 N.Y.2d 346; Belotz v. Jefferies & Co., 2000 U.S. App. LEXIS 11444 (2d Cir. 2000).

In the Complaint, Plaintiff claims to have performed services of the type that fall squarely within the ambit of GOL § 5-701(a)(10). *See* Whitman Heffernan Rhein & Co. Inc. v. Griffin Comp., 163 A.D.2d 86 (1st Dep't 1990). Thus, if he is unable to show a joint venture or co-finder relationship, his breach of contract claim must be dismissed for all transactions except the Riviera deal.

On a CPLR § 3211 motion to dismiss, a court must construe the complaint liberally (*see* 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 [2002]; CPLR § 3026), and can consider any submissions in opposition to the motion (*see* Sokoloff v Harriman Estates Dev. Corp., 96 N.Y.2d 409 [2001]). Although Plaintiff pleads that he was an independent contractor, the Complaint also describes investment of his own money and payments already made to him as a co-venturer. Giving him the benefit of every possible favorable inference (Leon v. Martinez, 84 N.Y.2d 83 [1994]), Defendants' motion to dismiss the first cause of action is denied at this time.

Good Faith and Fair Dealing

Plaintiff's second cause of action must be dismissed because "New York does not recognize a separate cause of action for violation of the implied covenant of good faith and fair dealing." Cohen v. Nassau Educators Federal Credit Union, 12

Misc. 3d 114A, 819 N.Y.S.2d 209 (Sup. Ct. Nassau Co. 2006).

Unjust Enrichment and Quantum Meruit

GOL § 5-701(a)(10) expressly states that it "shall apply to a contract implied in fact or law to pay reasonable compensation." *See* also Fitz-Gerald v. Donaldson, Lufkin & Jenrette, 294 A.D.2d 176 (1st Dep't 2002). However, as with the breach of contract claim, the motion to dismiss Plaintiff's third and fourth causes of action seeking unjust enrichment and quantum meruit, respectively, is denied.

Fraud

Plaintiff's fraud claim is essentially that Defendants defrauded him by reporting inaccurate profit details on the deals on which he was engaged, and is duplicative of his breach of contract claim. Moreover, the Complaint fails to comply with the particularity requirements of CPLR § 3016(b). Therefore, Defendants' motion to dismiss the fraud claim is granted.

Accounting

"A cause of action for an accounting is an equitable remedy, where the essential elements are an allegation of a fiduciary relationship and a charge of wrongdoing against the parties having the [fiduciary] duty." Lio v. Zhong, 10 Misc. 3d 1068A (Sup. Ct. New York Co. 2006). Despite the inclusion of the phrase "FWS will also provide a *complete accounting* of all expenses of the transaction" (emphasis added) in the written agreement evidencing the Riviera deal, what Plaintiff actually is seeking is discovery to fix the amount he is entitled to recover

rather than an accounting as a final remedy. Accordingly, an adequate remedy at law exists, and Defendants' motion to dismiss the accounting claim is granted.

Myles as a Defendant

Reviewing the Complaint and the submissions on the motion most favorably to Plaintiff, Defendants' motion to dismiss Myles as an individual defendant is denied. The pleadings contain non-conclusory allegations regarding piercing the corporate veil (Segua Corp. v. Christopher, 176 A.D.2d 498 [1st Dep't 1991]; Int'l Credit Brokerage Co. v. Agapov, 249 A.D.2d 77 [1st Dep't 1998]), and sufficiently set forth facts that the defendant corporations were dominated and controlled by Myles, lacked separate existence and were used by Myles to divert funds.

Accordingly, it hereby is

ORDERED that the motion to dismiss is granted as to the Second (Good Faith and Fair Dealing), Fifth (Fraud) and Sixth (Accounting) causes of action, and otherwise is denied; and it further is

ORDERED that counsel shall appear at a preliminary conference in Part 55 on Monday, September 24, 2007 at 12:00 noon.

Dated: August 16, 2007

ENTER: