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

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 56

Index Number : 601198/2004
MERRILL LYNCH, PIERCE, FENNER
VS
NFS SERVICES
Sequence Number : 007
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 4/4/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

; 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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
AUG 23 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/15/07

HON. RICHARD B. LOWE, III
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 56

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MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Plaintiff,

Index No. 601198/04

- against -

NFS SERVICES, INC. and EUGENE N. SCALERCIO,

Defendants.

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Hon. Richard B. Lowe, III:

This decision consolidates motion sequence numbers 007 and 008 for determination.

Plaintiff Merrill, Lynch, Fenner & Smith, Inc. (Merrill Lynch) and defendant NFS Services, Inc. (NFS) made an agreement (hereinafter, the Agreement) for NFS to find escheated assets legally and beneficially belonging to Merrill Lynch and to effect the recovery of said assets. Merrill Lynch commenced this action against NFS and its owner, Eugene Scalercio, alleging that NFS refused to turn over recovered assets.

In motion sequence number 007, plaintiff moves for partial summary judgment on four of its seven causes of action and for dismissal of NFS's counterclaims insofar as predicated on breach of oral agreements and other parol evidence. Defendants cross-move for partial summary judgment dismissing all but one of plaintiff's causes of action and its requests for punitive damages and attorneys' fees. In motion sequence number 008, plaintiff moves for an order striking defendants' demand for a jury trial.

The Agreement is dated in March 2001, but was signed in May 2001. The Agreement

authorized NFS "to pursue the identification and location of assets ... and to effect the recovery of these assets" (Libowsky Affidavit [Aff.], Ex. 3, ¶ 1). It provided that NFS was an independent contractor and not an agent of plaintiff. "All decisions with respect to whether NFS shall pursue the recovery of such assets shall be made by" plaintiff (*id.*). Plaintiff agreed to pay NFS a fee of 25% of the net value of any recovered asset, "once the asset is realized and full title has been transferred to the client and the asset is in possession of the client" (*id.*, ¶ 2).

The day after signing the Agreement, plaintiff issued a Letter of Authorization designating NFS as its "appointed representative" with the authority to identify and "effect the recovery" of assets (Libowsky Reply Aff., Ex. F). The letter authorized NFS to receive all the recovered funds, "which are to be issued in the name of Merrill Lynch and is further authorized to prepare and sign on our behalf the receipt of these assets" (*id.*).

Plaintiff issued other letters, dated from June through August 2001, addressed to the bureaus of unclaimed property in different states. The letters authorized named Merrill Lynch employees to collect abandoned property and unclaimed funds. The letters also advised that NFS was Merrill Lynch's agent authorized to process and collect claims (Libowski Reply Aff., Exs. G, H, I, J, K, L).

Pursuant to the Agreement, NFS recovered the net amount of $1,063,473.40 belonging to Merrill Lynch. In this action, plaintiff seeks 75% of this sum. Plaintiff terminated the Agreement by letter dated November 19, 2001. The termination letter asks that NFS immediately cease any current projects (Libowsky Aff., Ex. 5). Afterward, the parties agreed that NFS would hold on to the recovered assets for an undetermined period.

In September 2003, Merrill Lynch wrote NFS requesting the recovered assets. The letter

stated that Merrill Lynch understood that NFS had claims for fees against Merrill Lynch, that Merrill Lynch had tried in good faith to resolve those claims, that the attempts had not succeeded, and that NFS should turn over the 75% of the recovered assets that belonged to Merrill Lynch. NFS did not turn over the money, but used it for operating expenses. NFS admits to keeping and using the money. There is no dispute on that point.

NFS does not deny owing plaintiff the recovered assets sought in this action. NFS alleges that it was justified in not paying over the money because plaintiff owes NFS fees under a modified version of the Agreement and/or a new agreement made after the Agreement terminated. NFS alleges that the Agreement was modified in writing by the Letter of Authorization and the letters to the states, and orally by statements from plaintiff's employees. Under the Agreement, plaintiff decided if identified assets should be collected, and paid NFS according to collected assets, not merely identified assets. Under the Agreement, plaintiff did not pay NFS until plaintiff possessed the assets. NFS claims that the parties modified the Agreement, so that, in addition to identifying escheated assets, NFS could decide whether or not plaintiff should collect them. Under the allegedly modified Agreement, NFS identified assets to plaintiff and plaintiff was to collect the assets and pay NFS the fee. Furthermore, even if plaintiff did not collect the identified assets, it would pay NFS for identifying them. NFS seeks payment for assets it identified to plaintiff, whether or not plaintiff collected the assets.

NFS further alleges that, after plaintiff terminated the Agreement, the parties continued their relationship under a new oral agreement with the same terms as the modified Agreement. Pursuant to the modified Agreement and the new oral agreement, NFS continued to identify escheated assets for plaintiff through April 2004. NFS did not collect these assets. Plaintiff itself

collected some of the identified assets but did not pay NFS its fee. So NFS kept the money that plaintiff seeks in this action. NFS alleges that Merrill Lynch owes NFS $4 million in fees for $16 million worth of identified assets, both collected and uncollected.

Plaintiff denies that the parties modified the Agreement or came to any new agreement. Plaintiff's position is that it did not agree to pay NFS for identifying assets that went uncollected. Under the Agreement, plaintiff only has to pay NFS if the assets are collected and whether they are collected is plaintiff's decision, not the decision of NFS. Therefore, assuming that NFS identified assets for plaintiff which NFS did not collect, but which plaintiff collected, plaintiff does not have to pay NFS a fee. Plaintiff also claims that assets identified and collected after the Agreement terminated were done by its employees alone without any input from NFS. Plaintiff also claims that many of the assets identified by NFS are not worth collecting, that it did not ask NFS to identify those assets, and that NFS is seeking to force plaintiff to collect identified assets so that it will be obligated to pay NFS a fee.

Plaintiff's first cause of action sounds in breach of contract, the second in unjust enrichment, the third in breach of trust (alleging that NFS held the assets in trust for plaintiff), the fourth in a request for attorneys' fees, the fifth in conversion, the sixth in breach of constructive trust, and the seventh in fraud. The ad damnum clause seeks punitive damages. Plaintiff moves for partial summary judgment on its first, second, fifth, and sixth claims.

Defendants' first counterclaim sounds in unjust enrichment, the second in quantum meruit, the third in breach of contract, the fourth in specific performance, and the fifth in breach of duty of fair dealing. The sixth seeks an accounting.

The proponent of a summary judgment motion must make a prima facie showing of

entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once that initial burden has been satisfied, the burden of production shifts to the party opposing the motion to produce sufficient evidence of the existence of a material issue of fact requiring a trial of the action (*id.*).

To prove a cause of action for breach of contract, plaintiff must establish the existence of a contract, performance by plaintiff, breach by defendants, and damages sustained by plaintiff as a result of the breach (*Furia v Furia,* 116 AD2d 694, 695 [2d Dept 1986]). By failing to transmit the money to plaintiff, NFS did breach the Agreement. Nonetheless, NFS argues that plaintiff should not receive summary judgment on this claim because NFS's counterclaims seek damages in excess of the damages sought by plaintiff and the causes of action and counterclaims arise from the same transactions.

Where counterclaims are directly related to the complaint so as to be inextricably interwoven and inseparable in terms of the issues raised, this precludes the granting of partial summary judgment in favor of plaintiff (*GTE Automatic Elec. v. Martin's Inc.,* 127 AD2d 545, 546 [1st Dept 1987]). In *GTE,* summary judgment on the plaintiff's causes of action was denied, because the counterclaims were for fraudulent inducement of the same contract plaintiff was suing on, the amounts demanded were in excess of plaintiff's demands, and the counterclaims were a defense to plaintiff's causes of actions (*id.; see also Yoi-Lee Realty Corp. v 177th St. Realty Assoc.,* 208 AD2d 185, 189 [1st Dept 1995]).

However, in *Masterwear Corp. v Bernard* (298 AD2d 249, 250 [1st Dept 2002]), the Court held that the counterclaims were not inextricably intertwined with the causes of action,

although they emanated from the same agreement, and granted partial summary judgment. The court stated that the agreement's provisions were divisible and the counterclaims and causes of action did not arise from the same facts (*id.*).

Militating in favor of summary judgment for plaintiff is that both sides agree that NFS recovered assets pursuant to the Agreement and did not give them to plaintiff. Also, NFS has no defense to plaintiff's claim for the recovered assets. Militating against plaintiff's motion is that NFS's claims derive from the same agreement as plaintiff's claims or something similar to it, and that plaintiff may owe NFS more than vice versa.

Because NFS's claims depend upon an alleged oral agreement, the court must decide if NFS may argue that the parties made such an agreement. According to plaintiff, the Agreement bars any oral modifications of itself and bars any new oral agreements. Plaintiff argues that the Agreement could not be orally modified, because it states that it "may be amended on by an agreement, in writing, executed by both parties" (Libowski Aff., Ex. 3, ¶ 10). Also, the Agreement provides that it "contains the entire agreement between the parties with respect to the subject matter and there are no understandings or representations with respect to such subject matter as set forth in this Agreement" (*id.*).

Assuming that these provisions are specific enough to bar oral modifications of the Agreement, it is the law that the parties to a contract may change it by another contract, by course of performance, or by conduct that amounts to waiver or estoppel (*CT Chems. (U.S.A.) v Vinmar Impex*, 81 NY2d 174, 179 [1993]). Even a contract with a merger clause, such as the one here, may be changed by the parties' subsequent behavior and representations (*Simon & Son Upholstery v 601 West Assoc.*, 268 AD2d 359, 360 [1st Dept 2000]; *Getty Ref. and Mktg. v*

Linden Maintenance Corp., 168 AD2d 480, 481 [2d Dept 1990]). In addition, an oral modification of a written contract that provides that it can only be changed in writing is enforceable, if the oral modification is fully carried out or there has been a partial performance that is "unequivocally referable" to the oral modification (*Rose v Spa Realty Assoc.*, 42 NY2d 338, 343-344 [1977]).

At his deposition, Scalercio testified that NFS and plaintiff changed the written Agreement through their conduct and words, and that NFS worked for plaintiff pursuant to oral agreements. These allegations are enough to establish that the parties could have modified the Agreement, in a manner that the law would recognize and give effect to. To obtain summary judgment on its breach of contract claim, plaintiff would have to show that Scalercio's version of events is simply not true. Plaintiff does not do so.

It was also possible for the parties to make a new oral agreement. The Agreement's provisions could not prevent the formation of a new oral agreement after the Agreement ended. NFS presents a tenable claim that it performed under some agreement and was not paid and that plaintiff owes it more than the other way around. Therefore, the question of whether the parties modified their Agreement or made another agreement is for the factfinder and preclusive of summary judgment on plaintiff's breach of contract claim. Moreover, even if there were no new agreement, it may be that NFS should be paid for work performed that benefitted plaintiff.

Plaintiff moves to dismiss the counterclaims to the extent that those rely on oral agreements and other evidence outside the Agreement. But, as stated above, if NFS performed services that benefitted plaintiff, it may have been pursuant to an oral agreement. NFS alleges that it is so and plaintiff does not prove otherwise. Therefore, the part of plaintiff's motion to

dismiss counterclaims that rely on evidence of oral agreements is denied.

The court is able to resolve one of the parties' disputes at this point. As stated, the parties may have made an oral agreement. But the parties did not make any new written agreements. NFS's claim that the Agreement was modified by writings is not tenable. It is true that the letters that plaintiff wrote to the various states say that NFS is plaintiff's agent, while the Agreement says that NFS is not plaintiff's agent. But even if the statement of NFS's agency modified the Agreement so that NFS became plaintiff's agent, said modification does not have the effect that NFS claims. Contrary to NFS's contentions, the letters to the various states and the Letter of Authorization do not provide that plaintiff gave up the right to decide if an asset identified by NFS should be collected. Any agency power that the writings conferred on NFS was limited to NFS's ability to identify escheated assets and, if plaintiff approved, to collect them. Consequently, evidence of new or modified agreements will have to derive from oral statements, not writings.

Plaintiff's motion for summary judgment on its causes of action for unjust enrichment, breach of a constructive trust, and conversion is denied. As discussed below, the first two are dismissed on defendants' cross motion. As for conversion, if plaintiff owes NFS more than it is owed by NFS, that claim may not be tenable.

Discussion turns to defendants' cross motion for partial summary judgment dismissing plaintiff's second, third, fourth, fifth, sixth, and seventh causes of action and its request for punitive damages and attorneys' fees.

Unjust enrichment (second cause of action) occurs when a defendant enjoys a benefit bestowed by the plaintiff without adequately compensating the plaintiff (*Sergeants Benevolent*

Assn. Annuity Fund v Renck, 19 AD3d 107, 111 [1st Dept 2005]). "[A] valid and enforceable written contract precludes recovery on a theory of unjust enrichment" (*Cornhusker Farms v Hunts Point Coop. Mkt.*, 2 AD3d 201, 206 [1st Dept 2003], citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). Since the monies sought by plaintiff were recovered by NFS pursuant to a written contract, this cause of action will be dismissed.

In the breach of trust cause of action (third), plaintiff alleges that defendants failed to keep the recovered assets in a trust. Defendants point out that the Agreement nowhere provides that the assets must be kept in a trust. Plaintiff responds that such a provision is an implicit part of the Agreement. Plaintiff states that one party holding funds for another is obligated to keep the funds in a trust and, by using the funds, defendants breached trust arrangements. Whether valid or not, this cause of action duplicates the contract and conversion causes of action and will be dismissed as redundant.

Conversion (fifth cause of action) occurs when a party possesses money belonging to another and acts to exclude the owner's rights (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). Generally, an action for conversion cannot be predicated on a mere breach of contract; it must allege facts independent of the contract claim (*Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269 [1st Dept 2003]). Here, the allegations supporting the breach of contract cause of action are distinct from those giving rise to the conversion cause of action (*see New York Med. Coll. v Histogenetics, Inc.*, 6 AD3d 410, 411 [2d Dept 2004]). Not only did defendants not turn over the recovered assets that plaintiff seeks, defendants admit that they kept and spent the money owing to plaintiff. By dint of keeping and using the money, defendants may be liable for conversion. This cause of action will not be dismissed.

In general, a plaintiff seeking to impose a constructive trust (sixth cause of action) must show a confidential or fiduciary relation with the party holding the property, a promise by that party, a transfer in reliance thereon, and unjust enrichment by that party at the plaintiff's expense (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). The main purpose of a constructive trust is to prevent unjust enrichment (*id.* at 123; *Weissman v Bondy & Schloss,* 230 AD2d 465, 469 [1st Dept 1997]). "The doctrine of constructive trust ... is given broad scope to flex in response to all human implications of the transaction, to remedy whatever knavery ingenious wrongdoers can invent, to give expression to the conscience of equity, and to satisfy the demands of justice" (*Nastasi v Nastasi,* 26 AD3d 32, 38 [2d Dept 2005]). Relying upon the flexibility of the doctrine, plaintiff points out that the absence of one element will not by itself defeat the imposition of a constructive trust (*see Palazzo v Palazzo,* 121 AD2d 261, 264 [1st Dept 1986]; *Coco v Coco,* 107 AD2d 21, 24 [2d Dept 1985]). Plaintiff argues that the absence of a confidential or fiduciary relationship with NFS does not bar the imposition of a constructive trust on the recovered assets. However, even if that were true, plaintiff has no claim for unjust enrichment and no promise it can point to outside the Agreement. This cause of action duplicates the breach of contract cause of action and will be dismissed.

Fraud (seventh cause of action) consists of a false representation, made knowingly with the intent to deceive, deception, and injury due to relying on the representation (*Friedman v Anderson,* 23 AD3d 163, 166 [1st Dept 2005]). The complaint alleges that in 2002 and 2003, Scalerio told plaintiff that the recovered assets were being held in a trust, that this statement was false, and that Scalerio made it to induce plaintiff into believing its property was secure, so plaintiff would not commence legal action. Defendants point out that plaintiff told Merrill Lynch

to hold on to the money and did not request it until September 2003. The letter asking for the money states that plaintiff will take legal action to protect its rights. Therefore, defendants assert, they did not deceive plaintiff into refraining from legal action.

If defendant falsely told plaintiff that assets were held in a trust, that would be a fraudulent statement. Plaintiff's belief in the statement and consequent delay in bringing legal action would embody the element of reliance. Whether plaintiff was actually damaged by the alleged fraud is another question. But as defendants do not prove that plaintiff was not damaged, the fraud claim cannot be dismissed on that ground. Also, nominal damages are available for fraud. If, at trial, plaintiff fails to establish any losses incurred by reason of its belief that the money was in a trust, the fraud action may be dismissed or may result in nominal damages (*see Garnett v Hudson Rent-A-Car,* 276 AD2d 524, 525 [2d Dept 2000]). The fraud claim will not be dismissed now.

Plaintiff's ad damnun clause seeks an award of punitive damages. Punitive damages are available where the wrongdoing is intentional or deliberate, has aggravating or outrageous circumstances, has a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton (*Gamiel v Curtis & Riess-Curtis, P.C.,* 16 AD3d 140, 141 [1st Dept 2005]; *Don Buchwald & Assoc., Inc. v Rich,* 281 AD2d 329, 330 [1st Dept 2001]). Defendants contend that punitive damages should not be awarded for a mere breach of contract claim. But such damages may be awarded pursuant to tort claims. Plaintiff asserts causes of action for conversion and fraud, and it may be that defendants acted intentionally or deliberately in regard to those torts. On the facts alleged here, there is no reason to dismiss the demand for punitive damages.

Defendants move to dismiss the request for attorneys' fees and costs (fourth cause of action). The request is based on paragraph nine of the Agreement, which provides that NFS will indemnify plaintiff against all claims arising out of actions taken by NFS pursuant to the Agreement. Defendants correctly assert that this provision pertains to claims by third parties against plaintiff, not to claims by plaintiff against NFS. Defendants also argue that the complaint contains no basis for the imposition of legal fees, which is correct. Attorneys' fees are generally not available as an item of damages, unless authorized by agreement between the parties, statute, or court rule (*Hooper Assocs. v AGS Computers,* 74 NY2d 487, 492 [1989]). Nothing in the complaint or counterclaims provides a basis for the imposition of legal fees.

Plaintiff stipulates to the dismissal of this claim. It points out that defendants make the same request and asks that their request be denied. Both sides' demands for attorneys' fees are dismissed.

In motion sequence number 008, plaintiff seeks to strike defendants' demand for a jury trial. NFS, but not Scalercio, make the equitable counterclaims, which are for specific performance, accounting, quantum meruit, and unjust enrichment. These claims and the legal claims for breach of contract and breach of duty of fair dealing derive from the same alleged wrongs. Where a party asserts both legal and equitable counterclaims arising out of the same alleged wrongs or transactions, it waives its right to a jury trial on the legal counterclaims (*Paralegal Inst. v Big Sol Mfg. Co.*, 190 AD2d 595, 596 [1st Dept 1993]; *Zimmer-Masiello, Inc. v Zimmer, Inc.,* 164 AD2d 845, 846-47 [1st Dept 1990]). Elimination of the equitable claim, by discontinuance, amendment, severance, or dismissal, does not erase the waiver and revive the right (*Zimmer-Masiello, Inc.*, 164 AD2d at 846-847; *O'Rorke v Carpenter,* 125 AD2d 223, 224

[1st Dept 1986]).

At the same time, a party whose claims are primarily legal in nature, and who will be afforded full relief by a monetary award does not waive a jury trial by asserting both equitable and legal claims arising out of the same transaction (*Bressler v Kalow,* 13 AD3d 70, 70 [1st Dept 2004]; *Cadwalader Wickersham & Taft v Spinale,* 177 AD2d 315, 316 [1st Dept 1991]). A claim for unjust enrichment where an award of money would fairly compensate the party is legal in nature (*Miller v Epstein*, 293 AD2d 282, 282 [1st Dept 2002]). A party pursuing an accounting merely to determine the amount of such damages does not waive its right to a jury trial (*Lex Tenants Corp. v Gramercy N. Assoc.,* 284 AD2d 278, 278 [1st Dept 2001]).

Defendants assert that the equitable claims do not require dismissal of their jury demand. Defendants allege that monetary awards will fully compensate NFS, and that the accounting is sought in order to determine the amount of damages owed to NFS. The court agrees. Monetary awards will compensate NFS for any injuries that it can prove, given that its claims are primarily legal in nature. The motion to strike the jury demand is denied.

It must also be noted that Scalercio is not interposing counterclaims. The causes of action against him are legal. He has not waived his right to a jury trial. Scalercio is entitled to a jury trial. The court finds that justice and efficiency in this case will best be served by trying NFS and Scalercio together. Striking the jury demand would require depriving Scalercio of a jury trial or having separate trials, neither of which is desirable.

In conclusion, it is

ORDERED that plaintiff's motion for partial summary judgment (motion sequence number 007) is denied; and it is further

ORDERED that defendants' cross motion for partial summary judgment is granted to the extent that the second cause of action for unjust enrichment, the third cause of action for breach of trust, the fourth cause of action for attorneys' fees and costs, and the sixth cause of action for breach of a constructive trust are dismissed, and the motion is otherwise denied; and it is further

ORDERED that defendants' demands for attorneys' fees and costs is dismissed; and it is further

ORDERED that plaintiff's motion to strike defendants' demand for a jury trial (motion sequence number 008) is denied; and is further

ORDERED that the rest of the action shall continue.

Dated: August 15, 2007

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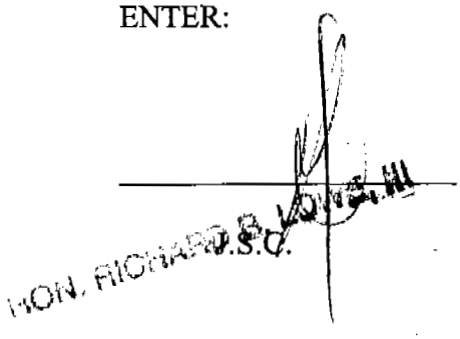

HON. RICHARD B. LOWE, III J.S.C.