[* 1]

SHORT FORM ORDER

INDEX No. 26794-2004

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY

PRESENT:
Hon. MELVYN TANENBAUM
Justice

MOTION #003-CASE DISP
R/D: 060407
S/D 062507

PHILIP E. JORDAN, JANET M. JORDAN also known as GINGER M. JORDAN and SELECT SYSTEMS, INC.

Plaintiffs,

- against -

SOUTH SHORE RECORD MANAGEMENT, INC. and MICHAEL LABY

Defendants.

PLTF'S/PET'S ATTY:
STEVEN A. STERNLICHT, ESQ.
8 Laurel Avenue
East Islip, New York 11730

DEFT'S/RESP'S ATTY:
LAWRENCE R. LONERGAN, ESQ.
275 Seventh Avenue
New York, New York 10001

Upon the following papers numbered 1 to 21 read on this motion for an order pursuant to CPLR §3212 Notice of Motion/Order to Show Cause and supporting papers 1-7; Notice of Cross Motion and supporting papers ____ Answering Affidavits and supporting papers 8-21 Replying Affidavits and supporting papers ____ Other ____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendants SOUTH SHORE RECORD MANAGEMENT, INC. ("SOUTH SHORE") and MICHAEL LABY ("LABY") for an order pursuant to CPLR Section 3212 granting summary judgment dismissing plaintiffs complaint is granted.

Plaintiffs operated a record retention, data entry and file management business known as SELECT SYSTEMS, INC. ("SSI"). In September, 1997 the parties entered into a working relationship in which defendant "SOUTH SHORE" agreed to service "SSI's" file storage customers by storing, filing and delivering "SSI's" clients file boxes, x-rays and medical records. Plaintiffs claim that the agreement was a joint venture in which "SSI" would be paid 20% of the income "SOUTH SHORE" earned from "SSI's" customers and would continue making such payments until two years after the death of the surviving "JORDAN" plaintiff. Defendants claim that the parties never entered into a binding agreement and that payments made to the plaintiffs from February 1, 1998 through November 30, 2002 were commission payments only.

Defendants motion seeks an order granting summary judgment dismissing plaintiffs complaint claiming that the evidence shows plaintiffs have no viable cause of action against the defendants. Defendants made a prior motion to dismiss plaintiffs complaint pursuant to CPLR Section 3211(a)(5)&(7) raising similar arguments presented on this motion. Such prior motion was denied by short form order dated July 6, 2005 with leave to renew upon completion of discovery.

In support of the present motion defendants submit an affidavit from defendant "LABY" and assert that no valid causes of action for breach of contract, fraud, unjust enrichment, promissory estoppel or imposition of a constructive trust exist against the defendants and therefore the complaint must be

dismissed. Movants argue that the Statute of Frauds bars plaintiffs breach of contract claim since the claimed oral agreement could not have been performed within one year. Defendants maintain that no evidence exists to support plaintiffs contention that the parties entered into a joint venture and claim that absent proof to substantiate such an agreement plaintiffs first cause of action must be dismissed. Defendants also maintain that the fraud claim is not sustainable since the only fraud alleged relates solely to the breach of contract claim. Finally defendants assert that essential elements for causes of action sounding in unjust enrichment, promissory estoppel and imposition of a constructive trust are not proven since the only evidence presented to support all of these claims is an unsigned document entitled "Commission Agreement" which clearly does not contain the necessary elements to make out a joint venture agreement. It is defendants position that the relevant, admissible proof submitted reveals that plaintiffs were paid commission payments for more than four years in return for services provided by "SOUTH SHORE" for the benefit of plaintiffs customers. Defendants assert that no basis exists to deny defendants summary judgment application since no viable claims are stated and discovery has been completed providing no other evidence to support plaintiffs claims. Defendant "LABY" also claims that no relevant, admissible evidence is submitted to sustain any claim against him personally since plaintiff "JORDAN" acknowledged during her deposition testimony that any agreement which may have been entered into was between the plaintiffs and the corporate defendant "SOUTH SHORE". It is defendant "LABY's" position that no grounds have been shown to justify piercing the corporate veil to permit a finding of personal liability against "LABY".

In opposition plaintiffs submit an affidavit from JANET JORDAN ("JORDAN") and an attorney's affirmation and claim that substantial issues of fact exist concerning the parties joint venture agreement sufficient to defeat defendants summary judgment application. Plaintiffs contend the unsigned document entitled "Commission Agreement" was misnamed since it was intended by the parties to be a joint venture agreement whereby the parties would share in the profits of customers referred to "SOUTH SHORE" by plaintiffs. Plaintiffs claim that they performed duties and obligations required under the agreement and that defendants breached the agreement in May, 2003 by arbitrarily failing to make payments due plaintiffs. It is plaintiffs position that the unsigned "Commission Agreement" together with copies of checks signed by defendant "LABY" for defendant "SOUTH SHORE" form the basis of evidence of the joint venture agreement. Plaintiffs contend the written document and checks provide proof of substantial part performance sufficient to satisfy the Statute of Frauds. Plaintiffs also claim that viable causes of action for fraud, promissory estoppel, unjust enrichment and imposition of a constructive trust are stated and can be proven by the written proof submitted and the deposition testimony of the parties. Plaintiffs contend that defendants motion is also premature since a non-party deposition of defendants former counsel is required to ascertain the circumstances surrounding the attorney's preparation of the unsigned "Commission Agreement"

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES, INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary

judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981).

The elements that must be alleged for a viable breach of contract claim are: 1) formation of a contract between plaintiff and defendant; 2) performance by plaintiff; 3) defendant's failure to perform; and 4) resulting damage (See 2 N.Y. PJI §4:1 438 (2003); FURIA v. FURIA, 116 AD2d 694, 498 NYS2d 12 (2d Dept., 1986); LEDAIN v. ONTARIO, 192 Misc 2d 247, 746 NYSA2d 760 (NY Sup Ct 2002).

In order to sustain a valid cause of action for fraud, plaintiff must allege that: 1) defendant made material, false representations to it, 2) which were known to defendant to be false and 3) upon which plaintiff relied to its detriment. (See LYONS v. QUANDT, 91 AD2d 709, 457 NYS2d 615 (3rd Dept., 1982); VITALE v. COYNE REALTY, INC., 66 AD2d 562, 414 NYS2d 388 (4th Dept., 1979); GERVASIO v. DINAPOLI, 126 AD2d 514, 510 NYS2d 634 (2nd Dept., 1987); see also SHARP v. KOSMALSKI, 40 NY2d 119, 386 NYS2d 72 (1976); GARGANO v. VC&J CONSTRUCTION CORP., 148 AD2d 417, 538 NYS2d 955 (2nd Dept., 1989); LESTER v. ZIMMER, 147 AD2d 340, 542 NYS2d 855 (3rd Dept., 1989)). Plaintiff must show not only that he actually relied on the misrepresentations but also that such reliance was reasonable (CPC INTERNATIONAL v. McKESAN CORP., 704 NY2d 268.285 (1988)). A cause of action for fraud in the inducement must assert that defendants made a promise as a representation of fact which was made with a preconceived and undisclosed intention of non-performance and upon which plaintiff relied to his detriment. (See DIERFIELD v. CHESEBROUGH-PONDS, INC., 68 NY2d 954, 510 NYS2d 88 (1986)).

Unjust enrichment occurs where a party holds or retains property under such circumstances that in equity and good conscience he ought not to retain it and does not require the performance of any wrongful act by the one so enriched (see SIMONDS v. SIMONDS, 45 NY2d 233, 242 (1979); CHEMICAL BANK v. EQUITY HOLDING CORP., 228 AD2d 338, 644 NYS2d 709 (1st Dept., 1996)). Causes of action for quantum meruit and unjust enrichment are quasi-contract doctrines developed to ensure that a party whose work has benefitted another will be paid the worth of his or her services (ZOLOTAR v. NY LIFE INS. CO., 172 AD2d 27 (1st Dept., 1991)). Neither doctrine applies where there is a written document that covers the particular subject matter underlying the parties dispute (CLARK FITZPATRICK, INC. v. LIRR, 70 NY2d 382 (1987); COOPER, BAMUNDO, HECHT & LONGWORTH LLP v. KUCZINSKI, et al, 14 AD3d 644, 789 NYS 2d 508 (2d Dept., 2005)).

In order to state a valid cause of action for promissory estoppel, plaintiff must allege: 1) an oral promise that is sufficiently clear and unambiguous; 2) reasonable reliance on the promise by a party, and 3) injury caused by the reliance (KNIGHT SECURITIES v. FIDUCIARY TRUST, 5 AD3d 172, 774 NYS2d 488 (1st Dept., 2004)).

A constructive trust may be imposed "when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest." (SHARP v. KOSMALSKI, 40 NY2d 119, 120, 386 NYS2d 72, 74 (1976) citing BEATTY v. GUGENHEIM EXPLORATION CO., 225 NY 380, 386, 122 NE 378, 380 (1919), see also SCIVOLETTI v. MARSALA, 97 AD2d 401, 467 NYS2d 228 (2nd Dept., 1983) aff'd 61 NY2d 806, 473 NYS2d 949 (1984)). To establish a constructive trust it must be shown that there exists 1) a confidential or fiduciary relationship, 2) a promise, 3) a transfer in reliance thereon and 4) unjust enrichment (SHARP v. KOSMALSKI supra; GARGANO v. VC&J CONSTRUCTION CORP., 148 AD2d 417, 538 NYS2d 955 (2nd Dept., 1989); LESTER v. ZIMMER, 147 AD2d 340, 542 NYS2d 855 (3rd Dept., 1980). It is the existence of a

confidential relationship which triggers the equitable considerations leading to the imposition of a constructive trust and the parties need not be husband and wife for such a relationship to exist (SHARP v. KOSMALSKI, supra). Moreover the four elements "are not rigid but are flexible consideations for the Court to apply in determining whether to impose a constructive trust" (MENDEL v. HEWITT, 161 AD2d 849, 555 NYS2d 899, 900 (3rd Dept., 1990) citing HORNET v. LEATHER 145 AD2d 814, 535 NYS2d 799 lv. denied 74 NY2d 603, 543 NYS2d 396 (1990); LESTER v. ZIMMER, supra).

General Obligations Law §5-701(a)(1) provides:

> "Agreements required to be in writing.
> a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
> 1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime;"

An exception to the bar created by the Statute of Frauds exists where evidence exists to establish a writing or a series of writings coupled with a pattern or course of conduct evidencing an intention that a binding contractual relationship exists between the parties (See BROWN BROS. ELEC. V. BEAM CONSTRUCTION, 41 NY2d 397, 393 NYS2d 350 (1977); CAPELES v. CROUSE HINDS FOUNDATION, 292 AD2d 829, 738 NYS2d 807 (4th Dept., 2002)).

A joint venture is a special combination of two or more persons where in some specific venture a profit is jointly sought (Gramercy Equities Corp v. Dumont, 72 NY2d 560, 565(1988) quoting Forman v. Lumm, 214 AD 579, 583 (1 st Dept.,1925)). The indicia of the existence of a joint venture are: 1) acts manifesting the intent of the parties to be associated as joint venturers; 2) mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge; 3) a measure of joint proprietorship and control over the enterprise; and 4) a provision for the sharing of profits and losses (Richbell Information Services v. Jupiter Partners, 309 AD2d 288, 298 (1 st Dept., 2003); Tilden of New Jersey v. Regency Leasing Systems, 230 AD2d 784, 646 NYS2d 700 (2 nd Dept., 1996)). The ultimate inquiry is "whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their own joint benefit" Steinbeck v. Gerosa, 4 NY2d 302, 317 appeal dismissed 358 U.S. 39 (1958)).

There is insufficient evidence provided by the plaintiffs to establish the required elements of a joint venture. The unsigned agreement which plaintiffs claim forms the basis of the joint venture agreement is entitled "Commission Agreement" and provides only for commission payments to the "JORDANs'" of their clients by "SOUTH SHORE". The only other documentary proof submitted in the form of cashed checks confirms nothing more than commission payments were made to plaintiffs for a four year period. Moreover plaintiffs have wholly failed to even allege that the parties agreed to share profits and losses which is an essential element of any joint venture arrangement (Accent Associates, Inc. v. Wheatley Construction Corp 268 Ad2d 494, 701 NYS2d 667 (2nd Dept., 2000)). Absent any other relevant proof there is no basis upon which to sustain plaintiffs breach of contract claim that a joint venture agreement was entered into by the

parties since plaintiffs have failed to establish the essential elements needed to prove the existence of an oral joint venture agreement (Schnur v. Marin, 285 AD2d 639, 729 NYS2d 155 (2nd Dept., 2001)).

Plaintiffs remaining claims are also not sustainable and must each be dismissed. The fraud claim relates solely to the breach of contract cause of action and must therefore be dismissed (Caniglia v. Chicago Tribune, 204 AD2d 233, 612 NYS2d 146 (1st Dept., 1994)). The remaining causes of action for unjust enrichment, imposition of a constructive trust and promissory estoppel are not supported by the admissible evidence submitted by the parties. Absent proof that any of these claims can be proven at trial defendants motion for summary judgment dismissing each claim must be granted. Accordingly it is

ORDERED that the complaint is hereby dismissed.

Dated: September 12, 2007

J.S.C.