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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48
Justice

JOHN C. BRADDOCK and BROAD OAK ADVISORS, LLC.

Plaintiffs,

-against-

DAVID B. BRADDOCK et al.,

Defendants.

INDEX NO. 600430/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that: This action involves a dispute between two cousins who participated in the creation of defendant Broad Oak Energy, Inc., a Texas-based oil and gas exploration company. The plaintiff, John C. Braddock, alleges that he and his cousin, defendant David B. Braddock, agreed in the Fall of 2005 to seriously pursue the creation of Broad Oak. At the time, John was working on Wall Street as an investment banking specialist and David was working and residing in Texas. According to John, they agreed that Broad Oak would need between $75 million and $150 million in investment capital to launch the business. The complaint alleges that in order to secure John's participation as an investment banker who could obtain the necessary capital, David, who was to be Broad Oak's Chief Executive Officer, offered him a position as the company's Chief Financial Officer and Land Manager, which would entitle John to receive "founder's shares" of the company stock equal to one-half of what John would be entitled to as CEO. In return, John and his investment company, plaintiff Broad Oak Advisors, LLC ("BOA"), would have to reduce their normal investment banking fee of 6-10% to under 2%. The complaint alleges that John agreed to these terms. In late February, 2006, Broad Oak and BOA entered into an Engagement Agreement which set forth the investment fees to which the plaintiffs would be entitled in securing capital for the company. The Engagement Agreement did not specify any executive position for David but merely referred to the possibility that if he became employed by the company, he would be granted certain equity interests in Broad Oak as negotiated by the parties at such time and that if he did not become so employed, he would be granted a fractional percentage of Broad Oak's equity membership interests in an amount to be determined by the company at its sole discretion. The Agreement included a merger clause stating that it reflected the complete and exclusive understanding of the parties and superseded all prior proposals and agreements, oral and written.

In the meantime, John began working to secure capital for Broad Oak. He alleges that, beginning in December, 2005, he spent more than a thousand hours doing so. In February, 2006, he resigned from the Wall Street firm where he was employed and moved to Texas in anticipation of the creation of Broad Oak. At about this time, two other executives were recruited to work for the company, John M. Coss as President and Robert N. Skinner as Vice-President of Operations.

On March 31, 2006, the firm Warburg, Pincus agreed to invest $150 million in Broad Oak. On April 17, 2006, David advised John that Warburg did not believe that John's substantial financial management and investment banking skills transferred to the high level oil and gas land management skills required for a small start-up company. By e-mail, John responded that he understood these concerns and believed they were rational and had merit. In the e-mail, he agreed that he would step back from the CFO role and proposed that he be employed by the company as a "Landman." In addition, he proposed that his salary be reduced from $150,000 per year to $125,000 and that his number of shares in the company be reduced, with vesting to be phased in pursuant to the terms set forth in another document. He also agreed to be hired as

an employee at will. However, in his opposing papers, John has submitted an affidavit in which he states that it was David who had first proposed that he be employed as a landman. He also states that David had promised him that, after a probationary period, he would become the company's Land Manager which would entitle him to the same allotment of founder's shares which he had originally been promised. He claims that he only sent the e-mail at David's suggestion.

In any event, by letter dated May 16, 2007, John signed an employment letter in which he agreed to serve as a landman for Broad Oak at a monthly salary of $10,416, with 3,750 shares of restricted stock vesting at a rate of 750 shares per year of employment, along with options of up to 10,000 shares of common stock. The agreement expressly stated that John's employment was at will. The agreement did not mention the possibility of John becoming land manager and, instead, specifically stated that it superseded all prior discussions regarding John's employment with Broad Oak.

At or about this same time, the plaintiffs, along with a BOA member named J. Barry Brokaw, entered into a Termination and Fee Payment Agreement ("T&F Agreement") with the defendants which terminated the Employment Agreement and provided new terms for the payment to plaintiffs of investment banking fees. The T&F Agreement provided that the plaintiffs would have no further rights under the Employment Agreement or any right to fee payments from defendants other than the rights set forth therein. The T&F Agreement also provided that 1,875 shares of common stock would be issued to Brokaw and the same number of shares issued to BOA, all of which would immediately vest.

Finally, John alleges, and the defendants do not dispute, that, as part of an agreement with David, he contributed $300,000 of capital out of his fees by purchasing the Company's Series A Preferred Shares and, in addition, paid Brokaw a cash commission of $504,000. It also appears that, the pursuant to the same agreement with David, the 1,875 shares which Brokaw received was paid for out of John's fees.

In June, 2006, John was diagnosed with cancer. On October 1, 2006, he took a medical leave from his position as landman at Broad Oak. By letter dated November 13, 2006, the defendants demanded that he provide medical verification of his condition. On November 30, 2007, John was terminated from his position for having failed to properly fill out a disability form which he had been given.

This action was commenced in February, 2007. The plaintiff essentially alleges that he was defrauded by his cousin David. According to John, he was fraudulently induced to accept reduced fees for his investment banking services and move to Texas on the promise that he would become an officer of the company and receive a significant share of its stock when, in fact, David never had any intention of making him an officer and issuing any significant shares of company stock to him. John also claims that he was fraudulently induced to make a capital contribution of $300,000 to the company and pay Brokaw's commission on David's promise that he would ultimately become Broad Oak's Land Manager which would entitle him to the shares he would have been entitled to as CFO when, in fact, David had no intention of ever making him Land Manager and, indeed, no intention of allowing him to remain for long as a company landman. The complaint asserts eleven causes of action, ranging from common law fraud and promissory estoppel to constructive trust and wrongful termination.

The defendants have now moved to dismiss the complaint, pursuant to CPLR 3211(a)(1), (7) and (8), for failure to state a cause of action, a defense based upon documentary evidence and lack of long-arm jurisdiction over David.

Discussion

A. Common Law Fraud - To prevail on a cause of action for fraud, a plaintiff must establish that there was a misrepresentation of a material fact, falsity, knowledge that the representation was false, reasonable reliance on the false representation by plaintiff and injury. *See Mayes v. UVI Holdings, Inc.*, 280 AD2d 153, 161 (1st Dept 2001); *Buxton Mfg. Co v. Valiant Moving & Storage, Inc.*, 239 AD2d 452 (2nd Dept 1997). On a claim of fraud in the inducement, the plaintiff must allege facts showing, *inter alia*, that the other party had knowingly made a false representation with a present intent to deceive. *See Eastman Kodak Company v. Roopak Enterprises*, 202 AD2d 220, 222 (1st Dept. 1994); *Navaretta v. Group Health, Inc.*, 191 AD2d 953, 954 (3rd Dept. 1993). The claim must consist of more than mere promissory statements

about what is to be done in the future. *See Eastman Kodak Company v. Roopak Enterprises*, 202 AD2d at 222.

As to the plaintiff's claim regarding David's representation that John would serve as the company's CFO and Land Manager, he has failed to allege any facts which support this contention other than the fact that he was not ultimately offered the position. Indeed, there is evidence before the court which suggests otherwise. John himself has attached copies of various Broad Oak documents which were allegedly presented to potential investors, such as its proposed business plan, term sheet and presentation package, which identify John as the company's prospective CFO. Although John suggests that these documents were part of a ruse to string him along and further deceive him into believing that he would be the CFO, no facts are alleged which support this assertion that David went to such lengths in carrying on his deception. In addition, the court notes that John himself, in his April 17, 2006 e-mail to David, expressly conceded that Warburg was concerned about his ability to perform as the company's CFO and agreed that this concern was rational and had merit. Although John now claims that he wrote the e-mail at David's request, he does not suggest that David instructed him to agree in the letter that it was because of Warburg that he was not ultimately offered the CFO position. Indeed, in this action, John himself has asserted that he continued to believe up until some point after he became employed by the company as a landman that David was being truthful with him. It was for this reason that he agreed to pay Brokaw's commission, contribute capital to the company and accept employment as a landman after having been rejected as the CFO. Thus, at the time he sent the e-mail, he clearly believed that the ultimate decision not to offer him the CFO position was rational. In this respect, he has failed to allege any facts which indicate that Warburg was not behind this decision and that David never intended to appoint him to the CFO position. The court is thus persuaded that plaintiffs do not have a cause of action for fraud with respect to David's representation that John would be made Broad Oak's CFO.

As to David's alleged promise that he would appoint John to the position of the company Land Manager after a probationary period as landman, the plaintiffs have alleged facts which support their allegation that, in fact, David never intended to do so. However, as already noted, the express written terms of his employment as a landman provided that John was an employee at will who, as such, could be terminated at any time and for any reason or for no reason. *See O'Connor v Eastman Kodak Co.*, 65 NY2d 724 (1985). Indeed, in his April 17, 2007 e-mail to David, John recognized this fact. It is well settled that, as a matter of law, the element of reasonable reliance necessary to a cause of action for fraudulent misrepresentation of present intent with respect to a promise as to continued or future employment cannot be established where the employment is at will. *See Demov, Morris, Levin & Schein v. Glantz*, 53 NY2d 553, 557-58 (1981); *Smalley v. Dreyfus Corp.*, 40 AD3d 99, 103-104 (1st Dept 2007); *Arias v. Woman in Need, Inc.*, 274 AD2d 353, 354 (1st Dept 2000). Thus, the plaintiffs do not have a cause of action for fraud with respect to David's failure to appoint him to the position of Land Manager.

Nor do the plaintiffs have a cause of action for fraud with respect to the reduced fee which John accepted for his investment banking services and John's payment of Brokaw's commission. Plaintiffs allege that John entered into the T&F Agreement and paid Brokaw's commission only because he had been told by David that he would be made the company's Land Manager after a probationary period as a landman. However, as already discussed, his reliance on this representation was not reasonable as a matter of law and he may not therefore claim that he was fraudulently induced to sign the T&F Agreement and pay Brokaw's commission. The court therefore agrees that the first cause of action should be dismissed.

B. Breach of Fiduciary Duty - The complaint asserts a cause of action for breach of fiduciary duty which is essentially co-extensive with the claim for common law fraud in that it is based on allegedly false promises made by David to induce John to accept reduced fees and to pay Brokaw's commission. In effect, the complaint asserts that David breached his fiduciary duty to John by lying to him about his future employment and stock interests. For the reasons the court has already discussed with respect to the defendants' alleged common law fraud, this claim fails to state a cause of action.

C. Promissory Estoppel - Plaintiff has also failed to state a claim for promissory estoppel. The elements of a promissory estoppel claim are (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance on that promise and (3) injury to plaintiff by reason of this reliance. *See Rodgers v. Town of Islip*, 230 AD2d 727 (2nd Dept 1996). For reliance to be reasonable, the promise allegedly relied upon must be clear and definite. *See Sanyo Electric, Inc. v. Pinros & Gar Corp.*, 174 AD2d 452, 453 (1st Dept 1991). Here, the complaint alleges that David promised John that he would be made Broad Oak's CFO and Land Manager, which would entitle him to receive a substantial number of shares of company stock, and that John relied on this promise to his detriment. This promise, however, was essentially replaced by a second alleged promise to employ John as a landman and then make him Land Manager. Indeed, the employment contract which John signed specifically stated that it superseded all prior discussions regarding his employment with Broad Oak. Thus, the first promise was superseded by the second. Since the terms of the employment contract also specifically stated that John was an at will employee who could be terminated at any time, with or without reason, John could not reasonably rely on any such promise to make him Land Manager in the future. *See Demov, Morris, Levin & Schein v. Glantz*, 53 NY2d at 557-58. In the absence of reasonable reliance as a matter of law, the complaint fails to state a cause of action for promissory estoppel.

D. Unjust Enrichment and Constructive Trust - The complaint alleges that the defendants were unjustly enriched by having obtained John's investment banking services at a significantly reduced price, as well as by the fact that John payed Brokaw's commission, without providing John with a position at the company which would have entitled him to the number of shares of company stock he expected in return. A quasi contract only applies in the absence of an express agreement and is a legal obligation imposed in order to prevent a party's unjust enrichment. *See Clark-Fitzpatrick, Inc v. Long Island RR Co.*, 70 NY2d 382, 388 (1987). However, the existence of a valid and enforceable contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. *Id.* at 388. Here, the fees which John received and his obligation to pay Brokaw's commission were fixed by contract, as were the terms of his employment. In view of these agreements, the plaintiffs do not have a cause of action for unjust enrichment.

Similarly, the complaint seeks the imposition of a constructive trust over assets belonging to the plaintiffs which reflect the monies John paid to Brokaw and the monies which the company saved through the reduction of his fees. As such, the claim appears to be duplicative of the plaintiffs' unjust enrichment claim. Indeed, it has been recognized that "'the ultimate purpose of a constructive trust is to prevent unjust enrichment.'" *Matter of Knappen*, 237 AD2d, 677, 679 (3rd Dept 1997) (citations omitted). *See also Plotch v. Sheibar*, 201 AD2d 431 (1st Dept 1994). Since plaintiffs do not have a cause of action for unjust enrichment, their claim for a constructive trust also fails to state a cause of action. *See DePasquale v. Estate of DePasquale*, 12 Misc3d 11995(A), 2006 WL 2348440 (S Ct Queens Co 2006).

E. Constructive Discharge - Constructive discharge occurs when an employer intentionally creates a work environment that is so difficult or intolerable that a reasonable person would feel forced to resign. *See Fisher v KPMG Peat Marwick*, 195 AD2d 222, 225 (1st Dept. 1994); *Chertkova v. Connecticut General Life Insurance*, 92 F3d 81, 87 (2nd Cir. 1996). Since John did not resign but was, instead, fired, the complaint fails to state a cause of action for constructive discharge. In any event, the court notes that since the defendants had the right to terminate John for any reason, they also had the right to constructively discharge him. This cause of action must therefore be dismissed.

F. Tortious Interference With Prospective Business Advantage - The plaintiffs have apparently conceded that this claim is without merit since they have notably failed to respond or even address the defendants' argument that the complaint fails to state a cause of action for tortious interference with prospective business advantage. This claim is therefore dismissed.

G. Causes of Action Seeking Declaratory Judgment - The remaining four causes of action seek declaratory relief based on the various claims asserted in the complaint which this court has dismissed herein. In view of the dismissal of all of plaintiffs' substantive claims, these causes of action for declaratory relief must also be dismissed.

Accordingly, the defendants' motion to dismiss is granted and the complaint is hereby dismissed in its entirety. Under the circumstances, the court need not address the issue of whether David is subject to the long-arm jurisdiction of this forum.

The Clerk Shall Enter Judgment Herein

Dated: 9/10/07

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION