

Gersh v Fortnow

2008 NY Slip Op 30641(U)

March 6, 2008

Supreme Court, New York County

Docket Number: 0602167/2007

Judge: Carol R. Edmead

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Gersh, Michael

INDEX NO.

602167107

MOTION DATE

11/8/07

MOTION SEQ. NO.

001

MOTION CAL. NO.

Fortnow, Matthew

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 07 2008
NEW YORK
COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby


ORDERED that the motion by defendant Matthew Fortnow to dismiss the complaint in its entirety is granted, except as to plaintiff's claim for unjust enrichment; and it is further

ORDERED that the parties shall appear for a preliminary conference on April 29, 2008, 2:15 p.m.; and it is further

ORDERED that defendant Matthew Fortnow serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 3/6/08


HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
MICHAEL GERSH, DAVID HERSH, KHALED MATAR,
PETER PEZARIS and JAMES PRICE,

Plaintiffs,

-against-

MATTHEW FORTNOW,

Defendants.
-----X

HON. CAROL ROBINSON EDMEAD, J.S.C.

Index No. 602167-2007

DECISION/ORDER

FILED
MAR 07 2008
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Plaintiffs Michael Gersh ("Gersh"), David Hersh ("Hersh"), Khaled Matar ("Matar"), Peter Pezaris ("Pezaris") and James Price ("Price") (collectively, "plaintiffs") commenced this action against defendant Matthew Fortnow ("Fortnow" or "defendant") for breach of fiduciary duty, breach of contract, contribution, and unjust enrichment.

Defendant now moves to dismiss the complaint on the grounds that (1) all of causes of action are conclusively refuted by documentary evidence (CPLR 3211(a)(1)); (2) the breach of fiduciary duty claim is duplicative of the breach of contract claim (CPLR 3211(a)(7)); (3) documentary evidence establishes that defendant was no longer a shareholder, officer, or director of the subject corporation at the time of the alleged activity complained of, and therefore, owed no fiduciary duty to the plaintiffs (CPLR 3211(a)(1) and (7)); (4) no claim lies for contribution in a contract case such as this one (CPLR 3211(a)(7)); (5) the unjust enrichment claim fails since a written contract exists governing the subject matter of this action (CPLR 3211(a)(1) and (7)); and (6) punitive damages may not be awarded in this private, contract dispute (CPR 3211(a)(7)).

Background¹

In June 1998, plaintiffs, defendant and non-party D. Scott Harger, entered into a Stockholders' Agreement to formalize their relationship as shareholders in Daedalus World Wide Corporation ("Daedalus"), which had, in 1996 developed a successful Internet fantasy sports website.² By 1998, Daedalus was developing online fantasy sports league products exclusively for Sportsline.com, Inc. ("Sportsline"), which had an exclusive option to purchase Daedalus.

In the fall of 1999, Sportsline raised the possibility of acquiring Daedalus for \$16 million in restricted and unregistered stock. Consequently, Daedalus engaged Broadview International, LLC ("Broadview") as a financial advisor to assist it in the negotiation and transaction with Sportsline (the "Engagement Agreement").³ Pursuant to the Engagement Agreement, Broadview's fee was "due when the consideration is received" by Daedalus, and "[w]ith respect to any additional or contingent consideration, the fee will be due when the amount of such consideration is determined and paid."

On December 6, 1999, Daedalus merged with Sportsline pursuant to an Agreement and Plan of Merger (the "Merger Agreement"), resulting in the formation of a new entity, Commissioner.com, Inc., ("Commissioner") as a wholly owned subsidiary of Sportsline. At the time of the merger, Gersh, Pezaris Price, and defendant Fortnow each owned 22%, plaintiff Matar owned 8%, and plaintiff Hersh owned 2% of Daedalus. The Merger Agreement was

¹ These facts are taken from the Complaint in this action and the decision in *Broadview International LLC v Commissioner.com Inc.*, Index No. 109947/2001 annexed as Exh. C to Fortnow's moving papers.

² Pursuant to the Stockholder's Agreement, Gersh, Pezaris, Price and Fortnow each owned 22% of the stock in Daedalus, while Matar owned 8%. Plaintiff Hersh later came to own 2% (Harger ceased to own any stock).

³ Complaint, ¶5 in *Broadview International LLC v Commissioner.com, Inc.*, Exh. C to Fortnow's instant motion.

executed by Gersh, Pezaris, Price and Fortnow, who were defined therein as the Principal Shareholders. As to the remaining two plaintiffs, Matar and Hersh, they executed the Merger Agreement solely for purposes of assenting to its terms.⁴ At the closing of the merger, Gersh, Pezaris, Price and Fortnow surrendered their shares. Also, each of the shareholders, including Fortnow, resigned as officers of Daedalus, and thereafter worked at Sportsline.⁵ As a result of the merger, the shareholders received millions of dollars in compensation, and Broadview obtained substantial broker fees.

The Merger Agreement set forth that the Principal Shareholders would be entitled to additional compensation (the "Earn Out") if the newly formed company, Commissioner, reached certain performance milestones during the period of January 1, 2000 through December 31, 2000, the first year of operation after the merger (Article III, Section 3.3(a)). Under Section 3.3(c) of the Merger Agreement, the additional compensation was payable on March 1, 2001, and then on December 31, 2001.

With respect to indemnification, the Merger Agreement also provided:

12.1 Survival. All representations, warranties and covenants of DWWC [Daedelus] and the Principal Shareholders and the SportsLine Companies contained in this Agreement will survive the Effective Time⁶ and remain operative and in full force and effect . . . for one year after the Closing Date (the "Release Date")

⁴ Page 55 of the Merger Agreement provides that "The following signatories personally as set forth below are only to evidence agreement to the terms and conditions set forth in Article XII.

⁵ Gersh Affidavit, Exh. B to Aff. in Opp.

⁶ E.g. the date the Merger Agreement is filed with the Secretary of State (Section 1.2 of the Merger Agreement).

12.2 Indemnification.

(a) Agreement to Indemnify. Subject to the terms and conditions of Article XII, the Principal Shareholders agree, and each other Shareholder will (to the extent of the Escrow Fund deposited in escrow⁷. . .) jointly and severally indemnify and hold harmless SportsLine and the Surviving Corporation [Commissioner] . . . from and against (ii) any and all claims . . . costs and expenses, including, without limitation, reasonable attorneys' fees, other professional and experts' fees . . . that are directly or indirectly incurred, result from or arise out of any . . . breach of, or default in, any of the representations, warranties or covenants given or made by [Daedalus] or the Principal Shareholders in this Agreement or in the Disclosure Letter or in any certificate delivered by or on behalf of [Daedalus] or the Principal Shareholders pursuant hereto." (Article XII, Section 12.2).

(b) Time to Bring Escrow Claims. Any claim for indemnification made by Sportsline or any other Indemnified Person under this Section 12.2. must be raised in writing delivered to the Escrow Agent prior to the Release Date, and, if raised by such date, such claim shall survive the Release Date until final resolution thereof; . . .

* * * * *

12.9 Third Party Claims.

(f) The rights and remedies of SportsLine and the Shareholders under this Section 12.2 are exclusive and in lieu of any and all other rights and remedies which Sportsline or the Shareholders . . . may have against the other under this Agreement or otherwise All claims for indemnification must be asserted, if at all, . . . in accordance with the provisions of this Section 12.2.

With respect to the representations and warranties made by the Principal Shareholders,

Section 5.14, entitled "Contracts and Transactions," provides:

. . . there is not under any of the Contracts set forth in Paragraph 5.14 of the Disclosure Letter any existing material breach, default or event of default by [Daedalus] or event that with notice of lapse of time or both would constitute a breach, default or event of default by [Daedalus]

Broadview's Engagement Letter is listed as one of the Contracts in Paragraph 5.14 of the

⁷ Section 3.4 of the Merger Agreement provides for deposit of 10% of the Sportsline shares and cash payable to the shareholders of Daedalus, together with an additional 18,000 shares and an additional amount of cash equal to \$270,000, in respect of indemnity obligations. Fortnow's respective portion of the escrow fund amounted to 13,500 shares and \$90,000 (Defendant's Memo of Law, page 13). Fortnow's portion of the escrow funds (except with respect to a certain "Harger claim"), was released to him shortly after the Release Date (Defendant's Memo of Law, page 15).

Disclosure Letter.

By the end of December 2000, Commissioner had reached its performance milestones. Fortnow left Sportsline at the end of December 2000.

Because Commissioner reached the performance milestones, the shareholders, including Fortnow, received substantial additional consideration from Commissioner after December 2000. The payment of such additional consideration triggered Broadview's entitlement to additional fees under the Engagement Agreement.

When Broadview's invoices for such additional fees went unpaid, Broadview brought suit against Commissioner to recover such fees. Commissioner asserted counterclaims against the four Principal Shareholders. To litigate the action, Commissioner retained the law firm of Kantor, Davidoff, Wolfe, Mandelker & Kass (Kantor PC). Kantor PC sent a Letter Agreement, addressed to Sportsline, Gersh, Pezaris, Price, Matar and Fortnow, agreeing to represent the interests of the individuals in light of the shareholders' indemnification obligations under the Merger Agreement. Gersh, Pezaris, Price and Matar executed the Letter Agreement, wherein they "acknowledge[d] and agree[d]" that each of them were jointly and severally obligated under the Merger Agreement to indemnify and hold Sportsline and Commissioner, harmless from and against any and all damages incurred by them in respect of the litigation. Although Fortnow did not sign the Agreement, Fortnow, along with the other shareholders, contributed to such legal fees, which were billed to "Commissioner.com c/o Matthew Fortnow, Esq."

According to Gersh, it was later discovered that Hughes, Hubbard & Reed, LLP, the law firm that had previously represented the Shareholders in connection with the Merger Agreement, including the engagement of Broadview, represented Broadview in various other matters. As a

result, the Shareholders commenced litigation against Hughes, Hubbard based upon a conflict of interest. When Hughes, Hubbard settled the action, the Shareholders agreed to maintain their proportionate share of the settlement proceeds for any payment of their indemnification obligations in the Broadview action.

In 2006, Broadview obtained judgments against Commissioner in the approximate amount of \$700,000.

On behalf of Commissioner, Sportsline then negotiated a settlement with Broadview for approximately \$500,000. Thereafter, Sportsline and Commissioner sought to negotiate a payment of \$399,000 from the Shareholders, citing to the Merger Agreement and Kantor PC's Letter Agreement.

Plaintiffs unanimously voted to indemnify Sportsline and pay Sportsline the reduced amount of \$399,000. When asked to participate in this payment, Fortnow responded to the plaintiffs by email, stating that he had "no interest in settling with Broadview or Sportsline, and [] [did] not intend to pay either of them anything." Fortnow also stated that "In any conversations (either oral or written) any of you may have with either Broadview or Sportsline . . . you do NOT have any authority to speak on my behalf."

Six months later, counsel for Sportsline and Commissioner circulated a settlement agreement among Sportsline, Commissioner, the plaintiffs and Fortnow, reciting the Merger Agreement and Kantor PC's Letter Agreement as the basis for indemnification *via* payment by those individuals to Sportsline of \$399,000. Fortnow did not sign this settlement agreement.

Thereafter, Gersh, Pezaris, Price, Matar, Sportsline and Commissioner, executed a settlement agreement, dated January 29, 2007, wherein plaintiffs agreed to settle the

indemnification claims for \$399,000.00. Fortnow was not a party to this settlement agreement and no reference was made to Kantor PC's Letter Agreement. All of the shareholders, including Fortnow, were released from liability to Sportsline relating to the Broadview Action. Although plaintiffs paid Sportsline the full amount, Fortnow did not participate or contribute his share of \$89,775.00 toward the settlement. This action for breach of contract, unjust enrichment, breach of fiduciary duty, contribution, and punitive damages ensued.

Motion

In support of dismissal, defendant argues that documentary evidence, such as the Merger Agreement, conclusively dispose of all of the causes of action in the Complaint. The breach of fiduciary duty, breach of Merger Agreement, contribution, and unjust enrichment claims are predicated upon a non-existent duty to indemnify Commissioner against non-fraud claims arising more than one year after the Closing Date, contrary to the express language of the Merger Agreement. According to the Merger Agreement, all of the representations, warranties, and covenants, along with the corresponding indemnification obligations, were extinguished as of the one-year anniversary of the Closing Date, except where fraudulent. Any breach of the Broadview's Engagement Agreement could not have existed or could not have been based on existing events as of the Closing Date of the merger; such fees were not due unless and until the amount of the "Earn Out" was determined and paid. Such determination and payment did not occur until more than one year after the Closing Date. Thus, the Broadview action did not trigger Fortnow's indemnification obligation.

Fortnow also argues that the breach of fiduciary duty claim fails as it is duplicative of the breach of contract claim. Regardless, since Fortnow ceased to be a shareholder, officer, or

director of Daedalus as of the Closing Date, which was long before Broadview's claims arose, he owed no fiduciary duty to plaintiffs as a matter of law.

The contribution and unjust enrichment claims also fail because such claims cannot be maintained in a lawsuit turning on a contract, *i.e.*, the Merger Agreement.

Nor does a punitive damage claim lie in this private, contract dispute. Since Fortnow's conduct is not actionable as a breach of fiduciary duty, such conduct cannot be alleged to be egregious or part of a pattern directed at the public generally so as to meet the pleading requirements of a punitive damage claim arising from a breach of contract.

In opposition, plaintiffs argue that this matter raises many questions of fact including: the proper interpretation of the indemnification clause of the Merger Agreement; whether the Shareholders orally agreed to indemnify Sportsline relating to the Broadview Action; whether Fortnow's retention of Kantor Davidoff, day-to-day involvement in the defense of the Broadview Action, payment of attorneys' fees in such case, commencement of the Hughes Hubbard litigation, and agreement to use the proceeds of such litigation toward any liability to Sportsline or settlement in the Broadview Action, indicated an acknowledgment to indemnify Sportsline; whether Broadview made claims concerning its additional compensation; and whether Sportsline expressed its intent to seek indemnification from the Shareholders concerning such claims, during the Earn Out Period.

Plaintiffs also argue Fortnow's alleged documentary evidence does not conclusively establish that their breach of contract claim is barred by documentary evidence. There is an issue as to whether Sportsline would have a good claim for indemnification against the Shareholders and thus, whether plaintiffs should have settled with Sportsline. Notably, Fortnow did not raise

the argument that Sportsline was not entitled to indemnification for claims of Broadview made after the expiration of the first year of the company's operation until Sportsline sought indemnification for the settlement amount it paid to Broadview. There is also a question as to why Fortnow paid legal fees if the Shareholders were not required to indemnify Sportsline in connection with Broadview's claims for additional compensation. In any event, the Shareholders agreement to indemnify Sportsline extended to Broadview's claims for additional compensation and was not barred by the Merger Agreement.

Plaintiffs contend that the Merger Agreement specifically provides for indemnification to Sportsline for claims of third-parties relating to the merger, including claims for professional fees. And, since Broadview's claims arose from Sportsline surpassing the revenue thresholds, such claims arose during the January 2000 to December 2000 time period which Fortnow points to as the "allowable indemnification period." Broadview's claim for additional compensation was linked to whether the company met its thresholds through December 2000. Thus, as Broadview's claims arose during the first year of operation, they were not barred by the one-year expiration highlighted by Fortnow. Further, Sportsline did not draft the indemnification clause to exclude all possible claims arising out of the Earn Out Period. The parties intended to provide Sportsline with indemnification for any claims arising out the merger.

Adopting Fortnow's interpretation would render the indemnification clause without any force or effect. Thus, it is necessary to consider parol evidence to ascertain the parties' intent with regard to the Shareholders' obligation to indemnify Sportsline. There is no better indicator of the parties' intent than the parties' actions after the Merger Agreement was executed, including the retention of Kantor Davidoff and the payment of Sportsline's attorneys' fees in connection

with the Broadview Action.

Further, the Shareholders orally agreed to indemnify Sportsline, and such oral agreement does not need to be writing to be enforceable. In connection with this oral agreement, the Shareholders retained Kantor Davidoff and paid Sportsline's legal fees for approximately 3 years after the purported expiration of the indemnification clause. Additionally, based on their agreement to indemnify Sportsline, the Shareholders brought suit against Hughes Hubbard, and agreed to maintain the proceeds they received for any liability to Sportsline or settlement of the Broadview Action. Fortnow's actions are proof of his oral agreement to indemnify Sportsline.

Plaintiffs also maintain that they are entitled to plead in the alternative a claim for unjust enrichment, as there is a question concerning whether a contract covers the dispute at issue. In the event the Merger Agreement bars their breach of contract claim, plaintiffs should be entitled to recover under unjust enrichment. Here, equity and good conscience demand that Fortnow repay his fellow shareholders for the benefit he received from the settlement by not having to defend a potential lengthy and costly litigation.

Similarly, plaintiffs are permitted to plead an alternate claim for breach of fiduciary duty. The same conduct may constitute both a breach of contract and a breach of fiduciary duty. Here, Fortnow, as a shareholder of Daedalus, had a duty to act in the best interests of Daedalus and his fellow shareholders. Due to the distinct characteristics of a close corporation such as Daedalus, a strict standard of fiduciary duty applies to shareholders. After the merger, Fortnow continued to owe a fiduciary duty to his fellow shareholders. Sportsline's demand for indemnification triggered a duty on the part of Fortnow to act in the best interests of his fellow shareholders. By failing to honor his agreements to indemnify Sportsline and use the proceeds of the Hughes

Hubbard Litigation as agreed, Fortnow breached his fiduciary duties to plaintiffs.

Plaintiffs are also entitled to contribution from Fortnow, due to his failure to discharge the equitable duty to contribute toward Daedalus' losses according to his proportionate share in the profits.

Finally, Fortnow's avoidance of his obligations which led to plaintiffs' paying his share of the indemnification to Sportsline is egregious and displays dishonest intent not to honor a contract. Fortnow's actions in retaining Kantor Davidoff, paying Sportsline's legal fees, agreeing to maintain his portion of the proceeds of the Hughes Hubbard Litigation, and then refusing to participate in the settlement with Sportsline is disingenuous and dishonest. At a minimum, plaintiffs should be permitted to conduct discovery to determine whether such actions demonstrate such a disingenuous or dishonest intent.

In reply, Fortnow maintains that the Merger Agreement narrowly circumscribes the Shareholders' obligation to indemnify Sportsline and Commissioner; the Merger Agreement required indemnification against certain post-closing claims asserted within a year of the closing (other than for fraud), which were in turn predicated upon pre-closing events giving rise to breaches of representations, warranties or covenants contained in such Agreement. The Broadview action was not based on fraud, and is the subject of this Complaint in this action. Sportsline and Commissioner settled with Broadview and sought indemnification from the former Shareholders who, except for Fortnow, had previously entered into the Letter Agreement indemnifying Sportsline and Commissioner against the claims asserted in the Broadview Action, even though those claims had not, and could not have, been made, much less arisen, until more than a year after the closing.

The clear language of the indemnification clause in the Merger Agreement conditions the indemnification obligations upon "other terms and conditions of Article XII." Under Section 12.1, Daedalus's and the Principal Shareholders' representations, warranties and covenants remain operative for one year only, other than when fraud is claimed. In addition, Section 12.2 (b) incorporates such one-year operative period in establishing a finite time to bring indemnification claims other than where grounded in fraud. Further, the term "other professionals' and experts' fee" represents a subset of "costs and expenses," rather than an independent claim or cause of action for such fees. Moreover, the balance of Section 12.1(a)(ii) provides that for indemnification purposes, such claims must arise out of a breach of the representations, warranties, or covenants made in the Merger Agreement, the Disclosure Letter or any certificate delivered pursuant to that Agreement.

Nor does Fortnow claim that the indemnification clause expired one year after the execution of the Merger Agreement in all instances, as plaintiffs suggest.

And, plaintiffs cannot avoid dismissal by asserting an oral agreement modifying the indemnification provisions, which expressly requires a signed writing for that purpose. Moreover, plaintiffs do not and cannot allege legal consideration for the alleged oral agreement. Lastly, only Sportsline could enforce the alleged oral agreement, but its Settlement Agreement with the other former Shareholders recites the Merger Agreement alone as the basis for indemnification.

Further, plaintiffs failed to raise a material issue of fact; the documents establish that Broadview did not make any claims for additional compensation until after the Earn Out Period; the full amount of Fortnow's portion of funds escrowed to cover indemnification claims was

released to him, signifying that no other unresolved indemnification claims had been previously made. The documents establish that only the other former Shareholders signed the Letter Agreement; documents establish that Commissioner interposed substantial counterclaims in the Broadview Action concerning the nature and quality of Broadview's services that were intertwined with the merits of its defenses and sought the return of the initial brokerage fee paid. It is hardly surprising that Fortnow and plaintiffs paid legal fees towards the defense of the Broadview Action, since they would all benefit from Commissioner prevailing on its counterclaims.

Further, plaintiffs supplied no valid reason why their breach of fiduciary, contribution, and unjust enrichment claims should survive dismissal on the other grounds asserted by Fortnow. Pleading alternative or inconsistent causes of action is not the same as impermissible, duplicative causes of action, as here. In addition, the continued duty to fellow shareholders applies to officers and directors, whose duties cease nonetheless once there is a severance of their official relationship with the corporation. Caselaw holding that partners owing a duty to one another after dissolution have nothing to do with the merger at bar. And, the Section of the Partnership Law that requires that a shareholder of a corporation contribute toward its losses according to his share in the profits does not deal with close corporations, such as Daedalus.

Further, the caselaw cited by plaintiffs regarding their unjust enrichment claims treats quantum meruit claims rather than unjust enrichment claims. Since Fortnow did not sign the Letter Agreement, he was not required to indemnify Sportsline or Commissioner, and therefore, received no benefit from the Settlement Agreement as plaintiffs suggest.

Analysis

Documentary Evidence

Pursuant to CPLR 3211 [a] [1], a party may move for judgment dismissing one or more causes of action asserted against him on the ground that “a defense is founded upon documentary evidence.” Thus, where the “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law,” dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; *Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] citing *Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]; *Igarashi v Higashi*, 289 AD2d 128, 735 NYS2d 33 [1st Dept 2001] [dismissal of claims, which essentially claimed that plaintiff was the sole owner of the property, was appropriate where documentary evidence, *to wit*, deeds signed by plaintiff at the closings of the four properties in question indicating that both plaintiff and defendant are owners of the properties; claims in a complaint which are “flatly contradicted by documentary evidence” must be rejected], citing *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]; *IMO Indus. Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999] [legal malpractice defendant's submission of excerpts of client's Answer and selected pre-litigation correspondence did not conclusively establish firm's defense as a matter of law]). Affidavits and deposition transcripts do not qualify as “documentary evidence” for purposes of this rule (*see Realty Investors v Bhaidaswala*, 254 AD2d 603, 679 NYS2d 179 [3d Dept 1988]; *Kearins v Gruberg, McKay & Stone*, 2 Misc 3d 1001, 2004 WL 316521 [Supreme Court Bronx County 2004]).

The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*see Slatt v Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see e.g. R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]).

A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Ultimately, the aim is a practical interpretation of the language employed so that there be a realization of the parties' "reasonable expectations" (*see Sutton v East River Sav. Bank*, 55 NY2d 550, 555, 450 NYS2d 460 [1982]).

The issue is the scope of Fortnow's indemnification obligations under the Merger Agreement toward Commissioner for claims arising from or resulting from any breach by Fortnow of the Broadview Engagement Agreement. The Court begins with an analysis of Fortnow's obligations under the Merger Agreement and Engagement Agreement.

Based on a plain reading of the Merger Agreement, plaintiffs and Fortnow represented

and warranted that there was no breach of the Engagement Agreement. However, under the express terms of Article 12 of the Merger Agreement, such warranty and representation expired in December 31, 2000. Thus, Fortnow's representation and warranty of his compliance with the Engagement Agreement, and by extension, his obligation to indemnify claims related to his compliance, were effective until December 31, 2000.

Turning to Broadview's nonpayment claim under the Engagement Agreement, Broadview was entitled to receive as its fee, "2.00% of the first thirty five million of consideration and 5.00% percent of consideration beyond the first thirty five million dollars *received by* Commissioner and/or its stockholders intially and subsequently" With respect to any additional or contingent consideration, the fee will be due when the amount of such consideration is "determined and paid." Thus, contrary to plaintiffs' contention, Broadview's fee, in addition to its initial fee, was based on any Earn Out *received by* plaintiffs and Fortnow. In other words, plaintiffs' and Fortnow's contractual obligation to Broadview's for additional fees were triggered upon their *receipt* of any payment under the Earn Out, *to wit*: March 1, 2001. Thus, any breach by Fortnow of the Engagement Agreement, did not, and could not ripen until after he received payment of the Earn Out in March 2001. Indeed, Broadview's fee dispute did not arise until after Broadview's invoices, sent after the first payment of the Earn Out in March 2001, remained unpaid (Decision in *Broadview International LLC v Commissioner.com Inc.*, page 7).

Since there was no breach by Fortnow of the Engagement Agreement during the period for which Fortnow was obligated to indemnify Commissioner, it cannot be said that Fortnow had a duty under the Merger Agreement to indemnify Commissioner for Broadview's nonpayment claim and resulting judgment against Commissioner. The Court notes that Fortnow did not sign

Kantor PC's Letter Agreement, in which plaintiffs consented to indemnify Commissioner in light of Kantor PC's representation of their interests. Further, plaintiffs' allegation that Fortnow orally agreed to indemnify obligations under the Merger Agreement is insufficient to create an indemnification obligation where the Merger Agreement contains a provision precluding the modification of its terms except by a writing signed by all parties (Section 15.4; *Opton Handler Gottlieb Feiler Landau & Hirsch v Patel*, 203 AD2d 72, 610 NYS2d 26 [1st Dept 1994] [alleged "oral modification is barred by both the parties' contract merger clause and General Obligations Law § 15-301, which specifically provides that changes to a written agreement which contains a provision to the effect that it cannot be changed orally, as here, may only be effected by an executory agreement in writing which is signed by the party against whom enforcement of the change is sought]). And, the alleged oral agreement by Fortnow to engage Kantor PC and purported oral agreement to sue Hughes Hubbard and retain any resulting damage award to satisfy an indemnity obligation is insufficient to overcome the terms of the Merger Agreement. Accordingly, the plaintiffs' breach of Merger Agreement against Fortnow lacks merit.

Breach of Fiduciary Duty

Conduct amounting to breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract which is nonetheless independent of such contract (*see Sally Lou Fashions Corp. v Camhe-Marcille*, 300 AD2d 224, 225, 755 NYS2d 67 [2002]). A breach of fiduciary duty claim, generally accrues upon the alleged breach (*Certain Underwriters at Lloyd's, London v William M. Mercer, Inc.*, 7 Misc 3d 1008, 801 NYS2d 231 Supreme Court New York 2005]). Fortnow was not a shareholder, officer, or director of Commissioner at the time Broadview's right to payment of its fees from plaintiffs and Fortnow

ripened in March 2001. Therefore, he owed no fiduciary duty to the plaintiffs. Accordingly, the breach of fiduciary duty claim lacks merit.

Contribution

Plaintiffs' claim for contribution rests on their position that Fortnow's status as a shareholder of Daedalus required him to contribute to all of the shareholders' expenses and losses in connection with the Merger (Aff. in Opposition, ¶42). Given that Fortnow's status as a shareholder of Daedalus terminated prior to the date Broadview's claim for nonpayment accrued, plaintiffs' contention lacks merit. Moreover, while contribution rules permit an adjudicated tort-feasor to seek contribution from another tort-feasor, whether or not the second tort-feasor had been made a party to the action, based on the tort-feasors' relative degree of fault, (*Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21 [1987]), the record does not indicate that the judgment against Commissioner for nonpayment of Broadview's fee was due to the fault of Fortnow.

Unjust Enrichment

A cause of action for unjust enrichment is stated where plaintiffs have properly asserted that a benefit was bestowed by them and that defendant will obtain such benefit without adequately compensating plaintiffs, and that "[m]oreover, [w]here defendants have reaped such benefit, equity and good conscience require that they make restitution" (*Korff v Corbett*, 18 AD3d 248, 251, 794 NYS2d 374 [1st Dept 2005], quoting *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 119, 672 NYS2d 8 [1st Dept 1998]). However, with respect to the benefit bestowed on defendants, the receipt of a benefit alone, pursuant to the standard set forth above, is

insufficient to establish a cause of action for unjust enrichment” (*Wiener v Lazard Freres & Co.*, *supra*). Plaintiffs’ claim that Fortnow received a benefit in the form of a release from Sportsline relating to the Broadview Action is unsupported by the record. Although Fortnow did not execute Kantor PC’s Letter Agreement containing the consent to indemnify Sportsline, it cannot be said that he received no benefit from the Settlement Agreement. The Settlement Agreement indicates that “Sportsline has asserted a claim for indemnification against the Indemnitors” who are expressly defined therein as Gersh, Pezaris, Price, and Matar. As Fortnow is not identified as an Indemnitor, it cannot be said that Sportsline’s claim for indemnification was ever made against Fortnow. However, Sportsline’s release in the Settlement Agreement of all claims, “whether in law or in equity, whether matured or unmatured and whether known or unknown or otherwise, which SportsLine ever had, now have, or hereafter can, shall or may have against “ the Shareholders of Daedelus as of prior to the Merger, creates an issue of fact exists as to whether Fortnow received a benefit from the Settlement Agreement. Thus, dismissal of the unjust enrichment claim cannot be granted at this juncture.

Punitive Damages

It is well settled that damages arising from a breach of contract will “ordinarily be limited to the contract damages necessary to redress the private wrong, but that punitive damages may be recoverable if necessary to vindicate a public right” (*Rocanova v Equitable Life Assurance Society of the United States*, 83 NY2d 603, 612 NYS2d 339 [1994]). In *Rocanova*, and again a year later in *New York University v Continental Insurance Company* (87 NY2d 308, 639 NYS2d 283 [1995]), the Court of Appeals set forth the four elements to state a claim for punitive damages as an additional remedy when the claim arises from a breach of contract: “(1)

Defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be of the egregious nature set forth in *Walker v Sheldon*, 10 NY2d 401, 404-405, 223 NYS2d 488, *supra*; (3) the egregious conduct must be directed to plaintiff; and (4) it must be part of a pattern directed at the public generally (*New York University, supra*). According to *Walker v Sheldon*, punitive damages may be allowed where the wrong complained of is "morally culpable, or is actuated by evil and reprehensible motives." In the case of fraud, there may be a recovery of punitive damages where the fraud, aimed at the public generally, is gross and involves high moral culpability.

Here, there is nothing in the record to indicate that any of Fortnow's alleged acts were egregious in nature. Furthermore, none of Fortnow's alleged acts were directed at the public generally. The disagreement herein pertained solely to the Merger Agreement, and was solely between Fortnow and the plaintiffs. Nor did the Merger Agreement or the parties' dispute involve any fraud or other tort against the general public (*cf. Walter v Sheldon, supra*).

Thus, the claim for punitive damages is dismissed.

Based on the foregoing, it is hereby

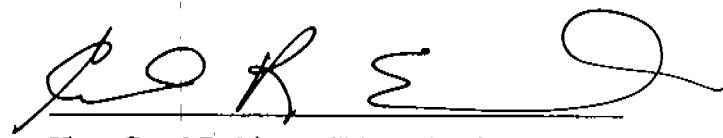
ORDERED that the motion by defendant Matthew Fortnow to dismiss the complaint in its entirety is granted, except as to plaintiff's claim for unjust enrichment; and it is further

ORDERED that the parties shall appear for a preliminary conference on April 29, 2008, 2:15 p.m.; and it is further

ORDERED that defendant Matthew Fortnow serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 6, 2008



Hon. Carol Robinson Edmead, J.S.C.

FILED
MAR 07 2008
NEW YORK
COUNTY CLERK'S OFFICE