

Blass v Kincaid Consulting, CPA, LLC

2008 NY Slip Op 30980(U)

April 1, 2008

Supreme Court, New York County

Docket Number: 0602259/2007

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Index Number : 602259/2007

BLASS, ALAN

INDEX NO. _____

vs

CONSULTING C.P.A. LLC.

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

DISMISS COMPLAINT

MOTION CAL. NO. _____

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

FILED
APR 07 2008
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: April 1, 2008

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X

Alan Blass,
Plaintiff,

-against-

Kincaid Consulting, CPA, LLC,
d/b/a Kincaid Consulting, LLC,
Karen Kincaid Balmer and Gary
Hewitt,

Defendants.

-----X

DECISION/ORDER

Index No.: 602259/2007
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Defs' n/m § 3211 w/MMR affirm (sep back), exhs	1,2
Pltf's opp w/SKS affirm, exhs	3
KKB affid, exhs	4

-----X

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for breach of contract and other claims arising from allegations by plaintiff Alan Blass ("Blass") that defendants defrauded him by making promises about his salary, and other compensation, all in an effort to have him join their accounting firm so they could obtain confidential information about his clients, or book of business. Now before the court is the defendants' pre-answer motion to dismiss the complaint insofar as Blass has asserted claims against the individually named defendants ("Balmer" and "Hewitt" or the "individuals"). Defendants also seek the dismissal of the detrimental reliance, equitable estoppel and unjust enrichment fraud (2nd cause of action) and fraud (3rd cause of action) against all the named defendants.

Defendants have not moved with respect to the 1st cause of action insofar as it sets forth claims against Kincaid Consulting, LLC. Blass opposes the motion in its entirety.

In deciding whether plaintiff has stated a cause of action, thereby defeating defendant's motion, the court will consider whether the plaintiff has a cause of action rather than whether he has properly stated one. CPLR § 3211 (a) (7); Rovello v. Orofino Realty Co., 40 NY2d 633, 634 (1976). Although defendants have not expressly cited CPLR 3211 (a) (1) as the basis for their motion, they are relying on the agreement among the parties as being dispositive plaintiff's claims as well. Thus, where a motion is premised upon the existence of documentary evidence, such evidence must definitively dispose of plaintiff's claims. Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1st dept. 1995). For the reasons that follow, some of the causes of action in the complaint withstand defendants' pre-answer motion to dismiss.

Plaintiff's Factual Claims

Blass was recruited by the defendants to join them at the defendants firm. The parties entered into an agreement as of May 1, 2007. The preamble of the agreement identifies Kincaid Consulting, LLC as "a limited liability corporation [sic] having its principal office at . . ." Karen Kincaid Balmer is identified as "an individual," who is "signing as Principal Partner of Kincaid Consulting, LLC." Gary Hewitt contains a similar recitation with him "signing as Partner of Kincaid Consulting, LLC." Blass is simply identified as a New York resident, and his address is provided. The agreement contains a "whereas" clause which states the following:

"WHEREAS, Kincaid Consulting, Balmer, Hewitt and Blass agree to enter into a mutual agreement whereby Blass will become an employee of Kincaid Consulting for a period of one year, at which time Blass will become a

Partner of Kincaid Consulting pursuant to the fulfillment of the provisions provided herein.”

Below this clause are various other clauses, including recitals and definitions.

Among those particularly germane to the motion to dismiss are the following:

“1. **CAPITALIZED TERMS**. As used in this Agreement, the capitalized terms listed in Section 18 shall have the meanings indicated therein. Other capitalized terms used in this Agreement shall have the meanings indicated in the Sections in which they are defined or as otherwise required by the context in which they are used. Any capitalized terms used but not defined in this Agreement shall have the respective meanings given to them in the Partnership Agreement.”

* * *

“2. **RECITALS**. [* * *] The parties hereto believe it would be in their best interests to combine the practices of Kincaid Consulting and Blass, and have Blass join Kincaid Consulting for the period of one year as a director, thereafter as a partner . . .”

* * *

“4.1 **ALLOCATIONS OF PROFITS AND LOSSES**. Partnership net income and losses are allocated on a prorate ownership basis . . .”

Under the section entitled “acquisition of ownership interest,” the agreement provides that Blass will accrue an ownership interest for “Partnering” Kincaid consulting work generated as “New Work.” Upon satisfaction of certain conditions in the agreement, the parties agreed “the Partnership Agreement [would be] amended to make Blass to the Partnership Agreement.” “Partnership Agreement” is defined as “18.3 . . . the Agreement among Balmer and Hewitt.”

The agreement is signed as follows:

"Kincaid Consulting, LLC

By: _____ /s/ _____
Karen Kincaid Balmer, Principal Partner
Kincaid Consulting, LLC

By: _____ /s/ _____
Gary R. Hewitt, Partner
Kincaid Consulting, LLC

By: _____ /s/ _____
Alan Blass, Director
Kincaid Consulting, LLC

Blass contends that Balmer and Hewitt are individually liable under the agreement because there is no such thing as a "limited liability corporation" nor does a "limited liability company" by the name of "Kincaid Consulting, LLC" exist. Blass alleges that he was induced into leaving a high paying job with promises of becoming a partner at "Kincaid Consulting, LLC." He contends that this is an assumed name used by the individual defendants, and entirely separate from another entity "Kincaid Consulting, C.P.A., LLC" which was already in existence when the parties agreed to develop their new business. It is Blass's contention that the document the parties signed was more than an employment agreement, but also the blueprint for a partnership among them. Blass contends that repeated references to the term "partner" and "partnership agreement" throughout the document is deliberate, and not attributable, as defendants urge, to any confusion on their part. Thus, it is his contention that Blamer and Hewitt are liable jointly and severally, as partners, [Partnership § 26] or an unincorporated association [General Association Law § 13].

Blass contends he was defrauded with promises of a lucrative salary, a partnership interest, and other things, but the defendants intentionally lied to him so

they could gain his trust and thereby obtain his client list and other confidential information. By doing so, Blass contends they wanted to eliminate him as a competitor. Blass contends further that he helped advanced the defendants standing in the forensic accounting community by being associated with them and supporting their entry into an elite professional organization. Many of these allegations also form the basis for his detrimental reliance, equitable estoppel and unjust enrichment claims. Blass contends that defendants did not act in good faith, but intended to deceive him for their personal gain. He contends further that from the outset, defendants had no intention of fulfilling their contractual obligations to him.

Defendants deny they acted in bad faith, or that they owe plaintiff a special duty. They contend that at best, plaintiff has a simple breach of contract action against, and he cannot ratchet it up to the level of a tort.

Defendants argue that there is no factual basis for plaintiff's claims against the individual defendants because Kincaid Consulting, LLC is a limited liability company, and therefore, the individual members are shielded from personal liability. Defendants contend that the equitable estoppel, detrimental reliance and unjust enrichment claims are duplicative of the breach of contract action, and therefore, must be dismissed.

Discussion

Affording the complaint every favorable inference, as the court must, Blass has stated claims against the individual defendants. Therefore, that branch of defendant's motion, seeking dismissal of the claims against Balmer and Hewitt is denied. Additionally, plaintiff has set forth a cause of action for unjust enrichment and equitable estoppel as well. However, plaintiff has failed to set forth a cause of action for fraud or

detrimental reliance against any of the defendants. These claims are, therefore, severed and dismissed. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st dept. 1997).

Fraud and Breach of Fiduciary Duty

A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract. First Bank of Americas v. Motor Car Funding, Inc., 257 A.D.2d 287, 291 (1st Dept. 1999). However, a cause of action for fraud is stated if plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract. First Bank of Americas v. Motor Car Funding, Inc., 257 A.D.2d at 291 (internal citations omitted).

Here Blass contends that the parties signed an agreement which the defendants never intended to honor, and that he has suffered economic damages. Though claiming he was defrauded, and that defendants never intended to honor their obligations, Blass alleges no specific facts that support these claims. Blass has failed to set forth any facts that would transform the breach of contract claim he has against the defendants into a tort. Therefore, fraud claim is not separate from the contract claim he has asserted against the defendants and it must be dismissed.

The court has considered plaintiff's further claims, that defendants entered into a "special relationship" with him and violated their attendant fiduciary duties to him. Marcella & Co., Inc. v. Avon Products, Inc., 282 AD2d 718 (2nd dept. 2001); Oursler v. Women's Interart Center, 170 AD2d 407 (1st dept. 1991). The relationships and obligations under the agreement are arm's length business relationships. None of the

facts alleged support a claim that there are fiduciary obligations among the parties that would transform this ordinary business relationship into a "special relationship" with attendant fiduciary duties. Therefore these claims are severed and dismissed as well.

Detrimental Reliance and Equitable Estoppel

In order to impose equitable estoppel upon a party, three elements must be established: 1) words or conduct by the party to be estopped which amounts to a misrepresentation or concealment of material facts; 2) that party's intention that the other party will act upon this conduct; and 3) actual or constructive knowledge of the real facts by the party to be estopped. Werking v. Amity Estates, Inc. 2 N.Y.2d 43 (1956). "Detrimental reliance" is not a separate claim, but an element of estoppel. Keane v. Kamin, 257 A.D.2d 433 (1st Dept. 1999). Consequently, without detrimental reliance, there is no claim for equitable estoppel.

Affording plaintiff's pleading every favorable inference, his estoppel claims are virtually indistinguishable from his fraud claims, which the court has dismissed because they are, in and of themselves, duplicative of the breach of contract claims. Therefore, these causes of action must be dismissed as well. Since "detrimental reliance" is not a cognizable or separate cause of action, it too is dismissed.

Quasi Contract (Unjust Enrichment)

In the event it is determined that there is no agreement among the parties, a plaintiff may be able to proceed upon a theory of quasi contract. Farash v. Sykes Datatronics, 59 N.Y.2d 500, 503 (1983). Here, although defendants do not deny the existence of an agreement between Kincaid Consulting and plaintiff, they deny they have any personal liability. This is based on the further claims that only Kincaid

Consulting, LLC and plaintiff are parties to the contract. Thus, until the issues concerning the scope of the contract are decided, this cause of action will not be dismissed. Blass has stated a cause of action against the individuals in quasi contract (unjust enrichment). Wiener v. Lazard Freres & Co., 241 AD2d 114 (1st Dept 1998).

Claims against the individuals

The agreement in dispute contains certain inherent ambiguities. Among these ambiguities are repeated references to a "partnership agreement" and "partners." There is also a reference to a "limited liability *corporation*" as opposed to a "limited liability company." LLC § 101. A "limited liability company" ("LLC") is an unincorporated entity recognized by statute in the State of New York. Although a corporation can be a member of an LLC, there is no such entity as a "limited liability corporation." Moreover, LLCs have "members," and "officers," but not partners. LLCs are regulated by an "operating agreement," but not a partnership agreement. LLC § 101 et seq.

There are also such entities as "professional service limited liability companies," "professional service corporations," and "professional partnerships." These entities have the meaning given to them by statute as well. See: LLC § 1201 (and other statutes cited therein).

Until the legal status of defendant "Kincaid Consulting, LLC" is resolved, the claims by Blass against the Balmer and Hewitt as individuals cannot be decided or dismissed. Blass has pled facts that, at this time, support his contract claims against the individually named defendants, thereby defeating defendants' motion to dismiss the claims against Blamer and Hewitt, in their individual capacities.

Conclusion

Defendants have prevailed in their motion to dismiss the fraud (3rd cause of action) cause of action against all of them. They have also prevailed in having the detrimental reliance, breach of fiduciary duty, and equitable estoppel claims set forth in the 2nd cause of action dismissed against all the defendants. The 1st cause of action withstands the motion to dismiss, however, as against all the defendants as does the 2nd cause of action for unjust enrichment.

Defendants' time to answer the complaint as same has been modified by this decision is extended to Ten (10) Days following service of an entered copy of this decision/order. Plaintiff's reply, if any, shall be made pursuant to the CPLR.


This matter is hereby scheduled for the preliminary conference on MAY 29, 2008 at 9:30 a.m. in Part 10, 80 Centre Street, Room 122.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
April 1, 2008

So Ordered:



Hon. Judith J. Gische, J.S.C.

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