[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 108380/2007
VASCOTTO, LORENZO
VS
ROTTEM, SHRAGA DR.
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5/13/08
MOTION SEQ. NO. 001
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

The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that plaintiff's motion for summary judgment on the second, third and fourth causes of action for breach of contract in the complaint is **denied without prejudice;** and it is further

ORDERED that counsel for all parties shall appear for a Preliminary Conference in Part 35, before Justice Carol R. Edmead, Supreme Court, New York County, 60 Centre Street, Room 438 on **Tuesday, June 24, 2008 at 2:15 p.m.**; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendant.

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

Dated: 5/14/08

_____ J.S.C.
HON. CAROL EDMEAD

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: PART 35

LORENZO VASCOTTO,

Plaintiff,

-against-

DR. SHRAGA ROTTEM,

Defendant.

Index No. 108380/07

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff Lorenzo Vascotto ("plaintiff") moves for an order pursuant to CPLR 3212, granting plaintiff summary judgment in his favor and against defendant Dr. Shraga Rottem ("defendant") on the second, third and fourth causes of action for breach of contract in the complaint.

Plaintiff's Contentions

In May 2005, plaintiff learned from a colleague about an opportunity to invest in a company called Intellison, Inc. ("Intellison" or the "Company"), which was raising capital for product development. Later that month, plaintiff met with defendant, who told plaintiff he was the CEO and Chief Scientist of Intellison. Defendant provided plaintiff with literature to further explain the products and services being developed by Intellison, including without limitation, a document entitled "Intellison Executive Summary." Based upon plaintiff's meetings with defendant and review of the product literature defendant provided, plaintiff decided to make an investment in Intellison.

In June 2005, defendant sent plaintiff a document entitled "Terms of Intellison, Inc.

Convertible Preferred Stock" (the "June 2005 Stock Purchase Agreement"). The June 2005 Stock Purchase Agreement outlined the terms of the investment, and provided for investors to invest a minimum of $20,000 with Intellison, Inc., in exchange for which the investors would receive convertible preferred stock in the Company. Plaintiff executed the June 2005 Stock Purchase Agreement and invested $30,000 with the Company in exchange for which he received 0.75 shares of preferred convertible stock of Intellison, Inc. Defendant signed the June 2005 Stock Purchase Agreement as "CEO" of Intellison, Inc., the "Issuer" of the convertible preferred stock.

In May 2006, defendant sent plaintiff an offer to purchase additional shares of Intellison convertible preferred stock. The language of the offering was nearly identical to that sent to plaintiff in June 2005. Plaintiff accepted the offer and paid $40,000 to defendant for 1.0 shares of preferred convertible stock of "Intellison, Inc." ("2006 Stock Purchase Agreement") As with the June 2005 Stock Purchase Agreement, defendant signed the May 2006 Stock Purchase Agreement as "CEO" of "Intellison, Inc.," the "Issuer" of the convertible preferred stock. "Intellison, Inc." was again defined as "the Company."

On or about April 28, 2007, defendant sent plaintiff a "Rights Offering Letter & Acceptance," printed on Intellison letterhead, which offered plaintiff the opportunity to purchase an additional 1.75 shares of Intellison, Inc. common stock for $1,500 per share. The letter represented that Intellison, Inc. had a Board of Directors, and stated that the Company records showed that plaintiff owned 1.75 shares of Intellison stock. This letter was signed by defendant as CEO" of "Intellison, Inc." Plaintiff accepted the Company's April 28th offer and paid defendant $2,625 for the purchase of 1.75 shares of common stock of "Intellison, Inc." stock.

In early 2007, plaintiff grew frustrated with the lack of information and sent letters to defendant asking for basic corporate information. In August 2007, defendant sent a letter which stated, *inter alia*, "[w]e are also moving forward to structure the business of the Company, in a more traditional fashion by incorporating Intellison in Delaware and by establishing a wholly-owned subsidiary to undertake the government business with SAIC."

Defendant thus admitted in the August 7th letter that "Intellison, Inc." was not in existence at the time the three agreements were signed. Therefore, plaintiff was not, and never has been a holder of any shares of "Intellison, Inc." stock, as plaintiff had bargained and paid for.

Defendant's Opposition

At all times, plaintiff was well aware of the corporate situation into which he was investing. That is, plaintiff was well aware that at the time of his original investment, the business in which he was investing operated as "Intellison," was part of the business of a corporation called "DOCS," that is, Digital Operator Consultant Systems Inc.

At the time plaintiff invested, DOCS had registered "Intellison" as a d/b/a and described Intellison as a Division.

At defendant's first and only meeting with plaintiff, defendant gave plaintiff his business card which correctly describes Intellison as a "Division of DOCS."

The "colleague" that plaintiff refers to who brought plaintiff to Intellison as an investor was Philip Giovanelli ("Giovanelli"), who at that time, was an employee of Oppenheimer & Co. Giovanelli was introduced to defendant as a licensed stockbroker and someone with the contacts to obtain investors in defendant's company.

Giovanelli was well aware of the corporate status of Intellison, and defendant has no

doubt that Giovanelli made his investors aware of it as well.

The fact that some of the paper involved in the transactions refers to "Intellison, Inc." resulted from defendant's mistaken belief that defendant could use the d/b/a as the name of the corporation. In fact, the corporation the shares of which plaintiff purchased was the corporation "Digital Operator Consultant Systems Inc.," d/b/a "Intellison." This distinction should make no difference as to what plaintiff received for his investment.

DOCS has now been reincorporated in the State of Delaware under the name "Intellison Corp."

Plaintiff and Giovanelli are responsible for the delay in reorganizing Intellison.

Finally, defendant individually never entered into any contract with plaintiff. Plaintiff's subscription agreements for the shares were with the corporation, not with defendant. Plaintiff's payments went into a corporate account in the name of "Intellison, Inc." not into defendant's personal account.

Analysis

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]

[defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32

NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

This is not a case where defendant failed to issue shares. In this case, the allegation is that the shares were in the name of an non-existent corporation.

First, neither plaintiff nor defendant provided the court with copies of the issued shares.

Second, in the submission by plaintiff, the Executive Summary clearly states: "Intellison is a subsidiary of Digital Operator Consultant Systems (DOCS)."

At this juncture, it would be premature and improvident to grant summary judgment. Discovery is warranted.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment on the second, third and fourth causes of action for breach of contract in the complaint is **denied without prejudice;** and it is further

ORDERED that counsel for all parties shall appear for a Preliminary Conference in Part 35, before Justice Carol R. Edmead, Supreme Court, New York County, 60 Centre Street, Room 438 on **Tuesday, June 24, 2008 at 2:15 p.m.**; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendant.

This constitutes the decision and order of this court.

Dated: May 14, 2008

Carol Robinson Edmead, J.S.C.