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

PRESENT: _____ **PART** B2

Index Number : 115077/2007

HAWLEY, RICHARD

INDEX NO. _____

VS

MERCHANT IVORY PRODUCTIONS

MOTION DATE 3/31/08

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

MOTION IS ... IN ACCORDANCE WITH ... MEMORANDUM DECISION

FILED
JUN 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/13/08

_____ **J.S.C.**

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

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 : IAS PART 56

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RICHARD HAWLEY,

Plaintiff,

Index No: 115077/2007

-against-

DECISION AND ORDER

MERCHANT IVORY PRODUCTIONS (USA) INC., JAMES IVORY and CITY PRODUCTIONS, INC.,

Defendants.

RICHARD B. LOWE III, J:

This dispute arises out of Plaintiff's attempt to recover amounts purportedly owed under an employment agreement and a production agreement and to recover damages for defamation. Defendant James Ivory now moves to dismiss pursuant to CPLR 3211[a][1] and [a][7].

BACKGROUND

Unless otherwise noted, the facts are taken from Plaintiff's Verified Complaint.

Plaintiff Richard Hawley was employed by Merchant Ivory as an Executive Vice-President of Merchant Ivory from June 16, 1996 through September 2007.

Hawley asserts that under both oral and written employment agreements (the "Employment Agreements"), Hawley was to receive a salary beginning in 1996, with ten percent (10%) aggregate salary increases, compounded annually, for each subsequent year thereafter. Additionally, Hawley asserts that he was to receive reimbursements for expenses he advanced on behalf of Merchant Ivory.

Hawley received partial payments of his salary and his last paycheck around September

2006. However, Hawley alleges that Merchant Ivory never paid Hawley the full amount of the salary he was owed under the terms of his employment with Merchant Ivory.

In November 2006, Hawley entered into an agreement (the "Production Agreement") with Defendant City Productions to produce a film. Under the Production Agreement, Hawley was to be named producer of the film. Furthermore, Hawley was to receive a straight fee for the production of the film as well as profits from the distribution of the film.

Hawley asserts that beginning in July 2007, he was prevented from performing his duties as producer of the film and denied access to facilities related to the production of the film. Hawley was not paid any of the compensation agreed to in the Production Agreement.

In October 2007, Hawley learned of statements made by Ivory and Merchant Ivory that Hawley asserts are defamatory.

Subsequently, Hawley brought this action bringing claims for breaches of contract, quantum meruit, tortious interference, unjust enrichment, and defamation. Individual defendant Ivory now moves to dismiss the Complaint as against himself pursuant to CPLR 3211[a][1] and [a][7].

DISCUSSION

On a motion to dismiss, "the pleading is to be afforded a liberal construction," and "the facts as alleged in the complaint [are presumed] as true" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). However, a complaint should be dismissed if the facts alleged do not fit within any cognizable legal theory (*see Callaghan v Goldsweig*, 7 AD3d 361 [1st Dept 2004]).

In his Complaint, Hawley brings seven causes of action against Ivory: breach of an employment agreement, quantum meruit for services as an employee of Merchant Ivory, breach

of an agreement for the production of a film, quantum meruit for services in connection with the production of a film, tortious interference, unjust enrichment, and defamation.

As a general rule, "only parties in privity of contract may enforce terms of the contract" (*Freeford Ltd. v Pendleton*, 2008 NY Slip Op 3148, *5-6 [1st Dept 2008]).

Here, the Complaint alleges that the purported Employment Agreements are between Hawley and Merchant Ivory (Hawley Aff Ex 1 at ¶¶ 6, 7, 38) and that the Production Agreement is between Hawley and CPI. Moreover, Hawley has not attached a copy of any contract, nor has it expressly referred to any specific terms that have been breached. "In an action to recover damages for breach of contract, the complaint must set forth the terms of the agreement upon which liability is predicated, either by express reference or by attaching a copy of the contract" (*Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [3d Dept 1987]).

However, Hawley argues that the limitation of liability for lack of privity notwithstanding, a corporate officer who commits a tortious act may incur personal liability (Mem in Opp at 6-7, citing *Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103 [1st Dept 2002]; *Ackerman v Vertical Club Corp.*, 94 AD2d 665 [1st Dept 1983]).

In *Joan Hansen & Co.*, the court held that "a pleading must allege that the acts complained of . . . were performed with malice and were calculated to impair the plaintiff's business for the personal profit of the defendant" (296 AD2d at 110). In finding that the plaintiff failed to satisfy the pleading standard, the court identified numerous pleading deficiencies:

> Plaintiff does not assert that the individual defendants acted in other than a corporate capacity. Plaintiff also does not explain why directing licensees "not to have any further dealings with Hansen" and applying pressure to licensees "by

> unjustified complaints and unreasonable audit demands" under the various license agreements should operate to subject these defendants to personal liability. It is uncontroverted that the respective corporations had an economic interest in the licensing arrangements said to have been interfered with. Significantly, there is no allegation that either of these defendants sought to obtain a personal benefit, as opposed to a benefit to the corporation he represented.

(*Id.*) Indeed, as *Ackerman* illustrates, the malicious and calculated conduct should be akin to "allegations that the individual defendants profited personally from the alleged *fraud and conversion*" (94 AD2d at 666 [emphasis added]).

Here, without citation to either the Complaint or to supporting affidavits, Hawley argues that "Ivory acted based upon personal feelings as opposed to what was in the best interest of investors and other third parties associated with the Film" (Mem in Opp at 6). Immediately following this statement, Hawley again reiterates "Ivory acted based upon personal feelings as opposed to what was in the best interest of Merchant Ivory and City Productions" (*id.*)

Hawley argues that its claim of tortious interference serves as a basis for imposing personal liability upon Ivory.[1] With respect to the tortious interference cause of action, the allegations in the Complaint state that "[Ivory] was aware of the duties imposed upon [Hawley] as Producer under the [Production Agreement]" (Hawley Aff Ex 1 at ¶ 55); that "[Ivory] intentionally sought to prevent Hawley from performing his duties as [P]roducer of the Film" (*id.* at ¶ 56); that "the Film has not been completed or distributed" (*id.* at ¶ 57); and that Ivory was "fully aware that a portion of [Hawley's] fees are contingent upon the completion and distribution of the Film" (*id.* at ¶ 58).

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[1]Hawley states that its "Fourth Cause of Action against Ivory is not a 'veil piercing' claim . . . ." (Mem in Opp at 7). As such, this Court does not consider allegations or argument under a veil piercing theory.

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 425 [1996]). Critically missing from the Complaint are allegations of an actual breach with respect to the tortious interference cause of action. "Failure to plead in nonconclusory language facts establishing all the elements of a wrongful and intentional interference in the contractual relationship requires dismissal of the action" (*Bonanni v Straight Arrow Publs.*, 133 AD2d 585, 587 [1st Dept 1987]). Accordingly, because Hawley fails to allege the essential elements of a claim for tortious interference, the fifth cause of action is dismissed.

While Hawley alleges that Ivory was motivated by "personal reasons," Hawley does not allege that Ivory personally benefitted from the alleged interference. Thus, Hawley fails to allege acts by Ivory sufficient to impose personal liability upon Ivory (*see Hoag v Chancellor, Inc.*, 246 AD2d 224, 228-29 [1st Dept 1998] ["To establish a corporate officer's liability for inducing a breach of a contract between the corporation and a third party, the complaint 'must allege that the officers' . . . 'acts were taken outside the scope of their employment or that they personally profited from their acts.'"] [citations omitted]). Accordingly, because the second and third causes of action in Hawley's Complaint assert breach of contracts in which Ivory is not in privity, those causes of action are dismissed.

Turning to the remainder of Ivory's motion to dismiss, this Court addresses the second, fourth, sixth, and seventh causes of action.

To state a claim in quantum meruit, a plaintiff must allege its good faith performance of

services, the defendant's acceptance of those services, an expectation of compensation for the services, and the reasonable value of those services (*Skillgames, LLC v Brody*, 1 AD3d 247, 251 [1st Dept 2003]). Furthermore, to state a claim for unjust enrichment, a plaintiff must allege "that a benefit was bestowed . . . and that defendants will obtain such benefit without adequately compensating plaintiffs therefor" (*Tarrytown House Condominiums v Hainje*, 161 AD2d 310, 313 [1st Dept 1990]). However, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 [1987]). "It is impermissible . . . to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties" (*id.*)

In Hawley's second cause of action for quantum meruit, Hawley alleges that Ivory "had the benefit of [Hawley's] services as an officer of Merchant Ivory between 1996 and 2007 and failed to properly pay for those services" (Hawley Aff Ex 1 at ¶ 41). However, Hawley also asserts breach of an employment agreement with Merchant Ivory for performance of duties as Executive Vice President from 1996 to 2007 (*see* Hawley Aff Ex 1 at 12, 38). Similarly, in Hawley's fourth cause of action for quantum meruit, Hawley alleges that Ivory " had the benefit of [Hawley's] services as Producer of the Film" (Hawley Aff Ex 1 at ¶ 49). Again, Hawley also asserts breach of contract in connection with the production of the Film (Hawley Aff Ex 1 at ¶ 46). Given that the disputes for quantum meruit fall within the scope of the Employment and Production Agreements, Hawley's second and fourth causes of action for quantum meruit are dismissed, as duplicative of the breach of contract claims (*Clark-Fitzpatrick*, 70 NY2d at 388;

Nikitovich v O'Neal, 40 AD3d 300, 301 [1st Dept 2007]).

In Hawley's sixth cause of action for unjust enrichment, Hawley makes a conclusory allegation that Ivory's "conduct constitutes sufficient grounds for liability under the legal theory of unjust enrichment" (Hawley Aff Ex A at ¶ 61). However, Hawley fails to allege facts sufficient to sustain a cause of action for unjust enrichment. Therefore, the sixth cause of action fails to state a claim upon which relief can be granted and is dismissed.

Lastly, Hawley's seventh cause of action asserts a claim for defamation. "[D]efamation must be dismissed since the allegations made therein do not meet the special pleading requirements of CPLR 3016[a]" (*Schenkman v New York Coll. of Health Professionals*, 2006 NY Slip Op 3758, *2-3 [2d Dept 2006]; *see Gill v Pathmark Stores*, 237 AD2d 563). CPLR 3016 [a] requires that "the defamatory words be set forth *in haec verba*" and that the pleading set forth the time, manner and persons to whom the publication was made (*Wadsworth v Beaudet*, 267 AD2d 727, 729 [3d Dept 1999], quoting *Conley v Gravitt*, 133 AD2d 966, 968 [citations omitted]). Indeed, dismissal is warranted where the alleged statements "made by unknown persons to certain unspecified individuals dates, times, and places are left unspecified" (*see Bell v Alden Owners, Inc.*, 299 AD2d 207, 208 [1st Dept 2002]; *Simpson v Cook Pony Farm Real Estate*, 12 AD3d 496, 497 [2d Dept 2004] ["Failure to state the particular person or persons to whom the allegedly defamatory statements were made also warrants dismissal."]).

Hawley sets forth two allegations that ascribe defamatory conduct to Ivory: "in October[] 2007, James Ivory and other employees, officers and agents of Merchant Ivory began circulating false rumors that they knew to be false that plaintiff had committed acts which constituted misconduct as an officer of Merchant Ivory" (Hawley Aff Ex A at ¶ 32); and that "he [Ivory]

spread rumors to associates and employees that [Hawley] had acted without authority during the past year" and that Hawley "had improperly used funds" (Hawley Aff ¶ 13). However, Hawley fails to fulfill his pleading obligation to also allege a specific recipient to whom Ivory made the statements, when and where the statements were made, and the manner in which they were made (*Bell*, 299 AD2d at 208; CPLR 3016[a]). Indeed, with respect to the first allegation, Hawley fails to articulate what he alleges to be defamatory remarks (*Schwartz v Nordstrom, Inc.*, 160 AD2d 240, 241 [1st Dept 1990] ["The actual words used are not set forth as required by CPLR 3016[a]"]).

Hawley's also alleges that "an individual by the name of Phillip Taber had informed plaintiff that he had heard that 'something else had happened' and that plaintiff had been accused of certain improprieties" (*id.* at ¶ 34). Although Hawley identifies a specific recipient ("Phillip Taber ") and what appear to be the actual defamatory words ("something else had happened"), Hawley fails to allege that Ivory was the source of the statements or the place and time the statements were made. Moreover, vaguely stating that "something else had happened" constitutes a non-actionable statement as a matter of law (*see Gross v New York Times Co.*, 82 NY2d 146, 153 [1993]).

Lastly, Hawley alleges that he was "informed by various acquaintances and friends, including 'Don' in or around the end of October that there were allegations that [Hawley] had allegedly 'stolen money'" (*id.* at ¶ 35). Although Hawley alleges an actionable statement ("stolen money"), Hawley fails to identify a specific recipient other than "Don," that Ivory is the source of the statement, the time and place of the statement, or the manner in which the statement was made (*see Bell*, 299 AD2d at 208; *Simpson v Cook Pony Farm Real Estate*, 12 AD3d 496,

497 [2d Dept 2004]). Accordingly, because Hawley's allegations lack the specificity required under CPLR 3016[a], Hawley's cause of action for defamation is dismissed (*Murganti v Weber*, 248 AD2d 208, 208 [1st Dept 1998] ["If the actual defamatory words are not evident from the face of the complaint, dismissal is warranted."]). .

As one of Hawley's general arguments in opposition to Ivory's motion, Hawley argues that Ivory's motion to dismiss should be denied pursuant to CPLR 3211[d]. Under CPLR 3211[d], a court has the "discretion to deny a motion to dismiss without prejudice to renewal after discovery if it appears that facts essential to justify opposition may exist but cannot then be stated" (*Herzog v Town of Thompson*, 216 AD2d 801, 803 [3d Dept 1995]). "However, if the complaint fails to state a cause of action as a matter of law and no amount of discovery can salvage the claim, it must be dismissed and no discovery is warranted" (*id.*). Additionally, it must be apparent from "affidavits submitted in opposition" that a motion made under CPLR 3211[a] should be denied (see CPLR 3211[d]).

Here, Hawley merely recites the language of CPLR 3211[d] that "facts essential to justify opposition may exist but cannot then be stated." While Hawley need not demonstrate the actual existence of facts which will justify denial of the motion, Hawley makes conclusory assertions that relevant information lies within the possession of Ivory without discussing how the information will justify denial (*see Cerchia v V.A. Mesa, Inc.*, 191 AD2d 377, 377 [1st Dept 1993]). Indeed, Hawley fails to submit any affidavits showing "that facts essential to justify opposition may exist but cannot then be stated" (CPLR 3211[d]; *Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 370 [1st Dept 2007]). Accordingly, this Court rejects Hawley's argument that Ivory's motion should be denied pursuant to CPLR 3211[d].

Lastly, on Hawley's cross-motion pursuant to CPLR 3025[b], Hawley seeks leave to amend. Although leave to amend pleadings under CPLR 3025[b] is to be freely given, the speculative allegations set forth by Hawley are insufficient to sustain the causes of actions asserted in the Complaint (*see Chestnut Hill Partners, LLC v Van Raalte*, 45 AD3d 434, 435-36 [1st Dept 2007]). "[I]t is equally true that the court should examine the merits of the proposed amendment when considering such motions. * * * Where, as here, the proposed amendments are totally devoid of merit and are legally insufficient, leave to amend should be denied" (*Zabas by Zabas v Kard*, 194 AD2d 784, 784 [2d Dept 1993] [citations omitted]). Beyond being "palpably insufficient," the proposed pleadings are inexplicably absent and, therefore, Hawley's cross-motion seeking leave to amend is denied (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]).

CONCLUSION

ORDERED that defendant's motion to dismiss as against individual defendant Ivory is granted; and it is further

ORDERED that plaintiff's cross-motion seeking leave to amend is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly

Dated: June 13, 2008

ENTER:

J.S.C.