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

PRESENT: _____ PART 56

Justice

Index Number : 115076/2007

MICHALEK, SUSAN

vs

MERCHANT IVORY PRODUCTIONS

Sequence Number : 002

DISMISS COMPLAINT

INDEX NO. _____

MOTION DATE 3/31/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his 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

DECISION

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

Dated: August 4, 2008

_____ J.S.C.

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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SUSAN MICHALAK a/k/a SUSAN MALICK,

Plaintiff,

Index No: 115076/2007

-against-

DECISION AND ORDER

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

Defendants.

----------x

RICHARD B. LOWE III, J:

This dispute arises out of an investment in the production of a film pursuant to a letter agreement. Plaintiff asserts causes of action in connection with allegations that Defendants failed to repay Plaintiff's investment. 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 and, for the purposes of this motion to dismiss, will be deemed true.

Michalak is an actress and model (Michalak Aff ¶ 2). Michalak has appeared in at least two films produced and distributed by Defendant Merchant Ivory Productions (USA) ("Merchant Ivory") (*id.*).

Merchant Ivory is the parent company of Defendant City Productions, Inc. ("City Productions"). Defendant James Ivory is a shareholder and officer of both Merchant Ivory and City Productions. City Productions acted as the production company for the film "The City of Your Final Destination" (the "Film"). Ismail Merchant and James Ivory were the original

founders of Merchant Ivory (Michalak Aff ¶ 5). Prior to his unexpected death, Merchant handled all business affairs of Merchant Ivory with Richard Hawley (*id.*). The role of Ivory in Merchant Ivory during the period that Merchant was alive was as director (*id.* at ¶ 7). After Merchant's death, all business operations fell on the shoulders of Hawley (*id.*).

Hawley was Executive Vice President of Merchant Ivory (Hawley Aff ¶ 1). Michalak was a partner both in business and personal life to Richard Hawley (Michalak Aff ¶ 2).

Though in the process of obtaining additional funding, Merchant Ivory's then current financial status placed the Film in jeopardy (*id.* at ¶ 4). Michalak was initially asked to invest in the Film in the form of cash or credit and in the amount of $50,000. Later, Michalak was asked to invest a total of $250,000. Michalak agreed to make the investment.

On January 19, 2007, Michalak executed an agreement (the "Letter Agreement"), under which Michalak was to have her investment repaid upon the receipt of a $5,000,000 loan from a third-party investor, Grosvenor Park Investors, LLC.

Around July 2007, a dispute arose between Hawley and Ivory. Michalak avers that Ivory hampered the completion of the Film by refusing to consider potential finding for the Film, including loans that would have permitted final production and necessary payments to third parties, including actors. Further, Michalak avers that Ivory's actions caused repayment by the corporate defendants to be impossible.

Subsequently, Michalak brought this action bringing claims for breaches of written and oral contracts, unjust enrichment, and a claim sounding in breach of fiduciary duty. 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]).

Breach of oral and written contract

Ivory argues that the breach of contract claims must be dismissed because only City Productions is a party to the Letter Agreement, not Ivory. With respect to the alleged oral agreement, Ivory argues that Michalak fails to allege facts giving rise to an agreement extraneous to the Letter Agreement between Michalak and Ivory.

In order to avoid dismissal of a breach of contract claim, a party must allege: (1) the existence of an agreement, (2) performance of the agreement by one party, (3) breach by the other party, and (4) damages (*Noise in the Attic Prods., Inc. v London Records*, 10 AD3d 303, 306 [1st Dept 2004]). 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, Michalak alleges that she "agreed to provide in the form of cash and/or credit the amount of $50,000" (Verified Compl ¶ 9). Later, Michalak "was requested to invest a total of $250,000" and agreed to do so (*id.* at ¶ 10). Michalak also alleges that she "executed a Letter Agreement with respect to her intended investment" (*id.* at ¶ 15), which was drafted by counsel for Merchant Ivory (*id.* at ¶ 21). However, no allegations suggest that Ivory was a party to any agreement. Indeed, Michalak only alleges that "Ivory was aware of Michalak's investment" (*id.* at ¶ 11; *see also* ¶ 12), yet nowhere does Michalak allege that Ivory exchanged any promises, oral or written, in exchange for her investment. Rather, Michalak alleges that she "was asked by

Hawley to provide in the form of cash and/or credit the amount of $50,000," and "was given the contract from Hawley" (Michalak Aff ¶ 4). Moreover, "[c]hanges were made by Hawley, who had prior to this time directed and drafted nearly all of the contracts used by Merchant Ivory" (*id.*). Still more, the Letter Agreement is signed by Michalak and Hawley, on behalf of City Productions and Merchant Ivory (Drohan Affirmation Ex C at 4). Ivory's name and signature appear nowhere in the Letter Agreement.

Accordingly, because Michalak fails to allege the essential elements of a claim for breach of contract again Ivory, the causes of action for breach of an oral and written agreement are dismissed.

Unjust enrichment

Ivory argues that Michalak fails to allege a benefit that Michalak bestowed upon Ivory.

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.*)

Here, allegations that Michalak bestowed any benefit upon Ivory are critically missing from the Verified Complaint as well as Michalak's supporting papers. Michalak alleges that "Defendants' [sic] knowingly accepted plaintiff's investment and used such investment for the production of the film" (Verified Compl ¶ 44). Michalak also alleges that "Ivory was aware that Michalak's investment was basically through the use of her credit cards for the operational expenses sustained by Merchant Ivory and City Production during the filming of the film" (¶ 12). Thus, by Michalak's own words, any purported benefit bestowed by Michalak was put towards the production of the film and not for the personal benefit of Ivory.

Moreover, the cause of action for unjust enrichment is duplicative of the cause of action for breach of contract (*Clark-Fitzpatrick*, 70 NY2d at 388). Both causes of action are based on Michalak's alleged investment of $250,000. For her breach of a written contract claim, Michalak alleges that she was not repaid her investment under the Letter Agreement (Verified Compl ¶ 35). For her unjust enrichment claim, Michalak alleges that Defendants "accepted [Michalak's] investment and used such investment for the production of the film" (*id.* at 44).

Accordingly, because Michalak fails to allege an essential element of unjust enrichment and the claim is duplicative, the cause of action for unjust enrichment is dismissed.

Cause of action sounding in breach of fiduciary duty

Lastly, Ivory argues that, as an officer and director of the corporate defendants, Ivory owes no fiduciary duty to Michalak.

In determining whether a fiduciary relationship exists, "a court will look to whether a party reposed confidence in another and reasonably relied on the other's superior expertise or

knowledge" (*Sergeants Benevolent Ass'n Annuity Fund v Renck*, 19 AD3d 107, 110-11 [1st Dept 2005]; *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 122 [1st Dept 1998]). "Thus, the ongoing conduct between parties may give rise to a fiduciary relationship that will be recognized by the courts" (*Lazard Freres*, 241 AD2d at 122)

In *Lazard Freres*, the plaintiffs alleged that the defendant had acted on their behalf in assuming negotiations with a mortgage bank, and that they had relied upon the defendant specifically because of the defendant 's expertise and reputation, because of the defendant 's alleged "inside connection" with a highly placed executive at the mortgage bank and because the mortgage bank apparently preferred to deal with plaintiffs through the defendant rather than directly with plaintiffs (*id.* at 123).

Here, the Verified Complaint and the supporting papers neither allege nor even suggest that Michalak placed confidence in and relied on Ivory. Michalak alleges that when she "agreed to make the investment, Richard Hawley was the producer and managed the operations of Merchant Ivory and City Productions" (Verified Compl ¶ 13). And, "Michalak's [sic] agreed to make the investment primarily based on Richard Hawley's participation in the production of the film" (*id.* at ¶ 14). Moreover, in her affirmation, Michalak alleges that "[t]he role of Ivory in Merchant Ivory during the period that Merchant was alive was as Director. It was common knowledge in the Company that James Ivory could not handle effectively the Company's business affairs and Merchant made it a point of keeping him away from the daily operation and funding of the business. After Merchant's death, all business operations fell on the shoulders of Hawley" (Michalak Aff ¶ 7). In an email to Ivory, Michalak writes to inform Ivory of her dire financial situation, seemingly for the first time:

> I wanted to fill you in my financial status. I don't exactly know if you are aware of the stressful financial position I am in now. * * * I have been given assurances by Richard [Hawley] that all of this would be take care of but due to length of time that as passed (approx. 7 months), . . . I am increasingly becoming more and more concerned about this issue, alarmed as a matter of fact. I do trust that you have every intention of taking care of this but I would like some reassurance from you that this matter will be cleaned up promptly.

(Ivory Aff Ex B; Michalak Aff ¶ 12 ["I did write to Mr. Ivory as stated in his affidavit."].) Michalak's allegations show that she agreed to make her investment because of Hawley; that Hawley managed operations of the film; indeed, that Ivory was deliberately insulated from such responsibilities; and that Michalak and Ivory did not share an ongoing relationship. Accordingly, Michalak fails to allege that a fiduciary relationship existed between herself and Ivory.

While Michalak generally argues that Ivory "had an obligation to act in the best interests of the corporate defendants because "Ivory accepted third party funds for investment in the production of the film" (Mem in Opp at 5), the alleged harm to the corporate defendants gives rise to a cause of action only to the corporation, not Michalak (*Empleton v D'Elia Gemstones Corp.*, 46 AD2d 751, 752 [1st Dept 1974]).

Rather than address the substantive arguments in support of dismissal, Michalak opts to generally oppose Ivory's motion by asserting four arguments: that Ivory's conduct was sufficient to impose personal liability; that Ivory's motion should be denied because facts and documents exist that are unavailable to Michalak; that Michalak should be granted a framed issue hearing; and that Michalak should be granted leave to amend the Verified Complaint. This Court finds each argument to be without merit. To that end, the arguments are briefly addressed below.

Personal liability

Michalak argues that Ivory acted in such a manner that the corporate defendants are unable to repay Michalak her investment and, therefore, personal liability should be imposed on Ivory.

Michalak relies on *Ackerman v Vertical Club Corp.*, 94 AD2d 665 [1st Dept 1983], for the rule to impose personal liability upon Ivory. That case states that "when the corporate officer commits independent torts or predatory acts directed at another, he may not seek refuge behind the mantle of immunity" (*id.* at 666). However, *Ackerman* illustrates that a party seeking to impose personal liability must allege malicious and calculated conduct, akin to "allegations that the individual defendants profited personally from the alleged *fraud and conversion*" (*id.*).

Here, only Michalak's claim sounding in breach of fiduciary duty resembles a claim of an independent tort. However, not only does Michalak fail to allege malicious and calculated conduct, but Michalak also fails to state a claim for an independent tort. Accordingly, this Court rejects the argument that personal liability should be imposed on Ivory.

Request for further discovery under CPLR 3211[d]

In opposition to Ivory's motion, Michalak also 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, Michalak merely recites the language of CPLR 3211[d] that "facts essential to justify opposition may exist but cannot then be stated." While Michalak need not demonstrate the actual existence of facts which will justify denial of the motion, Michalak 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, Michalak 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 Michalak's argument that Ivory's motion should be denied pursuant to CPLR 3211[d].

Request for a framed issue hearing

Michalak argues that this Court should direct a hearing on the issue of validity of "the contract" (Mem in Opp at 7).

Here, Michalak has not asserted any authority which permits or compels this court to direct such a hearing. Though not a single provision under the CPLR was offered, a number of provisions relevant to Michalak's application empower this Court to direct a framed issue hearing. Under CPLR 2218, "an issue of fact raised on a motion shall be separately tried by the court or a referee." However, validity of the Letter Agreement is not an issue raised in Ivory's motion and, therefore, a hearing on the issue of validity is unwarranted under CPLR 2218 (*see Graphic Offset Co. v Torre*, 78 AD2d 788, 788 [1st Dept 1980]). Similarly, under CPLR 3211[c], the court "may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion." Again, the issue of validity is not raised in Ivory's motion and, therefore, not germane to the "expeditious disposition of the

controversy" (CPLR 3211[c]. Also, under CPLR 4317[b], the court needs the consent of both parties to order a reference to determine an issue except in certain limited circumstances. However, Michalak does not aver that she has Ivory's consent to an order of reference. Accordingly, Michalak's motion seeking a framed issue hearing is denied.

Request to amend the complaint hearing under CPLR 3025

Under to CPLR 3025[b], Michalak seeks leave to amend. Although leave to amend pleadings under CPLR 3025[b] is to be freely given, the speculative allegations set forth by Michalak are insufficient to sustain the causes of actions asserted in the Verified 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 arc 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, Michalak's cross-motion seeking leave to amend is denied (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the defendant's motion to dismiss is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: August 4, 2008

ENTER:

J.S.C.