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

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 602601/2009
FIORILLO, JOHN
VS
KNERR, ANTHONY
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
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

FILED
MAR 26 2010
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

and PC Scheduled May 20, 2010 at 9:30 am Pt. 10 Rm 232

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

Dated: March 20, 2010

HON. JUDITH J. GISCHE 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 10

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John Fiorillo,

Plaintiff (s),

-against-

Anthony Kerr d/b/a Anthony Kerr & Associates and Anthony Kerr & Associates, LLC,

Defendant (s).

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DECISION/ ORDER
Index No.: 602601-2009
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/NB affirm, exhs	1
Pltf's opp w/JF affid, exhs	2
Steno mins 2/4/2010	3

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

GISCHE J.:

This an action for breach of contract and unjust enrichment. Defendants seek the pre-answer dismissal of the complaint on the basis that plaintiff has failed to state a cause of action (CPLR 3211 [a][7]). Plaintiff opposes the motion.

When deciding a motion to dismiss the complaint, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true, and provide the plaintiff with the benefit of every possible inference (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1st

Dept. 1997]).

The plaintiff asserts the following facts in his verified complaint and in his sworn affidavit. The sworn affidavit is considered for the sole purpose of sustaining the pleading and remedying any deficiencies in it (Ackerman v. Vertical Club Corp., 94 A.D.2d 665 [1st Dept 1983] *app dism* 60 NY2d 644 [1983]).

Facts and Arguments Presented

Plaintiff has extensive experience in the health care industry. He is the senior advisor to the president of a renown university and has written a number of scholarly articles on the health care industry. Plaintiff contends he and defendant Anthony Knerr ("Knerr") became acquainted several years ago. Knerr is the founder and managing director of the companies named as defendants in this action. Although Knerr has a doctorate degree, he is not a medical doctor.

In 2009 Knerr and several others saw a business opportunity in the field of medicine and embarked on a project to offer a continuing professional development program to medical doctors. In order for the program to be successful, defendants needed the approval of the American Board of Internal Medicine ("ABIM"). Since Knerr did not have plaintiff's extensive experience or background, Knerr personally contacted plaintiff and asked if he would be willing to join his "team" of professionals. Plaintiff agreed to be a consultant for the project if the ABIM approved it and it was awarded to the defendants. It was agreed that plaintiff would be paid for his consulting services. According to plaintiff, his usually hourly rate is $300 and the parties agreed to formalize the number of hours he would work once the project was approved because until then the actual scope was unknown.

ABIM approved of the project and Knerr notified plaintiff of the approval. In his email notification dated June 23, 2009 Knerr told plaintiff he had "good news" and "bad news." The "good news" was that the defendants had been awarded the project. The "bad news" was it was "the trimmed down version . . ." they had proposed. The other "bad news" was that another team member (Margaret Downs) would be "taking the lead on the project in light of the heavy financial planning and analysis component. . ." Knerr asked plaintiff to be "of counsel" and proposed a meeting about what that would entail. Plaintiff responding by sending Knerr a letter dated June 25, 2009 stating the following:

> "I had a feeling since we began pursuit of the ABIM assignment that you would use my knowledge of the medical community, my contacts and my grant writing skills and find a way to abrogate our agreement for full participation on the project team should we be successful in getting the work...If you think I am going to stand by quietly and allow you to use my labor, expertise and time without living up to your agreement, you are mistaken. Just to remind you I did research at your request...checked out two candidates...recruited a prominent internist...edited and made additions to three drafts of the proposal and participated in a strategy session...Attached to this letter is an invoice for the minimum amount acceptable to compensate me for my time and effort...In addition, my name and biography must be immediately removed from the...web site and all other materials used by [defendants]

Plaintiff contends he was fraudulently induced (1st cause of action) into allowing his name, qualifications, experience and credentials to be used in connection with the proposal to ABIM although defendants had no intention of ever actually letting plaintiff render services to them on the project.

Plaintiff has also asserted a cause of action (2nd) for unjust enrichment based upon his having rendered services to the defendants in connection with the project which

they did not pay for. The "unjust enrichment" is not based upon his not getting paid for services, but based upon claims defendants used his name, experience and credentials for their personal gain. He contends that he conferred something of value - defendants would not have obtained the project without him - they reaped and retained those benefits, but he has not received anything for it. Thus, he contends his reputation, name, etc., has value apart from the contract.

Plaintiff's 3rd cause of action is for breach of contract. He contends that although the number of hours he would be working on the project once obtained was not formalized, the parties had agreed that he would be a consultant and that he would be paid his usual fee ($300 per hour) for those services.

Defendants argue that plaintiff has failed to state a cause of action because he describes "an agreement to agree," and there are no precise, material contractual terms to be enforced such as plaintiff's hours, rate of pay or conditions of employment. Alternatively, defendants argue that that plaintiff's claims are barred by the Statute of Frauds (GOL 5-701[a][10]) because he is really seeking to enforcement a contract to pay compensation for services rendered in negotiating a business opportunity.

Defendants argue plaintiff's fraudulent inducement cause of action is indistinguishable from his breach of contract claim because the fraud claim arises from the same facts and they seek the same damages.

According to defendants, the unjust enrichment fails because plaintiff has not alleged he expected to get paid for having his name associated with the project.

In opposition to defendants' motion, plaintiff argues that the Statute of Frauds is not applicable to the complaint because he is not claiming he either located or retained

ABIM's approval of the project, but that he was retained to render professional services and then not paid. Plaintiff also argues that his fraud claim is not redundant of his breach of contract claim because he was defrauded into letting his name, credentials, and experience be associated with the proposed project, but without his imprimatur, ABIM would never have given the project to the defendants who have no experience in the health professions.

Plaintiff denies that the parties had an unenforceable "agreement to agree," pointing out that they had discussed and agreed to the material terms.

Discussion

A contract to pay compensation for services rendered in negotiating a business opportunity, including procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction must be in writing, and subscribed by the party to be charged therewith, or by his lawful agent (GOL 5-701 [a][10]).

Here, plaintiff's claim, that he did not negotiate defendants' business opportunity, or secure the client, but rendered services directly to the defendants and had a contract for other services for which he was not and will not be paid for, is broad enough to fall outside the scope and prohibitions of GOL 5-701 [a][10] and therefore, not a basis to dismiss the complaint (Festa v. Gilston, 183 A.D.2d 525 [1st Dept 1992]). Plaintiff makes no claim that he and the defendants engaged in a joint venture (*compare* Snyder v. Bronfman, 13 NY3d 504 [2009]). Nor is he claiming that he procured a particular client (compare Freedman v. Chemical Construction Corp., 43 NY2d 260 [1977]). Therefore, defendant's motion to dismiss the complaint because it violates the statue of frauds is denied.

The material terms of the parties' agreement are, according to plaintiff, that he would be defendants' consultant on this project and that he would get paid for his consulting services at his usual and customary rate which is $300 per hour. Since the project had not yet been approved, neither side knew exactly how many hours plaintiff would have to work and, therefore, the hours he would be paid for were not fixed but would be set later. These facts set forth specific enough terms to support a breach of contract action or a quasi contract claim at the pleading stage. Therefore, defendants' motion to dismiss the contract based cause of action is denied.

Unjust enrichment falls under the umbrella of quasi-contract. To prevail on a claim of unjust enrichment, plaintiff must show that (1) defendant was enriched (2) at plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (Paramount Film Distrib. Corp. v. State of New York, 30 N.Y.2d 415, 421 *cert. den.* 414 U.S. 829 [1973]). The existence of an implied contract may be inferred to prevent one person who has obtained a benefit from another from unjustly enriching himself at the other party's expense (Clark-Fitzpatrick, Inc. v. Long Island R.R., 70 N.Y.2d 382 [1987]). Plaintiff's facts do not support an unjust enrichment cause of action. He is not claiming he expected to be paid for letting the defendants use his reputation, name, etc. His claim is that he had a consulting contract with the defendants for which he expected to get paid a certain hourly rate. His reputation, experience, name, etc., was used by the defendants with his approval and consent. They were not unjustly enriched because - according to plaintiff- they would not have been approved by ABIM and he would have no basis for his contract claim.

Therefore, defendants' motion to dismiss the unjust enrichment cause of action is granted.

A claim for fraudulent inducement requires that there be a misrepresentation of then-present fact, which is extraneous to the contract and involves a duty separate from, or in addition to, that imposed by the contract (Hawthorne Group, LLC v. RRE Ventures, 7 AD3d 320, 323 [1st Dept 2004]; Orix Credit Alliance, Inc. v R.E. Hable Co., 256 AD2d 114 [1st Dept 1998]). Plaintiff's claim, that the defendants had no intention of actually using him as a consultant on their project, but induced him into letting his name being used with the project for their personal benefit, does not support a claim for fraudulent inducement because a fraud claim requires a level of detail not set forth in either the complaint or plaintiff's sworn affidavit (CPLR 3016 [b]). Although "unassailable proof of fraud" is not required to defeat a threshold motion, mere conclusions will not defeat a pre-answer motion to dismiss (Pludeman v. Northern Leasing Systems, Inc., 10 NY3d 486 [2009]). Furthermore, the fraud claim and the breach of contract are redundant because the only fraud plaintiff alleges 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]). Therefore, defendants' motion to dismiss the fraudulent inducement claim is granted; the fraudulent inducement cause of action is severed and dismissed.

Since service of a pre-answer motion to dismiss extends the time to serve the answer, defendants shall answer the complaint in accordance with CPLR 3211 [f]. Furthermore, the preliminary conference in this case is hereby scheduled for **MAY 20,**

2010 at 9:30 a.m. no further notices will be sent and this date supercedes any other notices the parties may receive.

Conclusion

In accordance with the foregoing,

IT IS HEREBY

ORDERED that defendants' motion to dismiss is granted as to the 1st and 2nd causes of action for fraudulent inducement and unjust enrichment; those claims are hereby severed and dismissed; and it is further

ORDERED that defendants' motion to dismiss the 3rd cause of action is denied; and it is further

ORDERED that defendants' time to answer the complaint is extended in accordance with CPLR 3211 [f]; and it is further

ORDERED that the preliminary conference in this case is hereby scheduled for **MAY 20, 2010 at 9:30 a.m.** no further notices will be sent and this date supercedes any other notices the parties may receive; and it is further

ORDERED that any relief that has not been expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
March 19, 2010

FILED
MAR 26 2010
COUNTY CLERK'S OFFICE
NEW YORK

Ordered:

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