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

PRESENT: HON. PAUL WOOTEN Justice PART 7

PAUL TURNER,

Plaintiff,

- against-

FLEXCORP SYSTEMS, LLC, ZEROCHAOS, LLC, APC WORKFORCE SOLUTIONS, LLC, XYZ ENTITIES and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Defendants.

INDEX NO. 603146/09

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion by defendant to dismiss pursuant to Section 3211 of the Civil Practice Law and Rules.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3, 4
Replying Affidavits (Reply Memo)	5

Cross-Motion: ☐ Yes ■ No

This is an action for damages based on breach of contract and quantum meruit. In an amended complaint[1], plaintiff Paul Turner ("plaintiff") alleges that defendants Flexcorp systems, LLC ("Flexcorp"), ZeroChaos, LLC, APC Workforce Solutions, LLC, XYZ Entities, and Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), collectively and individually, failed to pay Reinsurance Strategies LLC ("Reinsurance") bonuses earned for services provided to the defendant Merrill Lynch. Before the court is a motion by Merrill Lynch to dismiss the amended complaint pursuant to CPLR § 3211(a)(1), (a)(3), and (a)(7), based on a defense

[1] Although plaintiff never filed his amended complaint with the Court, Merrill Lynch raises no objection and attaches the amended complaint to its motion papers.

founded on documentary evidence, that plaintiff does not have legal capacity to bring the suit for breach of contract, and for failure to state a cause of action.

BACKGROUND

Plaintiff, a senior level actuary, was the Managing Director and sole member of Reinsurance, a limited liability company that provided actuarial, financial and consulting services, whose principal place of business was 6100 Pumpernickel Lane, Monroe, North Carolina, 28110. Merrill Lynch engaged Flexcorp to provide workplace management services, and in turn Flexcorp engaged Reinsurance.

Pursuant to an Independent Contractor Agreement for Professional Services, dated July 12, 2006 ("Consulting Agreement"), entered into between Flexcorp and Reinsurance, Reinsurance was to provide actuarial, consulting, and financial services to Merrill Lynch, a financial services company in New York, New York. As per the Consulting Agreement, Reinsurance was to be paid a $25,000 monthly retainer. Reinsurance was to submit invoices to Flexcorp, and would be paid by Flexcorp for invoices approved by Merrill Lynch. According to the Consulting Agreement, Reinsurance was potentially to receive a bonus paid by Merrill Lynch in 2006 and 2007 at Merrill Lynch's discretion. According to the plaintiff, Merrill Lynch paid bonuses in 2006 and 2007 to members of groups with whom plaintiff worked, but Reinsurance did not receive bonuses for those years.

Plaintiff provided actuarial services to Merrill Lynch until the end of the term of the Consulting Agreement in July, 2007.

On July 8, 2008, Reinsurance was formally dissolved. On or about April 8, 2009 and July 12, 2009, plaintiff through his attorney, sent two notices regarding his claims for bonuses for the years 2006 and 2007 to Merrill Lynch.

Plaintiff commenced an action against the defendants in October 2009. He filed an amended complaint on March 10, 2010, seeking compensatory damages for breach of contract

and quantum meruit. Plaintiff claims that by failing to pay Reinsurance bonuses for services at Merrill Lynch, defendants breached the Consulting Agreement. Plaintiff also asserts that, in the alternative, he is entitled to recover in quantum meruit because the defendants have received and benefitted from his consulting services, at his expense, without paying him a bonus.

On April 30, 2010, Merrill Lynch moved to dismiss the amended complaint pursuant to CPLR § 3211(a)(1), (a)(3), and (a)(7), based on a defense founded on documentary evidence, that plaintiff does not have legal capacity to bring the suit for breach of contract, and for failure to state a cause of action.

In support of its motion to dismiss, Merrill Lynch submits, *inter alia*, an affirmation of counsel, a copy of the amended complaint and Consulting Agreement, and a memorandum of law. In opposition to the motion, plaintiff submits an affidavit in opposition, a copy of the Consulting Agreement, and a memorandum of law in opposition.

Merrill Lynch contends that neither plaintiff nor Merrill Lynch are parties to the Consulting Agreement, thus the plaintiff lacks privity of contract to hold Merrill Lynch liable for breach of contract. Merrill Lynch also argues that the Consulting Agreement expressly prohibits and makes void any assignment of rights or obligations under the Agreement. Therefore, plaintiff could not have been assigned the contract rights under the Consulting Agreement, and as such, the plaintiff lacks standing to bring the breach of contract claim. Merrill Lynch also contends that the plain language of the Consulting Agreement provides that the bonus that plaintiff claims he is owed is discretionary and that it is settled under law that the plaintiff can have no legal entitlement to the discretionary bonus. Lastly, Merrill Lynch contends that plaintiff's quantum meruit claim must fail because Merrill Lynch is not a party to the written agreement between Reinsurance and Flexcorp, covering the subject matter in dispute.

Plaintiff, in opposition, asserts that he has standing to sue Merrill Lynch because Reinsurance dissolved in 2008, and according to the laws of the company's domicile, which

was North Carolina, Mr. Turner, as the sole member of Reinsurance, was assigned all rights and obligations of the company. Plaintiff contends that pursuant to the Consulting Agreement, Reinsurance was supposed to be paid a bonus in 2006 and 2007. Specifically, he points to language in the Consulting Agreement which states "Consultant will be given equal and consistent consideration for discretionary bonuses." Plaintiff argues that because Merrill Lynch paid bonuses to employees, with similar levels of experience and contribution as plaintiff and with whom plaintiff worked closely, plaintiff was to be given the same equal consideration for his work and granted a bonus. Plaintiff also contends that Merrill Lynch is promissorily estopped from claiming it is not liable under the contract. Lastly, plaintiff contends that plaintiff is a third party beneficiary to the agreement between Flexcorp and Merrill Lynch for workforce management services.

DISCUSSION

A. Motion to Dismiss Standards

CPLR § 3211(a), provides that:

> "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
> [1] A defense is founded on documentary evidence;. . .
> [3] The party asserting the cause of action has not legal capacity to sue; . .
> [7] The pleading fails to state a cause of action; . . ."

When determining a CPLR § 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citation omitted]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d at 414).

B. Breach of Contract

1. Documentary Evidence

"In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Center Partnership*, 221 AD2d 248, 248 [1st Dept. 1995]; *see Juliano v McEntee*, 150 AD2d 524 [2d Dept 1989]; *Demas v 325 West End Ave. Corp.*, 127 AD2d 476 [1st Dept 1987]). A CPLR § 3211(a)(1) "motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]; *see 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d at 152; *Ladenburg Thalmann & Co., Inc. v Tim's Amusements*, 275 AD2d 243, 246 [1st Dept 2000]).

In the instant action, Merrill Lynch has a defense as a matter of law based on the Consulting Agreement. It is well established that "absent privity of contract, plaintiff has no right to recover from defendant [for] breach of contract" (*Residential Board of Managers of Zeckendorf Towers v Union Square- 14th Street Associates*, 190 AD2d 636, 637 [1st Dept 1993]; *see Pevensey Press v Prentice-Hall, Inc.*,161 AD2d 500 [1st Dept 1990]; *CDJ Builders Corp. v Hudson Group Const. Corp.*, 67 AD3d 720 [2d Dept 2009] ["liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties"]). The Consulting Agreement was entered into by Flexcorp and Reinsurance, and neither plaintiff nor Merrill Lynch were parties to the Agreement. There is no privity of contract between Merrill Lynch and plaintiff, and as such, plaintiff does not have a cause of action against Merrill Lynch for breach of the contract to which it was a signatory.

2. Legal Capacity to Sue

Pursuant to CPLR § 3211(a)(3), a defendant's motion to dismiss will be granted when

the party asserting the claim lacks the legal capacity to sue. The doctrine of legal capacity "concerns a litigant's power to appear and bring its grievance before the court...legal capacity to sue, or lack thereof, often depends purely on the litigant's status" (*Security Pacific National Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006] [international citation omitted]).

Plaintiff has failed to demonstrate that he has the legal capacity to maintain this action because the parties to the Consulting Agreement were Reinsurance, a limited liability company, and Flexcorp. Though plaintiff was the sole member of Reinsurance, he cannot bring this action, in his individual capacity, for breach of contract for failing to pay Reinsurance a bonus.

Moreover, the Consulting Agreement contained a non-assignment clause, which stated that neither party may assign the agreement or any of its rights or obligations without prior written consent of the other party (affidavit of plaintiff, exhibit A ¶ 8.2). Reinsurance could not assign the rights contained in the Consulting Agreement without Flexcorp's consent, and any such assignment would have been void. Though plaintiff claims he was assigned the rights of Reinsurance by operation of North Carolina law subsequent to its dissolution, as its sole equity member, a review of the provisions of North Carolina's Limited Liability Act cited to by plaintiff do not support plaintiff's position. Additionally, upon Reinsurance's dissolution in 2008 and during its winding up, plaintiff would have been able to sue in the name of and on behalf of Reinsurance, under both New York and North Carolina law (*see* NY Limited Liability Company Law § 703 [b][2]; North Carolina Limited Liability Company Act § 57C-6-04 [c]). Accordingly, the plaintiff lacks capacity to recover damages for breach of contract.

3. Failure to State a Cause of Action

This Court also finds that plaintiff fails to state a cause of action against Merrill Lynch,

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[2] "Upon dissolution of a limited liability company, the persons winding up the limited liability company's affairs may, in the name of and for and on behalf of the limited liability company, prosecute and defend suits, whether civil, criminal or administrative" (NY Limited Liability Company Law § 703 [b]).

even if the Court were to assume that Merrill Lynch was a party to the contract (*see CBS Corp. v Dumsday*, 268 AD2d 350 [1st Dept 2000]).

Turner maintains that he is entitled to a bonus for the years 2006 and 2007 pursuant to the consulting agreement which states:

> "CONSULTANT will be given equal and consistent consideration for discretionary bonuses that may be granted to CONSULTANT and CUSTOMER employees from time to time in recognition of the achievements of the respective individuals, business units of CUSTOMER and the CUSTOMER itself" (affidavit of plaintiff, exhibit A, Schedule 1 ¶ 3).

The unambiguous language of the Agreement states that this bonus was to be discretionary, and may be granted to consultant [Reinsurance]. It is well settled under New York law that "an employee has no enforceable right to compensation under a discretionary compensation or bonus plan" (*Nikitovich v O'Neal*, 40 AD3d 300, 300 [1st Dept 2007]; *see Namad v Salomon, Inc.*, 74 NY2d 751 [1989]; *Hunter v Deutsche Bank AG, New York Branch*, 56 AD3d 274 [1st Dept 2008] ["plaintiff's claims for breach of contract lack merit in view of the unambiguous language of their contracts and the employee handbook plainly making bonus awards solely and completely a matter of defendant's discretion"]; *Kaplan v Capital Co. of America LLC,* 298 AD2d 110 [1st Dept 2002]). The language of the Consulting Agreement was clear and unambiguous that the bonuses to be paid were discretionary. Though members of groups with whom plaintiff worked received bonuses in 2006 and 2007, Merrill Lynch, according to the Consulting Agreement, had the discretion whether or not to give Reinsurance the bonus. Thus, plaintiff's amended complaint failed to state a cause of action for breach of contract for failure to pay Reinsurance bonuses in 2006 and 2007.

C. Quantum Meruit [3]

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[3]Plaintiff also makes reference in his amended complaint to unjust enrichment, but asserts a cause of action for quantum meruit. The distinction between the two quasi-contractual theories is irrelevant here because he is precluded from recovering under either theory as a matter of law.

Plaintiff is precluded from recovering in quantum meruit because of the presence of an express contract, the Consulting Agreement, which covers the bonus, the subject matter in dispute (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005] ["the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter"]; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]; *Dabrowski v Abax Inc.*, 64 AD3d 426, 427 [1st Dept 2009] ["The quantum meruit and unjust enrichment causes of action also should have been dismissed because they arise out of subject matter covered by express contracts and the validity of the contracts are not in dispute"]; *cf Joseph Sternberg, Inc. v Walber 36th Street Associates*, 187 AD2d 225 [1st Dept 1993] [First Department held that where there is a dispute as to the existence of a contract or whether the contract covers the dispute in issue, contractual and quasi-contractual claims can both be pursued]).

Existence of a written contract governing the subject matter in dispute, precludes quasi-contractual claims, even against noncontracting parties (*see Vitale v Steinberg*, 307 AD2d 107 [1st Dept 2003]; *Bellino Schwartz Padob Advertising, Inc. v Solaris Marketing Group*, 222 AD2d 313 [1st Dept 1995]; *Feigen v Advance Capital Mgt. Corp.*, 150 AD2d 281, 283 [1st Dept 1989]). Therefore, plaintiff has no cause of action against Merrill Lynch under quantum meruit.

The Court has considered the parties remaining arguments and finds them to be without merit.

For these reasons and upon the foregoing papers, it is,

ORDERED that the movants' motion to dismiss plaintiff's amended complaint pursuant to CPLR § 3211(a)(1), (a)(3), and (a)(7) is granted as to defendant Merrill Lynch; and it is further,

ORDERED that Merrill Lynch shall serve a copy of this order, with Notice of Entry, upon all parties; and it is further,

ORDERED that plaintiff is to file a copy of the amended complaint with the Court; and it is further,

ORDERED that the plaintiff and remaining parties are directed to appear for a preliminary conference on March 9, 2011 at 2:30 p.m., in Part 7, 80 Centre Street, Room 320.

This constitutes the Decision and Order of the Court.

Dated: December 27, 2010

PAUL WOOTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE