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

PRESENT: BERNARD J. FRIED Justice PART 60

HON. BERNARD J. FRIED

E-FILE

JONATHAN P. GODSON,

Plaintiff,

- v -

PHOENIX PARTNERS GROUP LP, ET. AL.,

Defendants.

INDEX NO. #651459-2010

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

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: 4/13/2011

J.S.C.

HON. BERNARD J. FRIED

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST [ ] REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER/JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIV: PART 60

----------X

JONATHAN P. GODSON,

Plaintiff,

Index No.
651459/2010

-against-

PHOENIX PARTNERS GROUP LP, PHOENIX PARTNERS MANAGEMENT LLC, NICHOLAS JOHN STEPHAN, JINGBIN WANG a/k/a WESLEY WANG and MARCOS BRODSKY,

Defendants.

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Appearances:

For Plaintiff:

Troutman Sanders LLP
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New York, NY 10174
Stephen F. Harmon, Esq.

For Defendants:

Office of the General Counsel
Phoenix Partners Group LP
315 Park Avenue South, 19th Floor
New York, NY 10010
Christopher J. Porzio, Esq.

FRIED, J.:

This dispute involves Plaintiff Jonathan Godson ("Godson" or the "Plaintiff") and Defendants Phoenix Partners Group LP ("Phoenix NY"), Phoenix Partners Management LLC ("PPM"), Nicholas John Stephan ("Stephan"), Jingbin Wang, a/k/a Wesley Wang ("Wang") and Marcos Brodsky ("Brodsky") (collectively, the "Defendants"). Before me is a motion to dismiss the complaint in its entirety against the Defendants pursuant to CPLR 3211(a)(1) and (a)(7).

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), Defendants "must show that the documentary evidence conclusively refutes plaintiff's . . . allegations." (*E.g.*, AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 N.Y.3d 582, 591 [2005] [citing Goshen v. Mutual Life Ins. Co., 98 N.Y.2d 314, 326 [2002]]). When evaluating a motion to dismiss pursuant to CPLR 3211(a)(7), the court must construe the pleading liberally, accept all facts alleged in the complaint to be true, and accord the plaintiff the benefit of every possible favorable inference. (*E.g.*, 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 [2002]).

Plaintiff Godson is a broker of equity derivatives. (Complaint ¶ 10). Defendant Phoenix NY is a limited partnership under the laws of the state of Delaware and is a credit and equity derivatives inter-dealer broker with principal offices in New York, London, and Paris. (*Id.* ¶ 3). Defendant PPM is a limited liability company organized under the laws of Delaware and is the general partner of Phoenix NY. (*Id.* ¶ 4). Defendants Stephan, Wang, and Brodsky are limited partners in Phoenix NY and controlling members of PPM. (*Id.* ¶¶ 4-7). In addition, Defendant Stephan is also the Chief Executive Officer of Phoenix NY. (Godson Aff. ¶ 7).

In the spring of 2008, Plaintiff and his friend and fellow broker, John L. Foley ("Foley"), resigned their positions at their former employers with the intent to establish their own equity derivatives business. (Complaint ¶ 12). In or about that time, Plaintiff and Foley met with Thomas Foxcraft ("Foxcraft"), another individual in the inter-dealer broker industry, and the three men agreed to work together as partners in a newly formed broker-dealer or as part of a business relationship to be formed with an existing inter-dealer broker.

(Complaint ¶ 13). During the process of exploring possible business relationships, Foxcraft introduced Plaintiff and Foley to Defendants. (Complaint ¶ 15).

In 2008 Plaintiff participated in negotiations with defendants Stephan, Wang, and Brodsky in New York. (Complaint ¶ 16; Godson Aff. ¶ 7). Plaintiff alleges that, as a result of these negotiations, an oral contract was formed whereby Phoenix NY would provide a registered broker-dealer entity for the purposes of operating an equity derivatives business conducted by Plaintiff, Foley, and Foxcraft, as well as other brokers recruited by Plaintiff in New York and London, as part of the overall operations of Phoenix NY. (Complaint ¶¶ 14, 18). Under the alleged oral contract, Plaintiff, Foley, and Foxcraft were to be compensated at a base annual salary of $200,000.00 plus a bonus. (*Id.* ¶ 20). Plaintiff's alleged bonus was to be paid quarterly, three months in arrears, calculated at 65% of the amount of net revenues generated by Plaintiff as an equity derivatives broker. (*Id.*). Plaintiff also alleges that he, Foley, and Foxcraft refused to enter into any relationship with Phoenix NY unless each man was to be granted an equity interest in Phoenix NY as well as an opportunity to increase that interest over time. (*Id.* ¶ 21). As a result, Plaintiff alleges that it was agreed that he, Foley, and Foxcraft were to become partners in Phoenix NY and to receive a fully vested 0.5% equity interest in Phoenix NY upon commencement of their employment. (*Id.* ¶ 22). Plaintiff alleges that it was also agreed that he, Foley, and Foxcraft would obtain an additional 0.5% equity interest in Phoenix NY in each of the calendar years of 2009 – 2013 if the revenues from the derivatives desk met 70% to 100% of designated revenue targets as well as an additional 0.333% in 2011, 2012, and 2013 if revenues were 125% or more of the revenue target for each year. (*Id.* ¶ 23). Plaintiff alleges that it was further agreed that he and Foxcraft

would begin work for Phoenix NY at its London desk before moving to New York after visa arrangements had been made, while Foley would begin work at the New York desk. (*Id.* ¶ 19).

From November 2008 until his termination on or about September 3, 2009, Plaintiff was employed in London as a broker at Phoenix Partners Group LLP ("Phoenix UK"), a United Kingdom Limited Liability Partnership affiliated with Phoenix NY and a non-party to the current suit. (Plaintiff's Mem. L. in Opposition to Motion to Dismiss, Exhibit 2 [termination email from John F. Bolton, General Counsel to Phoenix NY, to Plaintiff]; Affidavit of Stuart Jarrett, Exhibits A [Phoenix UK payroll records] and B [Phoenix UK Certificate of Incorporation]; Reply Affirmation of John F. Bolton, Exhibit A [HM Revenue and Customs form documenting Plaintiff's employment with Phoenix UK]). Upon termination of Plaintiff's employment at Phoenix UK, Phoenix NY refused to recognize him as a partner of Phoenix NY and refused to pay him a bonus owed to him under the alleged agreement for the second and third quarters of 2009. (Complaint ¶ 32).

On September 7, 2010, Plaintiff filed this complaint against Defendants alleging the following causes of action: (1) Breach of Contract; (2) Implied Contract; (3) Violation of Article VI of the New York Labor Law; (4) Breach of the [Implied] Covenant of Good Faith and Fair Dealing; (5) *Quantum Meruit*; (6) Unjust Enrichment; (7) Declaratory Judgment pursuant to CPLR 3001 that Plaintiff is a partner in Phoenix NY; and (8) Breach of Fiduciary Duty. (*Id.* ¶¶ 33-63).

Defendants move to dismiss the complaint in its entirety against the Defendants pursuant to CPLR 3211(a)(1) and (a)(7). The issues presented in this motion are the

following: (1) whether Defendants have provided documentary evidence that "conclusively refutes" Plaintiff's allegations in his first through sixth causes of action; and (2) whether Plaintiff's seventh and eighth causes of action sufficiently state a claim against Defendants.

I. First Cause of Action: Breach of Contract

In his first cause of action, Plaintiff alleges that an oral agreement was entered into between Plaintiff and Phoenix NY, and that such agreement constitutes a valid and enforceable contract which was materially breached when Phoenix NY refused to pay Plaintiff compensation promised to him under the agreement. (*Id.* ¶¶ 33-36). Defendants respond that the documentary evidence conclusively refutes that Plaintiff was ever employed by Phoenix NY by demonstrating his employment by non-party Phoenix UK. (Mem. L. in Support of Motion to Dismiss at 3). Thus, Defendants claim that any agreement Plaintiff may have had was with Phoenix UK, not Phoenix NY, (*Id.* at 4), and that, because Plaintiff "may not maintain a cause of action for contract against those parties with whom [he] is not in privity[,]" Plaintiff has no claim against Defendants. (*Id.* at 4-5 [citing LaBarte v. Seneca Res, Corp., 285 A.D.2d 974, 975, 728 N.Y.S.2d 618, 620 [4th Dep't 2001]]).

The first issue is whether the documents provided by Defendants meet the standard required by CPLR 3211(a)(1) in that the documentary evidence "conclusively refutes" Plaintiff's allegation that a valid contract or an implied contract was formed between Plaintiff and Phoenix NY. (*E.g.*, AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 N.Y.3d 582, 591 [2005]).

The documentary evidence provided by Defendants consists of payroll records of Phoenix UK that demonstrates Plaintiff was on the payroll of Phoenix UK from November 2008 to September 2009, and that, during that time, Phoenix UK made mandatory United Kingdom National Insurance payments on Plaintiff's behalf, which UK entities are required to do on behalf of employees. (Jarrett Aff., Exhibit A). Defendants also provide a Certificate of Incorporation of a Limited Liability Partnership for Phoenix UK as evidence that Phoenix UK is a duly registered United Kingdom Limited Liability Partnership. (Jarrett Aff., Exhibit B).

In support of his position, Plaintiff provides documents that allegedly demonstrate his employment at Phoenix NY, including a September 3, 2009 email to Plaintiff from John F. Bolton, General Counsel for Phoenix NY at the time, informing Plaintiff of his termination as an employee of Phoenix UK. (Godson Aff., Exhibit 2). Attached to the email is an Agreement and Release that defines Phoenix NY and Phoenix UK collectively as PPG, (*Id.*, Agreement and Release at 1), and contains a "whereas" clause that states that "[Plaintiff] and PPG hereby have mutually agreed to amicably end your employment relationship with PPG." (*Id.*). Plaintiff alleges that this clause, as well as other instances in the Agreement and Release that similarly refer to Godson's employment by PPG, are proof of the existence of an employment relationship between Plaintiff and Phoenix NY because PPG includes, by definition under the Agreement and Release, Phoenix NY. (Opp. Mem. L. at 13-14). However, Defendants argue that because the Agreement and Release is unsigned by the parties, it is not probative of Plaintiff's employment by Phoenix NY. (Further Support of

Motion to Dismiss at 5). In addition, the email itself specifically mentions Plaintiff's termination from Phoenix UK, not Phoenix NY. (Godson Aff., Exhibit 2).

While the documentary evidence provided by Defendants demonstrates that Plaintiff was employed in London by Phoenix UK, it does not conclusively refute Plaintiff's allegation that he had an agreement to work for, and obtain an interest in, Phoenix NY. Defendants do not dispute that negotiations took place in New York between Plaintiff and Defendants Stephan, Wang, and Brodsky, all three limited partners of Phoenix NY, in addition to Stephan being the Chief Executive Officer of Phoenix NY. Nor do Defendants attempt to explain what occurred during these negotiations, or how Plaintiff came to be employed solely by Phoenix UK, which has its own partners that are separate from the partners of Phoenix NY.

In sum, because the documentary evidence provided by Defendants does not conclusively refute Plaintiff's allegation that a valid contract or an implied contract was formed between Plaintiff and Phoenix NY, Defendants' motion to dismiss the first and second causes of action pursuant to CPLR 3211(a)(1) is denied.

The second issue is whether Plaintiff's complaint, when construed liberally, all facts alleged in the complaint are taken to be true, and given the benefit of every possible favorable inference, states a cause of action for breach of contract against Defendants pursuant to CPLR 3211(a)(7). (*E.g.*, 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 [2002]).

If the facts alleged in Plaintiff's complaint are taken to be true, an agreement was formed as a result of the negotiations in New York and Plaintiff has stated a claim against

Phoenix NY for breach of contract based on Phoenix's NY's refusal to pay Plaintiff his bonus and/or to grant him his equity interest under the alleged agreement. Accordingly, Defendants' motion to dismiss the first cause of action pursuant to CPLR 3211(a)(7) is also denied.

II. **Second Cause of Action: Implied Contract**

In his second cause of action, Plaintiff argues, in the alternative, that an implied contract was formed between Plaintiff and Phoenix NY, and that such contract was breached by Phoenix NY's refusal to pay Plaintiff compensation promised to him under the agreement. (Complaint ¶¶ 37-39). An implied contract "may result as an inference from the facts and circumstances of the case, although not formally stated in words, and is derived from the presumed intention of the parties as indicated by their conduct." (Jemzura v. Jemzura, 36 N.Y.2d 496, 503-504, 369 N.Y.S.2d 400, 330 N.E.2d 414 [1975] [internal citation omitted]). "A contract implied in fact rests upon the conduct of the parties and not their verbal or written words. Thus, the theories of express contract and of contract implied in fact are mutually exclusive." (Watts v. Columbia Artists Management Inc., 188 A.D.2d 799, 591 N.Y.S.2d 234, 236 [1992]).

Plaintiff's cause of action for breach of implied contract cannot stand because Plaintiff alleges that, contrary to the meaning of an implied contract, an express contract was in fact formed (Complaint ¶¶ 18-24). Therefore, the second cause of action is dismissed.

III. **Third Cause of Action: Violation of Article VI of the New York Labor Law**

In his third cause of action, Plaintiff alleges that failure by Phoenix NY to pay Plaintiff compensation due under the agreement constitutes a violation of Article VI of the Labor Law. (Complaint ¶¶ 40-43). Plaintiff states that he is an employee within the meaning of Article VI of the Labor Law, his compensation constitutes "wages" within the meaning of the Labor Law § 190, and Phoenix NY's failure to pay thereby constitutes an unlawful "deduction from wages" within the meaning of Labor Law § 193. (*Id.*). Defendants again respond that because the documentary evidence establishes that Plaintiff was an employee of Phoenix UK, such evidence conclusively refutes Plaintiff's claim that he was an employee of Phoenix NY, and thus Phoenix NY could not have been Plaintiff's "employer" as defined under the Labor Law § 190. (Mem. L. in Support of Motion to Dismiss at 5-6). However, as discussed above, the documentary evidence provided by Defendants does not conclusively refute Plaintiff's allegations, which are sufficient to state a claim against Defendants. Accordingly, Defendants' motion to dismiss the third cause of action pursuant to CPLR 3211(a)(1) and (a)(7) is denied.

IV. **Fourth Cause of Action: Breach of the [Implied] Covenant of Good Faith and Fair Dealing**

In his fourth cause of action, Plaintiff states that every contract in New York contains an implied covenant of good faith and fair dealing as a matter of law, and that this covenant prohibits a party to the contract from destroying or injuring the right of a different party to

the contract to receive the fruits of the contract. (Complaint ¶ 45). Plaintiff then alleges that Phoenix NY, as a party to the contract, violated this covenant. (*Id.* ¶ 46). An implied covenant of good faith and fair dealing "is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." (P.T. & L. Contr. Corp. v. Trataros Constr., Inc., 29 A.D.3d 763, 764 [2006] [*quoting* Aventine Inv. Mgt. v. Canadian Imperial Bank of Commerce, 265 A.D.2d 513, 514 [1999]]). Defendants argue that, because Plaintiff's breach of the implied covenant of good faith and fair dealing claim is duplicative of his breach of contract claim, this cause of action must also be dismissed. (Mem. in Support of Motion to Dismiss at 4-5 [citing Jacobs Private Equity, LLC v. 450 Park, LLC, 22 A.D.3d 347, 347-48, 803 N.Y.S.2d 14, 15 [1st Dep't 2005] [where breach of contract claim is dismissed, breach of implied covenant of good faith and fair dealing is "duplicative" and must also be dismissed]).

A good faith claim will be dismissed as duplicative if it merely repeats the facts of the breach of contract claim and seeks the same damages. (*See* Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce, 70 A.D.3d 423, 894 N.Y.S.2d 47, 49-50 [1st Dep't 2010] [dismissing a good faith and fair dealing claim because it arose from the same facts and sought the same relief as the breach of contract claims]). Here, Plaintiff's good faith claim is duplicative of his breach of contract claim because both claims repeat the same facts and seek the same damages. Accordingly, Defendants' motion to dismiss Plaintiff's fourth cause of action pursuant to CPLR 3211(a)(7) is granted.

V. **Fifth and Sixth Causes of Action: *Quantum Meruit* and Unjust Enrichment**

In his fifth cause of action, Plaintiff alleges that he has performed services for Phoenix NY enabling Phoenix NY to enter the business of brokering equity derivatives and that those services were performed in good faith and upon the expectation that Plaintiff would be adequately compensated by Phoenix NY. Plaintiff alleges that the services performed were accepted and conferred a benefit upon Phoenix NY, and that Plaintiff is therefore entitled to compensation by Phoenix NY under a theory of *quantum meruit*. (Complaint ¶¶ 47-50). The elements of a claim in *quantum meruit* are as follows: (1) performance by Plaintiff in good faith; (2) acceptance of Plaintiff's services by the Defendant; (3) expectation of compensation for services; and (4) reasonable value of services rendered. (*E.g.*, Soumayah v. Minnelli, 41 A.D.3d 390, 839 N.Y.S.2d 79 [1st Dep't 2007]).

In his sixth cause of action, Plaintiff alleges that his efforts in creating an equity derivatives desk for Phoenix NY and the generation of revenue retained by Phoenix NY conferred a substantial benefit upon and enriched Phoenix NY. (Complaint ¶¶ 51-54). Plaintiff argues that allowing Phoenix NY to retain such a benefit without adequately compensating Plaintiff for his efforts constitutes unjust enrichment. (*Id.*). Unjust enrichment requires that Plaintiff show that (1) Defendant was enriched (2) at Plaintiff's expense and (3) allowing Defendant to retain such enrichment would be against equity and good conscience. (*E.g.* Mandarin Trading Ltd. v. Wildenstein, 2011 WL 445634 [N.Y.], 2011 N.Y. Slip Op. 00741).

Although claims founded in *quantum meruit* and unjust enrichment may be dismissed as duplicative in cases where the complaint alleges an express, enforceable contract controls

the parties' relationship, (Zurakov v. Register .Com, Inc., 304 A.D.2d 176, 182 [1st Dep't 2003]), Defendants do not base their motion upon this theory. Instead, Defendants again argue that the documentary evidence establishes that Plaintiff was employed not by Phoenix NY but by Phoenix UK. (Mem. L. in Support of Motion to Dismiss at 6). As such, Plaintiff has not met the first two requirements for *quantum meruit*—services performed by Plaintiff were not for any Defendant nor did any Defendant accept such services. (*Id.*). In addition, Defendants argue that, because the documentary evidence establishes that Plaintiff was not employed by the Defendants, none of them could have been enriched by Plaintiff's alleged efforts, and thus Plaintiff's claim for unjust enrichment must also be dismissed. (Mem. L. in Support of Motion to Dismiss at 6-7). However, as discussed above, the documentary evidence does not conclusively refute Plaintiff's allegations, which, taken as true, are sufficient to state a claim against Defendants in *quantum meruit* because Plaintiff alleges that he performed in good faith with the expectation of compensation and that his services were accepted by Defendants. Therefore Defendants' motion to dismiss the fifth cause of action pursuant to CPLR 3211(a)(1) and (a)(7) is denied.

In addition, the documentary evidence does not conclusively refute Plaintiff's allegations, which, taken as true, are sufficient to state a claim against Defendants for unjust enrichment because Plaintiff alleges that the Defendants were enriched at his expense when Plaintiff's efforts resulted in the establishment of Defendants' equity derivatives business, and that allowing Defendants to retain such enrichment would be against equity and good conscience. Therefore Defendants' motion to dismiss the sixth cause of action pursuant to CPLR 3211(a)(1) and (a)(7) is also denied.

VI. **Seventh Cause of Action: Declaratory Judgment**

In his seventh cause of action, Plaintiff asserts that, as a minority equity holder in Phoenix NY under the alleged oral agreement, he is entitled to a declaration pursuant to CPLR § 3001 that he is a minority partner in Phoenix NY with not less than a 0.5% equity interest in Phoenix NY. (Complaint ¶¶ 55-57). Defendants argue that because the alleged oral agreement in its entirety contemplates events extending until 2013, the agreement cannot possibly be performed within a year of its making and thus violates the Statute of Frauds as embodied in New York General Obligations Law § 5-701(1). (Further Support of Motion to Dismiss at 10-11).

Although Plaintiff argues that Defendants' motion to dismiss based on the Statute of Frauds is procedurally improper because Defendants do not move under CPLR § 3211(a)(5), Plaintiff is not prejudiced by the failure to state the subsection of the CPLR. (Nardi v. Povich, 12 Misc.3d 1188(A), 824 N.Y.S.2d 764 [2006]). Accordingly, because the contract as alleged by Plaintiff contemplates events extending until 2013 and cannot be performed within a year, Defendants' motion to dismiss Plaintiff's seventh cause of action pursuant to § 3211(a)(5) is granted.

VII. **Eighth Cause of Action: Breach of Fiduciary Duty**

In his eighth and final cause of action, Plaintiff alleges that, as a minority equity partner in Phoenix NY, the other equity partners of Phoenix NY owe him a fiduciary duty not to do anything to interfere with, injure, or damage his interest in Phoenix NY.

(Complaint ¶¶ 58-59). Plaintiff goes on to state that, because he was one of the major revenue generators at Phoenix NY, the termination of his employment constituted a breach of fiduciary duty by the partners of Phoenix NY because Plaintiff's termination injured, damaged, and diminished Plaintiff's partnership interest in Phoenix NY. (Complaint ¶¶ 60-63). Defendants again argue that, because Plaintiff was employed not by Phoenix NY but by Phoenix UK, the equity partners of Phoenix NY could not have owed a fiduciary duty to Plaintiff. (Mem. L. in Support of Motion to Dismiss at 8). However, as discussed above, Defendants have not shown that the documentary evidence conclusively refutes Plaintiff's allegations, which, taken as true, are sufficient to state a cause of action against Defendants because, as partners, Defendants owe a fiduciary duty to him.

Defendants also argue that, even if Plaintiff is owed a fiduciary duty by the other equity partners in Phoenix NY, such duty does not extend to the right to continued, indefinite employment at Phoenix NY. In essence, Defendants argue that Plaintiff is using fiduciary duty as a means to "avoid the at-will nature of his alleged employment by [Phoenix NY]." In support of their position, Defendants cite *Ingle v. Glamore Motor Sales*, which dealt with the issue of whether an individual is insulated from termination by virtue of his status as an employee-minority shareholder of a close corporation employer. (73 N.Y.2d 183, 186 [1989]). In *Ingle*, the employee-minority shareholder plaintiff argued that the duty owed to him by the other shareholders in the close corporation should be similar to that of the duty owed between partners. (*Id.* at 187). However, the Court concluded that the employment relationship was at-will and, as such, there was "no implied obligation of good faith and fair dealing" between the minority shareholder-employee and the corporate officers when it came

to the employee's termination. (*Id.* at 188). The Court further concluded that "[n]o duty of loyalty and good faith *akin to that between partners*, precluding termination except for cause, arises among those operating a business in the corporate form who 'have only the rights, duties and obligations of stockholders' *and not those of partners*." (*Id.* at 189 [*citing* Weisman v. Awnair Corp., 3 N.Y.2d 444, 449-450] [emphasis added]). As such, the Court in *Ingle* specifically limited its discussion to the duties owed to employee-stockholders, not partners, as is the case here according to Plaintiff's allegations. Therefore, Defendants' motion to dismiss Plaintiff's eighth cause of action pursuant to 3211(a)(1) and (a)(7) is denied.

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss the first, third, fifth, sixth, and eighth causes of action of the Complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) is DENIED; and it is further,

ORDERED that Defendants' motion to dismiss the second and fourth causes of action of the Complaint pursuant to CPLR 3211(a)(7) is GRANTED; and it is further,

ORDERED that Defendants' motion to dismiss the seventh cause of action of the Complaint pursuant to CPLR 3211(a)(5) is GRANTED.

Dated: April 13, 2010

ENTER:

J.S.C.

HON. BERNARD J. FRIED