SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

MICHAEL NIGRO JR.,

Plaintiff,

INDEX No. 13054/10

MOTION DATE: Dec. 22, 2010
Motion Sequence # 001

-against-

OWEN LOGISTICS LLC, MERIDIAN TRANSPORTATION LOGISTICS LLC, MERIDIAN MOVING SYSTEMS LLC, JEFFREY OWEN, MINDI PETERS and KEVIN MCSHERRY,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X
Reply Affirmation..... X
Memorandum of Law..... XX

Motion by defendants Owen Logistics LLC, Meridian Transportation & Logistics LLC, Jeffrey Owen, Mindi Peters, and Kevin McSherry to dismiss the complaint on the grounds of a defense founded upon documentary evidence and failure to state a cause of action is **granted** in part and **denied** in part.

This is an action for breach of contract. Plaintiff Michael Nigro alleges that in July 2009 he entered into a verbal agreement with defendants Jeffrey Owen, Mindi Peters, and

Kevin McSherry to purchase their membership interests in defendants Owen Logistics LLC and Meridian Transportation & Logistics LLC. Plaintiff further alleges that he advanced the purchase price but defendants failed to transfer their interests in the companies.

The present action was commenced on July 8, 2010. In the first cause of action, plaintiff seeks specific performance of the membership purchase agreement. In the second cause of action for breach of contract, plaintiff seeks damages in the amount of the purchase price paid pursuant to the contract. In the third cause of action, for fraud in the inducement, plaintiff alleges that defendants fraudulently represented that they would convey to plaintiff a 49 % interest in Owen Logistics and a 50 % interest in Meridian Transportation & Logistics. Plaintiff alleges that he relied upon these representations by paying defendants $550,000 for their interests in the companies. Plaintiff also asserts claims for negligent misrepresentation, unjust enrichment, breach of a loan agreement, and conversion.

Defendants Peters, McSherry, and Meridian Transportation & Logistics move to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7). Defendants Owen, Peters, McSherry, Owen Logistics, and Meridian Transportation & Logistics move to dismiss the first and second causes of action based on a defense founded upon documentary evidence pursuant to CPLR 3211(a)(1). The latter defendants move to dismiss the third, fourth, and seventh causes of action for failure to state a cause of action pursuant to CPLR 3211(a)(7).

In support of their motion to dismiss, defendants submit a letter from their attorney to counsel for plaintiff dated October 19, 2009. In the letter, counsel states that plaintiff's proposed purchase price of $450,000 for a 49% interest in Owen Logistics was inadequate in view of the accountant's $2.1 million valuation of the company.

Defendants also submit a letter dated October 23, 2009 from plaintiff's counsel concerning the proposed transaction. In the letter, plaintiff's counsel states that his client made an initial loan of $445,000 to Owen Logistics and then made several additional loans to the company. Counsel inquires whether the seller "intends on honoring their prior agreement or whether the new terms contained in your correspondence is the present offer." In reply, defendants submit earlier correspondence, concerning a change in the price and repayment of plaintiff's loan, which would not "be binding until fully executed by all parties."

Defendants argue that plaintiff's claims for breach of contract are legally insufficient

because the parties did not agree as to the material terms. Defendants argue that plaintiff's fraud claims have not been pled with the required particularity. Defendants argue that plaintiff's claim for negligent misrepresentation fails because the parties did not have a "special relationship." Finally, defendants argue that plaintiff's claim for conversion is duplicative of his breach of contract claim.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction....[The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory"(***Arnav Industries, Inc. v. Brown***, 96 NY2d 300, 303 [2001]).

"If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract" (***Teutal v Teutal***, 912 NYS2d 664 [2d Dept 2010]). Thus, a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable (Id). The price for the purchase of an interest in a business is a material term, which must be defined with reasonable certainty. However, a price of "fair market value" may be sufficiently precise, particularly if the parties have agreed that fair market value is to be determined by way of appraisal (***Marder's Nurseries v Hopping***, 171 AD2d 63, 70-71 [2d Dept 1991]).

The documents before the court suggest that the parties agreed that plaintiff would purchase 49% of Owen Logistics and 50% of Meridian Transportation & Logistics for a price of $550,000, subject to adjustment based upon the accountant's valuation. Giving plaintiff the benefit of every possible favorable inference, the purchase price was defined with reasonable certainty. Defendants' motion to dismiss plaintiff's claims for specific performance and breach of contract on the grounds of a defense founded upon documentary evidence and failure to state a cause of action is **denied**.

CPLR 3016(b) provides that when a cause of action is based upon misrepresentation or fraud the circumstances constituting the wrong shall be stated in detail. Plaintiff alleges that defendants fraudulently represented that they would convey interests in Owen and Meridian Transportation & Logistics and that plaintiff relied upon those representations by either paying the purchase price or lending a substantial sum to the companies. The court concludes that the causes of action for fraud and negligent misrepresentation have been pled in sufficient detail.

However, a cause of action for fraud does not lie when the only fraud charged relates to a breach of contract (***Union Free School District v Bat-Jac Construction***, 28 AD3d 596 [2d Dept 2006]). Plaintiff's claim for fraud relates to defendants' breach of the oral agreement to sell plaintiff a share of the two companies. Accordingly, defendants' motion to dismiss plaintiff's fraud claim for failure to state a cause of action is **granted**.

A claim for negligent misrepresentation requires the plaintiff to demonstrate the existence of a special or privity-like relationship imposing a duty on defendant to impart correct information to the plaintiff (***JAO Acquisition v Stavitsky***, 8 NY3d 144, 148 [2007]). Had the agreement been performed, plaintiff and the individual defendants would have been joint members of the limited liability companies. However, in the negotiation of the agreement, the parties dealt at arm's length. Thus, plaintiff has not alleged the existence of a special or privity-like relationship. Defendants' motion to dismiss plaintiff's negligent misrepresentation claim for failure to state a cause of action is **granted**.

The theory of unjust enrichment lies as a quasi-contract claim (***IDT Corp v Morgan Stanley***, 12 NY3d 132, 142 [2009]). It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned (Id). Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded (Id).

The contract which plaintiff alleges is oral, rather than written. Moreover, while plaintiff has stated a cause of action for breach of contract, he has not yet established that the contract is enforceable. If plaintiff fails to establish an actual agreement to purchase the membership interests, he may nonetheless recover in unjust enrichment for amounts paid or loaned to the companies. Defendants' motion to dismiss plaintiff's claims for unjust enrichment and breach of a loan agreement for failure to state a cause of action is **denied**.

An action for conversion of money requires "a specific identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question" (***Thys v Fortis Securities***, 74 AD3d 546 [1st Dept 2010]). Plaintiff alleges that defendants converted the "money lent and expended for the defendants' benefit." While plaintiff may have invested a considerable sum of money in Owen and Meridian Transportation & Logistics, he has not alleged the existence of a specific identifiable fund, which could form the basis of a conversion action. Defendants' motion to dismiss plaintiff's conversion claim for failure to state a cause of action is **granted**.

So ordered.

Dated 14 February 2011

ENTERED

FEB 18 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE

J.S.C.