[* 1]

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

PRESENT: JAMIE B. BOCCHON PART 55

Index Number : 110157/2009

CARIBBEAN DIRECT

vs

DUBSET

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE 3/14/11

MOTION SEQ. NO. _____

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 ...	1-5
Answering Affidavits — Exhibits	6-7
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

NB Pre Trial Conf set at end 7-25-11 @ 2PM

FILED

JUN 16 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/15/11

JAMIE B. BOCCHON J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

----------X

CARIBBEAN DIRECT, INC., d/b/a CD, INC.,

Plaintiff,

-against-

DUBSET LLC and DAVID STEIN,

Defendants.

----------X

Index No. 110157/09

DECISION & ORDER

SOLOMON, J.:

Plaintiff Caribbean Direct, Inc. (CD) sues defendant Dubset, LLC (Dubset) and its principal, David Stein (Stein) (collectively, Defendants) for breach of contract, trademark infringement, misappropriation and conversion, an accounting, unjust enrichment and fraud. Defendants move for summary judgment on the ground that the complaint fails to state a claim against them. The motion is decided as follows.

CD alleges that in or about July 2007, Stein approached it for assistance in launching a new venture (Complaint, Notice of Motion, Ex. A, ¶ 5), including the provision of office space and supplies and a secretary. Stein also sought help in creating a website and logo for the company, to be called Dubset. CD's principal, Mark Selden, understood that Dubset did not yet exist and claims that Stein agreed that the company would be formed with CD as a 35% owner in return for CD's services (Complaint, ¶¶ 7-8). CD engaged an attorney, who drafted a limited liability company agreement to implement the plan and sent it Stein, but he

never executed it. CD later learned that Stein had formed Dubset without its participation. At this point, someone, presumably Stein, orally promised to give CD a 35% interest in Dubset if CD continued to provide its services (Selden Aff., ¶ 9). CD continued to work on the website, and to provide offices, staff and supplies. When CD did not receive its expected ownership interest, it demanded that Dubset "seize and desist" [sic] from using the logo. Dubset refused. The parties negotiated with CD's lawyer sending letters in the summer of 2008 and April 2009 offering to accept $25,000 plus 7 ½ percent of Dubset, or $50,000 and no interest in Dubset (Aff. Of Mark Selden, Ex. A), but no agreement was reached. This lawsuit ensued.

Defendants contend that between January and March of 2008 that payments they made to "2B-Unique", an entity related to CD, was compensation to CD for design work on the web page, but the web page was never completed and no part of the programming code ever was provided to them. Further, they contend that CD is not entitled to compensation for the logo which it obtained from a Norwegian artist named Mike Westjidk, pursuant to a separate written agreement (Agreement, attached to Motion, Ex. N, p. 5). They assert that Dubset is not using the web page designed by CD; rather, it uses a web page created by non-party web developers hired after CD failed to complete the web page. In support, affidavits are provided from two programmers who state that they

began work on the Dubset web page without knowing or obtaining any of CD's programming code or code files (Affidavit of Benjamin Katz, ¶ 4; Affidavit of Michael Wenzel, ¶ 2). These allegations are unopposed. Finally, they state that there was no agreement to create a new limited liability company with CD as a 35% owner, or to transfer a 35% interest in Dubset.

Defendants counter-claimed for breach of contract arising from CD's failure to produce a functional web page, breach of implied contract, quasi contract, fraud, tortious interference with prospective economic advantage, unjust enrichment, and conversion (Answer and Counterclaim, Notice of Motion, Ex. B). This motion for summary judgment is addressed only to the complaint.

To defeat the claim that Selden believed that Dubset was not yet in existence when he met Stein, Defendants point to the agreement the men signed on June 27, 2007 to which Dubset is a named party (Non-Disclosure Agreement, Notice of Motion, Ex. K, dated June 27, 2007). It shows that CD had notice that Dubset was an existing entity from the onset of CD's interaction with Stein.

DISCUSSION

1. Trademark Infringement

Defendants argue that CD cannot make a prima facie claim for trademark infringement. General Business Law (GBL) §

360(a) defines a trademark as "any word, name, symbol, or device . . .used by a person to identify and distinguish the goods of such person, including a unique product, from those manufactured and sold by others . . ." The term "use" is defined as "the bona fide use of a mark in the ordinary course of trade" (GBL § 360[h]).

Defendants correctly argue that the allegations in the complaint do not describe a trademark dispute.

2. Breach of Contract

CD alleges that "Defendants promised that Plaintiff would own thirty-five percent of the Dubset LLC to be formed" (Complaint, ¶ 42, attached to Motion, Ex. A), and that Defendants breached the agreement "by forming the Dubset LLC without the Plaintiff having an ownership interest therein" (Id., ¶ 43). The June 27, 2007 agreement defeats this claim. And, to the extent another entity might have been formed, the failure of a signed signature on the agreement drafted by CD's lawyer ends the matter since "few principles are better settled in the law of contract than the proposition that, 'if a material element of a contemplated contract is left for future negotiations, there is no contract enforceable under the Statute of Frauds or otherwise'" (*Willmott v Giarraputo*, 5 NY2d 250, 253 [1959]). Finally, the failed settlement negotiations are not evidence of an enforceable contract, because evidence of a promise or offer

to compromise a claim is inadmissible as proof of liability or the amount of damages (CPLR 4547).

Defendants' alternative argument that CD's breach of contract claim is barred by the statute of frauds (New York Uniform Commercial Code § 1-206[1]) also has merit. Under Limited Liability Company Law (LLC Law) § 601, a membership interest in a limited liability company is considered personal property. An agreement to sell an interest is governed by New York Uniform Commercial Code § 1-206(1), which states that "a contract for the sale of personal property is not enforceable . . . beyond five thousand dollars in amount or value unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price . . . ." As there is no writing regarding the alleged transfer of a 35% interest in Dubset to CD, even if an oral one could be shown, it would be worth no more than the statutory maximum.

3. Unjust Enrichment and Quantum Meruit

The fourth cause of action is labeled "Unjust Enrichment," but what is alleged is more properly called quantum meruit. "To state such a cause of action [for quantum meruit], plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" (*Fullbright &*

Jaworski, LLP v Carucci, 63 AD3d 487 [1st Dept 2009]). CD alleges that it provided services to defendants with an expectation of compensation, and even accepting as true that Defendants paid $9,000, there is a triable issue of fact as to the extent and value of whatever was provided.

4. Fraud

A fraud claim should be dismissed as redundant when it restates a breach of contract cause of action; i.e. "when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract" (*Gordon v. Dino De Laurentis Corp.*, 141 AD2d 435, 436 [1st Dept., 1988]). A fraud claim may be maintained where a plaintiff pleads a breach of duty that is separate from the breach of contract. CD has not done so here. It alleges that Defendants "falsely represented to [CD] that if [CD] assisted and designed a website and made a logo . . . that [CD] would own 35% of the Dubset LLC, which would be formed" and "[a]t the time the representations were made the Defendants knew it to be false . . ." (Complaint ¶ 36 and 38). These allegations restate the breach of contract grounds that when Dubset made the agreement it never intended to follow through. CD's fraud claim with respect to obtaining an interest in a to-be-formed entity also is dismissed because Selden had actual notice in June 2007 that Dubset existed.

5. Conversion and an Accounting

Defendants have established that Dubset obtained the logo on its own. Accordingly, CD has no claim for its conversion or anything else. As to CD's claim that it was damaged by Defendants' use of its programming work, that claim is disputed and goes with the damages claim discussed above.

"Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito v. New York Organ Donor Network, Inc.*, 8 NY3d 43, 50, [2006]). CD has supplied no proof that Defendants obtained a proprietary programming code from it, nor has it challenged the programmers' affidavits.

"The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Palazzo v. Palazzo*, 121 AD2d 261, 264 [1st Dept., 1986]). CD has not shown any fiduciary relationship between the parties. Its argument that the work done for Defendants created a partnership at will is unpersuasive.

In accordance with the foregoing, it hereby is

ORDERED that summary judgment dismissing the complaint is denied with respect to plaintiff's second cause of action

considered to be for money damages in conversion or quantum meruit claim, and otherwise is granted; and it further is

ORDERED that counsel shall appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York, NY, on July 25, 2011 at 2 PM.

Dated: June 15, 2011

Enter:

J.S.C.

JANE S. SOLOMON

FILED

JUN 16 2011

NEW YORK
COUNTY CLERK'S OFFICE