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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 20**
DR. GILBERT SPECTOR,	**NASSAU COUNTY**
Plaintiff,	**Index No: 008892-10**
	Motion Seq. No. 2
-against-	**Submission Date: 9/6/11**
JOSEPH J. KRIVULKA, AKRIMAX PHARMACEUTICALS, LLC, TRIAX PHARMACEUTICALS, LLC and JOHN DOES 1-10,	
Defendants.	
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The following papers having been read on this motion:

Notice of Motion.....x
Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affidavit in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x
Reply Memorandum of Law.....x

This matter is before the Court for decision on the motion (motion sequence # 2) filed by Defendants Akrimax Pharmaceuticals, LLC ("Akrimax"), Triax Pharmaceuticals, LLC ("Triax") and Joseph J. Krivulka ("Krivulka") (collectively "Defendants") on January 11, 2011 and submitted on September 6, 2011, following oral argument before the Court. For the reasons set forth below, the Court grants Defendants' motions to dismiss the eighth, eleventh, twelfth and thirteenth causes of action in the Amended Complaint, and otherwise denies Defendants' motion.

BACKGROUND

A. Relief Sought

Defendant moves for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), 1) dismissing the Amended Complaint of Plaintiff Dr. Gilbert Spector ("Spector" or "Plaintiff") against the Defendants. Plaintiff opposes Defendants' motion.

B. The Parties' History

The Amended Complaint ("Complaint") (Ex. B to Halper Aff. in Supp.) alleges as follows:

Plaintiff and Krivulka were business associates from 1997 to 2007. Between approximately May of 1997 and March of 1999, Krivulka worked for Plaintiff in a company known as Hogil Pharmaceutical Corp. ("Hogil"). Krivulka was an executive at Hogil and earned between $180,000 and $250,000 annually during his employment there.

From approximately 2000 to October of 2004, Plaintiff worked for Krivulka as a consultant/advisor in a company known as Reliant Pharmaceuticals, LLC ("Reliant") where Plaintiff earned approximately $250,000 annually. Krivulka left Reliant in or about November of 2004 and, in December of 2004, requested that Plaintiff work for him again as a consultant. In early 2005, Plaintiff accepted Krivulka's offer and began to work on the acquisition of a pharmaceutical product involving the sale of an over-the-counter Omega-3 ("Triomega") medicine. Plaintiff received payment of approximately $237,000 in July 2005 for his consulting services. The Complaint specifically alleges the following agreements and fraud:

I. Breach of contract by Krivulka and Triax

In or about December of 2004, Krivulka asked Plaintiff to perform consulting work for Krivulka and Triax, a start-up company, in connection with its purchase and distribution of Tretin X ("Tretinoin"), the sole generic product for Retin A. Plaintiff entered into a consulting contract with Krivulka and Triax and performed consulting work from December of 2004 to September of 2005. Due in large part to Plaintiff's consulting work, Triax, in or about July of 2005, purchased the Tretinoin product from Spear Pharmaceuticals ("Spear") and began operations with a sales force of approximately 30 people. Shortly thereafter, Johnson & Johnson released a generic version of Tretinoin to a different company for production and distribution, resulting in the devaluation of Triax' acquisition of Tretinoin.

Krivulka and Triax requested Plaintiff's assistance in obtaining a rebate from Spear. Plaintiff performed additional work which contributed to Triax' obtaining a rebate from Spear in the amount of $40 - $50 million. Krivulka agreed to compensate Plaintiff for his services from the rebate, but never paid Plaintiff for the consulting services he provided. Plaintiff submitted an invoice and account stated for services rendered for the period December of 2004 through September of 2005 in the amount of $150,000, but has not yet been compensated.

II. Breach of contract by Krivulka and Akrimax

In or about October of 2005, Krivulka asked Plaintiff to perform consulting work for Akrimax, a start-up company,[1] to purchase and distribute a pharmaceutical product known as "Inderal and Inderal LA" and three oral contraceptives from Wyeth Pharmaceuticals ("Wyeth"), and to purchase a manufacturing plant. In October of 2005, Plaintiff accepted the offer of employment for the period October 2005 through September of 2006, and Krivulka and Akrimax agreed to pay him for his consulting services. Plaintiff performed extensive consulting work but was not paid for those services despite his demand. Krivulka and Akrimax then agreed, "orally and partly in the written business plans" (Compl. at ¶ 30) to provide Plaintiff with a compensation package whereby Plaintiff would remain an officer of, and receive a salary and equity interest in, Akrimax. Krivulka and Akrimax breached the parties' agreement by failing to pay Plaintiff the $300,000 allegedly owed to Plaintiff for his consulting services related to the Inderal product acquisition.

III. Breach of Third Contract for Work Performed for Krivulka and Akrimax

In or about June of 2006, Krivulka asked Plaintiff to perform consulting work relating to additional products to be purchased by Krivulka and Akrimax. Plaintiff performed that consulting work but Krivulka and Akrimax failed to pay him the $150,000 owed as reflected on the invoice that Plaintiff submitted to Krivulka and Akrimax.

IV. Fraud by Krivulka and Akrimax

In January of 2007, Krivulka advised Plaintiff that he should seek other employment because Krivulka and Akrimax were not pursuing the acquisition of the Inderal products. Krivulka and Akrimax, however, changed the name of the start-up venture from Aberdeen to

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[1] The start-up company was previously known as Aberdeen Pharmaceuticals, LLC and is now known as Akrimax (Compl. at ¶ 24).

Akrimax, and proceeded with the acquisition of the Inderal products, as well as 3 contraceptive products and a manufacturing plant. Plaintiff alleges that Krivulka and Akrimax used his work product in connection with those acquisitions. Plaintiff further alleges that Krivulka and Akrimax committed fraud by 1) failing to compensate Plaintiff; 2) failing to advise Plaintiff that the acquisition was proceeding; 3) failing to offer Plaintiff the opportunity to continue his employment; 4) changing the name of the start-up company from Aberdeen to Akrimax prior to the acquisition; and 5) using Plaintiff's work product in their new venture.

The Complaint contains thirteen (13) causes of action: 1) breach of contract against Krivulka and Triax for the period December 2004 through September 2005, 2) account stated against Krivulka and Triax, 3) breach of contract against Krivulka and Akrimax for the period of October 2005 through September 2006, 4) account stated against Krivulka and Akrimax, 5) breach of contract against Krivulka and Akrimax for the agreement reached in September 2006, 6) breach of contract against Krivulka and Akrimax in connection with the third contract for work between June 2006 and January 2007, 7) account stated, 8) attorney's fees pursuant to the contract entered into by the parties and New York State Executive Laws § 290 *et seq.*, 9) unjust enrichment against Krivulka, Trix and Akrimax, 10) quantum meruit against Krivulka, Triax and Akrimax, 11) age discrimination against Krivulka and Akrimax, 12) fraud against Krivulka and Akrimax, and 13) fraud in the inducment against Krivulka and Akrimax.

Defendants rely on documentation in connection with their motion, including 1) the Certificate of Formation for Akrimax (Ex. C to Halper Aff. in Supp.), 2) the Certificate of Formation for Triax (*id.* at Ex. D), 3) the invoice submitted by Plaintiff to Krivulka c/o Triax, dated September 28, 2010 for services rendered from December 2004 through September 2005 (*id.* at Ex. E), 4) the invoice submitted by Plaintiff to Krivulka c/o Akrimax, dated September 28, 2010 for services rendered from October 2005 through September 2006 (*id.* at Ex. F), and 5) the invoice submitted Plaintiff to Krivulka c/o Akrimax for services rendered from June 2006 through January 2007 (*id.* at Ex. G).

In his Affidavit in Opposition, Spector affirms that he performed most of his work for the Defendants at offices in Mountain Lakes, New Jersey but that Triax moved its offices in September of 2005 to Cranford, New Jersey and then to another location ("New Office") in Cranford where Akrimax, formerly Aberdeen, also maintains its office. Spector affirms that

most, if not all, of the Defendants' documents and computers are located in the New Office. As Spector remained at the Mountain Lakes office, he had no access to documentation located in the New Office, and submits that he will need that documentation, as well as information contained in the Defendants' computers, to pursue this action. Spector submits, further, that he needs to obtain records regarding the Defendants' accounts payable and contracts for the relevant time periods before and after the incorporation of the start-up companies at issue. Specter also contends that the work he performed for Defendants was not governed by the Statute of Frauds.

With respect to Triax, Spector affirms that he possesses documentation suggesting that Triax was formed as early as January of 2005. In support, he provides copies of e-mails from Krivulka dated January 27, February 1 and February 16, 2005 (Ex. A to Spector Aff. in Supp.). The January 27, 2005 e-mail included an attachment titled "Spear Pharmaceuticals - Tretinoin Product Line - Confidential Descriptive Memorandum, January 2005." The February 1, 2005 e-mail included a 5-page attachment titled "A New Specialty-Focused Company - Triax Pharmaceuticals, January 2005, confidential." The February 16, 2005 e-mail, which also included an attachment related to Triax, was sent to several individuals, including Plaintiff, with the note "For your review and send to [S]andy and David." Spector submits that this documentation establishes that Triax was formed prior to its formal incorporation date. As further evidence that Triax was operational prior to its formal incorporation date, Krivulka and Triax ratified contracts for work completed by a colleague of Plaintiff named Jeffrey L. Wasserman ("Wasserman"), and paid Wasserman for "pre-incorporation work" that he performed (Spector Aff. in Opp. at ¶ 13). In support, Spector provides a copy of a complaint filed by Wasserman against Akrimax and Krivulka ("Wasserman Complaint") in the Superior Court of New Jersey, Morris County (Ex. B to Spector Aff. in Opp.). Spector refers to paragraphs 6 - 9 in the Wasserman Complaint in which Wasserman alleges that a) in or about 2004, Krivulka retained Wasserman to render services in connection with Triax' acquisition of certain pharmaceutical products; and b) in or about January 6, 2005, Wasserman and Krivulka entered into an agreement relating to Wasserman's engagement. Spector submits that, in light of this documentation, the alleged date of incorporation of the Defendants cannot be a defense to Plaintiff's claims. Plaintiff contends that further discovery will establish that the Defendants ratified his work.

When Defendants retained Plaintiff to provide consulting services to Aberdeen, which became Akrimax, Plaintiff was given the title of Chief Operating Officer, Generic/Over the Counter Division, was provided with an e-mail account at Aberdeen and had access to Aberdeen's telephones (*see* business cards, Ex. C to Spector Aff. in Supp.). Spector affirms that he no longer has access to the e-mail server for the account that he used in connection with this start-up venture. Spector affirms, further, that he received documents reflecting his salary and bonus which increased from $350,000 to $550,000. In support, Spector provides a document titled "Management Company G&A" (*id.* at Ex. D) which contains highlighted language 1) "VP Generics - $325,000" under the column titled "Salaries," and 2) VP Generics - $225,000" under the column titled "Bonuses." Spector also provides a document titled "Management Company" (*id.* at Ex. E) whose first page lists several individuals and their positions. That page reflects that Spector was the "COO - Generics" who received base compensation of $200,000 and a bonus of $150,000 for total compensation of $350,000. Spector submits that Defendants possess additional documentation relevant to his claims, including writings regarding Plaintiff's retention as a consultant and business plans that include Plaintiff as an employee/consultant for Akrimax, formerly Aberdeen. In support, Spector notes that the complaint in the Wasserman Action alleges that Krivulka confirmed Wasserman's compensation via e-mail (Wasserman Compl. at ¶¶ 19-20). Spector also submits that there are other individuals associated with the Corporate Defendants who can reasonably be expected to possess relevant e-mails and other documents. While disputing that the Statute of Frauds is applicable to the work he performed, Plaintiff contends that this documentation will assist him in defending the instant motion.

C. The Parties' Positions

Defendant submit that 1) Plaintiff's allegations that he entered into oral contracts with Akrimax and Triax are refuted by the documentary evidence, specifically, the Certificates of Formation for those entities, which establishes that a) Triax was formed on May 27, 2005, five months after Plaintiff alleges he entered into an oral contract with Triax; and Akrimax was formed on October 24, 2007, nearly two years after the first oral contract was allegedly entered into, and a year after Plaintiff and Akrimax allegedly entered into the final oral contract; 2) the purported oral contracts are unenforceable under the Statute of Frauds and indefinite as a matter of law because Plaintiff fails to adequately plead the compensation term; 3) the cause of action

for account stated cannot survive, both because there is no agreement between the parties as to the amounts owed to Plaintiff and because the alleged underlying oral contracts are unenforceable; 4) the claims for unjust enrichment and quantum meruit, which are based on Plaintiff's request for compensation for services performed pursuant to the alleged oral contracts, are also barred by the State of Frauds; 5) the claim for unjust enrichment is time-barred; 6) the fraud claims are deficient, both because they lack adequate particularity and because they arise out of the same facts as the breach of contract claim; and 7) the age discrimination claim is barred pursuant to the statute of limitations under New York Executive Law § 296, which is three years from the date on which the cause of action accrued, in this case January of 2007, when Plaintiff's alleged consulting services ended.

Plaintiff opposes Defendants' motion, submitting, *inter alia*, that 1) Defendants have improperly asserted that the contracts at issue are oral, despite the fact that the Complaint makes no such allegation; 2) the dates of incorporation of the Corporate Defendants are not dispositive of the time at which the parties entered into a contract; 3) the Corporate Defendants may be liable for contracts entered into prior to their dates of incorporation; 4) equitable notions of fairness support the compensation of Plaintiff for work he performed, irrespective of the dates of incorporation; 5) assuming, *arguendo*, that the contracts were oral and that New York law applies to the matter at bar, notwithstanding the parties' extensive connection to the State of New Jersey, the Statute of Frauds is inapplicable to the work performed by Plaintiff given that Plaintiff did not assist in the negotiation or consummation of a business transaction; 6) the Complaint adequately states the compensation terms, given its description of the work Plaintiff was to perform, the allegations that he was not compensated and the reference to invoices he submitted to Defendants; 7) the causes of action for account stated, unjust enrichment and quantum meruit are valid, as Plaintiff disputes Defendants' assertions that the contracts at issue were oral, and that the Statute of Frauds is a bar to a cause of action for unjust enrichment or quantum meruit; 8) the claims for unjust enrichment are not time-barred given that the applicable statute of limitations is 6 years; and 9) the age discrimination claims is not time-barred because Plaintiff's claim did not accrue until January of 2008 when Plaintiff learned, despite Defendants' efforts to keep the information from him, that Akrimax became an operational entity.

In reply, Defendants submit, *inter alia*, that 1) the alleged contracts fail as a matter of law

because Triax and Akrimax were not in existence at the time that Plaintiff allegedly entered into contracts with those entities; 2) the alleged contracts violate the Statute of Frauds; 3) there are no allegations that Triax and Akrimax adopted or ratified any pre-incorporation contracts and, therefore, there exists no basis for holding them responsible for those contracts; and 4) there is no basis for holding Akrimax liable for Aberdeen's obligations on a successor liability theory.

RULING OF THE COURT

A. Standards of Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Conflict of Laws Principles

Where a conflict of law exists between two states, courts look to the choice of law rules of the forum to determine which state's law applies. *Locke v. Aston*, 31 A.D.3d 33, 37 (1st Dept. 2006), citing *Tanges v. Heidelberg N. Am.*, 93 N.Y.2d 48, 54 (1999). New York uses an interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation. *Id.*, citing *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 192 (1st Dept. 1998), quoting *Padula v. Lilarn Props Corp.*, 84 N.Y.2d 519, 521 (1994).

C. Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia*, *supra*.

To establish a cause of action sounding in fraud, plaintiff must allege: 1) misrepresentation of a material fact, 2) scienter, 3) justifiable reliance, and 4) injury or damages. *In Re Garvin*, 210 A.D.2d 332, 333 (2d Dept. 1994). A cause of action for fraud does not lie where the only fraud alleged relates to a breach of contract. *Hylan Elec. Contracting, Inc. v. MasTec North America, Inc.*, 74 A.D.3d 1148 (2d Dept. 2010); *Stangel v. Chen,* 74 A.D.3d 1050 (2d Dept. 2010).

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d 58 (1st Dept. 2001).

To state a claim in *quantum meruit*, a claimant must establish 1) the performance of the 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. *Geraldi v. Melamid*, 212 A.D.2d 575, 576 (2d Dept. 1995). Where an express agreement exists between the parties, the rights and liabilities, as between them, should be determined based on a breach of contract theory. *Apfel v. Prudential-Bache Sec., Inc.*, 81 N.Y.2d 470, 479 (1993). Therefore, if a service is required by the terms of an express contract, there can be no recovery in *quantum meruit*. *Mary Matthews Interiors, Inc. v. Levis*, 208 A.D.2d 504, 506 (2nd Dept. 1994). *See also Dart Mechanical Corp. v. XL Specialty Insurance*, 593 F. Supp. 2d 464, 471 (E.D. N.Y. 2008) (parties may not recover in quantum meruit or unjust enrichment where the parties have entered

into a contract governing the subject matter, citing *Cox v. NAP Const. Co., Inc.*, 10 N.Y.3d 592, 606 (2008).

For an action on an account stated, where the parties have agreed that the defendant owes the plaintiff a certain amount of money on an account, the plaintiff must prove that 1) there has been an accounting of the alleged debt; 2) there is a specific balance due to the plaintiff by the defendant; 3) the defendant expressly or impliedly promised to pay the plaintiff; and 4) the defendant has not paid. *See Bock v. Breindel*, 5 A.D.2d 1007 (2d Dept. 1958); *Tridee Assoc., Inc. v. Board of Educ. of City of New York*, 22 A.D.3d 833 (2d Dept. 2005); *United Consolidated Industries v. Mendel's Auto Parts, Inc.*, 150 A.D.2d 768 (2d Dept. 1989).

D. Statute of Frauds

General Obligations Law ("GOL") § 5-701(a)(10) provides that:

> Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> [i]s a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman.

For a written memorandum or note to meet the requirements imposed by the Statute of Frauds, it must be subscribed by the party to be charged therewith and must contain substantially the whole agreement, and all its material terms and conditions, so that one reading it can understand from it what the agreement is. *Currier v. Prudential Insurance*, 266 A.D.2d 596, 598 (3d Dept. 1999), citing GOL § 5-701(a) and *HPSC, Inc. v. Matthews*, 179 A.D.2d 974, 975 (3d Dept. 1992), quoting *Mentz v. Newwitter*, 122 N.Y.491, 497 (1890), *reh. den.*, 26 N.E. 758 (1891).

In *Snyder v. Bronfman*, 13 N.Y.3d 504 (2009), the Court of Appeals held that plaintiff's claims for unjust enrichment and *quantum meruit*, brought to recover the value of plaintiff's services in helping to achieve a corporate acquisition, were barred by the statute of frauds contained in GOL § 5-701(a)(10). *Id.* at 506. In *Snyder*, plaintiff and defendant, characterized as prior "casual acquaintances" (*id.*), met while on vacation and subsequently entered into an oral agreement, which plaintiff characterized as a joint venture, to acquire and operate

companies in the media business. *Id.* The plaintiff alleged that the defendant assured plaintiff, *inter alia*, that he would share in the proceeds of any consummated transaction without providing his own funds and would receive a "fair and equitable" share of the value of the consummated transaction. *Id.* at 506-507. The plaintiff did not allege that the agreement was reduced to writing, or that any note or memorandum of it existed. *Id.* at 507.

The plaintiff in *Snyder*, *supra*, alleged that he contributed to the parties' joint venture in many ways, including 1) developing business relationships with people in the corporate and investment banking communities; and 2) working on several deals that did not materialize. 13 N.Y.3d at 507. Subsequently, a deal did come to fruition, and plaintiff alleged that he contributed to its success by, *inter alia*, identifying the opportunity and obtaining financial information from the target company. *Id.* The defendant invited plaintiff to make an investment in the acquired company, and plaintiff contributed $1.3 million to the deal. The next month, however, defendant refused plaintiff's demand for "a lot of money" for plaintiff's contribution to the transaction. *Id.* The plaintiff subsequently filed an action asserting causes of action for breach of a joint venture agreement, breach of fiduciary duty, an accounting of joint venture assets, unjust enrichment, promissory estoppel and *quantum meruit*. *Id.*

The trial court in *Snyder* had granted plaintiff's motion to dismiss all the claims, except those for unjust enrichment and *quantum meruit*, on the grounds that the alleged agreement was too vague to support a joint venture claim, and the promissory estoppel claim was deficient for the same reason. 13 N.Y.3d at 507. The trial court also held that the statute of frauds was inapplicable and concluded that plaintiff had adequately stated causes of action for *quantum meruit* and unjust enrichment. *Id.* at 507-508. The Appellate Division, First Department reversed the trial court's ruling and dismissed the surviving causes of action. *Id.* at 508. The Court of Appeals affirmed the ruling of the First Department, holding that the unjust enrichment and *quantum meruit* claims were essentially identical claims under "a contract implied in fact or in law to pay reasonable compensation." *Id.* The Court of Appeals noted that the "implied in fact or in law" language was added to GOL § 5-701(a)(10) to make clear that the statute of frauds applied to *quantum meruit* claims. *Id.* The Court further concluded that the case before it did involve the negotiation for the purchase of a business opportunity within the meaning of the statute. *Id.* at 509.

E. Age Discrimination - Statute of Limitations

The statute of limitations under New York Human Rights Law is three years from the date on which the cause of action accrued. *Samuel v. Merrill Lynch Pierce Fenner & Smith*, 771

F. Supp. 47, 49 (S.D.N.Y. 1991), citing, *inter alia*, *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293 (1983). The accrual date of a claim based on the discriminatory denial of a promotion is the date on which the position is filled to the exclusion of the plaintiff. *Id.*

F. Application of these Principles to the Instant Action

The Court concludes that New York's substantive law applies to this litigation. That determination is based on the allegations in the Amended Complaint, *inter alia*, that 1) Plaintiff is a resident of New York and does business within New York with a business located in New York, is authorized and licensed to do business in New York and has routinely transacted business in New York (Am. Compl. at ¶ 1); 2) Defendants reside and/or are incorporated within New York, and/or do business in New York (*id.* at ¶ 2); and 3) Defendants committed breaches of contract and/or tortious acts within New York, and out of state, causing severe injury to Plaintiff in New York. In light of the foregoing, as well as Plaintiff's election to file this action in New York, the Court concludes that New York has the greater interest in having its law applied in this litigation, and determines that New York's substantive law will apply.

The Court dismisses the twelfth and thirteenth causes of action in the Amended Complaint, alleging fraud, based on the Court's conclusion that the only alleged fraud relates to the alleged breach of contract.

The Court dismisses the eighth and eleventh causes of action in the Amended Complaint based on the Court's determination that 1) the cause of action for age discrimination is time-barred, in light of the Court's conclusion that Plaintiff's cause of action accrued in January of 2007 when Defendants allegedly terminated their consultation relationship with Plaintiff; and 2) Plaintiff has not provided a basis, other than the age discrimination cause of action which the Court has determined is time-barred, to warrant an award of attorney's fees.

The Court denies Defendants' motion to dismiss the remaining causes of action based on the Court's determination, *inter alia*, that the Court cannot conclude at this juncture, as a matter of law, that the services that Plaintiff provided to Defendants fall within the ambit of GOL § 5-701(a)(10). Unlike the factual allegations in *Snyder*, discussed *supra*, the allegations in the matter *sub judice* do not establish, as a matter of law, that the work that Plaintiff performed for Defendants constituted the negotiation of a business opportunity within the meaning of GOL § 5-701(a)(10). Plaintiff submits that Plaintiff was "simply a consultant for Krivulka and the start-up companies" (P's Memo. of Law in Opp. at p. 11), while Defendants argue that, in light of Plaintiff's allegations as to the nature of the work he performed, "by Plaintiff's own admission,

the alleged oral contracts were for services rendered in 'assisting in the negotiation or consummation' of business transactions" within the meaning of GOL § 5-701(a)(10). (Ds' Memo. of Law in Supp. at p. 11). The Court concludes that, accepting the facts alleged as true and according to the Plaintiff every favorable inference which may be drawn therefrom, the allegations in the Complaint support the conclusion that the services provided by Plaintiff do not fall within GOL § 5-701(a)(10) and, therefore, the alleged agreements are not barred by the Statute of Frauds. Accordingly, the Court denies Defendants' motion to dismiss the remaining causes of action in the Amended Complaint.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on November 3, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY
October 6, 2011

HON. TIMOTHY S. DRISCOLL
J.S.C.