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

PRESENT: PAUL G. FEINMAN J.S.C. PART 12

Index Number : 652291/2010 E
SAIVEST EMPREENDIMENTOS
vs.
ELMAN INVESTORS INC.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

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

Dated: 9/2/2011

Paul G. Feinman
J.S.C.

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: CIVIL TERM: PART 12

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SAIVEST EMPREENDIMENTOS IMOBILIARIOS E PARTICIPACOES, Ltda,
Plaintiff,

- against -

ELMAN INVESTORS, INC. and LEE ELMAN,
Defendants.

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Index No. 652291/2010E
Mot. Seq. No. 001

DECISION and ORDER

Appearances:

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Papers considered in review of this motion:	**E-Filing Document Number**
Notice of Motion	23
Turkel affirmation in support and exhibit A	24 - 25
Defendants' memorandum of law in support	26
Clement affirmation in opposition and attached exhibits 1 - 13	33 through 33-13
Plaintiff's memorandum of law in opposition	34
Defendants' reply memorandum of law	35

PAUL G. FEINMAN, J.:

Defendants Elman Investors, Inc. and Lee Elman move to dismiss plaintiff Saivest Empreendimientos Imobiliarios e Participacoes, Ltda.'s complaint pursuant to CPLR 3211 (a) (1) and (7). Plaintiff opposes. For the reasons provided below, the motion is granted.

Background

In this action, plaintiff is a Brazilian "real estate development company specialized in providing strategic real estate and investment opportunities for tenants and investors in emerging markets" whose "business was to identify and structure sale-leaseback transactions for real estate investors" (Doc. 25, Ex. A, Compl. at ¶ 5, 6). In May of 2009, plaintiff was approached by

Frialto, a Brazilian meat processing company that is not a party to this action, seeking to enter into a long-term lease for a refrigerated warehouse owned by another nonparty, Fresh Del Monte, in Cabreuva, Brazil. Recognizing this "investment opportunity," plaintiff entered into an agreement[1] with Frialto on July 31, 2009, and began searching for investors interested in purchasing the Cabreuva property and leasing it to Frialto.

Thereafter, plaintiff "engaged intensively in negotiations with several potential investors, including defendant Elman Investors" (Doc. 25, Ex. A, Compl. at ¶ 11). On August 19, 2009, the complaint alleges defendant Lee Elman, as president of defendant Elman Investors, Inc., made a "non-binding offer to [plaintiff], purporting to invest in the Cabreuva Project for a price of 6,500,000 Brazilian Reais ..." (*id.* at ¶ 14). In opposition to the instant motion, plaintiff submitted a copy of an email from Elman to Reginald Neirynck, plaintiff's principal, dated August 19, 2009, which attached an unsigned "draft of the Letter of Offer" (Doc. 33-4, Ex. 4, Aug. 19 email and attach.). The draft letter set forth the terms and conditions required by the "corporation or its nominee (which may be a Delaware limited liability company of which this corporation will serve as the Managing Member)."(*id.*). It also states that "[t]his Letter of Intent shall be non-binding on either party and is solely an expression of interest by Elman Investors, Inc. to purchase the Property. It will be superseded by a formal Purchase and Sale Agreement to be executed by the interested parties" (*id.*).

The parties continued to negotiate the terms, including the price, of the proposed

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[1] A copy of this agreement, written in Portuguese, is submitted by plaintiff in opposition to the instant motion (Doc. 33-1, Ex. 1, Frialto agree.). However, the translation provided by plaintiff is not accompanied by an affidavit of the interpreter stating his or her qualifications and affirming the translation's accuracy (see CPLR 2101 [b]).

transaction. The complaint alleges, on "October 16, 2009, Reginald Neirynck informed Lee Elman that [plaintiff] would only reopen negotiations with the Cabreuva sellers and attempt to convince them to agree to a lower price on the condition that Elman Investors commit irrevocably to close the transaction if [plaintiff] was able to secure the lower purchase price" (*id.* at ¶ 20). The affidavit of Reginald Neirnynck, submitted in opposition to defendants' motion to dismiss, adds, "[b]ecause [plaintiff's] reputation was on the line in Brazil due to the protracted negotiations, I refused to conduct any further negotiations on behalf of Investors unless Investors would first irrevocably commit to invest and pay [plaintiff] a fee of 600,000 Reais if [plaintiff] was able to lower the purchase price to the maximum amount indicated by Investors" (Doc. 33, Neirnynck affid. at ¶ 30).

Also on October 16, Lee Elman sent a signed letter, bearing Elman Investors, Inc.'s letterhead, to plaintiff "refer[ing] to [] ongoing negotiations regarding the investment to purchase the warehouse and adjacent land from Del Monte located in Cabreuva (SP) to be leased by your interested tenant Frialto ..." (Doc. 33-6, Ex. 6, Oct. 16 letter). The letter then "confirm[] that *Elman Investors LLC* is willing to go forward and close the Transaction, subject to a positive outcome of ... due diligence on the underlying documentation, based on the following assumptions ..." (*id.* [*emphasis added*]). These assumptions included the following: a purchase price for the property of 5,300,000 Brazilian Reais; plaintiff's fee in the amount of 600,000; 500,000 for "refurbishments/cooling installation;" and closing costs of 200,000 (*id.*). The letter does not contain any further terms regarding the terms and conditions of plaintiff's fee. Also, it contains no terms that suggest that the offer was intended to be irrevocable.

After a few additional exchanges and further negotiations between plaintiff and Del

Monte and its agents, the complaint alleges that on "November 11, 2009, Lee Elman advised [plaintiff] that Elman Investors would not honor the October 16 Agreement" (*id.* at ¶ 26). As a result, plaintiff eventually commenced the instant action alleging two separate causes of action: (1) breach of contract and (2) promissory estoppel. The complaint describes the nature of the action as one "for breach of contract arising from defendant Elman Investors, Inc.'s ... failure to comply with the terms of an agreement entered into between plaintiff and defendant on October 16, 2009 ..., and from defendant Lee Elman's abuse of the corporate form in connection with this transaction" (*id.* at ¶ 4).

Analysis

"In the posture of defendants' CPLR 3211 motion to dismiss, [the court's] task is to determine whether plaintiff['s] pleadings state a cause of action" (*511 W. Corp. v Jennifer Realty*, 98 NY2d 144, 152 [2002]). The motion must be denied "if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law'" (*id.*; quoting *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001]; quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). In performing this task, the complaint is to be liberally construed and the court will "accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*id.*; citing CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). To prevail on a motion to dismiss pursuant to CPLR 3211 (a) (1), the defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that the plaintiff's claim fails as a matter of law (*Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383 [1st Dept 2002]). Although "a complaint is to be

liberally construed in favor of plaintiff on a CPLR 3211 motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence" (*Excel Graphics Tech., Inc. v CFG/AGSCB 75 Ninth Ave., LLC*, 1 AD3d 65, 69 [1st Dept 2003]). Furthermore, a written agreement "that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*id.* at 69; citing *R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32 [2002]).

1. Breach of contract

To state a claim for breach of contract, plaintiff must plead the following elements: (1) formation of an enforceable agreement between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage (2 PJI 2d 4:1 [2011]). To establish the existence of an enforceable agreement, plaintiff must plead an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (*Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009][citing 22 NY Jur 2d, Contracts § 9]). Moreover, under New York's statute of frauds, certain types of agreements must be a signed writing in order to be enforceable, including those where an intermediary serves as a "finder." Pursuant to GOL § 5-701 (a) (10), a writing is necessary where there is an alleged agreement "to pay compensation for services rendered in negotiating ... the purchase, sale, exchange, renting or leasing of ... a business opportunity, business, its good will, inventory, fixtures or an interest therein .... 'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction." GOL § 5-701 (a) (10) applies where the party seeking compensation is a "finder," where plaintiff "was to use his 'connections,' his 'ability,' and his 'knowledge' to arrange for [the defendant] to meet appropriate persons so that the defendant

could procure a [] contract" (*Freedman v Chemical Constr. Corp.*, 43 NY2d 260, 267 [1977]). Where the intermediary's activity is "so evidently that of providing 'know-how' or 'know-who' in bringing about between principals an enterprise of some complexity ...," the statute of frauds applies and recovery is barred in absence of a writing (*id.* at 267). GOL § 5-701 (a) "contains two threshold requirements for proving the existence of a binding agreement, promise or undertaking: a writing, and a subscription of the writing by the party to be charged therewith" (*Parma Tile Mosiac & Marble Co., Inc. v Estate of Short*, 87 NY2d 524, 529 [1996]). The writing may be "pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject matter and occasion" (*Crabtree v Elizabeth Arden Sales Corp.*, 305 NY 48, 54 [1953] [*internal citations omitted*]).

As a general rule, a person or entity who is not a party to a contract cannot be held liable for its breach (*see HDR, Inc. v Intl. Aircraft Parts, Inc.*, 257 AD2d 603, 604 [2d Dept 1999]). Where plaintiff annexes a copy of an alleged written agreement to the complaint, and that agreement identifies the parties to the contract, the identification of the parties in the contract will prevail over allegations in the complaint that there were other parties (*see La Potin v Julius Lang, Co., Inc.*, 30 AD2d 527 [1st Dept 1968]). Here, any offer made in Lee Elman's October 16 letter was on behalf of "Elman Investors, *LLC*," an entity not named as a defendant in this action. The court will not presume to this be a mere typographical error, in light of the draft "Letter of Intent" from August of 2009 which stated the interest in consummating the transaction on behalf of Elman Investors, *Inc.*, "or its nominee (which may be a Delaware limited liability company which this corporation will serve as the Managing Member)" (Doc. 33-4, Ex. 4, Aug. 19 email and attach.). Thus, even if the court assumes that plaintiff correctly characterizes the October 16

letter as a binding agreement, the letter, by its own unambiguous terms, only purports to bind Elman Investors, *LLC*, not Elman Investors, *Inc.* or Lee Elman, individually. The complaint bases plaintiff's breach of contract and promissory estoppel causes of action solely on the alleged breach of the terms of the October 16 letter, which was annexed to the complaint. The unambiguous terms of that letter prevail over contrary allegations in the complaint (*see La Potin*, 30 AD2d at 527). Therefore, the documentary evidence conclusively establishes that there was no agreement between plaintiff and either of the named defendants that could have been breached. Accordingly, defendants' motion to dismiss the breach of contract cause of action must be granted.

Were the court to ignore the fact that the October 16 letter is only on behalf of Elman Investors, *LLC*, to survive the instant motion to dismiss, plaintiff would have to provide a sufficient writing because any agreement for compensation for the services plaintiff claims to have rendered falls within the scope of GOL § 5-701 (a) (10). The complaint alleges plaintiff was "[a]t all times relevant to this matter ..., a Brazilian real estate development company specializ[ing] in providing strategic real estate and investment opportunities for tenants and investors in emerging markets, mainly Brazil," and whose "business was to identify and structure sale-leaseback transactions for real estate investors" (*id.* at ¶ 5-6). With respect to the underlying transaction at issue in this action, the complaint alleges plaintiff was approached by Frialto "to enter into a long-term lease for the Cabreuva warehouse," and that plaintiff and "Frialto agreed on specific lease terms and [plaintiff] went on a search for investors interested in purchasing the [Cabreuva property from Del Monte] and leasing it to Frialto" (*id.* at ¶ 8-10). This activity is "so evidently that of providing 'know-how' or 'know-who,' in bringing about between [] principals

an enterprise of some complexity or an acquisition of a significant interest in an enterprise" (*Freedman*, 43 NY2d at 267). Therefore, the alleged agreement "was for services rendered in negotiating a 'business opportunity,'" (*id.*) and therefore unenforceable in the absence of a writing.

Even setting aside the fact that Elman Investors, *LLC* is only party to the alleged October 16 agreement, the letter itself is not sufficient to satisfy GOL § 5-701 (a). The letter does not set forth all of the material terms necessary for there to be an agreement between plaintiff and the defendants to pay plaintiff a fee in connection with the Cabreuva transaction. Although the amount of 600,000 Brazilian Reais, representing plaintiff's fee, is stated as an "assumption" underlying defendants' willingness to move forward to closing, the letter does state when such fee would be owed (*see Futterman Org., Inc. v Bridgemarket Assocs. LP*, 278 AD2d 105-106 [1st Dept 2000]). Other than listing plaintiff's proposed fee amount, the October 16 letter fails to establish the terms and conditions of the alleged relationship, including any promises given by plaintiff in exchange for compensation. As such, this writing, although signed by Elman, is barred from enforcement under the statute of frauds due to the lack of material terms (*Signature Brokerage, Inc. v Group Health Inc.*, 5 AD3d 196, 197 [1st Dept 2004]).

Moreover, plaintiff cannot rely on the alleged additional conditions, apparently never reduced to writing, that the October 16 letter was irrevocable, both as to defendants' intent to close the transaction and to pay plaintiff's fee. If, as plaintiff alleges, the October 16 letter is a binding written agreement between the parties, then it cannot offer extrinsic evidence of an alleged oral agreement that conflicts with its term (*see, WWW Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990] [noting that "[s]uch considerations are all the more compelling in the context of

real property transactions, where commercial certainty is a paramount concern"]). The alleged oral condition that the October 16 offer was irrevocable contradicts the clear language of the letter, stating that it was "subject to a positive outcome of ... due diligence on the underlying documentation..." (Doc. 33-6, Ex. 6, Oct. 16 letter). The October 16 letter contains no language indicating that it was intended to be an irrevocable offer to pay plaintiff's fee regardless of whether the transaction closed. Given the sophistication of the parties alleged by the complaint, if they intended the October 16 offer to be irrevocable with respect to plaintiff's fee, then they would have indicated this in writing (*see* GOL 5-1109).

Viewing all of the allegations made in plaintiff's complaint and in opposition to defendants' motion in conjunction with the documents submitted by plaintiff, plaintiff has not alleged the existence of an enforceable agreement pursuant to which defendants, Elman Investors, *Inc.* and Lee Elman, would be liable to plaintiff for the full amount of its proposed fee regardless of whether the transaction ultimately closed. Even if the complaint may be read as setting forth a cause of action for breach of contract, the documentary evidence conclusively establishes that the unambiguous terms of the agreement do not impose an unconditional obligation to pay plaintiff's fees. Moreover, plaintiff is barred from seeking relief by the statute of frauds because the writings submitted by plaintiff do not include all of material terms of the alleged agreement. The court need not address defendants' remaining arguments in support of dismissal of this cause of action. Accordingly, defendants' motion to dismiss is granted as to plaintiff's first cause of action.

2. Promissory Estoppel

To establish a viable cause of action sounding in promissory estoppel, plaintiff must

allege: (1) a clear and unambiguous promise; (2) reasonable and foreseeable reliance by the party to whom the promise is made; and (3) an injury sustained in reliance on the promise (*see Rogers v Town of Islip*, 230 AD 2d 727, 728 [2d Dept 1996]). However, the doctrine of promissory estoppel may not be invoked to circumvent the statute of frauds where there is "neither allegation nor proof of the infliction of unconscionable injury on plaintiff as a result of any reliance he placed on defendant's alleged promises" (*Melwani v Jain*, 281 AD2d 276, 277 [1st Dept 2001]). Here, dismissal of plaintiff's second cause of action sounding in promissory estoppel is warranted because the complaint fails to allege unconscionable injury. This claim is also not sufficiently plead because the terms of the October 16 letter are too unclear and ambiguous with respect to the alleged promise to pay plaintiff's fee (*see Richbell Information Servs, Inc. v Jupiter Partners, LP*, 309 AD2d 288, 304 [1st Dept 2003). Furthermore, under the alleged agreement, defendants' obligation to proceed to closing was conditioned on a positive outcome of due diligence. Thus, plaintiff, a sophisticated Brazilian real estate development company, would have foreseen the possibility that the transaction may not close and could not reasonably rely on a promise that it would. In addition, the complaint does not allege conduct by either party that is unequivocally referable to a clear and unambiguous promise of the type necessary for promissory estoppel (*Tsabbar v Maryann Auld*, 289 AD2d 115 [1st Dept 2001]). The actions plaintiff took in connection with this transaction were equally referable to its separate agreement with Frialto to attempt to locate a buyer for the Brazilian property.

3. Claims against Lee Elman, individually

"A cause of action seeking to hold corporate officials personally responsible for the corporation's breach of contract is governed by an enhanced pleading standard" (*Hansen & Co. v*

Everlast Corp., 296 AD2d 103, 110-111 [1st Dept 2002]). Paragraphs 30-36 of the complaint contain allegations related to plaintiff's apparent attempt to pierce the corporate veil and impose personal liability against defendant Lee Elman based on the same causes of action alleged against defendant Elman Investors, *Inc*. For the same reasons provided above, Lee Elman cannot be held individually liable for breach of contract or promissory estoppel. Furthermore, plaintiff does not plead any additional facts that support an independent cause of action against Elman. The October 16 letter "confirm[s] that Elman Investors *LLC* is willing to go forward and close the Transaction, subject to a positive outcome of a due diligence on the underlying documentation, based on the following assumptions ..."(Doc. 29, Ex. A, Oct. 12 letter). Although the letter is signed by Lee Elman, there is nothing that would suggest that the parties intended him to be personally bound. Plaintiff does not assert that Elman acted other than in a corporate capacity (*see, Hansen & Co.*, 296 AD2d at 110). Accordingly, defendants' motion is granted and all claims as against Lee Elman are dismissed in their entirety.

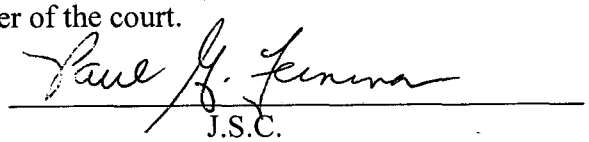
Accordingly, it is

ORDERED that the motion of defendants Elman Investors, Inc. and Lee Elman is granted and plaintiff's complaint is dismissed in its entirety with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: September 2, 2011
New York, New York



J.S.C.

(2011_Pt 112 D&O_652291_2010_001_daz(MTD_contract).wpd)