

Friman v Salter & Sachs

2012 NY Slip Op 33049(U)

November 29, 2012

Sup Ct, New York County

Docket Number: 109386/2008

Judge: Eileen A. Rakower

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SC ANKED ON 12/24/2012

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

PRESENT: **HON. EILEEN A. RAKOWER**
Justice

PART 15

Index Number : 109386/2008
FRIMAN, PAUL
vs.
SALTER & SACHS
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

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

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

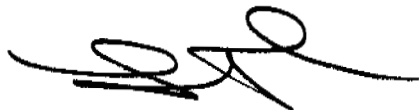
**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED

DEC 04 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/29/12



HON. EILEEN A. RAKOWER, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

PAUL FRIMAN,
Plaintiff,

Index No.
109386/2008

- against -

**DECISION
and ORDER**

SALTER & SACHS d/b/a BOLAN JAHNSEN
SALTER & SACHS, BOLAN JAHNSEN REARDON,
KEVIN SALTER, and GARY SACHS,

Mot. Seq.
007

Defendants.

FILED

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DEC 04 2012

HON. EILEEN A. RAKOWER

NEW YORK
COUNTY CLERK'S OFFICE

Paul Friman ("Plaintiff") commenced this action against defendants Salter & Sachs d/b/a Bolan Jahnsen Salter & Sachs ("Salter & Sachs"), Bolan Jahnsen Reardon,¹ Kevin Salter ("Salter") and Gary Sachs ("Sachs") alleging breach of employment contract and seeking unpaid wages. Plaintiff alleges that he began to work at defendants Salter and Sachs' start-up firm Salters & Sachs on or about January 1, 2006 and that he accepted the job based on their promise to pay him a salary of \$124,000.

Defendants pro se Salter & Sachs, Salter and Sachs (collectively, "Defendants") now move pursuant to CPLR §3212 granting judgment dismissing Plaintiff's Complaint "in its entirety on grounds, *inter alia*, that Plaintiff's averments and the real evidence, establish that there are no triable issues of fact and that there is no evidence on which plaintiff can make out a prima facie case."² Plaintiff opposes.

¹ By Order dated July 24, 2012, this Court granted summary judgment in favor of co-defendant Bolan Jahnsen Reardon.

² Defendants previous sought dismissal of Plaintiff's Complaint by Notice of Motion on April 26, 2011, which was denied by the Court on July 12, 2011.

In support of their motion, Defendants submit the sworn affidavit of Sachs, dated July 25, 2012, and the exhibits thereto, which include Sachs and Salter's April 26, 2011 sworn affidavits.

According to Defendants, Plaintiff was not a salaried "employee" and there was no employment agreement. Alternatively, Defendants contend that in August 2006, the parties reached an agreement whereby Plaintiff became a "partner" in the firm, thereby relinquishing an "employee's salary" status. Defendants contend that on August 7, 2006, the parties orally agreed to provide Plaintiff with a 10% equity interest in the firm and sent Plaintiff a copy of the purported partnership agreement by e-mail later that day. Defendants claim that after August 7, 2006, Plaintiff "acquiesced without exception in all and various express references to him as partner, which references include multiple email writings addressing him as a partner in both title and as the reason for the communication." Defendants also submit a letter from Plaintiff to Columbia University's Student Financial Planning Office dated August 10, 2006 and written on firm letterhead in which Plaintiff references the partnership agreement and represents that he expected no more income of any kind for the remainder of 2006.

Defendants state that on November 4, 2006, Plaintiff notified them by e-mail of his need to take immediate "emergency leave" for financial reasons but assured them that his decision was "by no means a resignation." By letter entitled "Re: Partnership" dated November 5, 2006 by Salter to Plaintiff, Defendants stated that they would advance Plaintiff \$25,000 before the year end to aid his financial situation. While Plaintiff alleges that he ceased working for Defendants because they continually breached the conditions of the purported employment contract by failing to pay Plaintiff his salary (thereby constructively terminating his employment), Defendants contend that it was not until April 30, 2007 that they learned that Plaintiff was claiming he was discharged when they received notice of Plaintiff's Workers Compensation and Unemployment Insurance benefits filing.

In opposition to Defendants' motion, Plaintiff submits the attorney affirmation of David Abrams, and the exhibits thereto, which include but are not limited to Plaintiff's sworn affidavit, excerpts from Plaintiff's deposition testimony, the Decision and Notice of Decision by the New York

Unemployment Insurance Appeal Board ("UIAB") affirming the Department of Labor's initial determination and stating that "[t]he credible evidence establishes that claimant was not paid on a regular basis, and was not paid the salary agreed upon on hire"; an email dated January 3, 2007 from Sachs to Salter, which states, "Our treatment of Paul and our books do not reflect him as either employee or partner"; Defendants' malpractice application listing Plaintiff as an employee and Salter and Sachs as partners; and a copy of the 2006 IRS Form 1099 issued to Plaintiff by Defendants.

Plaintiff disputes Defendants' allegations concerning the terms of his employment. In his sworn affidavit, Plaintiff states that he "originally accepted the job based on a promise made to [him] in or about mid November, 2005 that if [he] accepted the job [to work for Defendants' firm], [he] would receive a 'big raise.'" At the time, Plaintiff states that at that time, his salary was \$119,500, which was known to Salter because Salter was a partner and his then employer. Plaintiff states that after he started to work with Defendants, he was advised by Sachs that his salary would be \$124,000 per year. He states that while he had been promised this salary, he was paid only \$45,000 during the year in which he worked for the Defendants. He states that he was advised that Salter and Sachs that the failure to pay the promised salary was due to cash flow problems and that they would "eventually make good on [his] salary."

Plaintiff contends that at all times he was an employee of Defendants and not their partner. Plaintiff states that he worked under Defendants' supervision, was listed on Defendants' malpractice application as an employee, and was issued an IRS Form 1099.

Plaintiff states that while he was offered a partnership at one point and was emailed a partnership agreement, he never accepted the offer either in writing or orally. He states that the partnership agreement, which was mailed to him on August 7, 2006, was between Salter and Sachs, and that it did not mention him, was never modified by him, and that he never signed it or indicated in any way that he was agreeing to it. Plaintiff states that he never agreed to waive his promised salary or consented to any agreement which superseded this promised salary. Plaintiff admits that he drafted the referenced letter in August 2006 regarding his wife's financial aid, but

points out that he never stated in that letter that he was a partner, never sent the letter to Defendants, and never intended for Defendants to rely upon it.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moniger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Dev. Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

In their motion for summary judgment, Defendants contend that any breach of contract claim must fail based on Plaintiff's failure to allege and inability to establish a valid and enforceable employment contract at any relevant time. "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dept. 2009]). Defendants also contend that the evidence establishes that even if Plaintiff could show there was no partnership agreement, that he is nonetheless estopped by his words and deeds from claiming he was an employee or owed a salary. "[An] estoppel rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury." (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 N.Y.2d 174 [1982]).

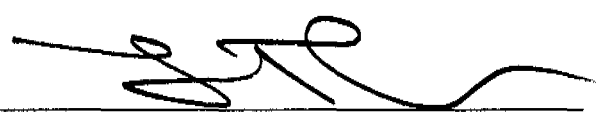
"Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue." (*Rotuba Extruders v. Ceppos*, 46 NY2d 223, 385 NE2d 1068, 413 NYS2d 141 [1978]). Here, based on the parties' conflicting affidavits and testimony, questions of fact exist concerning the relationship of Plaintiff and Defendants and when and if at all the relationship changed, that preclude summary judgment.

Wherefore, it is hereby,

ORDERED that defendants Salter & Sachs d/b/a Bolan Jahnsen Salter & Sachs, Kevin Salter and Gary Sachs' motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 11/29/12



EILEEN A. RAKOWER, J.S.C.

FILED

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