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

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

JF CAPITAL ADVISORS, LLC

- v -

THE LIGHTSTONE GROUP, LLC, et al

INDEX NO. 651902/11

MOTION DATE

MOTION SEQ. NO. 001

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion by defendant to dismiss the complaint is GRANTED with leave to serve and file an amended complaint alleging causes of action for quantum meruit and unjust enrichment, as per the attached Decision and Order.

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

Dated: January 31 2012

MELVIN L. SCHWEITZER, 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 : PART 45

JF CAPITAL ADVISORS, LLC,	:	
Plaintiff,	:	Index No. 651902/11
-against-	:	DECISION AND ORDER
THE LIGHTSTONE GROUP, LLC, LIGHTSTONE VALUE PLUS REAL ESTATE INVESTMENT TRUST, INC. and LIGHTSTONE VALUE PLUS REAL ESTATE INVESTMENT TRUST II, INC.,	:	Sequence No. 001
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

Plaintiff, JF Capital Advisors, LLC, (JF Capital) brings suit against various Defendants,[1] referred to collectively as "Lightstone," after a contemplated business relationship between the parties failed to materialize. JF Capital's suit asserts causes of action for:(1) monies due; (2) account stated; (3) breach of contract; (4) quantum meruit; (5) unjust enrichment; and, (6) fraudulent misrepresentation. Lightstone moves to dismiss the complaint. For the reasons stated below, Lightstone's motion to dismiss is granted but JF Capital is granted leave to amend as provided below.

Background

JF Capital is in the business of providing investment advisory services. On November 15, 2010, JF Capital's managing member, Mr. Falik, met with Lightstone to discuss whether JF Capital could provide Lightstone with services to assist Lightstone in its acquisition

[1]The defendants are several interrelated business entities, namely, The Lightstone Group LLC, Lightstone Value Plus Real Estate Investment Trust, Inc., and Lightstone Value Plus Real Estate Investment Trust II Inc.

of new properties. On November 19, 2010 JF Capital and Lightstone entered into a written agreement pursuant to which JF Capital agreed to assist Lightstone with the purchase of a 10-asset hotel portfolio with water park components (water park agreement). The water park agreement called for JF Capital to provide its services to Lightstone from November 19, 2010 through December 10, 2010 and, in exchange for these services, Lightstone was to pay JF Capital $200,000. JF Capital has not claimed that Lightstone failed to pay this sum for the work performed under the water park agreement.

JF Capital alleges that, after December 10, 2010 when the water park agreement had ended, Lightstone requested that JF Capital continue to provide services for the water park properties and for other projects, as well. JF Capital further contends that, because of these requests by Lightstone, JF Capital expended "substantial time and efforts" working on over a dozen projects for Lightstone after the water park agreement had ended.

In February 2011, Mr. Falik met with several of Lightstone's representatives in order to negotiate the terms of an agreement that would govern the future of Lightstone's business relationship with JF Capital. JF Capital asserts that at this meeting, Lightstone offered the following terms: (a) JF Capital would receive 2% of revenues as a base management fee; (b) JF Capital would receive 15% annually of the increase in net operating income over the trailing net operating income at time of the acquisition, as an incentive fee; (c) JF Capital would assume asset management of all of Lightstone's existing hospitality assets and its future assets; and (d) JF Capital would move into Lightstone's office space and be afforded two offices and four cubicles on a rent free basis. JF Capital alleges that Mr. Falik orally accepted these terms.

Several days after this meeting, a Lightstone executive named Mr. Owen contacted Mr. Falik and stated that it might take a week or so to finalize the parties' arrangement. Since the written agreement would not be finalized immediately, Mr. Owen was concerned that JF Capital would delay the performance of its services, and that such a delay could affect Lightstone's ability to complete the acquisition of a target property located in Danvers, Massachusetts. Therefore, Mr. Owen requested that JF Capital enter into an interim "2 pager" that would solely cover the Danvers acquisition, in order to ensure that JF Capital was committed to providing its services on that particular project. The agreement governing JF Capital's work on the Danvers acquisition stated that JF Capital would receive $30,000 for its services. JF Capital has not alleged that Lightstone failed to make this payment.

By late March 2011, JF Capital had not received a written version of the broader agreement that the parties had originally discussed, so Mr. Falik drafted his own version and sent it to Lightstone. In mid-April, Mr. Owen responded to JF Capital's draft with commentary that included additional terms to be included in the final version of the agreement. In response to Mr. Owen's comments, Mr. Falik prepared a new draft and sent it to Mr. Falik, who stated that he was waiting on the final sign off from the appropriate supervisors.

After JF Capital spent several weeks trying to ensure that the contract would be signed, one of defendant's executive's told Mr. Falik that Lightstone had hired a new chief investment officer named William Scully, and that the agreement could not be signed without Mr. Scully's approval. On May 16, 2011, Mr. Scully met with Mr. Falik and informed him that he did not approve of the agreement's terms and was "killing the deal." JF Capital alleges that from the beginning of its involvement with Lightstone until the time when Mr. Scully "killed the deal,"

JF Capital put "extensive resources" into numerous projects for Lightstone and never received compensation for this work.

On June 13, 2011, in order to receive remuneration for the services it provided, plaintiff sent Lightstone an overview of its uncompensated work. Mr. Scully responded by stating that the claims made by JF Capital in this overview were "outrageous" and that they "put the C in chutzpah." However, he also told JF Capital that he would discuss the claims with other Lightstone executives, and JF Capital should send over invoices, which JF Capital did on June 14, 2011. Lightstone has not made any payments on these invoices, and, plaintiff brings this suit to collect for its services.

Discussion

On a motion to dismiss, the court takes the facts as alleged in the complaint as true and grants the benefit of every favorable inference to the plaintiff. *See AG Capital Funding Partners, LP v State Street Bank and Trust Co.*, 5 NY 581 (2005). "The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion to dismiss will fail." *Ackerman v 204 East 40th Owners Corp.*, 189 AD2d 665 (1st Dept 1993).

Claims 1-3: Breach of Contract, Account Stated, and Monies Due

A contention that is vital to each of JF Capital's first three causes of action is its assertion that, when Mr. Falik orally agreed to Lightstone's proposed terms during the February 2011 meeting, this agreement created an oral contract which was legally binding on the parties. The Appellate Division has noted that, "for all but the simplest of transactions, the burden of establishing the terms of a verbal contract – which falls to the proponent – presents a formidable

obstacle to its enforcement. Before a court will impose contractual obligation, it must ascertain that a contract was made." *Charles Hyman, Inc. v Olsen Indus.*, 227 AD2d 270, 275 (1st Dept 1996).

Courts have declined to find the existence of an oral contract when the circumstances surrounding the formation of the alleged contract indicate that the parties did not intend for their oral communications to create a binding contract. *See U.K. Cable Ventures, Inc. v Bell Atlantic Investments*, 232 AD2d 294 (1st Dept. 1996) (reasoning that no oral contract existed because "the very magnitude of the [alleged oral] contract involving an estimated cost of $166 million to construct and operate cable systems, is such that a formal writing would be the ordinary expectation."); *Oui Cater, Inc. v Lantern Group, Inc.*, 71 AD3d 555 (1st Dept. 2010) (finding that "the emails between the parties conclusively negate plaintiff's claim that the parties entered into a contract" since these emails "expressed the parties' intention to enter into a contract at a later date" by referencing "notes for agreement," a "draft contract," and repeated mentions of the "formal contract signing, reflecting the parties' intent not to be bound until a formal agreement was signed."); *Langer v Dadabhoy*, 44 AD3d 425 (1st Dept. 2007) (noting that "the documentary evidence in the form of emails conclusively established that the parties intended to finalize their agreement in a writing, which never materialized, inasmuch as negotiations had been ongoing and were eventually discontinued with plaintiff").

The proposed written contract that JF Capital's own representative drafted and sent to Lightstone in March 2011, a month after the alleged oral contract was formed, states that the agreement "shall become effective as of the Effective Date." This language clearly indicates an understanding on the part of JF Capital that an agreement was not yet in effect, but that it "shall

become effective" at some future point. The very first line of JF Capital's draft contract contains a blank space for a date to be filled in, followed by language indicating that the date which the parties will fill into the blank is to be the "Effective Date" of the contract. Once again, by calling for an "Effective Date," JF Capital showed that it did not view the contract as already being in force, and by leaving the space for the "Effective Date" blank, JF Capital demonstrated that the future point when the contract would take effect had yet to even be determined.

Additionally, the interim "two pager" covering the property in Danvers, Massachusetts also contains a clause indicating that the parties had not entered a binding oral contract, but that both parties understood there were still negotiations to complete before any final contract would be reached. Specifically, the Danvers contract states that "Lightstone agrees to have a good faith discussion with JF Capital regarding incentive fees and additional asset management projects and acquisitions."

A commitment to continue negotiating these particular issues contradicts plaintiff's assertion that the parties had entered into a binding oral contract. This is true because, according to JF Capital, two out of the four Lightstone proposals that JF Capital accepted in forming the alleged oral contract dealt directly with the issues of incentive fees and the management of other properties. Specifically, JF Capital alleges that Lightstone proposed and it agreed 1) that Capital would assume asset management of all of Lightstone's existing hospitality assets and future assets; and 2) that it would receive 15% annually of the increase in net operating income as an incentive fee. If JF Capital truly believed it had entered into a binding oral contract containing the above mentioned two terms, then it would not have acquiesced to a clause in the Danvers agreement explicitly stating that matters which were clearly and conclusively addressed by the

oral contract were not binding upon Lightstone, but were merely to be the subject of future "good faith discussions."

These communications clearly establish that JF Capital and Lightstone did not view themselves as bound by an oral agreement, but were in the process of completing a written contract that would define the terms of their business relationship. Although JF Capital's interests were harmed when this written contract failed to see fruition, that does not justify this court finding an oral contract where one simply never existed, and JF Capital's claim for breach of contract is dismissed. As was the case in *Langer* and *Oui Cater*, the communications between JF Capital and Lightstone clearly indicate that they did not intend to become legally bound until a future point by a written memorialization of their agreement.

In light of the court's finding that the parties never entered into an enforceable oral contract, JF Capital's claims of monies due and account stated are also dismissed. Regarding the monies due claim, this cause of action will not lie in cases where the "plaintiff does not allege any agreement requiring repayment," such as in the present action where JF Capital has failed to establish that there was an enforceable agreement between the parties. *Eastside Food Plaza, Inc. v "R" Best Produce, Inc.*, 2003 WL 21727788 at 5 (SDNY 2003).

Similarly, JF Capital's claim for an account stated is precluded by the lack of an enforceable oral contract because a claim for an account stated "assumes the existence of some indebtedness between the parties or an express agreement to treat the statement in question as an account stated." *Martin H. Bauman Assoc. v H&M Intl. Transp.*, 171 AD2d 479, 485 (1991). The lack of an enforceable agreement in the present case precludes the possibility of any indebtedness between the plaintiff and defendant. Furthermore, the parties never expressly

agreed to treat JF Capital's invoices as an account stated. To the contrary, in the very email where Lightstone instructed Mr. Falik to send over the invoices, Lightstone referred to the claims embodied by the invoices as "outlandish" and said that they "put the C in chutzpah." Therefore, for the above stated reasons, JF Capital's claims for monies due and account stated are also dismissed.

Claim 6: Fraudulent Misrepresentation:

In order for a claim of fraud to meet the pleading standard set by CPLR 3016, the claim must allege facts that "suffice to permit a reasonable inference of the alleged misconduct." *Eurycleia Partners LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). Here, JF Capital alleges that "false statements were made to Falik to induce JF Capital to continue to perform services for Lightstone." JF Capital further alleges that "JF Capital relied on these false statements and continued to perform services for Lightstone," and , "but for these statements that an agreement was reached, JF Capital would not have continued to perform services for Lightstone."

While these allegations could arguably meet CPLR 3016 pleading standard with regard to the other elements of fraud, JF Capital has failed to plead facts giving rise to a "reasonable inference" that JF Capital was justified in relying on defendant's misrepresentations. *Id.* To the contrary, JF Capital's factual allegations make its continuous reliance on Lightstone's alleged misrepresentation seem unreasonable. For instance, JF Capital asserts in its brief that "the constant delays in writing up the agreement [Lightstone] originally proposed in February 2011 were done purposefully and for the sole reason to induce JF to continue work for them despite no intention to enter a formal, written agreement, despite continuous promises to do so." If it is the

case that JF Capital continuously sought to finalize a binding written contract, and Lightstone kept pushing off the date when it would sign a writing, then it is difficult to understand why JF Capital would continue to expend time and money providing services to Lightstone.

In response to this point, JF Capital would no doubt contend that it was operating under the impression that it and Lightstone were parties to a fully enforceable oral contract, and that it was not trustingly providing substantial amounts of services to an entity that had not entered into a contract. However, as discussed above, any suggestion that JF Capital viewed its oral acceptance of Lightstone's proposals as creating an enforceable agreement between the parties is belied by the language in both the Danvers interim contract and the draft written contract that was authored by JF Capital's own representative. JF Capital cannot claim it was operating under the view that it was protected by a legally enforceable oral agreement. Rather, the work that JF Capital performed was essentially done on the hope that Lightstone would stand by its legally unenforceable representations that it would eventually enter into a written contract with JF Capital.

On this point, *see Hill v Coates*, 78 AD3d 439 (1st Dept. 2010), where the plaintiff alleged that it was entitled to manage the assets of a trust, but the court found the oral agreement on which this alleged entitlement was based was void under the statute of frauds. There, the court also dismissed the fraud claim, reasoning that since there was no valid oral agreement between the parties, "it cannot be said that plaintiff justifiably relied on any of the statements made by defendant." Here too, there was never a valid contract in effect, and therefore, JF Capital was not justified in continuing to perform work in reliance on Lightstone's representations that it intended to enter into a contract whose exact terms had not yet been set, at

some point in the future. The longer Lightstone delayed in finalizing the contract, the less reasonable JF Capital's reliance became. Therefore, JF Capital's claim of fraudulent misrepresentation is dismissed.

Since JF Capital's claim for fraud is dismissed, the accompanying claim for punitive damages based on the fraudulent acts cannot stand alone as an independent action, and is also dismissed. *See Goldstein v Winrad*, 173 AD2d 201 (1st Dept. 1991) (stating that "since there can be no separate cause of action for punitive damages, plaintiff's separate cause of action for punitive damages should be dismissed").

Claims 4-5: Quantum Meruit, Unjust Enrichment

JF Capital alleges that it has never been compensated for the "substantial time and efforts" it expended in providing services for Lightstone, and, under the theories of quantum meruit and unjust enrichment, it is entitled to the reasonable value of the work it has performed. These claims are based on a theory of contracts implied in law, and New York's statute of frauds states explicitly that it applies to "contracts implied in law to pay reasonable compensation." General Obligations Law § 5-701(a)(10). This statue bars the recovery of a claim that is based on a plaintiff "negotiating the purchase, sale, exchange, renting or leasing of any real estate . . . or of a business opportunity." *Id.* The statue further provides that "negotiating includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction." *Id.*

In their briefs to the court, the parties disagree over what percentage of JF Capital's uncompensated work qualifies as "negotiations" such that claims for compensation on this work is based on an "implied in fact contract" and is subject to the statute of frauds. Lightstone

contends that every single service JF Capital listed in its itemized bills to it entails "assistance in the negotiation or consummation of a transaction," whereas, JF Capital asserts that "even a cursory review" of these bills will demonstrate that Lightstone's contention is incorrect, and that many of the services listed are not "negotiations." One thing remains quite clear: any portion of JF Capital's restitutionary claim that is based upon work consisting of "negotiations" is barred by the statute of frauds. Therefore, the court dismisses these claims, with leave to re-plead them specifying the work it performed that does not consist of "procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction."

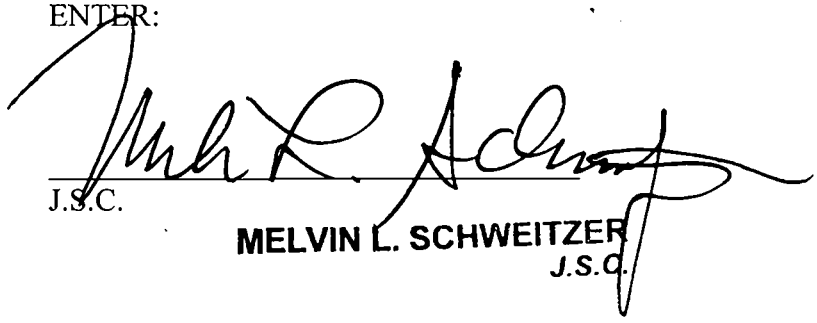
Accordingly, it is

ORDERED that Lightstone's motion to dismiss is granted and the complaint is dismissed; and it is further

ORDERED that JF Capital is granted leave to serve and file an amended complaint alleging causes of action for quantum meruit and unjust enrichment.

Dated: January 31, 2012

ENTER:



J.S.C.

MELVIN L. SCHWEITZER
J.S.C.