

<b>Long v O'Neill</b>
2013 NY Slip Op 33854(U)
January 7, 2013
Supreme Court, New York County
Docket Number: 101518/12
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13  
*Justice*

JOHN DE LANDE LONG

Plaintiff(s).

INDEX NO. 101518/12

- v -

MOTION DATE 10-31-2012

MOTION SEQ. NO. 002

PATRICK G. O'NEILL and FRED KNOLL

Defendant(s).

MOTION CAL. NO. \_\_\_\_\_

**FILED**  
JAN 09 2013  
COUNTY CLERK'S OFFICE  
NEW YORK

The following papers, numbered 1 to \_\_\_\_\_, were filed on this motion and cross-motion to/ for Dismiss:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_ cross motion \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 5</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>6, 7</u>
Replying Affidavits _____	<u>8, 9</u>

Cross-Motion: Yes  No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant's, Fred Knoll ("Knoll"), motion to Dismiss (Motion Sequence 002) and Defendant's, Patrick G. O'Neill ("O'Neill", and collectively with Knoll "Defendants"), motion to Dismiss (Motion Sequence 003) are granted and the case is dismissed.

Defendants are directors of a Cayman Islands investment fund identified as CMIA China Fund II Ltd. (the "Fund"). Defendants are also the sole members of KOM Capital Management LLC ("KOM"), which served as the Fund's investment sub-advisor. The Fund's primary investment advisor/manager was CMIA Capital Partners PTE ("CMIA"), a Singapore entity.

Plaintiff is the principal of Chartwell Advisors LLC, which in exchange for procuring investors for the Fund, was entitled to a portion of the management and performance fees paid by the Fund to KOM. At some point, Plaintiff was also appointed as a director of the Fund.

According to the parties, CMIA breached its fiduciary duties and through negligence and/or fraud deprived the Fund of somewhere between

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

\$50 and \$100 million in profits/assets. The Fund initiated legal action in Singapore to recover the losses and remove CMIA as the Fund's investment advisor/manager. CMIA responded by asserting counter-claims in the Singapore action and causing entities under its control to initiate derivative lawsuits here in New York against Plaintiff and Defendants asserting breach of fiduciary duty and corporate waste.

Plaintiff states that he was involved in the negotiations between the Fund and CMIA to reach a settlement in lieu of litigation. In June 2011, a settlement agreement, (the "Settlement Agreement") was executed by all individuals and entities associated with the lawsuits.

According to the terms of the Settlement Agreement, the Fund received no compensation from CMIA, and the remaining assets of the Fund were liquidated. The Settlement Agreement also released all parties and entities from liability past, present, and future, related to the investments, business, or affairs of the Fund.

Plaintiff alleges that in recognition of the efforts Plaintiff expended in connection with the Fund's legal actions and settlement negotiations, Defendants entered into an oral agreement with Plaintiff to compensate Plaintiff for his efforts. Plaintiff alleges that the parties eventually modified their oral agreement such that Plaintiff would receive one third of the performance fee KOM received at the liquidation of the Fund.

Plaintiff initiated the instant action after Defendants kept the performance fee paid to KOM for themselves. Plaintiff claims Breach of Contract, Fraudulent Inducement, Unjust Enrichment, and Promissory Estoppel.

Defendants have each filed a Motion to Dismiss based on the terms of the Settlement Agreement under which Defendants argue that all parties released all claims related to the business of the Fund, which Defendants argue includes all claims asserted by Plaintiff.

Plaintiff opposes the Motions and argues that the Settlement Agreement was executed between the parties associated with the Fund and the parties associated with CMIA. Plaintiff argues that because Plaintiff and Defendants were all parties associated with the Fund, the releases executed in the Settlement Agreement would not apply to claims between Plaintiff and Defendants.

A motion to dismiss under CPLR Section 3211(a)(1) should be granted where the documentary evidence conclusively establishes a defense as a matter of law. *See Greenapple v. Capital One, N.A.*, 92 A.D. 3d 548, 939

N.Y.S.2d 351 (N.Y.A.D. 1<sup>st</sup> Dept. 2012). The meaning and coverage of a release "necessarily depends, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given." *Cahill v. Regan*, 5 N.Y. 2d 292, 184 N.Y.S. 2d 348 (1959).

Article 3 of the Settlement Agreement states that,  
*Upon the execution of this [Settlement] Agreement, each Party hereby irrevocably and fully releases and forever discharges each other Party, and its employees, officers, directors, agents, (collectively, the "Released Parties"), from all and/or any actions, claims, rights, demands, suits, charges, complaints, obligations, damages, costs...expenses, liabilities, losses, debts, set-offs, promises, contracts, agreements, and controversies of any nature whatsoever, in any jurisdiction, whether known or not now known, suspected or claimed, fixed or contingent, that the Party has ever had, now has or may have against the Released Parties, or any of them, arising from or resulting from or in connection with any act or omission, event, transaction, occurrence, agreement, contract or relationship concerning [the Fund], its investments, business or affairs.*

The Settlement Agreement defines 'Party' as including all of the individuals and entities associated with the Fund as well as all of the individuals and entities associated with CMIA.

Plaintiff may be correct in asserting that the beginning of the Settlement Agreement states that the Settlement Agreement was executed between the two opposing sides. However, the plain language of Article 3 makes it clear that the release was meant for much more than the settlement of the lawsuits between the two sides.

The plain language of the Settlement Agreement that Plaintiff claims to have played an instrumental part in negotiating, makes it clear that each party was releasing each and every other party involved in any way with the Fund. This would include a release from the Plaintiff to the Defendants.

The fact that the Settlement Agreement includes such extensive lists of who the release covered as well as such broad, sweeping language of release indicates that the Parties intended to leave no loose ends in regards to the affairs of the Fund.

Since the legal actions for which Plaintiff claims to have exerted substantial and significant efforts all focused in one way or another upon fiduciary duties owed to the Fund, they would clearly fall under the description of the business or affairs of the Fund.

Regardless of how this Court categorizes what Plaintiff alleges transpired between Plaintiff and Defendants, it would have to be covered by the Settlement Agreement. All of the events described in the parties' papers arose, occurred, resulted from or in connection with an act or omission, event, transaction, occurrence, agreement, contract or relationship concerning the Fund. Plaintiff presumably was chosen for the task because of his relationship to the Fund and/or the other individuals associated with the Fund. Plaintiff's act(s) of negotiation was clearly connected to the business and affairs of the Fund. If Plaintiff's allegations are correct, Defendants' promises would have to be described as either an agreement or a contract.

The extensive and broad settlement language of the Settlement Agreement would encompass claims such as those Plaintiff now asserts against the Defendants. By executing the Settlement Agreement which he worked so hard to negotiate, Plaintiff released Defendants from any and all of the claims he now makes. The Settlement Agreement includes detailed instructions concerning the liquidation of the Fund and the disposition of its assets. If the Parties intended to compensate Plaintiff for his efforts in negotiating the Settlement Agreement, such compensation should have been documented therein.

Accordingly, it is the decision and order of this Court that Defendant Knoll's Motion to Dismiss and Defendant O'Neill's Motion to Dismiss are granted and the case is dismissed.

Accordingly, it is ORDERED and ADJUDGED that Defendant Knoll's Motion to Dismiss and Defendant O'Neill's Motion to Dismiss are granted and the case is dismissed.

**FILED**

JAN 09 2013

ENTER : MANUEL J. MENDEZ  
J.S.C.

Dated: January 7, 2013

COUNTY CLERKS OFFICE  
NEW YORK

MANUEL J. MENDEZ  
J.S.C.

Check one: X FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE