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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

MARCUM LLP, f/k/a MARCUM & KLIEGMAN LLP,

Plaintiff,

-against-

JERRY SILVA and STEVEN SILVA,

Defendants.

Decision and Order

MOTION SUBMITTED: January 28, 2013
MOTION SEQUENCE:05
INDEX NO.:004148-11

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Plaintiff's Rule 19-A Statement of Facts	2
Memorandum of Law in Support	3
Affirmation in Opposition	4
Defendant's Rule 19-A Statement of Facts	5
Affidavit in Opposition	6
Memorandum of Law in Opposition	7
Fred R. Gruen, Esq. Certification in Support of Opposition	8
Memorandum of Law in Reply	9

In an action to recover damages for breach of contract, the Plaintiff, Marcum LLP, f/k/a Marcum & Kliegman LLP ("Marcum") moves for an order pursuant to CPLR 3212 granting it summary judgment against the Defendants, Jerry Silva and Steven Silva (the "Silvas").[1]

For the reasons that follow, Marcum's motion is denied.

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[1] The Silvas were shareholders of B.J.K., Inc., which did business as Chem Rx.

Factual and Procedural Background

In February 2007, Jerry Silva and Marcum entered into an oral agreement whereby the Silvas would pay Marcum, an accounting firm, a $5 million fee for finding a purchaser of his family's stock in Chem Rx and for providing "financial advisory services" in connection with the sale. It is undisputed that the parties entered into this oral agreement and that Marcum did procure a buyer, Paramount Acquisition Corp. ("Paramount"), which resulted in a closing on October 26, 2007.[2]

The SEC Definitive Proxy Statement ("Proxy Statement") prepared for Paramount's shareholders and filed by the Silvas recites that:

> At the closing of the Transaction, we [Paramount] will pay to the Sellers $133 million in cash (subject to adjustment), and will issue 2,500,000 shares of Paramount common stock.
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> * * *
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> In connection with the closing of the Transaction, Jerry Silva and Steven Silva will pay Marcum & Kliegman LLP ("M&K") [now Marcum] a fee of $5,000,000, which is contingent upon the closing of the Transaction, for the rendering of financial advisory services to the Silva family. [Marcum] was the independent accounting firm whose audit report is included in this proxy as to the Chem Rx financial statements as of December 31, 2004 and December 31, 2005 and for the fiscal years then ended. In early February 2007, [Marcum] and the Silva family entered into an informal agreement for such financial advisory services, and [Marcum] simultaneously resigned as the independent accounting firm of Chem Rx. Such financial advisory services commenced in early February 2007 and are expected to continue until the closing of the Transaction (Ex. "E" to Motion).

According to Stephen Feldman, a partner of Marcum: immediately prior to closing, the parties agreed that "Marcum would defer $1,000,000.00 of its $5,000,000.00 fee for a period of twelve (12) months from the date of the closing" so that the Silvas could use those funds to help fund a 'put escrow' account required by Paramount; Marcum has only been paid $4 million; the Silvas were required to pay Marcum the $1 million balance due under the contract by October 25, 2008; and $1 million remains due under the agreement (Marcum's Rule 19-a Statement at ¶¶ 8-

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[2] At closing, a large portion of the Silvas' Chem Rx stock was held in put escrows pursuant to put agreements and ultimately was returned unsold to the Silvas in exchange for return to Paramount of that escrowed portion of the purchase price (Jerry Silva's Rule 19-b Statement at ¶ 4).

11; Affidavit in Support at ¶ 32).[3]

Jerry Silva maintains, however, that $1 million was not deferred but, rather, the parties agreed that $1 million of the $5 million fee "would be placed in put escrow along with $29,000,000 cash from the Silvas from the sale proceeds to abide the outcome under the put agreements"; Marcum was paid the $5 million in full; and "when the put holders elected to reverse the escrowed sale and receive return of $30,000,000 purchase price and release escrowed Chem Rx shares to Silvas, Silva offered 1/30th thereof to [Marcum]" which was rejected (Jerry Silva's Rule 19-b Statement at ¶¶ 8-10).

Marcum thereafter commenced a breach of contract action against the Silvas based upon the Silvas' failure to pay the $1 million balance purportedly due to Marcum by October 26, 2008 (Ex. "A" to Motion). Issue was joined after the Silvas served answers asserting many affirmative defenses, including statute of frauds defenses.[4]

Motion practice ensued after which, by order dated September 12, 2013, this court dismissed each of the affirmative defenses asserted in the answers and denied the Silvas leave to serve amended answers (Exs. "A"- "D" to Motion). With respect to the oral agreements, the court stated as follows:

> [T]he documentary evidence submitted in support of the motion as well as the submissions contained in the Defendants' opposition papers and motions establish the existence of an agreement [the first oral agreement].
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> * * *
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> Significantly, the Defendants argue that the parties entered into a new agreement regarding the payment of the $1 million balance (of the $5 million fee) which effected a novation, and that the new agreement was invalid because it violated the Statute of Frauds. However, the argument is specious to the extent that the Defendants suggest that an invalid agreement could effect a novation of a valid one (Ex. "D" at pp 4-5).

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[3] According to Feldman, he and Jerry Silva "attempted to come to terms on a deal in which Marcum would share in the downside risk of the put options, however, we could not agree on terms of such a deal and no agreement concerning Marcum's participation in the downside risk of the put options was ever entered into" (Feldman Affidavit in Support at ¶ 34).

[4] The fourth and fifth affirmative defenses, and seventh and eighth affirmative defenses, in Jerry Silva and Steven Silva's answers, respectively, assert that Marcum's claims are barred by the statute of frauds (Exs. "B" and "C" to Motion).

Marcum now moves for summary judgment on the sole cause of action in its complaint, breach of contract.

The Court's Determination

Marcum argues that "[i]n light of the admissions made by [the Silvas] in connection with the prior motions and the September 12 Order, there are no genuine triable issues of fact, and, accordingly, Marcum's motion for summary judgment should be granted in its entirety" (Memorandum of Law in Support at p 2). More specifically, Marcum asserts that the Silvas should be barred, under the doctrines of law of the case and judicial estoppel, from arguing that there is an issue of fact as to whether the Silvas and Marcum entered into a second agreement regarding the $1 million to fund a put escrow. Further, Marcum claims entitlement to summary judgment given that the existence of the first oral agreement is undisputed, that Marcum performed under that agreement (by finding a purchaser and performing financial advisory services) and that the Silvas breached the agreement by failing to pay Marcum the remaining $1 million.

Initially, contrary to Marcum's contention, the Silvas are not barred under the doctrines of law of the case and judicial estoppel from arguing that the $1 million was used to help fund a put escrow. The doctrine of 'law of the case' precludes relitigation of issues of law that have already been decided at an earlier stage of the proceeding and applies only to legal determinations that were necessarily resolved on the merits in a prior decision in the same litigation (*People v Evans*, 94 NY2d 499 [2000]; NY Jur 2d §§ 237, 238). However, the court in its prior order did not make a determination as to the enforceability of the second agreement. Rather, the court found that the Silvas' legal argument (that a novation of the first agreement occurred with the second oral agreement but that the second agreement was unenforceable under the statute of frauds), was "specious". The court did not make any determination as to the enforceability of the second agreement other than rejecting Silvas' suggestion that an invalid agreement could effect a novation of a valid one. Accordingly, law of the case does not apply under the circumstances.

Marcum's other contention, that the Silvas should be judicially estopped from asserting the existence of a binding second oral agreement, is similarly unavailing. Specifically, Marcum argues that the Silvas "should be judicially estopped from arguing on this motion that Jerry Silva and Marcum entered into a binding subsequent agreement, since [the Silvas] argued successfully in the prior motions that the purported subsequent agreement was unenforceable" (Memorandum of Law in Support at p 5). However, the Silvas correctly maintain that judicial estoppel is inapplicable to the facts at bar given that the Silvas' legal argument on the prior motions was not adjudicated in their favor (*see Environmental Concern v Larchwood Construction Corp.*, 101 AD2d 591, 593 [2d Dept 1984] ["Judicial estoppel, also known as estoppel against inconsistent

positions provides that where a party assumes a certain position, in a legal proceeding, and succeeds in maintaining that position, he [or she] may not thereafter, simply because his [or her] interests have changed, assume a contrary position"] [internal quotation marks and citation omitted]). Moreover, the court notes that its prior order dismissed each of the Silvas' affirmative defenses, including those which raised the statute of frauds as a defense.

Finally, considering the affidavit of Jerry Silva dated October 26, 2011 submitted in opposition to Marcum's motion, the court finds that there are issues of fact concerning the second oral agreement warranting the denial of summary judgment.[5]

Conclusion

Based on the forgoing, it is hereby ordered that the Plaintiff's motion for summary judgment is denied. All parties are directed to appear on April 16, 2013 at 9:30 a.m. in Part 15 to certify the case as ready for trial and to file a note of issue within seven days of certification.

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[5] According to Jerry Silva:

> The sale closing did not include all of the Silva family stock and we did not receive $133 million. The 'Transaction' referred to in the October 2, 2007 proxy statement did not occur because three of Paramount's shareholders demanded in exchange for their approval of the sale that approximately $30 million of the sale proceeds other wise due the Silvas be held - and they were held - in a 'put escrow'.
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> * * *
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> Faced with the prospect of realizing $30 million less than the 'Transaction' amount ($133,000,000) contemplated by the $5 million oral fee agreement with Plaintiff and the June 1, 2007 Stock Purchase Agreement with Paramount, and the prospect of having much of my family's stockholdings in ChemRX returned to them by the put holders, Plaintiff's principal Stephen R. Feldman and I agreed orally at or just before the closing on the stock sale that the $5 million fee would be - and it was - paid to Plaintiff but that $1 million thereof would be deposited in escrow as Plaintiff's contribution to the $30 million put agreement and escrow, approximately 1/30th thereof, such that if the put holders did not exercise their puts, the $30 million would be distributed to me who in turn would return the $1 million to Plaintiff, and if the put holders did exercise their puts, the returned stock would be distributed to me who in turn would give 1/30th thereof to Plaintiff (Jerry Silva Affidavit dated October 26, 2011 at ¶¶ 5-6) (emphasis in original).

This constitutes the decision and order of the court.

Dated: March 18, 2013

Hon. Vito M. DeStefano, J.S.C.