

<b>Newmark &amp; Co. Real Estate, Inc. v Frischer</b>
2014 NY Slip Op 30749(U)
March 25, 2014
Supreme Court, New York County
Docket Number: 650769/12
Judge: Saliann Scarpulla
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 39**

-----X  
NEWMARK & COMPANY REAL ESTATE, INC.,

Plaintiff,

- against -

**DECISION and ORDER**  
Index No. 650769/12  
Motion Seq. No. 001

PAUL FRISCHER and NEWMARK ENERGY  
SOLUTIONS, LLC,

Defendants.

-----X  
PAUL FRISCHER,

Counterclaim-Plaintiff,

- against -

NEWMARK & COMPANY REAL ESTATE, INC.,

Counterclaim-Defendant.

-----X  
**SALIANN SCARPULLA, J:**

This action arises out of an employment dispute between plaintiff Newmark & Company Real Estate, Inc., doing business as Newmark Knight Frank (“NKF”), and defendants Paul Frischer (“Frischer”) and Newmark Energy Solutions, LLC (“Newmark Energy”). NKF’s 10-count complaint asserts causes of action against Frischer for breach of contract and breach of fiduciary duty, and against both Frischer and Newmark Energy for unjust enrichment, constructive trust, unfair competition, conversion, declaratory judgment, and trademark infringement. In his amended answer, Frischer asserts five counterclaims, including claims for breach of contract, promissory estoppel, *quantum meruit*, and unjust enrichment.

NKF now moves to dismiss the counterclaims for failure to state a cause of action and based upon documentary evidence, pursuant to CPLR 3211 (a) (7) and (a) (1).

**Factual Allegations**

On December 2, 2008, Frischer joined NKF, a full-service, international real estate firm, as an Executive Director for Research and Real Estate Strategies. Complaint, ¶¶ 1, 8; Amended Answer ¶ 1. Before commencing employment, Frischer executed NKF's "Code of Business Conduct" (the "Code of Conduct"), which prohibits activities involving conflicts of interest. Complaint, Ex. C, pp. 2-3. In relevant part, the prohibited activities include:

5. Personal exploitation of a corporate opportunity, such as the investment in an enterprise in which NKF has an existing interest in which the employee or the affiliate has reason to believe NKF will have an interest in, such as acquisitions, financial projects, new products or any other developments. . .

6. Any other dealing for personal profit or gain based upon inside knowledge or confidential information obtained in the course of employment or affiliation concerning important business of NKF, such as acquisitions, financial projects, new products or any other developments.

\* \* \*

8. No employee may accept a retainer or consulting fee or enter into any other fee arrangement with any company or individual or operate as an independent practitioner where such arrangement or work is in any way inconsistent with his or her obligations to NKF or in any way interferes with the performance of his or her duties.

*Id.* at 3.

Frischer also allegedly agreed to be bound by the terms of its “Employee Handbook” (the “Handbook”), which NKF submits as documentary evidence. Aff. of Alexander D. Levi in Supp., Ex. 3. The Handbook includes a “Work Product Ownership” provision, which provides in relevant part that:

“All Company employees must be aware that NKF retains legal ownership of the product of their work. No work product created while employed by NKF may be claimed, construed, or presented as property of the individual, even after employment by NKF has been terminated or the relevant project completed. This includes written and electronic documents, audio and video recordings, system codes, and also any concepts, ideas, or other intellectual property developed for NKF or its clients, regardless of whether the intellectual property is actually used by NKF.”

*Id.* at 13. The Handbook also contains a “Bonuses” section, which provides as follows:

“The Company, in its sole discretion, may pay bonuses to eligible staff. Bonuses are generally paid at year end. The Company will consider several factors in awarding bonuses, including but not limited to, your overall performance and the Company profitability. In order to be eligible for bonuses, you must be actively employed on the date bonuses are paid and must not have given notice of resignation or received notice of termination on or before the date bonuses are paid.”

*Id.* at 20-21.

Page two of the Handbook contains an “Employee Acknowledgment Form” (the “Acknowledgment”), which Frischer signed on December 2, 2008. Levi Aff., Exs. 3, 4. In so doing, Frischer acknowledged that he received the Handbook and understood it was “[his] responsibility to read and comply with the policies contained in [the] handbook and any modifications.” *Id.*, Ex. 4.

Further, the Handbook and the Acknowledgment require agreements between NKF and its employees to be in writing. The Handbook's introduction explains:

**“This handbook is not a contract, expressed or implied, guaranteeing employment for any specific duration. . . . Please understand that no supervisor, manager, or representative of NKF, other than the Chairman, President, Chief Executive Officer, or Chief Operating Officer of Newmark Knight Frank has the authority to enter into any agreement with you for employment for any specified period of time, or to make any promises or commitments contrary to the foregoing. Further, any employment agreement entered into by a designated company representative shall not be binding unless it is in writing and signed by both you and such designated representatives.”**

*Id.*, Ex. 3, p. 8 (emphasis in original). In addition, the Acknowledgment provides that “no supervisor, manager or other representative of NKF has the authority to make verbal promises, commitments, or statements of any kind regarding the Company's policies, procedures, or any other issues that are legally binding on the Company.” *Id.*, Ex. 4. The Acknowledgment further provides “that no representative of the Company, other than the Chairman, President, Chief Executive Officer, or Chief Operating Officer of NKF has any authority to enter into any agreement guaranteeing employment for any specific period of time,” and that “any such agreement, if made, shall not be enforceable unless it is in a formal written agreement signed by both parties.” *Id.*

The parties now dispute their respective interests in defendant entity Newmark Energy. On November 12, 2010, while working as an Executive Managing Director of NKF, Frischer organized Newmark Energy, which is in the business of “provid[ing] cost-saving, sustainable, alternative energy solutions for commercial real estate owners

globally.” Complaint, ¶¶ 4, 21-22; Amended Answer, ¶ 22. Among Newmark Energy’s most significant assets is its contract with UTC Power Corporation (“UTC”), dated March 22, 2011 (the “UTC Agreement”). *Id.* NKF claims that the UTC Agreement granted “Newmark Energy exclusive distribution rights for UTC’s stationary power fuel cells in key market segments throughout the United States.” Complaint, ¶ 22. NKF is not a signatory to the UTC Agreement. *Id.*, ¶ 24. However, NKF alleges that its role in the UTC Agreement was crucial because of NKF’s extensive client relationships and vast marketing and project management experience. *Id.* According to NKF, Newmark Energy did business as part of NKF, and Frischer described Newmark Energy as a “Newmark company” in a press release dated April 13, 2012, a copy of which is annexed to the complaint. Complaint, ¶¶ 4, 25, Ex. D.

On February 29, 2012, Frischer allegedly resigned from NKF. Complaint, ¶ 28. NKF alleges that, without NKF’s participation or consent, Frischer continues to operate Newmark Energy and is seeking financing from nonparty Barclay’s Capital to further Newmark Energy’s business. Complaint, ¶ 33. NKF alleges that this conduct constitutes a breach of Frischer’s fiduciary duties and his written obligations under the Code of Conduct, the Handbook, and the Acknowledgment.

Frischer, on the other hand, alleges that he formed Newmark Energy in 2010, with NKF’s approval, to continue his efforts in the fuel cell business. *Id.*, ¶ 3 (g). According to Frischer, Newmark Energy sold fuel cells and provided power purchase agreements, earning profits under the UTC Agreement, while NKF provided project management services relating to the installation of fuel cells sold by Newmark Energy. *Id.*, ¶ 3 (i).

According to Frischer, Newmark Energy and NKF had a “strategic relationship,” and marketing materials distributed to potential customers and financiers described it as such. *Id.* Frischer alleges that, at all relevant times, he was the Chief Executive Officer, President, and sole owner of Newmark Energy. *Id.*, ¶ 3 (g).

Frischer’s counterclaims are based on defendants’ non-payment of a 2011 bonus and of funds related to an acquisition. According to Frischer, in October 2011, approximately three years after he signed NKF’s Code of Conduct and Acknowledgment, NKF was acquired by BGC Partners (“BGC”). Affirmative Defenses, ¶ 7. Frischer claims that he did not want to work for BGC or its Chief Executive Officer, Howard Lutnick. Counterclaims, ¶ 18. However, NKF’s Chief Executive Officer, Barry Gosin (“Gosin”), purportedly “requested that Frischer not seek alternative employment and not interrupt delivery of products and services to NKF from Frischer’s Companies.” *Id.*, ¶ 19. NKF and Gosin allegedly “promised Frischer that a monetary amount would be set aside for Frischer’s benefit as part of BGC’s acquisition of NKF, and that Frischer would be treated as a partner in the transaction.” *Id.*, ¶ 20. Frischer alleges that “the parties agreed that, in addition to being an employee of NKF, Frischer was considered a business partner with NKF and that, as a result, he would receive money from the acquisition in an amount no less than the amount received by the partner of NKF with the smallest partnership interest.” *Id.*, ¶ 21. Frischer further alleges that, in August 2011, Romel Cañete, the Executive Managing Director of Financial Services of NKF, confirmed Gosin’s promise. *Id.*, ¶ 24.

In purported reliance on these promises, Frischer did not seek alternative employment and continued business activities between his companies and NKF. *Id.*, ¶ 22. Further, he took on responsibilities beyond those required of him as the Executive Managing Director of Research and Real Estate Strategies for NKF, including the coordination of critical activities among various NKF departments after the announced acquisition. *Id.*, ¶ 23.

In October 2011, BGC completed its acquisition of NKF. *Id.*, ¶ 25. Gosin allegedly promised Frischer that NKF had set aside funds to pay Frischer, based on the final sale price of the acquisition. *Id.*, ¶ 26. Frischer claims that NKF breached its agreement with him by excluding him from these acquisition proceeds and failing to treat him as a partner. *Id.*, ¶ 28.

With respect to the disputed bonus payment, Frischer maintains that upon commencing employment at NKF, NKF agreed that his compensation would include a base salary and “an annual non-discretionary bonus based, in part, upon NKF’s yearly performance.” Counterclaims, ¶ 15. According to Frischer, the bonus was intended to compensate for his low base salary, which was allegedly half the market rate for Frischer’s position. *Id.*, ¶ 15. Frischer allegedly received a \$50,000 bonus for 2009 and a \$100,000 bonus for 2010. *Id.*, ¶¶ 26, 30. Frischer claims that, in 2011, he and NKF agreed that his bonus would be the same as it had been in 2010: “specifically in an amount of \$100,000, as an integral part of Frischer’s compensation package.” *Id.*, ¶¶ 16, 31. Frischer alleges that this agreement was confirmed by NKF’s announcement that employees would receive bonus compensation before the end of the year in an amount

equal to the prior year's bonus (Bonus Announcement), and by a list (Bonus List), in which NKF identified Frischer as one of the employees who would receive a bonus for 2011. *Id.*, ¶¶ 16, 31. The Bonus List allegedly identified Frischer's bonus as \$100,000. *Id.*, ¶¶ 16, 31.

Frischer further alleges that in December 2011, while handling approvals for NKF employee bonuses with Joseph Radar, NKF's Chief Operating Officer, Romel Cañete and Gosin, Frischer noticed that his name had been deleted from the final payment list. *Id.*, ¶ 32. On December 27, 2011, Frischer notified Joseph Radar of the omission and was informed that his compensation would be discussed after the New Year. *Id.*, ¶ 32. Frischer alleges that in January 2012, Gosin refused to authorize his \$100,000 bonus for 2011 and he never received said bonus, in breach of his agreement with NKF. *Id.*, ¶¶ 33, 35.

#### **Breach of Contract (First and Second Counterclaims)**

NKF seeks dismissal of the first and second counterclaims for breach of contract which are based on its alleged failure to pay the acquisition-related funds and the 2011 bonus, respectively. NKF argues that both counterclaims are precluded by the Handbook's discretionary bonus provision and by the writing requirements contained in the Handbook and the Acknowledgment.

It is well settled that "[a]n employee's entitlement to a bonus is governed by the terms of the employer's bonus plan." *Hall v. United Parcel Serv. of Am.*, 76 N.Y.2d 27, 36 (1990). Here, the bonus provision clearly provides that NKF could pay bonuses "in its sole discretion." Moreover, the writing requirements contained in the Handbook and the

Acknowledgment require that any modifications to this discretionary policy, or any other terms of Frischer's employment, be in writing. Frischer signed the Acknowledgment, evidencing his receipt of the Handbook and his understanding of its terms.<sup>1</sup> Given these facts, there is no "enforceable agreement entitling [Frischer] to bonus compensation." *Kaplan v. Capital Co. of Am.*, 298 A.D.2d 110, 111 (1st Dep't 2002)(dismissing breach of contract claim where employee handbook contained a discretionary bonus provision and a requirement that any modifications to the employment relationship be in writing, and defendant signed acknowledgment).

Frischer argues that despite the existence of an ostensible discretionary bonus policy, employees "may enforce an agreement to pay an annual bonus made at the onset of the employment relationship where such bonus constitutes an integral part of plaintiff's compensation package." *Mirchel v. RMJ Sec. Corp.*, 205 A.D.2d 388, 389 (1st Dep't 1994)(internal quotation marks omitted). Frischer's reliance on *Mirchel* is misplaced as that case does not involve an employee handbook or discretionary bonus policy at all, but rather an agreement between parties in the form of a compensation package.

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<sup>1</sup> Frischer argues that it is not clear whether the Handbook submitted to the court is the same handbook he received at the time he signed the Acknowledgment. However, his sole basis for this suspicion is that the notation "Updated 10/1/07" appears on the acknowledgment form inside the Handbook, but not on the Acknowledgment Frischer signed on December 2, 2008. See Memo in Opp, n.1, p. 4. Frischer does not allege a single substantive inconsistency between the Acknowledgment he signed and the one inside the Handbook to persuade the court that further discovery is warranted. Nor is the court persuaded by Frischer's argument that he did not receive a Handbook when he signed the Acknowledgment (8/7/13 Tr., 21:6-7), because, in signing the Acknowledgment, Frischer explicitly confirmed receipt of the Handbook.

In addition, Frischer argues that bonus provisions in employee handbooks are not binding unless there is substantial evidence that the provisions were relied on when the parties entered into the employment agreement, citing *Giuntoli v. Garvin Guybutler Corp.*, 726 F.Supp. 494, 508 (S.D.N.Y. 1989)(quoting *Luisi v. JWT Group*, 128 Misc.2d 291, 297 (Sup. Ct., NY Co. 1985). However, both *Luisi* and *Giuntoli* are distinguishable on their facts. In dismissing the breach of contract causes of action in *Luisi*, the court cited the fact that the handbook in question became effective in only the last two months of plaintiff's approximately 24-year employment. The court in *Giuntoli*, citing *Luisi*, sustained plaintiff's breach of contract cause of action in order to allow discovery to establish whether plaintiff relied on her former employer's policies. In neither of those cases did the plaintiffs expressly acknowledge, in writing, their agreement to "read and comply with the policies" in their employee handbook as Frischer did here. Thus, Frischer's reliance on *Giuntoli* (and, indirectly, *Luisi*) is inapposite because, based on the Acknowledgment alone, it is clear that the parties relied on the policies in the Handbook at the outset of Frischer's employment. <sup>2</sup>

Next, Frischer's attempt to paint the 2011 bonus and the acquisition payout as something unique and entirely outside the scope of the Handbook is unconvincing. The bonus provision does not limit the form of bonus to which it applies and the 2011 bonus

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<sup>2</sup> Frischer relies on several additional cases, all of which are distinguishable on their facts. See *Ryan v. Kellogg Partners Inst. Servs.*, 19 N.Y.3d 1, 12 (2012); *Marin v. AI Holdings (USA) Corp.*, 2012 WL 1850375 (Sup. Ct., NY Co. May 17, 2012); *Zentz v. International Foreign Exch. Concepts, L.P.*, 2011 WL 5009553 (Sup. Ct., Kings Co. Oct. 20, 2011) *aff'd* 106 A.D.3d 904 (2d Dep't 2013); *Guggenheimer v. Bernstein Litowitz Berger & Grossmann LLP*, 11 Misc.3d 926, 931 (Sup. Ct., NY Co. 2006).

falls squarely within this provision. Moreover, the alleged promise to pay Frischer “like a partner” in connection with the acquisition amounts to nothing more than a promise to pay him a bonus in addition to his base salary and is, therefore, discretionary under the Handbook. In any event, such an alleged oral agreement is not enforceable pursuant to the writing requirement in the Handbook and the Acknowledgment.<sup>3</sup>

For the foregoing reasons, NKF’s motion to dismiss Frischer’s first and second counterclaims for breach of contract is granted.

### **Quasi-Contract Claims**

NKF also seeks dismissal of Frischer’s quasi-contract counterclaims for promissory estoppel, *quantum meruit* and unjust enrichment, arguing that he could not have reasonably relied on the alleged oral promises or have had a reasonable expectation of additional compensation. The promissory estoppel claim relates only to the proceeds from BGC’s acquisition of NKF, whereas the *quantum meruit* and unjust enrichment claims relate to the acquisition proceeds and the 2011 bonus. *See* 8/7/13 Tr., 17:22-25.

To plead promissory estoppel, a party must allege: “(1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance.” *MatlinPatterson ATA Holdings LLC v. Federal Express Corp.*, 87 A.D.3d 836, 841-42 (1st Dep’t 2011). Here, Frischer alleges that NKF orally represented that he would receive certain proceeds from BGC’s acquisition of NKF. *See* Counterclaims, ¶¶ 20-21, 24, 26, 49-52. However, as discussed above, this

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<sup>3</sup> Although not specifically addressed above, I have considered but find unpersuasive Frischer’s remaining arguments. Moreover, in light of the foregoing holding, I do not reach NFK’s additional arguments concerning indefiniteness and the statute of frauds.

promise of additional incentive compensation falls within the Handbook's discretionary bonus policy. Given that Frischer had no contractual right to the bonus and that he acknowledged and agreed to comply with the policies set forth in the Handbook, he may not claim reasonable reliance on the alleged representations. *See De Madariaga v. Union Bancaire Privée*, 103 A.D.3d 591, 591 (1st Dep't 2013) (holding that none of plaintiff's bonus-based claims—including causes of action for breach of an oral contract, *quantum meruit*, unjust enrichment, and promissory estoppel—were viable where discretionary bonus payment policy was clearly expressed in an offer letter, the company handbook, and memorandum confirming plaintiff's bonus, and plaintiff acknowledged in writing that she understood the policy); *see also Kaplan*, 298 A.D.2d at 111. Accordingly, Frischer's third counterclaim for promissory estoppel is dismissed.

Next, to state a cause of action for *quantum meruit*, Frischer must allege: "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." *Soumayah v. Minnelli*, 41 A.D.3d 390, 391 (1st Dep't 2007). Frischer alleges that, in anticipation of BGC's acquisition of NKF, he increased his efforts at NKF and coordinated internal activities among NKF's departments. NKF allegedly accepted these services, which together with NKF's promises, allegedly gave rise to Frischer's expectation of compensation from the proceeds of the acquisition. Counterclaims, ¶¶ 23-24, 51, 53-57. Frischer further alleges that NKF's payment of his bonuses in prior years along with his acceptance of a reduced salary support his expectation of a bonus payment for 2011. *Id.*, ¶¶ 29-30, 53-57. Frischer's allegations,

however, fall short. Having been apprised of, and acknowledged in writing, the discretionary bonus policy and the writing requirement, Frischer cannot demonstrate a reasonable expectation of bonus or acquisition-related compensation. *See Kaplan*, 298 A.D.2d at 111; *De Madariaga*, 103 A.D.3d 591. Accordingly, Frischer's counterclaim for *quantum meruit* is dismissed.

Finally, to state a claim for unjust enrichment, Frischer must allege that he "conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor." *Nakamura v. Fujii*, 253 A.D.2d 387, 390 (1st Dep't 1998). With respect to the acquisition proceeds, Frischer alleges that he provided NKF with additional assistance during its preparation for the acquisition and that, despite the successful closing of the transaction, Frischer was never compensated for his services. Counterclaims, ¶¶ 23, 25, 27-28, 59. Frischer further alleges that NKF was unjustly enriched by retaining the acquisition proceeds that were due to him. *Id.*, ¶¶ 58-61. With respect to the 2011 bonus, Frischer alleges that he provided NKF with labor and services, but that NKF failed to adequately compensate him by withholding his 2011 bonus, which was to make up for the \$100,000 difference between his base salary and the market rate for his position. *See id.*, ¶¶ 31-35. Frischer alleges that it is inequitable to allow NKF to withhold this integral part of his compensation while having benefitted from his services. *See id.*, ¶¶ 58-61.

The Court is unpersuaded by these allegations. It is undisputed that NKF paid Frischer a base salary. Moreover, as discussed above, NKF had discretion under its bonus policy to pay Frischer additional compensation. NKF's refusal to exercise its

discretion does not give rise to a cause of action for unjust enrichment. Thus, under these circumstances, Frischer's unjust enrichment counterclaim cannot be sustained and is dismissed. See *Buckman v. Calyon Secs. (USA) Inc.*, 817 F.Supp.2d 322, 339 (S.D.N.Y. 2011), citing *Kaplan*, 298 A.D.2d at 111 ("New York courts have refused to permit litigants to use a quasi-contractual theory as a backdoor to enforce an unenforceable oral bonus promise").

Accordingly, it is hereby

ORDERED that plaintiff's motion to dismiss the counterclaims of defendant Paul Frischer is granted and the counterclaims are dismissed in their entirety; and it is further

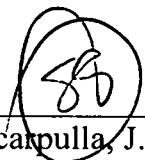
ORDERED that the parties appear for a preliminary conference in IA Part 39, 60 Centre Street, Rm. 208 on April 23, 2014 at 2:15 p.m.

This constitutes the decision and order of this Court.

Dated: New York, New York

March 25, 2014

ENTER:

  
Saliann Scarpulla, J.S.C