

**Josephberg v Crede Capital Group, LLC**

2014 NY Slip Op 31018(U)

April 15, 2014

Supreme Court, New York County

Docket Number: 650915/2013

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 45

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RICHARD JOSEPHBERG,	:
	:
Plaintiff,	:
	:
-against-	:
	:
CREDE CAPITAL GROUP, LLC, SOCIUS	:
CAPITAL GROUP, LLC, CEOcast, INC.,	:
MICHAEL S. WACHS, TERREN PEIZER AND	:
RACHEL WACHS, a/k/a RACHEL GLICKSMAN	:
	:
Defendants.	:
-----X	

Index No. 650915/2013  
DECISION AND ORDER  
Motion Sequence No. 003

**MELVIN L. SCHWEITZER, J.:**

This is a motion to dismiss for failure to state a claim under CPLR 3211 (a) (7), and for being barred by the statute of frauds under CPLR 3211 (a) (5).

**Facts**

The facts are as alleged in the complaint.

The plaintiff was employed by Socius Capital Group, LLC, (Socius), in August of 2010. According to Richard Josephberg (Mr. Josephberg) he was employed as a “commissioned salesperson,” but was not provided with, and did not sign, a written employment agreement.

Mr. Josephberg’s employment package included an annual salary of \$35,000, health insurance for him and his wife, and fifteen percent of the profits generated by Socius financing transactions originated by Mr. Josephberg. Although Mr. Josephberg was employed by Socius, his salary was paid by CEOcast, Inc. (CEOcast), while commissions were paid by Socius.

In September 2010, Mr. Josephberg initiated a business relationship with the President and Vice President of Finance and Administration of Cell Therapeutics, Inc. (CTIC), on behalf of Socius. As a result of this introduction Socius provided an aggregate \$50,000,000 in

financing to CTIC in January and February of 2011, from which Socius earned a fee of approximately \$10,000,000. Mr. Josephberg was paid \$1,058,861, fifteen percent of profits, pursuant to his employment arrangement.

In May and July 2012 Socius provided an additional \$35,000,000 in financing to CTIC, from which it earned a fee of \$12,000,000. In October 2012, Mr. Wachs informed Mr. Josephberg that Socius would not be paying him a commission on the 2012 CTIC financing transaction. Later that month, Mr. Wachs offered \$60,000 in compromise, in response to which Mr. Josephberg reminded Mr. Wachs that he was entitled to fifteen percent of the profits pursuant to the terms of his employment arrangement.

Mr. Josephberg alleges three other transactions in which he initiated the business relationship resulting in profits to Socius. In none of the three transactions was Mr. Josephberg paid fifteen percent pursuant to the employment arrangement.

Following the dispute over the second payout from the CTIC financing, Mr. Josephberg's employment with Socius was terminated on November 9, 2012. His health insurance was cancelled retroactively without any prior notification. Socius (through CEOcast) failed to pay his base salary for the last two weeks of his employment.

Immediately after Mr. Josephberg's employment was terminated, Socius ceased doing business under that name and instead carried on future business under the name of Crede Capital Group, LLC (Crede).

## Discussion

### Standard of Review

On a motion to dismiss for failure to state a cause of action [CPLR 3211 (a) (7)], the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

### Statute of Frauds/Breach of Contract

New York General Obligations Law 5-701 (a)(1) states that

[e]very agreement, promise, or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: [b]y its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime....

"We have long interpreted this provision of the Statute of Frauds to encompass only those contracts which, by their terms, have absolutely no possibility in fact and law of full performance within one year." *Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998) (internal quotations omitted). However unlikely it is that performance will occur within one year, the Statute of Frauds will not act as a bar if performance could be "fairly and reasonably interpreted" as being completed within one year. *Id.* At-will employment contracts have long been considered outside the reach of the Statute of Frauds. *See Murphy v American Home Prods.*

*Corp.*, 58 NY2d 293 (1983); *see also Weider v Skala*, 80 NY2d 628 (1992); *Martin v New York Life Ins. Co.*, 148 NY 117 (1895). The fact that payment may extend beyond the time that employment has been terminated does not force the contract within the Statute of Frauds. *See Cron*, 91 NY2d at 369; *see also Rifkind v Web IV Music*, 323 NYS2d 326 (1971).

General Obligations Law 5-701 (a) (10) contains the requirement that a contract be in writing if it

[i]s a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity...including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.

Business opportunities within the definition of this section have been construed liberally. In *Freedman v Chemical Const. Corp.*, 43 NY2d 260 (1977), the Court of Appeals held that plaintiff's role, while limited and transitory, involved "us[ing] his connections, his ability, and his knowledge to arrange for Chemical to meet appropriate persons and somehow to procure for it the opportunity to build the multimillion dollar plant." *Id.* at 267 (internal quotations omitted).

Where

the intermediary's activity is so evidently that of providing know-how or know-who, in bringing about between principals an enterprise of some complexity or an acquisition of a significant interest in an enterprise, the statute is entitled to be read both in accordance with its plain meaning, its evident purpose, and to accomplish the prevention of the mischief for which it was designated.

*Id.* It is clear that Socius employed Mr. Josephberg for his "know-who," and to procure an "introduction to a party to the transaction," which was unquestionably a "business opportunity."

This falls squarely within the plain meaning of the statute, requiring any contract to be enforceable between Socius and Mr. Josephberg to be in writing and subscribed by an agent of Socius.

The motion to dismiss is granted as to the first and second causes of action, alleging breach of contract and implied in fact contract, which are barred by the Statute of Frauds.

#### Promissory Estoppel, Unjust Enrichment and Quantum Meruit

Plaintiff's third, fourth and fifth causes of action are dismissed for the same reason as his first and second causes of action. They are barred by GOL 5-701 (a) (10).

#### Labor Law 191

To state a claim here, plaintiff asserts he was a commissioned salesperson. However, a "commission salesman" does not include "an employee whose principal activity is of a supervisory, managerial, executive or administrative nature." Labor Law 196 (6). Plaintiff's duties involved the exercise of independent judgment in determining who to solicit, and the extent he should advise them. As such, he acted in an administrative capacity and there cannot be a violation of the Labor Law in connection with the facts here. *Conticommodity Servs. v Halmier*, 67 AD2d 480, 482 (2d Dept 1979). The plaintiff's sixth cause of action is dismissed.

#### Constructive Trust

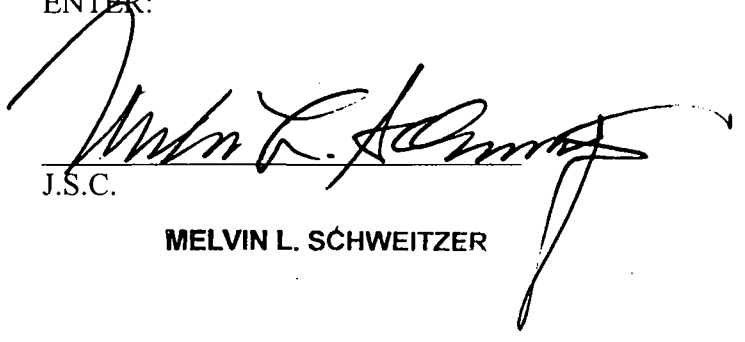
In order to state a claim under this theory one must allege a confidential or fiduciary relationship. Here, plaintiff alleges such a relationship in purely conclusory terms – no facts are stated on which to base such an allegation. He was an employee. As such, only in special circumstances will a fiduciary duty be implied. This is not one of them. The plaintiff's seventh cause of action is dismissed.

Accordingly, it is

ORDERED that defendants' motion to dismiss all of plaintiff's causes of action is granted.

Dated: April 15, 2014

ENTER:



A handwritten signature in black ink, appearing to read 'Melvin L. Schweitzer', is written over a horizontal line. The signature is stylized and cursive.

J.S.C.

MELVIN L. SCHWEITZER