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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

-- X

SHEKHAR K. BASU,

Plaintiff,

- against -

ALPHABET MANAGEMENT LLC, ALPHABET PARTNERS LP, ALPHABET ADVISORS LLC, MOG CAPITAL LLC, JASON ADLER and ANDREW GARNOCK,

Defendants.

-- X

Index Number: 651340/10
Submission Date: 11/6/13

DECISION and ORDER

For Plaintiff:
Harrington, Ocko & Monk LLP
81 Main Street, Suite 215
White Plains, NY 10601

For Defendants:
Sadis & Goldberg LLP
551 Fifth Avenue, 21st Floor
New York, NY 10176

Papers considered in review of the defendants' motion for summary judgment (motion seq. no. 002):

Notice of Motion 1
Affs. in Supp 2
Memo in Supp 3
Opposition 4
Aff in Reply 5
Memo in Reply 6

HON. SALIANN SCARPULLA, J.:

In this action arising from an alleged breach of an employment contract, defendants Alphabet Management LLC ("Alphabet Management"), Alphabet Partners LP, Alphabet Advisors LLC, MOG Capital LLC ("MOG"), Jason Adler, and Andrew Garnock (collectively, "defendants") move: (1) for summary judgment dismissing plaintiff Shekhar K. Basu's ("Basu") complaint pursuant to CPLR § 3212.

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Basu is an experienced analyst and trader who worked for Alphabet Management, an investment advisor to a hedge fund Alphabet Partners LP ("the hedge fund"), between November 2008 and May 2010.[1] Prior to joining Alphabet Management, Basu had known its principal, Jason Adler ("Adler"), in a professional capacity. In November 2008, Adler hired Basu to work as an analyst for Alphabet Management based on his experience in analyzing investments in healthcare and biotechnology companies.

Basu alleges that, upon commencing his employment, he and Adler entered into an oral contract whereby Basu would be paid: (1) a salary of $10,000 per month; (2) expense reimbursement; and (3) ten percent (10%) of the profits from trades made in the trading accounts of Andrew Garnock ("Garnock") that resulted from Basu's analysis and recommendations ("the oral contract"). During the time period of Basu's employment, Garnock was the head trader of MOG Capital LLC, the broker-dealer that conducted trades for the hedge fund. Basu claims that he supplied Garnock with investment advice regarding biotechnology stocks through his work in predicting "binary events" – events which have a significant effect on the value of a company's stock such as FDA approval or rejection of a drug, or the success or failure of a drug trial.

In or around May 2009, Basu alleges that Adler increased his salary to $15,000 per month and provided him with a trading account of $5 million dollars of which Basu was entitled to receive 15% of the profits made in this account. Basu also claims that Adler

[1] The general partner of the hedge fund is defendant Alphabet Advisors LLC.

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orally agreed to pay him 15% of the profits from any investments that the hedge fund made on the basis of his analysis and recommendations.

Basu asserts that, based on his analysis and advice, the hedge fund then began investing in biotechnology companies through private investments in public entities known as "PIPE" transactions. Specifically, Basu claims that the hedge fund invested in seven PIPE transactions: (1) Emisphere Technologies (August 2009); (2) Biosante Pharmaceuticals Inc. (August 2009); (3) Fibrocell Technologies (October 2009); (4) Unilife (October 2009); (5) Pharming Group (January 2010); (6) Cleveland BioLabs, Inc. (March 2010); and (7) Senesco Technologies (April 2010). Because these PIPE transactions allegedly resulted from Basu's analysis and advice, Basu claims that he is entitled to 15% of the profits from these seven transactions.

Basu contends that, although he performed under the terms of the oral contract, the defendants never paid him the full compensation that he is owed – 10% of profits from trades made in Garnock's trading accounts, 15% of the profits from his trading account, and 15% of the profits from the seven PIPE transactions that resulted from his analysis and recommendations.

Basu claims that he repeatedly asked Adler to put the oral contract in writing, but that Adler promised to do so and later ignored his requests. On May 25, 2010, Basu's employment was terminated. On August 17, 2010, Basu then commenced this action to recover damages resulting from the defendants' alleged breach of the oral contract. Basu

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alleges that the defendants terminated him in order to avoid paying him in connection with large profits that were made on investments that he recommended.

In the complaint, Basu asserts seven causes of action for: (1) breach of contract; (2) promissory estoppel; (3) unjust enrichment; (4) breach of fiduciary duty; (5) request for a constructive trust; (6) request for an accounting; and (7) aiding and abetting breach of fiduciary duties.

The defendants now move for summary judgment dismissing the complaint. First, the defendants argue that the breach of contract claim should be dismissed on the grounds that: (1) Basu and Adler never entered into an oral contract providing that Basu would receive 10% of the profits from Garnock's trading accounts and 15% of the profits from the PIPE transactions; and (2) the alleged oral contract is barred by the Statute of Frauds because it cannot be performed within one year.[2]

The defendants claim that Basu's own admissions and deposition testimony demonstrate that no oral contract existed. The defendants submit a January 6, 2010 email written by Basu, which states "I would appreciate an written understanding as to how I will be compensated for all the binary event trades that Andrew [Garnock] did – I think there were close to 18 ideas, and also how I get compensated on the PIPE transactions." The defendants also submit a March 30, 2010 email written by Basu, in which he states to Adler, "I suggest we document the three lines of work I do, run the carve out, advice

[2] The defendants do not dispute that Basu is entitled to 15% of the profits from his trading account.

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Andrew [Garnock] and advice you on PIPEs, and have this compensation agreement written out." The defendants argue that Basu's emails and his deposition testimony prove that Adler and Basu never entered into the oral contract, with any definite terms.

The defendants next argue that the promissory estoppel claim should be dismissed because it is duplicative of the breach of contract claim, and cannot be asserted to enforce a defective oral contract. In addition, they argue that Basu cannot prove the essential elements of a promissory estoppel claim – a clear and unambiguous promise, a change in his circumstances, and reasonable reliance. They claim that Basu could not reasonably rely on any alleged promise because he was never paid according to the alleged oral contract, and the parties never agreed to any terms regarding how Basu would be paid.

The defendants similarly argue that the unjust enrichment claim should be dismissed because Basu cannot assert this cause of action to evade the Statute of Frauds or as a substitute for a breach of contract claim. They also claim that they were not unjustly enriched because they paid for any benefit provided by Basu through his salary.

Lastly, the defendants contend that Basu's claims for breach of fiduciary duty, constructive trust, accounting, and aiding and abetting a breach of a fiduciary duty should be dismissed because no fiduciary relationship existed between Basu and Adler, or between Basu and MOG. The defendants argue that Basu was not a partner in MOG because he refused to sign MOG's operating agreement. The defendants also urge this Court to dismiss the complaint against Alphabet Advisors for failure to state a claim.

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In opposition, Basu argues that the defendants' motion for summary judgment should be denied because there are material issues of fact as to whether the oral contract existed and the terms of the contract. Basu also argues that the oral contract is not barred by the Statute of Frauds because it could be performed within one year.

Further, Basu claims that his breach of fiduciary duty claim should not be dismissed because an issue of fact exists as to whether he was a partner of MOG. He submits copies of his federal K-1 tax forms that he received from MOG for 2009 and 2010, which list him as a "general partner or LLC member-manager." Basu further argues that his promissory estoppel and unjust enrichment claims are not duplicative, and that defendants failed to demonstrate their entitlement to summary judgment.

To raise an issue of fact, Basu submits his own deposition testimony. Basu testified that, upon commencing his employment, Adler orally agreed to pay him 10% of the profits from Garnock's trading accounts that resulted from his analysis and recommendations. Basu testified that he immediately asked Adler to put the oral contract in writing, and several time afterwards. According to Basu, Adler promised to put the contract in writing, and repeatedly stated that he would pay Basu pursuant to the oral contract.

Basu testified that the oral contract was modified in or around May 2009. Basu explained that Adler agreed to increase his compensation to include: (1) a monthly salary of $15,000 per month; (2) 15% of the profits made from a new $5 million dollar trading account that Adler allocated to Basu; and (3) 15% of the profits from any other investments that resulted from Basu's analysis and recommendations. Basu specifically testified that Adler agreed to pay him "15 percent of whatever I made – in whatever security he purchased, whether it was private placement or secondary offering, but as long as I was involved with it and I made the decision that the firm should get involved."

He further testified that, after he received his own trading account, he asked Adler for a written copy of the standard trader's agreement to ensure that there was no disagreement as to how he would be compensated from his trading account. Basu then asked Adler to revise the trading agreement to include his other compensation related to Garnock's accounts and the PIPE transactions. Basu told Adler that he would sign the trading agreement once it was revised, but Adler never gave him an agreement that reflected his additional compensation to sign.

Basu further submits Adler's deposition testimony. Adler testified that when he hired Basu, he agreed to pay him a monthly salary of $10,000, plus a discretionary bonus. In May 2009, Adler increased Basu's salary to $15,000 per month, and he agreed to give him 15% of the profits from a new trading account that he opened for Basu.

Adler also testified that, in or around October 2009, "we agreed to allow his account [Basu's account] to participate in the P & L [profit or loss] of one of these or a couple of these guys – a couple of these PIPEs." According to Adler, he and Basu "never had a deal saying, all right, your agreement with PIPEs is X, Y, or Z. It's we did a deal and based on, A, when he sourced it, right, was he just an analyst, was he going to participate in this, B, how big it was, how much of it was he going to participate in."

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Adler further testified that Basu participated in the profits and losses from unexercised stock warrants, and that Basu should have access to the profit and loss information from his trading account. Adler explained that the hedge fund's administrator kept track of the profits and losses for all of the trading accounts, and that "it would be Mr. Basu's responsibility to say how did you come up with this $315,000 you paid me."

In addition, Adler testified that Basu asked him for a written contract, and that they had many conversations about his compensation that he cannot recall. Although Adler recalled that Basu had asked about receiving 10% of the profits from Garnock's accounts, he testified "[m]y response was – I mean I'm guessing – just, no. I don't know what my response was. Maybe I told him to talk to Andrew [Garnock] about it."

Adler stated that Basu was the only person at the firm with dual roles as an analyst and trader. Adler testified that all traders were considered trading partners in MOG, and that the traders did not have any partnership agreements outside of their trading agreement with the company. Adler explained that he considered Basu a trading partner, even though Basu never signed his trading agreement.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to

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demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

1. Breach of Contract

The defendants argue that the breach of contract claim should be dismissed because Basu and Adler never entered into an oral contract, in which Basu would receive 10% of the profits from Garnock's trading accounts or 15% of the profits from the seven PIPE transactions. To support their argument, the defendants submit Basu's emails and deposition testimony, which purportedly show that the parties never agreed to any definite terms regarding this additional compensation.

Based on the documentary evidence and deposition testimony submitted, I find that the defendants failed to demonstrate their entitlement to judgment as a matter of law dismissing the breach of contract claim. The emails written by Basu in which he inquires about obtaining a written contract regarding his compensation do not conclusively demonstrate that no oral contract exists. The language used in the emails is ambiguous as to the existence of the oral contract, and, as Basu argues, may simply reflect Basu's repeated attempt to get the contract in writing.

In addition, the deposition testimony of both Basu and Adler raises material issues of fact as to whether they entered into the oral contract. Basu testified that Adler orally agreed to give him 10% of the profits from Garnock's trading accounts, and 15% of the profits from the PIPE transactions. In contrast, Adler could not recall many of the parties' discussions concerning compensation. For example, Adler testified that he only agreed to give Basu a discretionary bonus, but he also stated that he had many other conversations with Basu about his compensation, but that he could not recall them. Adler also testified that although Basu had asked him about receiving 10% of the profit from Garnock's accounts, he could not recall his response.

In fact, Adler admitted that he agreed to let Basu's trading account participate in the profit and loss of several PIPE transactions, and that he gave Basu a list of four PIPEs in which Basu's account was participating. This evidence is inconsistent with defendants' claim that no oral contract exists which provided that Basu would receive 10% of the profits from Garnock's trading accounts and 15% of the profits from the PIPE transactions.

Where, as here, questions of fact and credibility exist with respect to the existence of a binding oral agreement, and the terms thereof, summary judgment is inappropriate. *Sabre Int'l Sec., Ltd. v. Vulcan Capital Mgmt., Inc.*, 95 A.D.3d 434, 436 (1st Dep't 2012); *Curtis Properties Corp. v. Greif Companies*, 212 A.D.2d 259, 263 (1st Dep't 1995).

The defendants also argue that the oral contract, even if it existed, is void for indefiniteness because no formula was agreed upon on how to calculate the percentage of profits allegedly owed to Basu. However, issues of fact remain as to the terms of the alleged oral contract, and those terms may have been sufficiently definite to be enforceable. A price term is not necessarily indefinite because it contains no computational formula. *Henri Assoc. v. Saxony Carpet Co.*, 249 A.D.2d 63, 66 (1st Dep't 1998). On the contrary, a price term may be considered sufficiently definite if it can be "ascertained by reference to an extrinsic event, commercial practice, or trade usage." *Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp.*, 74 N.Y.2d 475, 483 (1989).

The calculation of profits, and Basu's share of the profits, may be ascertainable by reference to the hedge fund's own practice of calculating the profits owed to its traders, or by commercial practice in the industry. At his deposition, Adler testified that the profits and losses for all traders were calculated independently by the firm's administrator, and that it was common for traders to receive a set percentage of the profits. Because the calculation of profits may be obtainable by reference to an objective standard, the alleged contract may not be void for indefiniteness. *McLaughlin v. Gunning*, 132 A.D.2d 796, 797 (3d Dep't 1987); *Chapman, Spira & Carson, LLC v. Helix BioPharma Corp.*, 115 A.D.3d 526, 526 (1st Dep't 2014). "Before rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear. The conclusion that a party's promise should be ignored as meaningless 'is at best a last resort.'" *Cobble Hill Nursing Home, Inc.*, 74 N.Y.2d at 483 (internal citations omitted).

The defendants' contention that the alleged oral agreement is barred by the Statute of Frauds is misplaced. Under the Statute of Frauds, an oral contract is voidable if it "is not to be performed within one year" from the making of the contract. General Obligations Law § 5-701(a)(1). The contract at issue here is an at-will employment agreement, which does not fall within the Statute of Frauds because it could possibly be performed within one year. *Cron v. Hargro Fabrics*, 91 N.Y.2d 362, 36 (1998).

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Further, while the alleged contract provides that Basu would receive a share of the profits from certain investments that could be made after more than one year, it is also possible for the profits to be made within one year, and therefore the oral contract is not barred by the Statute of Frauds. Under Section 5-701(a)(1), an oral contract is barred only if the contract has "absolutely no possibility in fact and law of full performance within one year." *Gural v. Drasner*, 114 A.D.3d 25, 25 (1st Dep't 2013) (quoting *Cron*, 91 N.Y.2d at 366).

For the above stated reasons, I deny defendants' motion for summary judgment dismissing the first cause of action for breach of contract.

2. Promissory Estoppel

To establish a claim for promissory estoppel, a plaintiff must prove: (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise. *Sabre Int'l Sec., Ltd.*, 95 A.D.3d at 439; *Gurreri v. Assoc. Ins. Co.*, 248 A.D.2d 356, 357 (2d Dep't 1998).

The defendants have demonstrated that Basu's promissory estoppel claim should be dismissed as a matter of law. Basu failed to state any damages that he suffered in reliance on defendants' alleged promises to pay him 10% of the profits from Garnock's accounts and 15% of the profits from the PIPE transactions. In an action for promissory estoppel, a plaintiff is limited to damages resulting from "expenses that plaintiff incurred in relying on defendant's alleged promise" and cannot recover expectation damages. *Clifford R. Gray, Inc. v. LeChase Constr. Servs.*, 51 A.D.3d 1169, 1171 (3d Dep't 2008);

MatlinPatterson ATA Holdings LLC v. Federal Express Corp., 87 A.D.3d 836, 841-842 (1st Dep't 2011). Here, Basu did not assert any reliance damages recoverable under a promissory estoppel claim.

Accordingly, I grant the defendants' motion for summary judgment dismissing the second cause of action for promissory estoppel.

3. Unjust Enrichment

A cause of action for unjust enrichment requires a showing that: (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) that it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff. *Georgia Malone & Co. Inc. v. Ralph Rieder*, 86 A.D.3d 406, 408 (1st Dep't 2011); *Clifford R. Gray, Inc.*, 31 A.D.3d at 987-88.

Contrary to the defendants' assertion, Basu is permitted to maintain his unjust enrichment claim because a factual dispute exists as to whether Basu and Adler entered into a valid oral contract. It is well settled that "a party is not precluded from proceeding on both breach of contract and quasi-contract theories where there is a bona fide dispute as to the existence of a contract." *Curtis Properties Corp.*, 236 A.D.2d at 239.[3]

Defendants claim that they could not have been unjustly enriched because they paid a salary to Basu, however, issues of fact remain as to whether the defendants agreed

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[3] The defendants' contention that Basu asserted an unjust enrichment claim to evade the Statute of Frauds is without merit. The Statute of Frauds is not applicable to the alleged oral contract at issue, and therefore it is unnecessary for Basu to assert an unjust enrichment claim to evade the Statute of Frauds.

to pay him additional compensation beyond a salary in exchange for his analysis and recommendations on certain investments such as the PIPE transactions. Therefore, I deny defendants' motion for summary judgment dismissing the third cause of action for unjust enrichment.

4. Breach of Fiduciary Duty

A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR § 3016(b). *Armentano v. Paraco Gas Corp.*, 90 A.D.3d 683, 684 (2d Dep't 2011). The elements of a cause of action to recover damages for breach of fiduciary duty are: (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699-700 (1st Dep't 2011).

Basu alleges that MOG and Adler breached their fiduciary duties to him by failing to compensate him under the oral contract and disclose the profits obtained by MOG and Garnock resulting from his advice. MOG and Adler argue that this claim should be dismissed because Basu was never a partner in MOG, and therefore they do not owe any fiduciary duties to him.

First, I dismiss the breach of fiduciary duty claim as against MOG. As a limited liability company, MOG does not owe any fiduciary duties to Basu. It is well-settled that a corporate entity does not owe fiduciary duties to its members and shareholders. *Hyman v. New York Stock Exchange, Inc.*, 46 A.D.3d 335, 337 (1st Dep't 2007). Therefore, Basu cannot assert a breach of fiduciary duty claim against MOG.

Basu's breach of fiduciary claim against Adler is also dismissed. Basu's allegations that Adler failed to compensate him under the oral contract or disclose MOG's profits to him are merely duplicative of his breach of contract cause of action. *Andejo Corp. v. South Street Seaport Ltd. Partnership*, 40 A.D.3d 407, 408 (1st Dep't 2007).

For these reasons, Basu's seventh cause of action for aiding and abetting a breach of fiduciary duty is dismissed as well. *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 809 (2d Dep't 2011).

6. Constructive Trust and Accounting

A constructive trust may be imposed when "property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest." *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 (1976) (internal citation omitted); *Maiorino v. Galindo*, 65 A.D.3d 525 (2d Dep't 2009). Under New York law, a party claiming entitlement to a constructive trust must ordinarily establish four elements: (1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer made in reliance on that promise; and (4) unjust enrichment.

Basu seeks to impose a constructive trust upon his share of all profits and/or gains, whether realized or unrealized, obtained by MOG as a result of his analysis and advice. Basu alleges that he transferred his investment research and analysis to the defendants in reliance of their promise to pay him pursuant to the oral contract. Basu's transfer of his investment research and analysis, however, does not constitute a legally cognizable transfer of property upon which a constructive trust can be imposed. *Sharp*, 40 N.Y.2d at 122; *Gaentner v. Benkovich*, 18 A.D.3d 424, 427 (2d Dep't 2005).

To establish a right to an equitable accounting, a plaintiff must demonstrate the existence of a fiduciary or confidential relationship and a breach of the duty imposed by that relationship respecting property in which the plaintiff has an interest. *Adam v. Cutner & Rathkopf*, 238 A.D.2d 234, 242 (1st Dep't 1997).

While Basu submits evidence in support of his contention that he may have been a member of MOG, and Adler may therefore have owed a fiduciary duty to him, Basu fails to sufficiently allege a breach of fiduciary duty in order to establish a right to an accounting. I therefore dismiss Basu's claim for an equitable accounting. Basu, however, is entitled to discovery regarding the extent of his alleged damages, to the extent that discovery on this issue has not already been produced by the defendants.

In accordance with the foregoing, it is hereby

ORDERED that the defendants Alphabet Management LLC, Alphabet Partners LP, Alphabet Advisors LLC, MOG Capital LLC, Jason Adler, and Andrew Garnock's motion for summary judgment dismissing the complaint pursuant to CPLR § 3212 (motion seq. no. 002) is granted to the extent that the second, fourth, fifth, sixth, and seventh causes of action are dismissed, and the motion is otherwise denied; and it is further

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ORDERED that counsel for the parties are directed to appear for oral argument on defendants' motion to strike plaintiff's demand for a jury trial (motion seq. no. 001) and for a status conference on September 11, 2014 at 9:30 am, 60 Centre Street, Room 335.

This constitutes the decision and order of the Court.

Dated: New York, New York
July 9, 2014

ENTER:

Saliann Scarpulla

Saliann Scarpulla, J.S.C.