

<b>Fishkind v IF Studio LLC</b>
2014 NY Slip Op 32146(U)
August 8, 2014
Supreme Court, New York County
Docket Number: 153813/2012
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
SCOTT FISHKIND,

Plaintiff,

Index No.: 153813/2012

Motion Seq. No. 002

-against-

IF STUDIO LLC,

Defendant.

-----X  
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this breach of contract action, defendant IF Studio LLC (“defendant”) moves for summary judgment dismissing the complaint of the plaintiff, Scott Fishkind (“plaintiff”). In response, plaintiff cross moves for summary judgment on its claims for *quantum meruit*, unjust enrichment, and promissory estoppel in the amount of \$35,532 plus interest.

*Factual Background*

Defendant, a graphic design and brand strategy company, hired plaintiff from February 2011 through February 2012 to perform new business development services. It is alleged that by email dated February 25, 2011, plaintiff set forth the “general idea” of the parties’ arrangement:

[Plaintiff] will actively use his best efforts to bring in new client and business to [defendant] and will be entitled to the following compensation:

30% of the first \$500,000 of gross income (other than income resulting from mark-up profits, defined below) brought in by [plaintiff] each year . . . and 50% of all markup profits from third party client services materials.

Payment of commissions will be made by [defendant] to [plaintiff] promptly upon receipt by [defendant] of the underlying income concerned.

[Defendant] will reimburse [plaintiff] for reasonable out of pocket expenses relating to his new business efforts . . . .

It is understood that if both parties are satisfied with working together after a reasonable period of time, the parties will discuss in good faith entering into a partnership on terms to be mutually agreed.

Let me know what else I might be missing.

In a response approximately three hours later on the same date, defendant stated,

“I think below works - give me a day or so to mull. [I]t is what we discussed so no problems. [J]ust want to make sure there is nothing else we need to add . . . .

On April 21, 2011, however, plaintiff reiterated the terms *via* email, “to feel secure that we are all on the same page” and according to plaintiff, defendant was “totally on board with” the agreement terms.

After rendering services to defendant, plaintiff sent defendant three invoices totaling \$9,000 for commissions in connection with a residential real estate property located on Worth Street, New York City, dated September 15, October 11, and October 26, 2011, in connection with the project work, which defendant paid. However, when defendant failed to pay any further commissions due, plaintiff commenced this action for breach of contract, *quantum meruit*, unjust enrichment, promissory/equitable estoppel and an accounting.

In support of dismissal, defendant argues that plaintiff’s alleged agreement for sales commissions is barred by New York’s Statute of Frauds and Labor Law §191(1)(b), which require such an agreement between an employer and a commission salesperson to be in a signed writing between the parties.

Plaintiff admitted at his deposition that the February 25, 2011 email was part of on-going negotiations. Emails preceding the February 25, 2011 emails show the undecided terms and negotiations between the parties. Additionally, the invoices referenced in plaintiff’s complaint

indicate that they were for “Branding and Marketing Services” as well as “consulting services” and do not reference any commission agreement. And, plaintiff failed to render any further invoices for services. Plaintiff admitted at his deposition that the parties’ relationship terminated in January 2012 (EBT, p. 30). Moreover, plaintiff’s own emails (and course of conduct in rendering invoices only when the defendant received payment from the client) indicate that he would only receive payment after the defendant received payment from the Client. Even assuming plaintiff “earned” his commission only as money was received from customers, then he is not entitled to post-termination commissions and defendants are entitled to summary judgment.

The *quantum meruit* and unjust enrichment claims also fail as plaintiff does not indicate the basis for any calculations of the value of the alleged services, or what exactly was received, and plaintiff performed no additional services after receiving payments under the invoices.

And, the promissory/equitable estoppel claim fails as the emails do not create a clear and unambiguous promise, and, despite the voluminous documents plaintiff produced, plaintiff did not specify or document any business or new clients he lost based on defendant’s alleged breach. And, the conclusory assertion of unconscionability is also defective.

Further, plaintiff is not entitled to an accounting of post-termination “commissionable income” as there was never a signed contract for commissionable income. And, since all relevant documents were produced, the accounting claim is moot.

In support of his cross-motion, and in opposition to the motion, plaintiff attests that the emails between the parties between February and April 2011 establish the parties’ agreement to pay him 30% of the first \$500,000 of gross income he brought in. Plaintiff (as demonstrated by

various emails) worked through his contacts, set up meetings that defendant was unable to secure, and brought in new business concerning a real estate development project at 93 Worth Street, New York, New York (the “Worth Street project”) which, by August 2011, resulted in a 13-month contract between defendants and IGI for \$117,500, with monthly payments made due to defendants starting in September 1, 2011. Plaintiff asserts that he is entitled to 30% of this amount (\$32,250), less the amounts already received, totaling \$23,250, plus 50% of defendant’s mark-ups (\$9,272). Plaintiff asserts that the amount he received does not reflect the value of his services, though. It is undisputed that plaintiff’s work generated new business for defendant, that defendant accepted plaintiff’s work, and defendant received a valuable benefit from plaintiff. It is also undisputed that the parties’ relationship ended based on defendant’s unilateral decision to stop paying plaintiff the commissions. Although plaintiff’s breach of contract claim is not viable, the statute of frauds does not bar plaintiff’s quasi-contractual claims.

In reply, defendant argues that the emails show, at most, an “agreement to agree.” And, plaintiff does not contest that the fifth cause of action for an accounting should be dismissed. The emails only show that plaintiff would receive payment after defendant received payment from the client, and in the event of any termination, commissions would be limited to three months from the date of termination. And, the invoices defendant paid are silent as to “commissions.” The *quantum meruit* claim is based on earnings from an alleged commission that was never finalized, since plaintiff did not render any services after January 2012. Thus, he is not entitled to any additional compensation under either theory of *quantum meruit* or unjust enrichment. Plaintiff cannot circumvent the statute of frauds by repleading a barred breach of contract claim. Since the unjust enrichment claim seeks compensation for services rendered in

procuring an introduction to a party to the transaction, it also falls within the ambit of the statute of frauds. And, the promissory estoppel claim fails because lost fees do not constitute a sufficient injury to invoke this doctrine, and the claim is, nevertheless, duplicative of the breach of contract claim and does not assert a duty independent of the agreement.

In his reply, plaintiff argues that the Statute of Frauds does not bar his three *quasi*-contract claims, as plaintiff's obligations were to identify deals and close them as well, and there are writings, even if unsigned, that confirm plaintiff's employment. It would be unconscionable to deny plaintiff the recovery he seeks, as he worked diligently and successfully for many months, without a salary, and \$9,000 does not fully compensate him for his efforts and contacts he cannot now use with any other design firm.

#### *Discussion*

Since each side seeks summary judgment, each side bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217(A), 951 NYS2d 84 [Supreme Court, New York County 2012], *affd*, 102 AD3d 563, 958 NYS2d 383 [1<sup>st</sup> Dept 2013], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217, *supra*, *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v. Filstein*, 35 AD3d 184 [1st Dept 2006]).

Plaintiff concedes that his breach of contract claim is not viable and withdraws this claim (Plaintiff's memorandum of law in opposition and in support of cross-motion, pp. 2, 13).

Plaintiff also does not contest dismissal of the fifth cause of action for an accounting. Therefore, the first and fifth causes of action are dismissed.

As to the remaining claims and the Statute of Frauds, General Obligations Law (“GOL”) § 5-701(10) provides that:

Every 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 . . . if such agreement, promise or undertaking:

Is a contract to pay compensation for services rendered in negotiating a . . . business opportunity . . . . “Negotiating” includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.

As to the claims for *quantum meruit* and unjust enrichment, the Statute of Frauds is sufficiently satisfied (*Kalfin v. U.S. Olympic Committee*, 209 A.D.2d 279, 618 N.Y.S.2d 724 [1<sup>st</sup> Dept 1994] (finding that letters acknowledging defendant's obligation to compensate plaintiff for his “involvement” in bringing about the agreement between defendant and J.C. Penney, failed to satisfy the statute of frauds to support a breach of contract claim, but “do, however, satisfy the statute of frauds insofar as plaintiff's second and third causes of action for quantum meruit and unjust enrichment”). In *MP Innovations, Inc. v. Atlantic Horizon Intern., Inc.* (72 A.D.3d 571, 899 N.Y.S.2d 213 [1<sup>st</sup> Dept 2010]), plaintiff's alleged contract provided for plaintiff to be paid a six percent commission on all sales of the product for a three-year term. The Court held that such contract was governed by the statute of frauds, GOL § 5-701(a)(10), and, since the e-mail plaintiff submitted “did little more than identify the parties' principals,” such “writing [did] not, either ‘expressly or by reasonable implication,’ identify a number of material terms, including, inter alia, the product, time frame or rate of compensation.” As such, the alleged oral agreement was barred by the statute of frauds. Importantly, and as relevant herein, the Court further held

that since the unjust enrichment claim was one for reasonable compensation for services rendered in negotiating the purchase or sale of a business opportunity, such claim fell within the ambit of the statute of frauds and was likewise barred.

Therefore, since the agreement herein likewise provided for plaintiff to be paid a percentage in commissions on certain business he negotiated and closed, the agreement falls within the Statute of Frauds.

However, the emails submitted adequately, and unequivocally identify a number of material terms. As to *quantum meruit* and unjust enrichment claims, “a memorandum sufficient to satisfy the statute of frauds ‘need only evidence the fact of plaintiff’s employment by defendant to render the alleged services. The obligation of the defendant to pay reasonable compensation for the services is then implied’” (*Kalfin v. U.S. Olympic Committee*, 209 A.D.2d 279, 618 N.Y.S.2d 724 [1<sup>st</sup> Dept 1994]) (after finding that the letters attached to the complaint did not constitute a writing sufficient to satisfy the statute since they did not contain all the essential terms of an agreement or refer to other documents that did, the Court held that such letters did “satisfy the statute of frauds insofar as plaintiff’s second and third causes of action for quantum meruit and unjust enrichment”); *Learning Annex Holdings, LLC v. Rich Global, LLC*, Not Reported in F. Supp. 2d, 2011 WL 2732550 [SDNY 2011]). The emails dated April 21, 2011 identify plaintiff and defendant as the parties to the agreement, the subject matter of the agreement, *i.e.*, that plaintiff would engage in new business development services for defendant, and the compensation plaintiff was to receive for his services, including, percentages of gross sales and differing amounts, and percentages of mark-ups. That the previous emails, including those dated February 25, March 20, and March 27 show that the parties were in negotiations is

inconsequential, in light of the affirmative statements in the April 21, 2011 email in which plaintiff outlined the material terms, and defendant stated her agreement. Defendant's reliance on *Schneider v. Jarmain*, 85 A.D.3d 581, 925 N.Y.S.2d 487 [1<sup>st</sup> Dept 2011]) is misplaced, as the emails do not contain an "express[] denial" of "the existence of any binding agreement between the parties." Therefore, the *quantum meruit* and unjust enrichment claims are not barred by the Statute of Frauds.

Turning to the merits of plaintiff's *quantum meruit* claim, plaintiff must show "the performance of services in good faith, acceptance of the services by the person to whom they are rendered, an expectation of compensation therefor, and the reasonable value of the services" (*Georgia Malone & Co., Inc. v. Ralph Rieder*, 86 A.D.3d 406, 926 N.Y.S.2d 494 [1<sup>st</sup> Dept. 2011] citing *Freedman v. Pearlman*, 271 A.D.2d 301, 304 [2000]).

It is uncontested that plaintiff performed new business development services for defendant, and that in so doing, plaintiff brought and secured the 93 Worth Street deal for defendant. It is uncontested that defendant was paid \$117,500 on the 93 Worth Street deal, plus \$18,545 in mark-up fees. The emails fully demonstrate plaintiff's expectation to be paid for the services he rendered in connection with such a deal. And, the emails constitute sufficient evidence of what plaintiff and defendant discussed concerning the value of plaintiff's services for purposes of a *quantum meruit* claim. Therefore, given that defendant failed to raise an issue of fact as to plaintiff's services in securing the 93 Worth Street contract for defendant, plaintiff established his entitlement to summary judgment on liability under his *quantum meruit* claim against defendant. Since the record does not establish, as a matter of law, the value of plaintiff's services, a hearing on the issue of the reasonable value of services rendered is required (see

*Longo v. Shore & Reich, Ltd.*, 25 F.3d 94 [2d Cir. 1994] citing *Isaacs v. Incentive Systems, Inc.*, 52 A.D.2d 550, 382 N.Y.S.2d 69 [1st Dept 1976] (“where an express employment contract was barred by the statute of frauds, the “defendant was precluded from relying upon that express contract to measure plaintiff’s recovery”)).

As to the unjust enrichment claim, a plaintiff must allege that he or she “conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor” (*Nakamura v Fuji*, 253 AD2d 387, 390 [1st Dept 1998]). Plaintiff must establish that he/she performed services for the defendant, at the request or behest of the defendant, which resulted in the defendant being unjustly enriched (*Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc. v Holiday Organization, Inc.*, 12 Misc 3d 1182 [2006], citing *Clark v Daby*, 300 A.D.2d 732, 751 N.Y.S.2d 622 [3d Dept 2002] and *Kagan v. K-Tel Entertainment, Inc.*, 172 A.D.2d 375, 568 N.Y.S.2d 756 [1st Dept 1991]; *Prestige Caterers v. Kaufman*, 290 A.D.2d 295, 736 N.Y.S.2d 335 [1st Dept 2002]). Dismissal of the unjust enrichment claim is unwarranted in light of the showing that plaintiff’s services benefitted defendant, and were performed at defendant’s request. However, since the issue of the reasonable value of the services plaintiff provided remains unresolved, summary judgment on in favor of plaintiff for unjust enrichment cannot be granted at this juncture (*see Coogi Partners LLC v. Soho Fashion, Ltd.*, 107 A.D.3d 426, 967 N.Y.S.2d 45 [1<sup>st</sup> Dept 2013]).

That plaintiff did not perform any further services after the relationship between the parties ended, and that plaintiff was paid pursuant to the invoices, do not defeat the quantum meruit and unjust enrichment claims.

And, as to the promissory estoppel claim, a plaintiff established “(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 Intern. Sec., Ltd. v. Vulcan Capital Management, Inc.*, 95 A.D.3d 434, 944 N.Y.S.2d 36 [1<sup>st</sup> Dept 2012] citing *Gurreri v. Associates Ins. Co.*, 248 A.D.2d 356, 669 N.Y.S.2d 629 [1998]; *Matter of Carr*, 99 A.D.2d 390, 394, 473 N.Y.S.2d 179 [1984], appeal dismissed 62 N.Y.2d 802 [1984]). The lack of definiteness in the promise of a material term such as compensation is fatal to plaintiff’s promissory estoppel claim (*Benham v. eCommission Solutions, LLC*, 118 A.D.3d 605, --- N.Y.S.2d ----, 2014 WL 2841139 [1<sup>st</sup> Dept 2014]). A promissory estoppel claim may survive in the absence of pleading an unconscionable injury (*see Venetis v. Stone*, 81 A.D.3d 503, 916 N.Y.S.2d 586 [1<sup>st</sup> Dept 2011]). Here, in light of the payments plaintiff received pursuant to the invoices plaintiff sent, the record fails to establish, as a matter of law, that plaintiff suffered an unconscionable injury in reliance on defendant’s promise to pay him a commission based on the new business he secured for defendant (*cf. AHA Sales, Inc. v. Creative Bath Products, Inc.*, 58 A.D.3d 6, 867 N.Y.S.2d 169 [2d Dept 2008] (finding that “plaintiff did not suffer unconscionable injury since it derived substantial revenues over the course of many years in reliance on the alleged representations”)).

Therefore, summary judgment in favor of either plaintiff or defendant on the promissory estoppel claim is unwarranted.

#### *Conclusion*

Based on the foregoing, it is hereby

ORDERED that defendant’s motion for summary judgment dismissing plaintiff’s complaint is granted solely as to the first cause of action for breach of contract and fifth cause of

action for an accounting, and such causes of action are severed and dismissed; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on its claims for *quantum meruit*, unjust enrichment, and promissory estoppel in the amount of \$35,532 plus interest is granted solely as to plaintiff's second cause of action *quantum meruit* on the issue of liability, and denied as to third and fourth causes of action for unjust enrichment and promissory estoppel, respectively; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant within 20 days of entry; and it is further

ORDERED that the issue of the reasonable value of services plaintiff rendered to defendant is hereby referred to Hon. Ira Gammerman to hear and determine; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Hon. Ira Gammerman .

This constitutes the decision and order of the Court.

Dated: August 8, 2014

A handwritten signature in black ink, appearing to read 'C. Robinson Edmead', written over a horizontal line.

Hon. Carol Robinson Edmead, J.S.C.