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

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JEFFREY WALD,

Plaintiff,

Index No. 652461/2013

-against-

Decision and Order

LAWRENCE G. GRAEV and THE GLENROCK GROUP, LLC,

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action for breach of contract, defendants Lawrence G. Graev ("Graev") and The GlenRock Group, LLC ("GlenRock") (collectively the "defendants") move to dismiss the complaint for failure to state a cause of action, or in the alternative as barred by the statute of limitations.

Background[1]

GlenRock is a private equity firm based in New York, founded and managed by Graev since 2000. Jeffrey Wald ("Wald") began working as a consultant at GlenRock in April 2003 and later became a vice president. In both roles, he alleges, he was paid a

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[1]Unless otherwise indicated, all background facts are taken from the allegations of the complaint, and will be accepted as true only for the purposes of this motion to dismiss. *See Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994).

regular salary with benefits, and in addition was promised a bonus or "carry" in the investments he worked on, if they made a profit.

At GlenRock, Wald was responsible for identifying potential investments and assisting in raising the necessary funds for those investments. In early 2006, Wald discovered Pangea3, a legal outsourcing company, which he thought would be a good investment, and he presented the opportunity to Graev.

Graev agreed with Wald's recommendation, and the decision was made that GlenRock would pursue it. Graev, Wald and other employees of GlenRock performed due diligence to assess the risk of the investment in Pangea3. By April 2006, GlenRock had raised funds totaling approximately $4 million, and GlenRock purchased nearly 14 million shares of Pangea3 at .2875 cents per share. As part of the transaction, GlenRock received 2 million "warrants." As alleged in the complaint, "[a] 'warrant' is a security that entitles the holder to buy the underlying stock of the issuing company at a fixed exercise price prior to the defined expiration date."

On April 12, 2006, Wald received an email from Graev stating:

> GlenRock will grant you an ownership interest in 20% of the GlenRock warrants (or 320,000 warrants) on the following vesting schedule:
>
> a. 120,000 warrants will vest immediately;
> b. 100,000 warrants will vest on March 31, 2007; and
> c. 100,000 warrants will vest on March 31, 2008.

The email further states that, at a later date, Graev would speak to Wald about any concerns he might have regarding the vesting schedule for the warrants.

Wald then worked on a project to assist Cortiva Institute ("Cortiva"), an investment opportunity which was suffering financially. After he completed this project, he received 20 percent of the fees GlenRock received from Cortiva as a bonus for his work. After Wald finished his work for Cortiva, and Graev had brought in a new business partner, "there was no real role for Wald." In April 2007, Wald left GlenRock and accepted a position with a start-up company.

In November 2010, Thomson Reuters acquired Pangea3. As alleged in the complaint, Graev received profits from the acquisition, yet Wald did not receive the warrants described in the April 12, 2006 email. Wald contacted Graev, to remind him of the promised warrants. On April 26, 2011, Graev sent an email to Wald that stated: "I started drafting a document and then I dropped the ball – I have to get an offer letter out by Friday on a large deal I have been working on so I will try to get to it over the weekend and get you something to review early next week." On May 4, 2011, Graev wrote to Wald: "Just came back from a two day Travelers' Board meeting and I am trying to finish your agreement – it is getting close and I should be able to send it to you soon."

On May 26, 2011, Graev sent Wald a "Letter Agreement." The Letter Agreement informed Wald that if he signed the accompanying Release, GlenRock would make payments to him in the amount of $219,627.62, less all taxes required to be withheld. Additionally, GlenRock would pay Wald 13.75% of any payment received by GlenRock on or after November 18, 2011, out of the escrow account established under the escrow

agreement with respect to the GlenRock warrants used to purchase 1,600,000 shares of Pangea3 common stock.

Wald alleges that he "found the compensation terms of the letter agreement acceptable (indeed, Graev was offering approximately $240,000 to Wald) and responded to Graev that he only had some minor changes to the Release that Graev proposed he sign in connection with the Letter Agreement." According to the complaint, although Wald sent emails to Graev regarding his suggested changes, he never heard back from Graev.

On August 10, 2011, Wald signed the Letter Agreement and Release, without any of his suggested changes, and sent them to Graev, but received no response. Subsequently, during a telephone conversation, Graev informed Wald that his feelings had changed and he would not sign the Letter Agreement, but would make a different offer compensating Wald for his work on the Pangea3 transaction.

On or about December 5, 2011, Graev sent Wald a revised Draft Agreement ("Draft Agreement"). Under the Draft Agreement, Wald would receive an initial $100,000 payment, and another $100,000 payable in three installments. On December 9, 2011, Wald responded that he was disappointed that the amount had been reduced, but was willing to compromise in the middle at $220,000.

On December 12, 2011, Graev responded by withdrawing the offer. He wrote: "the issue of your participation in the Pangea3 warrant has become an increasingly annoying thing for me." Graev further "confirmed that Wald had 'first identified

Pangea3' and 'did part of the due diligence for the investment,' but Graev now contended for the first time that Wald's due diligence was 'less than adequate.' Graev also now blamed Wald for 'leaving' GlenRock, despite the fact that Graev changed the nature of the firm and told Wald in April of 2007 that, "there really is no place for you at Glenrock anymore." Of the December 5, 2011 Draft Agreement, Graev stated that it was "my attempt to resolve this matter once and for all . . . ," and"[a]fter considering your recent emails to me, I am hereby withdrawing and retracting the proposed letter agreement dated December 5 previously sent to you."

Although attempts were made by the parties to resolve the issue of the Pangea3 compensation, there were no agreements. In his complaint, Wald alleges breach of contract, unjust enrichment, quantum meruit, promissory estoppel, and conversion.

Defendants move to dismiss the complaint for failure to state a claim, on the ground that there never was an agreement between GlenRock and Wald to compensate him for Pangea3; there were only email negotiations, and consideration was lacking for the existence of a contract. In the alternative, defendants argue that if the August 10, 2011 Release constituted consideration, Wald failed to sign the 2011 Release, and return it, as required by defendants in the language of the email.

Further, defendants assert, if there were an agreement, it was breached more than six years ago, and such any claim for breach of contract is barred by the applicable statute of limitations. Defendants also argue that the quasi contract claims are all barred by the

existence of an express employment contract, according to which Wald was promised a salary for his services. Further, defendants maintain that Wald has not alleged any detrimental reliance that would support a claim for promissory estoppel. Moreover, defendants argue that failure to pay a debt cannot be construed as conversion. Finally, defendants assert that because Graev acted in his official capacity as a principal at GlenRock, Wald is unable to sustain any claims against him individually.

Discussion

On a motion to dismiss a claim, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action, "the pleading is to be afforded a liberal construction," the court accepts "the facts as alleged in the complaint as true," and the plaintiffs are accorded "the benefit of every possible favorable inference." *Leon v Martinez*, 84 N.Y.2d 83, 87-88 (1994).

In addressing a motion under CPLR 3211 (a) (7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.'" *Leon*, 84 NY2d at 88 (citations omitted).

Under New York law, an action to recover for breach of contract must be commenced within six years of the breach. CPLR § 213 (2). The statute of limitations for breach of contract accrues at the time of the breach, and the same six-year statute of limitations applies for quasi contract actions such as quantum meruit, unjust enrichment,

and promissory estoppel. Conversion is governed by a three-year statute of limitations. CPLR 214(3).

In his complaint, Wald alleges the existence of two "agreements," one embodied in the "Offer Letter," email from April 2006, and the other the "Letter Agreement," embodied in the email dated August 10, 2011. As alleged in the complaint, the defendants breached the contract with Wald by "refusing to compensate [Wald] under the terms of the Agreements."

Because Wald filed the verified complaint in July 2013, any breach of contract claim he might have arising from the April 2006 email Offer Letter, are time-barred, because the claim accrued around April 2006, when Wald anticipated, "delivery" of a portion of the compensation "immediately," and this did not happen. In the complaint, Wald alleges that the April 2006 email states that GlenRock will grant Wald an ownership interest in 320,000 warrants, and "120,000 warrants will vest immediately". Wald further alleges that sometime subsequent to the 2010 sale of Pangea3, he contacted Graev to remind him that "[d]efendants had not delivered the warrants as promised."

Because the alleged Letter Agreement was dated no earlier than August 10, 2011, Wald's breach of contract claim with respect to this document is not barred by the applicable six-year statute of limitations. However, Wald fails to adequately plead a breach of contract claim as to the Letter Agreement.

To plead a breach of contract claim, a plaintiff must show: (1) the existence of a contract between the plaintiff and defendant; (2) performance by plaintiff; (3) breach by the defendant; and (4) damages resulting from the breach. *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Plaintiff must identify the provisions of the contract the defendant is alleged to have breached. *See Maldonado v Olympia Mech. Piping & Heating Corp.*, 8 AD3d 348, 350 (2d Dept 2004).

Moreover, "[t]o create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 1999). "Generally, courts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract." (*Id.*) "To enter into a contract, a party must clearly and unequivocally accept the offeror's terms." *Thor Props., LLC v Willspring Holdings LLC*, 118 AD3d 505, 507 (1st Dept 2014).

"If instead the offeree responds by conditioning acceptance on new or modified terms, that response constitutes both a rejection and a counteroffer which extinguishes the initial offer. The counteroffer extinguishes the original offer, and thereafter the offeree cannot . . . unilaterally revive the offer by accepting it." *Thor Properties LLC*, 118 AD3d at 507. Yet, it is only when the counteroffer seeks to alter a term that is material that it is

a "rejection" of the offer, which extinguishes the opportunity to thereafter accept the offer. *See id.* at 508.

Here, Wald alleges in the complaint that he "found the compensation terms of the letter agreement acceptable and responded to Graev that he only had some minor changes to the Release that Graev proposed he sign in connection with the Letter Agreement." As he set forth in his complaint, although Wald sent emails to Graev regarding his suggested changes, he never received a response from Graev. Wald then signed the Letter Agreement and Release, on August 10, 2011, without any changes and sent them to Graev. Subsequently, during discussions between Wald and Graev, Graev stated that he changed his mind, would not sign the Letter Agreement, and would make a different offer to Wald. On or about December 5, 2011, Graev sent Wald the Draft Agreement, which included new terms for compensation, including a revised amount. In response, Wald "expressed his disappointment to Graev" and "indicated he was willing to compromise in the middle at $220,000 . . . ."

As alleged in the complaint, there never was a meeting of the minds as to the essential terms of any agreement, including the compensation for Wald. Although Wald might have believed he had a signed agreement in August 2011 when he returned the Letter Agreement and Release to Graev, this is not borne out by the conduct of the parties thereafter. The negotiations on key terms continued between Graev and Wald into December 2011, with each party making offers and counteroffers. At some point after

this, the communication ceased, leaving the matter unresolved. Because there was no meeting of the minds with respect to the Letter Agreement, the defendants' motion is granted, and Wald's breach of contract claim is dismissed.

With respect to Wald's quasi-contract allegations of unjust enrichment, quantum meruit, and promissory estoppel, the court grants defendants' motion to dismiss, as they are duplicative of his breach of contract claim. "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987). Here, the April 2006 Offer Letter, which embodied the terms of Wald's compensation for his work on Pangea3, precludes his quasi contract claims as to the same compensation.

Even if not duplicative of his breach of contract claim, these claims are time-barred. A six-year statute of limitations applies to causes of action in quasi contract. *IMS Engrs.-Architects, P.C. v State of New York*, 51 AD3d 1355, 1358, n 2 (3d Dept 2008). These claims accrue "'upon the occurrence of the wrongful act giving rise to a duty of restitution.'" *Elliot v Qwest Communications Corp.*, 25 AD3d 897, 898 (3d Dept 2006) (citations omitted).

In order to make out a claim for unjust enrichment, a plaintiff must establish that he "conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff." *Nakamura v Fujii*, 253 AD2d 387,

390 (1st Dept 1998). In order to allege a cause of action for quantum meruit, Wald must establish that he performed the services, and defendants accepted them, with a "reasonable expectation of compensation." *Farina v Bastianich*, 116 AD3d 546, 547 (1st Dept 2014). To bring a claim for promissory estoppel, one must establish: "'(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 Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 439 (1st Dept 2012) (citation omitted).

Here, Wald alleges that at the outset of his employment in 2003, in addition to his regular salary, he was "promised . . . that he would receive a bonus or 'carry' in the investments he worked on for GlenRock, where GlenRock made a profit or generated income." Furthermore, Wald alleges that he received bonuses from GlenRock on other projects. He also alleges that he worked on Pangea3, that GlenRock profited from that work, and that he received emails from Graev with respect to the payment of a bonus for his work on Pangea3. However, he did not receive that bonus.

However, according to his complaint, "by April 2006, GlenRock raised funds totaling approximately $4 million . . . . As part of the transaction, Defendant GlenRock received 2 million 'warrants.'" Further, Wald alleges that for his work on the deal, Graev agreed that Wald was entitled to bonus compensation and sent him the April 12, 2006 Offer Letter. Thus, by 2006, Wald had done the work, a benefit for that work was

realized by the defendants, and Wald anticipated compensation. Wald additionally alleges that he contacted Graev some time subsequent to Thomson Reuters' acquisition of Pangea3, which occurred in 2010, "to remind him that Defendants had not delivered on the warrants as promised." Because Wald's quasi contract claims accrued in 2006, and he brought this action in 2013, these claims are time-barred.

The court also dismisses Wald's cause of action for conversion, as it is duplicative of his breach of contract claim. *See Sebastian Holdings, Inc. v Deutsche Bank, AG.*, 108 AD3d 433, 433 (1st Dept 2013). Additionally, in his papers and during oral argument, Wald's counsel expressed his intention to withdraw this claim.

Finally, the court dismisses all claims alleged as against the individual defendant, Graev. Alleged participation in a breach of contract will typically not give rise to individual liability on the part of the principal of a corporation. *Fletcher v Dakota, Inc.*, 99 AD3d 43, 47 (1st Dept 2012). In order to seek the imposition of individual liability on Graev, an owner of Glenrock, Wald must seek to pierce the corporate veil, which a court will undertake only to "prevent fraud, illegality or to achieve equity." *Treeline Mineola, LLC v Berg*, 21 AD3d 1028, 1029 (2d Dept 2005) (internal quotation marks and citation omitted]). Here, Wald alleges only breach of contract, based upon an agreement between Wald and GlenRock, not Graev, as well as quasi contract claims, and has failed to establish the elements necessary, beyond conclusory statements, to hold Graev personally liable.

In accordance with the foregoing, it is hereby

ORDERED that motion by defendants The GlenRock Group, LLC and Lawrence G. Graev to dismiss the complaint is granted in its entirety, and the complaint is dismissed, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly.

Dated: New York, NY
September 15, 2014

ENTER:

Saliann Scarpulla, J.S.C.