

**Redwood Valuation Servs. LLC v Premium Holding,  
LLC**

2014 NY Slip Op 32544(U)

September 30, 2014

Supreme Court, New York County

Docket Number: 151158/2014

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
REDWOOD VALUATION SERVICES LLC,

Plaintiff,

- v -

Index No.  
151158/2014

**DECISION  
and ORDER**

Mot. Seq. 004

PREMIUM HOLDING, LLC

Defendant.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

This is an action for breach of contract and promissory estoppel based on, *inter alia*, an alleged agreement to perform valuation services for a portfolio of life insurance policies obtained as “viatical settlements” and held as investment assets. Plaintiff, Redwood Valuation Services LLC (“Redwood” or “Plaintiff”) claims to have entered into an agreement (the “Agreement”) with defendant, Premium Holding, LLC (“Premium” or “Defendant”), on April 2, 2012, to value a portfolio of life insurance policies, and to have entered into a supplemental agreement (“the Supplemental Agreement”) with Defendant, in or about November 2012, to perform further analysis of the portfolio of life insurance policies. Plaintiff alleges that, pursuant to the Supplemental Agreement, Defendant promised to pay Plaintiff an additional \$40,000 in fees and \$10,000 in expenses. Plaintiff claims to have performed under the Supplemental Agreement, and that Defendant failed to pay Plaintiff as required thereunder.

Defendant now moves for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing Plaintiff’s amended complaint on the basis of documentary evidence and failure to state a claim upon which relief may be granted; and striking Plaintiff’s jury demand.

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence;

(7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR § 3211(a)(1), “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]). In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep’t, 2003]) (internal citations omitted) (*see* CPLR § 3211[a][7]).

“The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage.” (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, \*9 [1st Dept. 2009]). In the event that a written agreement unambiguously contradicts the allegations supporting a litigant’s cause of action for breach of contract, “the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211 (a) (1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim.” (*150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 A.D.3d 1, 5 [1st Dep’t 2004]). Where the contract requires any amendments to be evidenced by a writing subscribed by the parties, oral modification is prohibited by statute. (*SAA-A, Inc. v. Morgan Stanley Dean Witter & Co.*, 281 A.D.2d 201, 203 [1st Dep’t 2001]; General Obligations Law § 15-301). However, once a party to a written agreement has induced another's significant and substantial reliance upon an oral modification, the first party may be

estopped from invoking the statute to bar proof of that oral modification. (*Rose v. Spa Realty Associates*, 42 N.Y.2d 338, 344 [1977]).

Here, Plaintiff's complaint alleges, "Plaintiff and Defendant entered into a certain contract on or about April 2, 2012, under which Plaintiff agreed to analyze, estimate and report on the value of certain asserts [sic] held by Defendant, and Defendant agreed to pay fees and expenses to Plaintiff for its valuation services." Plaintiff's amended complaint also alleges that, "Plaintiff completed all work as stated in the Agreement, and was paid all contract amounts owing thereunder." Plaintiff's amended complaint further asserts:

In or about November 2012, however, Defendant requested Plaintiff to do supplemental work evaluating the portfolio of life insurance policies and Plaintiff agreed. Plaintiff and Defendant agreed orally and via email that Plaintiff would perform further analysis of the portfolio for a payment of \$40,000 in additional fees plus Plaintiff's expenses, which amounted to \$10,000.

Plaintiff's amended complaint alleges that, "Plaintiff performed the work requested by Defendant but has failed to pay Plaintiff the additional fees and expenses related to Plaintiff's additional work, all for a total of \$50,000." [sic].

Defendant argues that the Agreement constitutes documentary evidence warranting the dismissal of Plaintiff's claim for breach of the Supplemental Agreement. Specifically, Defendant argues that the Agreement contains an express "No Oral Modification" clause (the "No Oral Modification Clause") that requires "handwritten signatures" on all written changes to the Agreement. Defendant further argues that the No Oral Modification clause explicitly prohibits the use of email correspondence to effect a change to the Agreement without a "handwritten signature." As a result, Defendant contends, Plaintiff's complaint fails to state a claim for breach of contract because Plaintiff's amended complaint does not plead a separate signed writing to pay for supplemental work.

Plaintiff, in turn, argues that paragraph 9(a) of the Agreement contemplates that Premium could request, and Redwood would be required to provide, quarterly updates at the price of \$10,000 each plus reasonable expenses. Plaintiff argues that the supplemental work at issue falls within this provision of the Agreement, and therefore does not constitute a modification of the Agreement. Plaintiff further argues that section 10(a) of the Agreement specifically contemplates that Premium

could request additional services, and become obligated to pay for them, without a separate writing related to those additional services, as long as they “directly or indirectly relat[e] to the subject matter of this Agreement beyond the services contemplated above.” Plaintiff argues that the supplemental work relates to the subject matter of the Agreement, that Defendant specifically requested such work, and that, as a result, the Agreement does not require a formal writing. Alternatively, Plaintiff argues that the Supplemental Agreement can be construed as a new and separate contract that does not alter any of the terms of the Agreement.

Accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff’s amended complaint are sufficient to state a claim for breach of contract. Plaintiff’s amended complaint pleads a contract between the parties, the Agreement and Supplemental Agreement, as well as Plaintiff’s performance thereunder, Defendant’s failure to perform, and resulting damages. In addition, Defendant fails to establish that the alleged Supplemental Agreement modifies the Agreement in violation of the No Oral Modification Clause. The Agreement contemplates that Premium could request additional quarterly updates at the price of \$10,000 each plus reasonable expenses, and Defendant’s documentary submissions do not flatly contradict Plaintiff’s allegation that the supplemental work at issue falls within this provision, or that Plaintiff performed additional work relating to the Agreement at Defendant’s request. Accordingly, the Agreement fails to flatly contradict the factual allegations and legal conclusions asserted in Plaintiff’s amended complaint, for purposes of a motion to dismiss at this early stage of litigation.

As for Plaintiff’s second cause of action, also for breach of contract, Plaintiff brings this claim not to enforce the Agreement or the Supplemental Agreement, but rather, to enforce a release and settlement agreement (the “Release and Settlement Agreement”) between certain members of Defendant’s board and that of Defendant’s parent company. A party asserting rights as a third-party beneficiary must establish: 1) the existence of a valid and binding contract between other parties; 2) that the contract was intended for the third party’s benefit; and, 3) that the benefit to the third party is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost. (*Cal. Pub. Empl. Ret. Sys. v. Shearman & Sterling*, 95 N.Y.2d 427, 434-35 [2000]; *PT. Bank Mizuho Indon. v. PT. Indah Kiat Pulp & Paper Corp.*, 25 A.D.3d 470 [1st Dep’t 2006]). The parties’ intent to benefit the third party must be apparent from the face of the contract. (*LaSalle Nat’l Bank v. Ernst & Young LLP*, 285 A.D.2d 101, 108-09 [1st Dep’t 2001] [citations omitted]). “Absent clear contractual

language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent.” (*Id.*).

Plaintiff’s complaint alleges, “Defendant requested Plaintiff to value the portfolio of life insurance policies primarily in order to permit Defendant’s parent company, Premium of America, LLC (‘POA’), to register with the U.S. Securities and Exchange Commission (the ‘SEC’).” Plaintiff’s amended complaint further alleges that, following a dispute between members of the boards of POA and Defendant (the “Control Dispute”), certain “Old Board Members of POA and Defendant agreed to resign, and the New Board Members were permitted to join the boards of POA and Defendant.” Plaintiff’s amended complaint asserts that, “in advance of the final resolution of this Control Dispute, Defendant’s officers and counsel instructed Plaintiff to cease the supplemental work that had been requested in November 2012 and submit Plaintiff’s invoice for payment of \$40,000 in additional fees plus expenses to Defendant for payment.” Plaintiff’s amended complaint further alleges:

On or about April 22, 2013, in final resolution of the Control Dispute, the Old Board Members and the New Board Members, together with POA and Premium, entered into a “Release and Settlement Agreement” (the “Change-Of-Control Agreement”). Among other things, paragraph 9 of the Change-Of-Control Agreement provides that Defendant “shall pay all outstanding legal and accounting, and other professional fees incurred by the Old and New Boards in connection with [a] their disputes, [b] this [Change-Of-Control] Agreement, and [c] in connection with Registration.” The Change-Of-Control Agreement defines “Registration” as POA’s efforts to register with the SEC. Plaintiff had been retained to value the portfolio of life insurance policies specifically in connection with POA’s efforts to register with the SEC.

Plaintiff’s amended complaint alleges that Plaintiff submitted an invoice to Defendant for fees and expenses related to the supplemental work (the “Supplemental Invoice”), and further asserts, “For reasons never disclosed, Premium, under control of the New Board Members, has failed and refused to pay Plaintiff’s Supplemental Invoice as previously agreed.”

Defendant argues that Plaintiff lacks standing to enforce the Release and Settlement Agreement because Plaintiff is not a party to this agreement. Defendant argues that the Release and Settlement Agreement resolves a dispute between individual members of the Old and New Boards, and does not contemplate Plaintiff as an intended beneficiary. To this end, Defendant argues that the Release and Settlement Agreement does not state that Premium will pay vendors that already maintain direct contracts with Defendant, and does not contain any reference to Redwood.

Here, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the Release and Settlement Agreement, on its face, flatly contradicts Plaintiff's alleged status as third-party beneficiary of this agreement. Plaintiff is not a party to the Release and Settlement Agreement, and the Release and Settlement Agreement does not identify Redwood as an intended beneficiary. In fact, this agreement contains no mention of Redwood, and there is nothing in the Release and Settlement Agreement clearly showing an intent to permit Plaintiff to enforce this agreement. Thus, even accepting Plaintiff's allegation that the supplemental valuation services at issue are properly characterized as "professional services" for "Registration" under the Release and Settlement Agreement, the benefit alleged is, at most, incidental. Furthermore, Plaintiff's amended complaint alleges that Plaintiff provided the supplemental services in issue before the Release and Settlement Agreement was executed, and that Defendant was under a preexisting contractual obligation, pursuant to the Agreement and Supplemental Agreement, to pay for said services. "Since the past consideration is not expressed in the [Release and Settlement] agreement, and since '[i]n the absence of a writing that can be understood without dependence upon extrinsic evidence and that clearly describes the consideration, a promise derived from past consideration is simply not actionable,'" (*Transamerica Realty v. Winokur*, 668 N.Y.S.2d 885, 886 [1st Dep't 1998] [citation omitted]), the Release and Settlement Agreement does not contain an actionable promise to Plaintiff respecting the supplemental services alleged. Accordingly, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, Plaintiff's second cause of action for breach of contract fails.

Finally, with respect to Plaintiff's third cause of action, for promissory estoppel, the elements of a claim for promissory estoppel are: 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. (*NYC Health and Hosp. Corp. v. St. Barnabas Hosp.*, 10 A.D.3d 489, 491 [1st Dep't 2004]). A claim for promissory estoppel cannot stand when there is a contract between the parties. (*Susman v Commerzbank*

*Capital Mkts. Corp.*, 95 A.D.3d 589, 590 [1st Dep't 2012]; *see also*, *Celle v. Barclays Bank P.L.C.*, 48 A.D.3d 301, 303 [1st Dep't 2008] [finding that, in the absence of a duty independent of the agreement, promissory estoppel claim was duplicative of breach of contract claim). In addition, where an agreement "explicitly requires the execution of a further written agreement before any party is contractually bound, it is unreasonable as a matter of law for a party to rely upon the other party's promises to proceed with the transaction in the absence of that further written agreement." (*StarVest Partners II, L.P. v Emportal, Inc.*, 101 A.D.3d 610, 613 [1st Dep't 2012]).

Here, Plaintiff's amended complaint alleges, "Defendant made a clear and unambiguous promise to Plaintiff that if Plaintiff commenced the supplemental work that Defendant requested Plaintiff to perform, Defendant would pay Plaintiff \$40,000 plus Plaintiff's expenses incurred in connection with the supplemental work", that, "Defendant intended and expected that Plaintiff would rely on Defendant's promise to pay to induce Plaintiff to perform the supplemental work, and, in fact, Plaintiff reasonably relied on Defendant's promise to pay in commencing the supplemental work", and that, "Plaintiff substantially performed the supplemental work and incurred expenses in connection therewith in reliance on Defendant's request and promise to pay." Plaintiff's amended complaint further alleges that, "Defendant has failed and refused to honor its promise to pay the additional fees and expenses related to the supplemental work it requested from Plaintiff as reflected in the Supplemental Invoice" and that, "Plaintiff has been damaged by Defendant's breach of its promise to pay Plaintiff for the supplemental work in the amount of \$40,000 in fees and \$10,000 in expenses incurred in connection with Plaintiff's performance of the supplemental work."

Even accepting Plaintiff's allegations as true, Plaintiff's claim for promissory estoppel cannot stand in light of the alleged Agreement and/or Supplemental Agreement. To the extent that Plaintiff's amended complaint pleads additional services contemplated under provisions 9(a) or 10(a) of the Agreement, the terms of that writing govern the instant dispute. Likewise, to the extent that Plaintiff's amended complaint pleads a separate, new Supplemental Agreement, Plaintiff's promissory estoppel claim fails to plead a duty independent of the Supplemental Agreement and is duplicative of Plaintiff's first cause of action for breach of contract. Accordingly, accepting all allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's amended complaint fail to plead an independent cause of action for promissory estoppel that is distinct from Plaintiff's breach of contract claim.

Wherefore it is hereby,

ORDERED that Defendant's motion to dismiss Plaintiff's complaint is granted only to the extent that Plaintiff's second and third causes of action, for breach of contract and promissory estoppel, respectively, are dismissed and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiff's remaining cause of action is severed and shall proceed; and it is further

ORDERED that Defendant is directed to file an answer to Plaintiff's amended complaint within 20 days of service of a copy of this Order with notice of entry.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: September 30, 2014



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Eileen A. Rakower, J.S.C.