Goldfarb v Schaeffer
2014 NY Slip Op 32589(U)
October 3, 2014
Supreme Court, New York County
Docket Number: 650173/2014
Judge: Marcy S. Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

Sanford Goldfarb,

Plaintiffs,

- against –

Index No.: 650173/2014

Richard Schaeffer, Schaeffer Holdings, LLC, Schaeffer Group, LLC and Shaf Holdings,

DECISION/ORDER

Defendants.

This is an action for breach of an oral contract brought by plaintiff Sanford Goldfarb against defendants Richard Schaeffer, Schaeffer Holdings, LLC, Schaeffer Group, LLC and Shaf Holdings, LLC. Defendants moves to dismiss the complaint, pursuant to CPLR 3211. Plaintiff cross-moves for discovery, pursuant to CPLR 3106 (a).

It is well settled that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) The test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." (Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 [1st Dept 1990].)

The complaint seeks enforcement of an oral agreement "between Goldfarb and Schaeffer pursuant to which Schaeffer promised to give Goldfarb 20% of any equity interest that Schaeffer received from his role in the development of LIQD." (Compl., ¶ 5.) According to the complaint, "Goldfarb was responsible for introducing Schaeffer to LIQD, as he had previously introduced Schaeffer to other business activities in the past. Goldfarb not only found the opportunity for Schaeffer but he helped bring LIQD's business, finances and management to a level where LIQD was able to attract substantial private investment and then go public." (Id.) It is undisputed that there is no writing documenting this agreement.

The complaint further alleges that based on Goldfarb's introduction of Schaeffer to LIQD, Schaeffer became a co-founder of the company. (Compl., ¶ 10.) In addition, Goldfarb provided services, including assistance "in building LIQD's business . . ." by "introduc[ing] LIQD and Schaeffer to individual equity traders. . .[and] also introduc[ing] individuals to LIQD to make early-stage investment in the equity of LIQD and to serve as executives." (Id., ¶¶ 12, 14.) Goldfarb's assistance helped LIQD make money and be able to ultimately go public. (Id., ¶ 16.) Plaintiff claims that "Schaeffer breached the contract by failing to transfer to Goldfarb cash or stock equal to 20% of the equity that Schaeffer received from LIQD." (Id., ¶ 24.)

Defendant contends that plaintiff's breach of contract claim is barred by the Statute of Frauds because it is one for a finder's fee and therefore must be evidenced by a writing. (Defs.' Memo. in Support at 2.) Plaintiff acknowledges that a claim for a finder's fee brought by a finder against a principal is barred by the Statute of Frauds if there is no writing. (P.'s Memo. In Opp. at 2.) Plaintiff contends, however, that the Statute of Frauds does not apply because the agreement was between co-finders who worked together, "akin to a joint venture." (Id., at 5-6.)

The New York Statute of Frauds is codified in section 5-701 (a) of the General Obligations Law, which provides in pertinent part:

> "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, or by his lawful agent, if such agreement, promise or undertaking: . . .10. Is a contract to pay compensation for services rendered in negotiating a loan . . . or of a business opportunity . . ."Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction."

In Freedman v Chem. Constr. Corp. (43 NY2d 260 [1977]), on which defendants rely, the Court of Appeals addressed the scope of the term "business opportunity" in this provision of the Statute of Frauds. The Court held that where an intermediary provides services of "know-who" or "know-how" in bringing about a business enterprise between principals, the agreement for the intermediary's services must be in writing to be enforceable. (Id., at 267.) Such services include the intermediary's "use [of] his 'connections', his 'ability', and his 'knowledge' to arrange for [the principal] to meet 'appropriate persons' and somehow to procure for it the opportunity. . . ." (Id.)

In Dura v Walker, Hart & Co. (27 NY2d 346 [1971]), on which plaintiff relies, the Court of Appeals recognized an exception to the Statute of Frauds for oral agreements between finders to share fees. As the Court explained: "[T]he plaintiff is suing not an employer or principal for a fee but a fellow finder for a portion of a fee already received by the latter, on the strength of an agreement by the two of them that they pool their efforts and share the benefits. In so doing, the plaintiff relies on a theory closely akin to that of joint venture . . . in which situations . . . there is no requirement that there be a writing to evidence the agreement." (Id. at 350.) Subsequent decisions have applied this "narrow exception to the Statute of Frauds" only where the business enterprise is "closely akin to that of joint venture." (Haskins v Loeb Rhoades &Co., 52 NY2d

523, 525 [1981], rearg denied [1981]; Baytree Assoc., Inc. v Forster, 240 AD2d 305, 306 [1997] lv denied 90 NY2d 810 [1997] [holding that enforcement of alleged oral agreement was barred by the Statute of Frauds because agreement "did not create a partnership or joint venture, since certain key terms of such an agreement – the sharing of profits and losses, joint control and management of the company, and contribution of capital – were not established"].)

Here, the complaint pleads that Goldfarb provided "know-who" and "know-how" in bringing a business opportunity to Schaeffer in Schaeffer's capacity as a principal. On the authority of Freedman (43 NY2d 260, supra), the alleged oral agreement to pay Goldfarb a share of Schaeffer's equity interest is unenforceable due to the absence of a writing. Even if, giving the complaint the benefit of all reasonable inferences, the court were to find that the complaint pleads a claim by Goldfarb as a co-finder, the complaint does not plead any of the indicia of an enterprise resembling a joint venture. In particular, the complaint does not contain any allegations as to the sharing of profits or losses, and therefore fails to allege an oral agreement outside the scope of the Statute of Frauds. The first cause of action for breach of contract must therefore be dismissed.

Plaintiff acknowledges that the second cause of action for breach of fiduciary duty must fail if the breach of contract claim fails. (P.'s Memo. In Opp. at 11.) The third cause of action for an accounting is not maintainable absent a fiduciary duty.

The fourth cause of action for quantum merit also fails. General Obligations Law § 5-701 (a) (10) expressly states: "This provision shall apply to a contract implied in fact or in law to pay reasonable compensation." As held by the Court of Appeals: "Unjust enrichment and quantum meruit are, in this context, essentially identical claims, and both are claims under 'a contract implied . . . in law to pay reasonable compensation.'" (Snyder v Bronfman, 13 NY3d

504, 508 [2009].)[1] Plaintiff seeks recovery under the quantum meruit cause of action for services he provided to Schaeffer "with respect to establishing and developing LIQD." (Compl., ¶ 40.) As the claim is thus clearly for compensation for negotiating the business opportunity in LIQD, it is barred by the Statute of Frauds. (See id. at 509.)

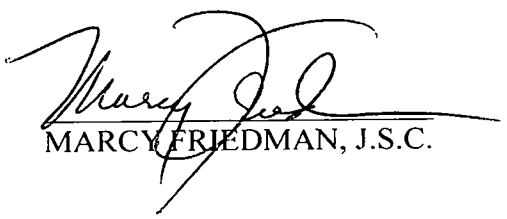
Plaintiff's cross-motion must also be denied. Plaintiff makes no showing that discovery may lead to evidence or facts essential to justify opposition to the motion. (See CPLR 3211 [d].)

Finally, plaintiff's request for leave to replead should be denied, as it is unsupported by a showing of "any new facts that would overcome the legal defects" in the original complaint. (See Pollak v Moore, 85 AD3d 578, 579 [1st Dept 2011]; Fletcher v Boies, Schiller & Flexner, LLP, 75 AD3d 469, 470 [1st Dept 2010] [rejecting plaintiff's "cursory request" for leave to replead "because there was no proposed pleading accompanied by an affidavit of merit"]; see also AJW Partners, LLC v Admiralty Holding Co., 93 AD3d 486, 486 [1st Dept 2012].)

It is accordingly hereby ORDERED that defendants' motion to dismiss is granted to the extent of dismissing the complaint in its entirety with prejudice; and it is further

ORDERED that plaintiff's cross-motion for discovery is denied.

Dated: New York, New York
October 3, 2014



MARCY FRIEDMAN, J.S.C.

[1] Plaintiff's request to denominate the claim one for unjust enrichment, rather than for quantum meruit, would therefore have no effect on the outcome.