Rao v International Licensing Indus. Merchandisers' Assoc.
2015 NY Slip Op 31281(U)
July 20, 2015
Supreme Court, New York County
Docket Number: 652955/2012
Judge: Saliann Scarpulla

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

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JUAN RAO, A/K/A SHERRY RAO and LIMA CHINA, LTD.,

Plaintiffs,

Index No. 652955/2012

- against -

INTERNATIONAL LICENSING INDUSTRY MERCHANDISERS' ASSOCIATION, CHARLES M. RIOTTO, CHINA TOY & JUVENILE PRODUCTS ASSOCIATION and MEI LIANG,

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action, plaintiff Juan Rao a/k/a Sherry Rao ("Rao") seeks compensation for services rendered, including creating plaintiff LIMA CHINA, Ltd. ("LIMA CHINA"), a limited company registered in Shanghai China, where Rao resides. Defendant International Licensing Industry Merchandisers' Association ("LIMA") moves for summary judgment dismissing causes of action one through eight in the complaint and on its fourth counterclaim for unjust enrichment.

Charles M. Riotto ("Riotto") is the president of LIMA, a New York corporation. Although Riotto was originally named as a defendant in this action, all claims against him were dismissed. Riotto appointed Rao to promote licensing in China on LIMA's behalf. An email from Riotto, dated December 31, 2003, stated that Rao's appointment was for the period January 1, 2004 to December 31, 2004, and a letter containing the same date

stated that she was LIMA's representative, "authorized to act on LIMA's behalf to develop educational programs to promote the concept of licensing in China," amongst other activities. In the email, Riotto stated that the appointment could be terminated by either party with 30 days written notice. The email additionally stated:

> Please be aware that any arrangement you make as far as developing LIMA-branded events . . . and any use of the LIMA logo, must first have the prior written approval of me or another designated member of the LIMA New York staff. Also, at this time, LIMA will have no financial obligations relative to this arrangement. . . . Regarding your recruitment of Chinese companies to join LIMA, I am happy to offer you a commission of 50% of the membership fee. I am anticipating that, as the concept of licensing in China becomes better understood, and LIMA develops a presence and membership base in China, we will be interested in discussing a long-term salary position with you.

Rao claims to have

> devoted [herself] entirely into promoting the value and concept of licensing and seeking licensing business in China by exploring the market, translating LIMA materials, producing LIMA membership packages and marketing materials, developing networking and trade events, developing educational programs and setting up a Chinese website to promote the concept of licensing, organizing licensing forums, and recruiting Chinese companies to join as members.

Rao claims to have contributed more than $120,000 of her own capital to set up LIMA CHINA.[1]

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[1] In 2004, Rao allegedly created a limited company, China Licensing Group, "in order to implement the policy of promoting the concept of licensing in China on behalf of LIMA." According to the complaint, later that year, "RAO changed the name of her newly established company from China Licensing Group to LIMA CHINA LTD . . . in order to facilitate her work to promote the value and concept of licensing and signing up Chinese companies as members on behalf of LIMA in China." For the sake of simplicity, this opinion will only refer to the entity Rao set up as LIMA CHINA.

Rao maintains that LIMA "renewed" her appointment by letter "[i]n recognition of [her] excellent performance." In the letter, dated June 21, 2004, Riotto wrote: "Please accept this letter as confirmation of you and your company [LIMA CHINA] to exclusively represent the International Licensing Industry Merchandisers' Association (LIMA) in China. . . . As LIMA's representative, you are authorized to act on LIMA's behalf to develop educational programs to promote the concept of licensing in China," amongst other activities.

On September 17, 2004, Riotto sent Rao an email, stating that he believed he confirmed to another party that Rao was authorized to represent LIMA. Riotto also told that party "that all agreements must be reviewed by our attorney first, and that I am the only one authorized to sign for LIMA. This is done to protect you in case you should sign an agreement and then legal problems ensue." The email asks for "an estimated budget of income and expenses, including your management fees, for the year 2005. My plan is to ask the LIMA Board to make a long-term commitment to you to manage our China office and build awareness of LIMA and create ongoing programs for us there." Riotto wrote that he would discuss the financial estimate with the Board.

Rao claims that LIMA promoted her to managing director of the China office. She maintains that

> [she] was recognized and perceived as the 'staff member' or '*de facto* employee of LIMA' by LIMA USA on all the public information of LIMA, including but not limited to LIMA official website, LIMA Letterhead, LIMA Global Membership

> Directory, LIMA Database, LIMA Gala Book, LIMA Newsletters, LIMA Board Meetings, LIMA Awards Ceremony, and many others.

In June 2005, LIMA announced that LIMA CHINA was officially opened.

In 2010, LIMA CHINA, nonparty Shanghai Oleena Communications Inc. ("Oleena"), and defendant China Toy & Juvenile Products Association ("TJPA") allegedly partnered with one another such that LIMA CHINA and Oleena would "provide professional exhibition preparations and promotion services to TJPA." The complaint avers that LIMA CHINA and Oleena assisted TJPA in developing a larger licensing exhibition than a previous TJPA exhibition, where internationally renowned licencing companies participated in the exhibition. LIMA CHINA and Oleena recruited all of the exhibitors for the exhibitions from 2007 through 2010.

On or around September 28, 2010, TJPA, LIMA CHINA, and Oleena allegedly agreed in writing "to mutually prepare and promote the Chinese International Licensing Show for the period of five years from 2011 to 2015." Allegedly, in 2011, LIMA CHINA, Oleena, and TJPA "successfully prepared and promoted the China International Licensing Show." For the 2011 show, LIMA CHINA and Oleena allegedly recruited 85% of the exhibitors and TJPA recruited the rest.

The complaint alleges "[u]pon information and belief" that in or around February 2012, defendant Mei Liang ("Liang"), TJPA's secretary, met with Riotto, "discussed the possibility of working together for future exhibition preparation and promotion with an attempt to get rid of the plaintiffs RAO and LIMA CHINA," and came to "a preliminary

agreement during this meeting." According to the complaint, shortly after the meeting, TJPA breached its agreement with LIMA CHINA and Oleena by applying to a Chinese governmental agency to hold the China International Licensing Show on its own behalf without authorization from Oleena or LIMA CHINA. Allegedly, "[i]n or about April 2012, defendant RIOTTO initially offered to mediate with OLEENA or LIMA CHINA to work out a resolution to the contract disputes between TJPA and OLEENA or LIMA CHINA."[2]

The complaint alleges "[u]pon information and belief" that in or around May 11, 2012, Liang and Riotto met again and, about four days later, "the Defendant TJPA notified the exhibiters [sic] of the Chinese Licensing Exhibition by spreading a rumor that LIMA CHINA no longer represented LIMA."

Rao claims that "[o]n June 11, 2012, [she] made a successful presentation to the board meeting of the US Headquarter on China office's annual report and future development projections in Las Vegas." She also claims that two days after that presentation, Riotto and LIMA's general counsel Greg Battersby pledged that LIMA "would continue the long-term relationship with LIMA CHINA." Allegedly, about two

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[2] Although TJPA and Liang are named defendants in this suit, the affidavits of service on file for these defendants does not indicate proper service of the summons and complaint, neither of these defendants has answered the complaint, and no one has entered an appearance on their behalf. LIMA's moving memorandum of law also states, "[t]o LIMA's knowledge, neither of these parties has ever been served or appeared in the action."

days after this promise was made, "the plaintiffs RAO and LIMA CHINA received a letter from defendant RIOTTO requiring the plaintiffs RAO and LIMA CHINA not to interfere with the preparation of the Chinese International Licensing applied solely by the TJPA."

On or around June 27, 2012, Riotto terminated plaintiffs, effective July 31, 2012. As a result, "[Rao] was forced to close the office and wind down the business operation which [she] had built over 9 years effort."

LIMA's December 2003 email provides that Rao's only compensation was half of the membership fees of Chinese companies that join LIMA. However, LIMA claims, and Rao does not deny, that she retained all of the membership fees from 2004 until the end of the appointment in June 2012. Also, LIMA made periodic payments, "management fees," totaling $250,000, to subsidize LIMA CHINA's operating expenses from 2004 through 2008. On or around June 3, 2009, Riotto told Rao that LIMA and Riotto would no longer pay management fees, but that plaintiffs could retain all of the revenues generated from LIMA CHINA's activities.

Rao claims that, because the management fees were not enough to cover the operation of LIMA CHINA, she had to contribute her own money. Rao also claims that LIMA CHINA did not receive any management fees from LIMA since 2008, although "the US Headquarter asked [her] to keep the operation of LIMA China and again promised [her] that all [her] hard work for LIMA USA would be paid off and financially

compensated." Rao maintains that she relied on these promises when "[she] decided to continue the business of LIMA CHINA upon the firm belief that when [she] successfully establish[ed] the presence of LIMA in China, [she] would be compensated by the US Headquarter with great financial rewards."

Rao claims that she and Riotto established a pattern "where [she] submitted business plan, budget or other report to Riotto first, and such plan, budget or report would be deemed approved by LIMA USA unless Riotto explicitly and expressly rejected the same." For instance, Rao planned to change the office's name from China Licensing Group to LIMA China Ltd., and she told Riotto about these plans. She claims that Riotto did not approve or reject the name change, but the name change was acknowledged by LIMA when it used it on its website.

In June 2009, Rao asked LIMA to pay an outstanding $170,000 balance for LIMA CHINA's operating expenses from 2004 to 2008. Rao claims that LIMA did not reject the request and asked her to continue to operate LIMA CHINA. Based on the working pattern between her and LIMA, she believed that the request was approved and that she would be reimbursed. For its part, LIMA claims that it denied Rao's plea for additional monies.

Rao maintains that LIMA, acting through Riotto, "repeatedly promised [her] that LIMA USA would reimburse [her] for [her] expenses," including, "management fees, the membership fees collected in China, and the revenues from trade shows held by LIMA

CHINA such as educational seminars, licensing shows, to name just a few." In reliance on the promises, Rao claims that "[she] devoted [herself] fulltime into [sic] the development of LIMA USA's presence in China from the year 2003 to the present." Rao says that "[she] and LIMA China have successfully established the presence of LIMA in China by recruiting approximately 160 Chinese companies to join as members of LIMA." She also alleges that "[d]ue to the hard work of the plaintiff RAO, LIMA CHINA has become a notable international organization across the country in China."

In the complaint, plaintiffs plead causes of action against LIMA for; 1) breach of contract; 2) breach of implied contract; 3) unjust enrichment; 4) equitable estoppel; 5) promissory estoppel; 6) misrepresentation; 7) tortious interference with contractual relations; and 8) emotional distress.[3] Rao claims $1 million in damages.

LIMA's answer with counterclaims alleges, inter alia, that Rao used its name without authorization to promote Rao, LIMA CHINA, and Oleena. LIMA asserts ten counterclaims.

Discussion

The proponent of a motion for summary judgment "'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

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[3] The remaining causes of action (causes of action nine through eleven) against Riotto and have been discontinued. The twelfth through eighteenth causes of action are pled against TJPA and Mei. As stated above, these defendants were never properly served with the summons and complaint. As plaintiffs' time to move to extend its time to serve these defendants has long since passed, I dismiss the twelfth through eighteenth causes of action as abandoned.

demonstrate the absence of any material issues of fact'" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012] [citation omitted]). "This burden cannot be satisfied merely by pointing out gaps in the plaintiff's case . . . " (*Nationwide Prop. Cas. v Nestor,* 6 AD3d 409, 410 [2d Dept 2004]). If the moving party succeeds in eliminating issues of fact, "the burden shifts to the party opposing the motion 'to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action'" (*Madeline D'Anthony Enters.*, 101 AD3d at 607 [citation omitted]). Mere "unsubstantiated allegations or assertions" are insufficient to overcome a motion for summary judgment (*see Alvord & Swift v Muller Constr. Co.,* 46 NY2d 276, 281-82 [1978]).

"On a motion for summary judgment, we must accept as true the evidence presented by the opposing party" (*Hotopp Assoc. v Victoria's Secret Stores,* 256 AD2d 285, 286-87 [1st Dept 1998]), and the court must base its decision "'on the version of the facts most favorable to'" that party (*McLaughlin v Thaima Realty Corp.,* 161 AD2d 383, 384 [1st Dept 1990] [citation omitted]).

LIMA's motion is denominated as one for summary judgment, but LIMA's main arguments are that the complaint fails to state a cause of action and that plaintiffs have no evidence to support their claims. A motion for summary judgment may be based on a failure to state a cause of action (*Safier v Kassler,* 124 AD2d 944, 945 [3d Dept 1986]; *Brown v Village of Albion,* 128 Misc 2d 586, 592 [Sup Ct, Orleans County 1985]).

Because this is a motion for summary judgment, "failure to state a . . . cause of action in pleadings would not be sufficient to permit unconditional summary judgment in favor of defendant, as a matter of law, if plaintiff[s'] submissions provided evidentiary facts making out a cause of action" (*Alvord*, 46 NY2d at 280).

Breach of Contract

The first cause of action, for breach of contract, is based on "an implied covenant that the exclusive representation would last at least for a sufficient time for plaintiffs . . . to recoup the expenses and costs incurred" establishing LIMA's presence in China. Another breach allegedly occurred when LIMA terminated the agreement. Additionally, according to Rao, "[t]he mutual understanding between Riotto and [her] is that [the agreement] will not be unilaterally terminated until [she] successfully establish[ed] LIMA USA's presence in China and I receive the financial award I deserve from LIMA USA."

In its memorandum of law, LIMA argues that termination of the agreement was proper, and even if the 2004 letter superseded the December 2003 email and letter, termination was still allowed because plaintiffs were at-will agents. LIMA also argues that plaintiffs have failed to show that LIMA was obligated to pay any additional money because the promise of "financial rewards" is indefinite and the December 2003 email sets forth the parties' financial rights and obligations. Plaintiffs argue that there are material issues of fact that preclude summary judgment because the writings do not set forth all of the operative terms.

Termination

The December 2003 email and letter created an express contract. The email clearly stated that the agreement was terminable at will, upon 30 days notice. The "renewed" agreement, dated June 21, 2004, did not contain terms different from those in the previous writings. None of the parties' post-2003 writings changed the termination provision or indicated that plaintiffs' representation of LIMA would continue for a set length of time.

"[I]t is well settled in New York that '[w]hen an agreement expires by its terms, if, without more, the parties continue to perform as theretofore, an implication arises that they have mutually assented to a new contract containing the same provisions as the old'" (*North Am. Hyperbaric Ctr. v City of New York*, 198 AD2d 148, 149 [1st Dept 1993] [citation and internal quotation marks omitted]; *see Watts v Columbia Artists Mgt.*, 188 AD2d 799, 801 [3d Dept 1992]). While the 2003 agreement expired at the end of December 2004, the parties continued to perform. Their continued performance did not alter the termination provision in the 2003 agreement.

In accordance with the parties' contract, LIMA gave proper notice to plaintiffs of termination of their relationship, thus plaintiffs may not base their breach of contract claim on the termination of the agreement.

Recoupment of Expenses and Costs

The December 2003 email set forth Rao's only compensation: "[r]egarding your recruitment of Chinese companies to join LIMA, I am happy to offer you a commission of 50% of the membership fee." Rao admits that she retained all of the membership fees from 2004 until the end of the appointment in June 2012. Also, from 2004 through 2008, LIMA paid management fees to subsidize LIMA CHINA's operating expenses. In one submitted email, LIMA promised to pay Rao's expenses, if she attended "the HK [L]icensing Show and other licensing events." These payments and promised payments varied the terms of the written contract.

A written agreement can be changed by the parties' course of conduct (*see Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 494 [1st Dept 2010]). For a contract to be modified or altered, all parties must consent (*Larson v Eney,* 741 F Supp 2d 459, 465 [SD NY 2010]; *Burnside Coal & Oil Co. v City of New York,* 135 AD2d 413, 415 [1st Dept 1987] [finding "plaintiff may not unilaterally modify the contract terms at the defendant's expense"]). Consent to contract modification may be shown by the parties' conduct (*see Beacon Term. Corp. v Chemprene, Inc.,* 75 AD2d 350, 354 [2d Dept 1980]).

"The modification of a contract results in the establishment of a new agreement between the parties which *pro tanto* supplants the affected provisions of the original agreement while leaving the balance of it intact" (*id.*). When the language of the original

contract and subsequent modification conflict, "the new terms control" (*Jacob Gold Realty v Sckoczylas*, 186 Misc 2d 612, 613 [App Term, 2d Dept 2000]).

Unlike the termination provision, which was never modified in writing or through conduct, the evidence submitted shows that, through their course of conduct, the parties modified the payment terms of their agreement. Rao claims that LIMA agreed to pay for membership and management fees and expenses, and both sides agree that LIMA did pay some of them. In addition, Rao presents evidence that the parties established a pattern of conduct whereby LIMA would tacitly consent to her modifications of their agreement, such as when Rao changed the company's name to LIMA CHINA, although the original agreement was that LIMA had to approve "LIMA-branded events" and "any use of the LIMA logo" in writing.

Once the parties agree to a modification of their contract, neither party may cancel the modification with the intent of restoring the old contract without the consent of both parties. "A modification, because it is an agreement based upon consideration, is binding according to its terms and may only be withdrawn by agreement" (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]). In June 2009, LIMA told Rao that no more management fees would be paid. But, in reference to Rao's request for additional funding, Rao stated during deposition, "[a]lthough he didn't say that he was unwilling to pay but he didn't say that he was willing to pay that amount either." LIMA has not shown as a matter of law that the payment of the management fees was solely

discretionary and could be withdrawn at any time. After review of the parties' submissions, I find that there are disputed issues of facts regarding whether the parties modified the original agreement regarding the reimbursement of expenses through their conduct, such that they agreed to LIMA paying certain items for LIMA CHINA and Rao.

Financial Rewards

In regard to the allegation that LIMA was to give plaintiffs "great financial rewards," plaintiffs have no claim. "[B]efore we can enforce a contractual right, we must first find that the contract is sufficiently definite to allow us to ascertain the terms of the parties' agreement" (*Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 242 [1st Dept 2013]). "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" (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 483 [1989]). In this case, there is no "reasonabl[e] certain[ty]" (*id.*). Rao repeats only that financial rewards were promised and expected. Even if LIMA made those promises, they were vague and Rao alleges nothing to suggest any meeting of the minds, so no contract or modification took place regarding those terms (*see Gessin Elec. Contrs., Inc. v 95 Wall Assoc., LLC,* 74 AD3d 516, 518 [1st Dept 2010] ["Even if parties intend to be bound by a contract, it is unenforceable if there is no meeting of the minds, i.e., if the parties understand the contract's material terms differently."]). This limitation on the claim for compensation applies to the other causes of action, as well. None of them

sufficiently states a claim for financial rewards and profits, and the opposing papers do not make a case for them.

In accordance with the foregoing, I find that LIMA has failed to show, as a matter of law, entitlement to summary judgment dismissing the breach of contract cause of action, but solely as to plaintiffs' claim for reimbursement of expenses laid out during the life of the contract. I dismiss the remainder of the breach of contract claim.

Breach of Implied Contract

The second cause of action, for breach of implied contract, is based on LIMA's failure to compensate plaintiffs with financial rewards and pay their expenses and costs. LIMA claims that it is entitled to summary judgment because it is duplicative of the contract cause of action and the plaintiffs have not shown that LIMA agreed to pay any more money.

> A contract implied in fact may result as an inference from the facts and circumstances of the case, although not formally stated in words, and is derived from the 'presumed' intention of the parties as indicated by their conduct. It is just as binding as an express contract arising from declared intention, since in the law there is no distinction between agreements made by words and those made by conduct.

(*Jemzura v Jemzura,* 36 NY2d 496, 504 [1975] [internal citations omitted]). "'[A] contract cannot be implied where there is an express contract covering the same subject matter'" (*Osberg v Rajaratnam,* 95 AD3d 649, 649 [1st Dept 2012], quoting *Azimut-Benetti S.p.A. v Magnum Mar. Corp.*, 55 AD3d 483, 484 [1st Dept 2008]). Here,

because there is a contract on the identical subject, the implied contract claim is dismissed.

Unjust Enrichment

The third cause of action sounds in unjust enrichment. Plaintiffs allege that LIMA benefitted from their work and did not compensate them. LIMA argues that summary judgment on the unjust enrichment claim should be granted because it is duplicative of the breach of contract cause of action and because LIMA did not derive a benefit at the expense of plaintiffs because plaintiffs were compensated by LIMA, by means of management fees, and third parties, by means of membership fees and revenues from trade shows. Plaintiffs counter that the fees and revenues were insufficient to cover the expenses of LIMA CHINA, and that despite numerously telling LIMA about financial struggles, Riotto "encouraged the Plaintiffs to keep the office running and open to maintain the momentum that has been established by the Plaintiffs with the Licensing Pavilion, membership development, government relations and educational and networking events." Thus, plaintiffs argue, "Defendant LIMA USA profited a lot at Ms. Rao's cost."

Unjust enrichment "is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). "'[A] party may not recover in . . . unjust enrichment where the parties have entered into a contract that governs the subject

matter'" (*Pappas v. Tzolis*, 20 N.Y.3d 228 (2012) (citation omitted). Like the implied contract claim, I dismiss the unjust enrichment claim because there is a contract on the identical subject.

Equitable Estoppel

The fourth cause of action sounds in equitable estoppel. Allegedly, LIMA caused plaintiffs to believe in an exclusive representation agreement between LIMA and LIMA CHINA which would last long enough for plaintiffs to recoup the expenses and costs incurred operating LIMA CHINA. Also, plaintiffs allege that they were led to believe that they would make a profit and would be compensated for their effort and time. Rao alleges that plaintiffs relied on these representations, and "defendant LIMA [should be] equitably stopped and absolutely precluded from denying the existence or enforceability of an exclusive representation agreement between plaintiffs RAO and LIMA CHINA and defendant LIMA." LIMA claims that summary judgment is warranted on plaintiffs' fourth cause of action because "equitable estoppel is not a cause of action, but rather a doctrine that bars a statute of limitations defense in certain circumstances."

> In order for estoppel to exist, three elements are necessary: '(1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts.'

(*BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 853 [1st Dept 1985] [citations and internal quotation marks omitted]). The conclusory allegations in the complaint and in

Rao's affidavit do not show that LIMA led plaintiffs to believe that the relationship would continue for a certain length of time or that LIMA would not enter into an agreement with another party, thus I dismiss the equitable estoppel cause of action.

Promissory Estoppel

The fifth cause of action sounds in promissory estoppel. Allegedly, LIMA promised Rao that if she formed LIMA CHINA, LIMA would "for the foreseeable future," compensate plaintiffs with financial rewards and pay their expenses. In reliance on these promises, plaintiffs worked and were not compensated. LIMA argues that summary judgment should be granted on the fifth cause of action because it is duplicative of the breach of contract claim and "for failure to establish a sufficiently clear and unambiguous promise."

"[I]n order to state a viable cause of action for promissory estoppel, the following elements must be established: (1) an oral promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance" (*New York City Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 491 [1st Dept 2004]; *see Arfa v Zamir*, 55 AD3d 508, 509 [1st Dept 2008]). The promissory estoppel claim duplicates the breach of contract cause of action (*Celle v. Barclays Bank P.L.C.*, 48 A.D.3d 301, 303 (1st Dep't 2008) ["In the absence of a duty independent of the agreement, the promissory estoppel claim was duplicative of the breach of contract claim."]). Accordingly, the claim is dismissed.

Misrepresentation

The sixth cause of action sounds in misrepresentation. LIMA claims that summary judgment is warranted because the cause of action is duplicative of the breach of contract claim.

Plaintiffs allege that the promise made by LIMA through Riotto "to compensate plaintiffs [sic] RAO with financial rewards and other expenses was false when made in 2004," that such a promise was never intended to be honored, and that it "was made with the intent to deceive the plaintiff RAO and to induce the plaintiff RAO to devote herself into [sic] the performance of the LIMA Agreement promoting the concept of licensing in China on behalf of LIMA and pursuing the development and presence of LIMA in China." These allegations do not meet the level of specificity required in pleading fraud (*see Bohn v 176 W. 87th St. Owners Corp.*, 106 AD3d 598, 599 [1st Dept 2013]). Rao does not specifically name false representations on which she relied or state when, where, or how the representations were made (*see id.*). Accordingly, I dismiss the sixth cause of action.

Tortious Interference with Contract

The seventh cause of action sounds in tortious interference with contract. Allegedly, LIMA interfered with LIMA CHINA's contract with TJPA by soliciting the latter's business, causing TJPA to breach its contract with LIMA CHINA. LIMA argues

that summary judgment should be granted on this cause of action because plaintiffs have not come forward with evidence that before the alleged breach LIMA knew the terms of the alleged agreement between TJPA, LIMA CHINA, and Oleena; that TJPA acted in contravention to the alleged agreement; or "that LIMA procured TJPA's breach of that agreement."

"The tort of . . . interference with contractual relations[] consists of four elements: (1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]).

Plaintiffs have not submitted sufficient evidence to raise a material issue of fact for this cause of action. Accordingly, the tortious interference with contract claim is dismissed.

Emotional Distress

The eighth cause of action sounds in emotional distress caused by the sudden termination of the exclusive representation agreement. Summary judgment is warranted, LIMA claims, because "termination of employment alone has consistently been held by New York courts to be insufficiently extreme or outrageous to form the basis of an emotional distress cause of action."

Since Rao's association with LIMA was on an at-will basis, the termination of the association by itself "'may not form the basis of an intentional infliction of emotional distress cause of action'" (*Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 125 [1st Dept 2007], quoting *Fama v American Intl. Group,* 306 AD2d 310, 311 [2d Dept 2003]). In addition, "[l]iability for this cause of action requires conduct that is 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community'" (*Bailey*, 38 AD3d at 125 [citations omitted]). Plaintiffs have not alleged such actions here.

LIMA seeks summary judgment on its fourth counterclaim for unjust enrichment. LIMA claims that after Rao's termination in July 2012, dues paying members of LIMA in China received services from LIMA, not from plaintiffs. Nonetheless, according to LIMA, "Plaintiffs have unjustly retained, and refused to surrender to LIMA, that portion of 2012 membership dues payments covering the period of the year 2012 following Rao's termination." Although Rao does not deny that the membership dues were kept in their entirety, I deny summary judgment on this counterclaim because LIMA does not put forward any evidence that it offered services to members who were previously serviced by LIMA CHINA.

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment by plaintiff International Licensing Industry Merchandisers' Association for summary judgment dismissing the first through the eighth causes of action and for judgment in its favor on its fourth counterclaim is granted to the extent that the second, third, fourth, fifth, sixth, seventh, and eighth causes of action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that all parties are directed to appear for a pretrial conference at 60 Centre Street, in Room 208, on October 21, 2015, at 2:15 p.m.

Dated: New York, New York
July 20, 2015

ENTER:

Saliann Scarpulla, J.S.C.