| **Invictus Entertainment, LLC v Dollaway** |
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| 2016 NY Slip Op 31048(U) |
| June 7, 2016 |
| Supreme Court, New York County |
| Docket Number: 150912/2015 |
| Judge: Geoffrey D. Wright |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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INVICTUS ENTERTAINMENT, LLC,

Plaintiff,

- against -

NINA DOLLAWAY P/K/A
NINA LISANDRELLO,

Defendant.

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Index No. 150912/2015

Motion Sequence No. 001

DECISION/ORDER

RECITATION, AS REQUIRED BY CPLR § 2219 (A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION/ORDER FOR SUMMARY JUDGMENT.

| PAPERS | NUMBERED |
|---|---|
| NOTICE OF MOTION AND AFFIDAVITS ANNEXED...... | 1 |
| ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED | |
| ANSWERING AFFIDAVITS.................................... | 3 |
| REPLYING AFFIDAVITS...................................... | 4 |
| EXHIBITS.......................................................... | |
| MEMORANDA.................................................... | |
| CROSS-MOTION ................................................ | 2 |

Plaintiff Invictus Entertainment, LLC (Invictus) seeks to recover management fees from defendant Nina Dollaway (Dollaway), professionally known as Nina Lisandrello. The four-count complaint asserts causes of action for: (1) breach of contract (first and second causes of action); (2) unjust enrichment; and (3) quantum meruit.

Dollaway now moves to dismiss the complaint for failure to state a claim and as barred by the statute of frauds, pursuant to CPLR 3211 (a) (7) and (5). Invictus cross-moves for an order lifting the stay on discovery, pursuant to CPLR 3214 (b), and directing Dollaway to produce the requested disclosures. In the event the court grants Dollaway's motion, Invictus seeks leave to amend the complaint.

Factual Allegations

Unless indicated otherwise, the following facts are taken from the complaint and are presumed to be true for purposes of the instant motion.

Invictus is a talent manager in the entertainment industry. In September 2011, Dollaway, an actress, contacted Invictus, seeking management services. According to Invictus, in January 2012, they entered into an oral management contract (Agreement), which provided that: "[Dollaway] would pay, for the duration of any given job that was initiated during the term of the contract, ten percent (10%) of gross receipts for said jobs, including but not limited to episodic fees, residuals and merchandising receipts." Complaint, ¶ 5.

On February 22, 2012, Dollaway entered into an agreement with CBS Broadcasting in connection with a television program known as "Beauty and the Beast" (Test Agreement). Under the terms of the Test Agreement, Dollaway was to be paid on a per-episode basis, $20,000 per episode for the pilot and the first series year, $20,800 for the second series year, $21,632 for the third series year, and on a further escalating schedule as the series continued. Dollaway was also to be paid a certain share of merchandising funds and residuals.

Invictus states that it performed its duties under the Agreement by setting up meetings, fielding casting inquiries, managing Dollaway's schedule and preparing her for casting and testing for the "Beauty and the Beast" project.

Dollaway paid Invictus a total of $6,000 in connection with her work on the pilot episode and the first two subsequent episodes. On August 14, 2012, she informed Invictus that she no longer wished to retain its services. According to Invictus, as of the commencement of the

instant action, Dollaway had performed in a total of 57 episodes, but had made no further payments to Invictus, despite repeated demands. [1]

Invictus commenced the instant action by filing a summons and complaint on January 30, 2015. Dollaway filed her answer on May 4, 2015, asserting a number of affirmative defenses and a counterclaim for breach of contract, seeking damages in the amount of $6,000. In the answer, Dollaway stated that she and Invictus "entered into an oral agreement on a trial basis terminable by either party at any time," but otherwise denied Invictus' allegations concerning the Agreement. Answer, ¶ 4. In her counterclaim, Dollaway asserted that: she and Invictus "entered into a binding and valid agreement whereby [Invictus] would render management services to [Dollaway] on an at-will basis with no set duration" (answer, first counterclaim, ¶ 1); "[Invictus] would be paid a percentage of monies actually earned and received by [Dollaway] up until the date of termination of the Agreement" (*id.*, ¶ 3); and, despite Invictus' failure to perform, Dollaway paid it for the three "Beauty and the Beast" episodes that she worked on before she terminated the relationship. On December 22, 2015, by stipulation of the parties, Dollaway filed the amended answer, which withdrew the counterclaim for breach of contract and added the statute of frauds as an affirmative defense.

Analysis

Dollaway contends that the breach of contract claim must be dismissed as barred by the statute of frauds, because the alleged oral contract between Invictus and Dollaway could not be performed within one year. In addition, Dollaway argues that Invictus' quasi-contract claims must be dismissed as duplicative of the breach of contract claim. Invictus counters that Dollaway is bound by the Agreement, having admitted to entering a client-manager relationship

[1] Invictus states that, to date, Dollaway has performed in 69 episodes. Diamonika aff, ¶ 22.

with Invictus. In addition, it contends that the existence of the Agreement is unequivocally evidenced by (1) Dollaway's emails to Invictus; (2) Dollaway's partial performance thereof; and (3) industry usage and custom. It also urges the court to nullify the CPLR 3214 (b) stay on discovery and to compel Dollaway to comply with outstanding discovery demands, which seek, among other things, Dollaway's communications with third parties regarding the Agreement. Lastly, Invictus contends that its quasi-contract claims are not duplicative of the breach of contract claims, because they are based on the value of services rendered rather than the Agreement.

"[O]n a motion to dismiss the complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true." *Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 (1st Dept 2004); *see also Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 (1st Dept 2009) ("[t]he court must . . . accord the plaintiff[] the benefit of every possible favorable inference").

Pursuant to CPLR 3214 (b), "[s]ervice of a notice of motion under rule 3211, 3212, or section 3213 stays disclosure until determination of the motion unless the court orders otherwise." The court, in the exercise of its discretion, may nullify the stay, "where discovery [is] necessary because facts needed to oppose the motion [are] unavailable to [the plaintiff]." *Federal Deposit Ins. Corp. v Hyer*, 66 AD2d 521, 527 (2d Dept 1979).

The statute of frauds, as set forth in General Obligations Law (GOL) § 5-701 (a) (1), provides that an agreement is void "unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith," if the agreement "[b]y its terms is not to be performed within one year from the making thereof." "A service contract of indefinite duration," where one is entitled to a commission for so long as a procured customer or account remains

active, "is not by its terms performable within a year . . . since performance is dependent, not upon the will of the parties to the contract, but upon that of a third party." *Zupan v Blumberg*, 2 NY2d 547, 550 (1957); *Zaveri v Rosy Blue, Inc.*, 4 AD3d 146, 146 (1st Dept 2004) (finding that "[t]he alleged oral agreement obligating defendants to pay plaintiff commissions on sales made subsequent to the termination of his employment with defendants [was] unenforceable under the statute of frauds"); *Guterman v RGA Accessories*, 196 AD2d 785, 785 (1st Dept 1993) (finding that "[t]he indefinite promise to pay commissions on all future sales [was] clearly within the Statute [of Frauds] and voidable for want of a writing satisfying the Statute").

"Generally the statute is satisfied by some note or memorandum signed by the party to be charged that is adequate to establish an agreement when considered in light of the admitted facts and surrounding circumstances." *Henry L. Fox Co. v Kaufman Org.*, 74 NY2d 136, 140 (1989). Proof of the agreement and its terms "may be pieced together from separate writings if they can be shown to be related to the transaction." *Nausch v AON Corp.*, 2 AD3d 101, 102 (1st Dept 2003). However, "the writings must contain all the essential terms of the purported agreement." *Henry L. Fox Co.*, 74 NY2d at 141; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 528 (1st Dept 2014) ("[t]o satisfy the Statute of Frauds . . . a memorandum must contain expressly or by reasonable implication all the material terms of the agreement, *including the rate of compensation if there has been agreement on that matter*" [internal quotation marks and citation omitted]). "Parol evidence, even in affidavit form, is immaterial to the threshold issue whether the documents are sufficient on their face to satisfy the Statute of Frauds. ... That issue must be determined from the documents themselves, as a matter of law." *Bazak Intl. Corp. v Mast Indus.*, 73 NY2d 113, 118 (1989).

Here, the Agreement allegedly provided that "[Dollaway] would pay, *for the duration of any given job* that was initiated during the term of the contract." Complaint, ¶ 5 (emphasis added). Such an agreement is not capable of performance within a year. *See Zupan*, 2 NY2d at 550; *Zaveri*, 4 AD3d at 146; *Guterman*, 196 AD2d at 785. That the Agreement "was terminable at will does not make the alleged agreement as to future commissions any less indefinite or capable of performance within a year." *Guterman*, 196 AD2d at 785. Therefore, unless evidenced by a written "note or memorandum thereof . . . and subscribed by the party to be charged therewith," the Agreement is void. GOL § 5-701 (a) (1).

Invictus contends that the Agreement is, nonetheless, enforceable, because Dollaway admitted to entering into it. While "the statute [of frauds] was not enacted to enable defendants to interpose it as a bar to a contract fairly and admittedly made," none of Dollaway's statements include an admission of the Agreement's essential terms. *Cole v Macklowe*, 40 AD3d 396, 399 (1st Dept 2007). In her original answer, Dollaway admitted that she and Invictus "entered into an oral agreement on a trial basis" (answer, ¶ 4) and that it was "a binding and valid agreement whereby [Invictus] would render management services to [Dollaway] on an at-will basis" (*id.*, first counterclaim, ¶ 1). However she denied Invictus' allegations regarding compensation (answer, ¶ 5) and claimed that she and Invictus agreed that it "would be paid a percentage of monies *actually earned and received* by [Dollaway] *up until the date of termination of the Agreement*." *Id.*, first counterclaim, ¶ 3 (emphasis added). Thus, while these statements "constitute[] a formal judicial admission which, even though subject to a subsequent, valid amendment, remains evidence of the facts admitted" (*Bogoni v Friedlander*, 197 AD2d 281, 291-292 [1st Dept 1994] [internal citations omitted]), they do not negate the statute of frauds' requirement that the Agreement be in writing. *See Tallini v Business Air, Inc.*, 148 AD2d 828,

829-830 (3d Dept 1989) ("reject[ing] plaintiff's argument that defendant's admission that an employment contract existed between the parties [took] the oral agreement out of the Statute of Frauds requirement that a contract not to be performed within a year must be in writing," where the "[e]ssential terms of the contract [were] not admitted and [were] in dispute").

Nor is the statute of frauds satisfied by some note or memorandum establishing the Agreement's existence. Invictus relies on its email exchanges with Dollaway. However, none of these contain the material terms of the Agreement. In particular, none mention the agreed upon compensation. *See* Falcon affirmation, exhibit I (Dollaway's January 9, 2012 email to Invictus stating that she was going to inform her talent agency that she and Invictus were "going to be working together"); exhibit L (Dollaway's February 24, 2012 email to Invictus' principal, sent after she tested for the "Beauty and the Beast" pilot episode, thanking him for "giving [her] the confidence [she] needed to shred that audition"); exhibit M (Dollaway's March 23, 2012 email, thanking Invictus' principal "for being a great manager and friend"). Therefore, these emails fail to satisfy the statute of frauds. *See Chapman, Spira & Carson, LLC*, 115 AD3d at 528 (finding plaintiff's breach of contract claim was barred by the statute of frauds where defendant's emails "fail[ed] to make *any* reference to payment terms"); *see also MP Innovations, Inc. v Atlantic Horizon Intl., Inc.*, 72 AD3d 571, 572 (1st Dept 2010) (finding oral agreement was barred by the statute of frauds where the e-mails that the plaintiff submitted failed to "identify a number of material terms, including, inter alia, the product, time frame or rate of compensation").

Invictus' reliance on the alleged industry practice of paying a personal manager post-termination commission does nothing to salvage its breach of contract claims, because such evidence "is immaterial to the threshold issue whether the documents are sufficient on their face

to satisfy the Statute of Frauds." *Bazak Intl. Corp.*, 73 NY2d at 118. As explained above, the documents in the instant case are insufficient.

Invictus' reliance on Dollaway's alleged partial performance, the payments she made to Invictus in connection with the first three episodes, is also misplaced. "The exception to the statute of frauds for part performance applies to General Obligations Law § 5-703, which deals with real estate transactions, but it has not been extended to General Obligations Law § 5-701." *Gural v Drasner*, 114 AD3d 25, 32 (1st Dept 2013) (internal quotation marks and citations omitted); *see also Abyssinian Dev. Corp. v Bistricer*, 133 AD3d 435, 436 (1st Dept 2015).

In addition, Invictus fails to demonstrate that "discovery [is] necessary because facts needed to oppose the motion [are] unavailable to [it]." *Federal Deposit Ins. Corp.*, 66 AD2d at 527. Instead, Invictus states that it "is informed and believes" that documents in Dollaway's possession (Falcon reply affirmation in support of cross-motion, ¶ 8), particularly Dollaway's "recorded statements to third parties concerning her engagement with Invictus," may satisfy the statute of frauds. Falcon affirmation, ¶ 19. Such "arguments concerning the existence of additional evidence establishing the oral agreement [are] speculative and consequently insufficient on a motion to dismiss." *Klein v Jamor Purveyors*, 108 AD2d 344, 350 (2d Dept 1985) (affirming dismissal of claims for failure to state a claim and as barred by the statute of frauds); *see also Fitz-Gerald v Donaldson, Lufkin & Jenrette*, 294 AD2d 176, 176 (1st Dept 2002) (affirming dismissal of action seeking recovery of finder's fee as barred by the statute of frauds and affirming denial of the plaintiff's request for further discovery); *Gersten-Hillman Agency, Inc. v Heyman*, 68 AD3d 1284, 1288 (3d Dept 2009) (rejecting plaintiff's argument "that defendant's responses to its discovery requests may, collectively, produce the necessary

writing to satisfy the statute of frauds with respect to this alleged agreement to pay future commissions," because "a party's mere hope or speculation that evidence sufficient to defeat the motion may be uncovered during the discovery process is insufficient to postpone determination on the motion [for summary judgment]").

For the foregoing reasons, the first and second causes of action for breach of contract are dismissed and Invictus' cross motion, for an order lifting the stay on discovery and ordering Dollaway to comply with Invictus' discovery demands, is denied.

Invictus' unjust enrichment and quantum meruit claims must, likewise, be dismissed, because "the plaintiff may not assert these causes of action to circumvent the Statute of Frauds." *Strauss v Fleet Mtge. Corp.*, 282 AD2d 736, 737 (2d Dept 2001) (affirming dismissal of unjust enrichment and quantum meruit claims, where breach of contract claim was barred by the statute of frauds); *see also J.E. Capital v Karp Family Assoc.*, 285 AD2d 361, 362 (1st Dept 2001) ("the necessity of a writing may not be circumvented by the simple expedience of recasting the action as one seeking damages for unjust enrichment"); *American-European Art Assoc. v Trend Galleries*, 227 AD2d 170, 171 (1st Dept 1996) ("plaintiffs may not utilize a quantum meruit theory of recovery to circumvent the Statute of Frauds"). While Invictus argues that these claims are based on the value of the services it rendered and not on the Agreement, this contention is belied by the complaint, which seeks identical recovery for its contract and quasi-contract claims (complaint, ¶¶ 20, 30, 35), as well as Invictus' argument that "the reasonable value of the services Invictus rendered for [Dollaway] is ten percent (10%) of what [she] earns from any engagement entered into during the manager-client relationship, for the duration of the engagement." Falcon affirmation, ¶ 77. Accordingly, the third and fourth causes of action are

dismissed. *See J.E. Capital*, 285 AD2d at 362; *American-European Art Assoc.*, 227 AD2d at 171.

Lastly, Invictus cross-moves for leave to amend the complaint, "in order to modify the language of paragraph five (5) concerning the period of time for which Invictus seeks recovery to a reasonable amount of time." Falcon affirmation, ¶ 82. However, having pleaded that the Agreement was "for the duration of any given job that was initiated during the term of the contract" (complaint, ¶ 5), Invictus is bound by that statement as "evidence of the facts admitted." *Bogoni*, 197 AD2d at 292. Therefore, the cross motion is denied because "the proposed amendment . . . is patently devoid of merit." *Bishop v Maurer*, 83 AD3d 483, 485 (1st Dept 2011) (internal quotation marks and citations omitted).

Accordingly, it is hereby

ORDERED that the motion of defendant Nina Dollaway, professionally known as Nina Lisandrello, to dismiss the complaint herein is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion of plaintiff Invictus Entertainment, LLC is denied in its entirety; and it is further

ORDERED the Clerk is directed to enter judgment accordingly.

Dated: June 7, 2016

J.S.C.