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| <b>Schraft v MyGrove Media, Inc.</b>   |
| 2017 NY Slip Op 30656(U)   |
| April 5, 2017  |
| Supreme Court, New York County   |
| Docket Number: 157649/2015   |
| Judge: Ellen M. Coin   |
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN

PART 63

JESSE SCHRAFT et al.,  
Plaintiffs,

INDEX NO. 157649/2015  
MOTION DATE Dec. 14, 2016  
MOTION SEQ. NO. 002  
E-FILED

-against-

MYGROVE MEDIA, INC., et al.,  
Defendants.

The following papers, numbered 1, were read on this motion to dismiss:

| <u>Papers</u>                        | <u>Papers Numbered</u> |
|--------------------------------------|------------------------|
| Notice of Motion-Affidavits-Exhibits | 1                      |
| Answering Affidavits-Exhibits        | 2                      |
| Reply Affidavits                     | 3                      |
| <b>Cross-Motion</b>                  | <b>X No</b>            |

Defendants move to dismiss the amended complaint pursuant to CPLR § 3211(a)(7). The motion is granted in part and denied in part, for the reasons set forth below.

On a 3211 motion to dismiss for failure to state a cause of action, the pleadings are to be liberally construed. See CPLR 3026; *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 227 (2011); *Leon v Martinez*, 84 NY2d 83, 87 (1994). The court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001) (internal citations omitted); see *Nonnon v City of New York*, 9 NY3d 825, 827 (2007); *511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002); *Leon*, 84 NY2d at 87-88. The court further may consider a plaintiff's opposing affidavits to remedy pleading defects. See *Rushaid*, 28 NY3d at 327; *Chanko v American Broadcasting Cos.*, 27 NY3d 46, 52 (2016); *Leon*, 84 NY2d at 88.

"The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *511 W. 232<sup>nd</sup> Owners Corp.*, 98 NY2d at 152, quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 (2001). "Whether a plaintiff can

ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005); see *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 (2005).

The court initially notes that in opposition to this motion each of the plaintiffs submits a document entitled "affidavit." Each such "affidavit" states that the plaintiff "swear[s] or affirm[s]" the facts listed therein, and concludes, "I swear or affirm that the above and foregoing representations are true and correct to the best of my information, knowledge, and belief." None of the so-called affidavits bear the signature or stamp of a notary.

CPLR 2106 permits a person "physically located outside the geographic boundaries of the United States" or its territories to use "in an action in lieu of and with the same force and effect as an affidavit" an affirmation. None of the plaintiffs claims to be outside of the United States or its territories. Thus, their submissions are impermissible, being unsworn, and cannot be considered. *Grasso v Angerami*, 79 NY2d 813 (1991); *Puentes v Martinez*, 309 AD2d 675 (1<sup>st</sup> Dept 2003); *Sanchez v Romano*, 292 AD2d 202 (1<sup>st</sup> Dept 2002).

However, plaintiffs' unsworn submissions, standing alone, do not warrant granting of this motion. "CPLR 3211 allows [a] plaintiff to submit affidavits, but it does not oblige him [or her] to do so on penalty of dismissal." *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 (1976); *Law Offices of Neal D. Frishberg v Toman*, 105 AD3d 712, 713 (2<sup>nd</sup> Dept 2013).

### **The First and Third Causes of Action**

Plaintiffs' First Cause of Action is for breach of oral contract. The only plaintiff who claims to have had an oral contract is plaintiff Schraft. Plaintiffs Dusharm and Van allege that they entered into written employment contracts. Accordingly, the claims of plaintiffs Dusharm and Van alleged in the First Cause of Action are dismissed. For the same reason, the claims of plaintiffs Dusharm and Van alleged in the Third Cause of Action for quantum meruit are also dismissed.

However, plaintiff Schraft states a claim for breach of oral contract as against the individual defendants. He alleges that the individual defendants induced him to perform services for the yet-to-be formed MyGrove Media in exchange for equity in the company. As this alleged agreement was made on January 24, 2012,

five months before MyGrove was incorporated, defendants Morgan and Fox, as promoters, may be personally liable on this alleged oral contract. *Clinton Invs. Co., II v Watkins*, 146 AD2d 861 (3<sup>rd</sup> Dept 1989).

Similarly, since Schraft alleges that the individual defendants accepted his services prior to the formation of MyGrove Media, so much of their motion as seeks dismissal of his Third Cause of Action for quantum meruit must be denied.

Schraft fails to state facts demonstrating that MyGrove Media, Inc., formed after the individuals' alleged promises to him in January 2012, bears responsibility for those alleged oral promises. *Cf Clinton Invs. Co., II*, 146 AD2d at 863. Accordingly, the motion to dismiss the First and Third Causes of Action as to Schraft is granted to defendant MyGrove Media, Inc.

#### **The Second Cause of Action**

Plaintiffs claim a breach of the covenant of good faith and fair dealing as against the defendants. A cause of action based upon a breach of a covenant of good faith and fair dealing requires a contractual obligation between the parties. *Duration Mun. Fund, L.P. v J.P. Morgan Sec., Inc.*, 77 AD3d 474 [1<sup>st</sup> Dept 2010). Initially, plaintiffs Schraft and Dusharm cannot sustain their claim for breach of the covenant of good faith and fair dealing against the individual defendants, as those plaintiffs allege written contracts with the corporate defendant only. Plaintiff Van, in contrast, alleges that he entered into a written contract with the "defendants."

The implied covenant of good faith and fair dealing is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement. (*Frankini v Landmark Constr. Of Yonkers, Inc.*, 91 AD3d 593, 595 (2<sup>nd</sup> Dept 2012).

Here plaintiffs allege that the defendants simply breached the terms of their contracts, not that they committed some act that deprived them of the benefit of their bargain under the contracts. Accordingly, the motion to dismiss the second cause of action is granted.

#### **The Fourth Cause of Action**

A claim for fraudulent inducement requires a false representation, made for the purpose of inducing another to act

on it, and that the party to whom the representation was made reasonably relied on it and was damaged. *Perotti v Becker, Glynn, Melamed & Muffly, LLP*, 82 AD3d 495, 498 (1<sup>st</sup> Dept 2011).

The amended complaint alleges that the defendants induced plaintiffs "to sign employment contracts with false information." (Amended Complaint, ¶154 at 18). The amended complaint alleges the specific misrepresentations as to plaintiff Schraft (¶ 33) and plaintiff Dusharm (¶ 93). As to plaintiff Van, the pleading alleges representations of fact (¶ 120), but not that Van was damaged because of those misrepresentations. He simply claims that he did not get what he bargained for under his written employment agreement. The motion to dismiss the Fourth Cause of Action is granted only to the extent of dismissing the claim of plaintiff Van.

#### **The Fifth Cause of Action for breach of written contract**

It is uncontested that each of the plaintiffs entered into a written contract with defendant MyGrove Media, Inc. The plaintiffs each allege the existence of a written employment contract, his performance under the contract, the corporate defendant's breach and plaintiffs' resultant damages. Neither side produces copies of the written contracts.

Schraft alleges that the July 1, 2012 written contract provided that his salary would be increased "commencing on day initial funding being completed." Contrary to defendants' contention, the amended complaint alleges that various amounts of money were invested in MyGrove "which should have triggered the initial funding clause in employee contracts...." (Amended cp., ¶ 50 at 8). For purposes of this motion to dismiss, Schraft's allegations sufficiently state facts to support his claim that the preconditions for his salary raise were met.

Schraft alleges that the July 1, 2012 written contract provided that he would receive "7.5% of common stock, vesting pro rate in arrears over four years....Governed by terms of separate Restricted Stock Purchase Agreement." (Amended complaint, ¶ 31 c at 6). Although the amended pleading is hardly a model of good pleading, the document it mentions can be obtained in discovery, and its absence at this juncture is not the basis for a motion to dismiss. Indeed, if the terms of the Restricted Stock Purchase Agreement supported this motion to dismiss, no doubt defendants would have offered it in support.

Schraft alleges another written agreement executed on January 29, 2013. He does not set forth the terms of the

agreement. The court agrees that in the absence of his allegation of the terms of the contract, so much of the motion as seeks dismissal of this aspect of the claim for breach of written contract must be granted.

Plaintiff Dusharm alleges that he entered into a written employment agreement with defendant MyGrove. According to the complaint, the written agreement provided for a salary of \$90,000 per annum, commencing on the day initial funding was completed. He further alleges that the parties modified the agreement orally to provide Dusharm with 3.5% equity in MyGrove in lieu of salary. He alleges his continued work and that defendants refused to issue the equity. Plaintiff Dusharm states a claim for breach of written agreement against the corporate defendant.

Plaintiff Van alleges that he entered into a written employment contract with "DEFENDANTS." (Amended Complaint, ¶ 122 at 16). He alleges that under the contract his salary was to increase upon initial funding and that he was to receive 150,000 shares of equity. He alleges that initial funding occurred, but that he received neither the increased salary or the equity. He alleges that the contract was modified to give him an additional 50,000 shares in lieu of a salary increase, but that he received no additional shares. His allegations sufficiently set forth a claim for breach of written contract against all of the defendants.

In accordance with the foregoing, it is ORDERED that defendants' motion to dismiss the amended complaint is granted to the following extent:

so much of the First Cause of Action of the amended complaint (1) as was brought by plaintiffs Cory Dusharm and Eric Van is dismissed, and (2) as was brought by plaintiff Jesse Schraft against defendant MyGrove Media, Inc. is dismissed;

the Second Cause of Action is dismissed;

the claims of plaintiffs Cory Dusharm and Eric Van in the Third Cause of Action are dismissed; and the claim of plaintiff Jesse Schraft against defendant MyGrove Media, Inc. in the Third Cause of Action is dismissed;

the claim of plaintiff Eric Van in the Fourth Cause of Action is dismissed;

the claim of plaintiff Jesse Schraft in the Fifth Cause of Action predicated on the January 29, 2013 agreement is dismissed;

and (2) the claims of plaintiffs Jesse Schraft and Cory Dusharm in the Fifth Cause of Action against defendants Spencer Morgan and Mitch Fox are dismissed; and it is further

ORDERED that the balance of the motion is denied.

This constitutes the decision and order of the Court.

Dated: April 5, 2017



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Ellen M. Coin, A.J.S.C.

Non-final disposition