SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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MMG AGENCY, INC.,

Plaintiff,

- v -

GENERALI GLOBAL ASSISTANCE, INC., EUROP ASSISTANCE USA, INC., WORLDWIDE ASSISTANCE SERVICES, INC.,

Defendants.

INDEX NO. 655484/2016

MOTION DATE 08/22/2017

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for DISMISSAL.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion to dismiss the amended verified complaint is granted to the extent that the fourth, fifth, and sixth causes of action and the demand for punitive damages are dismissed and is otherwise denied; and it is further

ORDERED that defendants shall serve an answer to the amended verified complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 331, 60 Centre Street, on October 11, 2018, at 9:30 AM.

DECISION

Background

Plaintiff, a broker and consultant, sues defendants for certain fees (commissions). GGA provides identify theft protection services.

In their pre-answer motion to dismiss (motion sequence number 002), defendants (GGA) move, pursuant to CPLR 3211 (a) (1), (5) and (7), to dismiss the amended verified complaint (complaint).

In its complaint, plaintiff alleges that, in 2006, plaintiff was the insurance broker and consultant for a nonparty company (the nonparty company) that experienced a data breach situation involving its employee information. Plaintiff contends that it brokered or provided consulting services that culminated in a written agreement, between GGA and the nonparty company (the resolution agreement) in which GGA was to provide identify theft protection services for the nonparty company's current and former employees. Plaintiff further contends that it was agreed that plaintiff would receive a commission for its work, at a rate of 20% of the total payment made by the nonparty company to GGA. Plaintiff claims that it was to be paid certain of the commissions on an annual basis, and others monthly. Plaintiff also claims that it is unable to locate the resolution

agreement, that was executed in 2006, but seeks a copy of that agreement from GGA.

Plaintiff alleges that, after the resolution agreement was executed, the nonparty company made payment to plaintiff for both the services that GGA provided to the nonparty company and plaintiff's commission. Out of those funds, plaintiff retained 20%, as its fee, and remitted 80% to GGA. In 2009, the nonparty company began making payments directly to GGA, and GGA began paying plaintiff 20% of the payment made by the nonparty company. In 2015, GGA informed plaintiff that it would no longer pay plaintiff, and plaintiff commenced the herein law suit.

The Complaint

Plaintiff asserts causes of action for: (1) breach of contract; (2) breach of implied contract; (3) unjust enrichment; (4) breach of the covenant of good faith and fair dealing; (5) breach of fiduciary duty; and, (6) an accounting.

GSA argues that the complaint should be dismissed based upon: (1) documentary evidence that irrefutably establishes its defense; (2) for failure to state a cause of action, as a matter of law; (3) with respect to unjust enrichment claim, as duplicative and inadequately pleaded; (4) with respect to the claim for breach of the implied covenant of good faith and fair dealing, as duplicative; (5) as for the breach of fiduciary duty

claim, and the accounting claim depending thereon, as inadequately stated; and (6) as punitive damages, as without merit.[1]

Analysis

On a motion addressed to the pleadings, the court may dismiss the complaint only if no legally cognizable cause of action has been stated within the four corners of the complaint (Scott v Bell Atl. Corp., 282 AD2d 180, 183 [1st Dept 2001], affd as mod sub nom. Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002]). Factual allegations of the complaint must be accepted as true, the complaint must be construed in a light favorable to plaintiff, and plaintiff must be given the benefit of possible reasonable inferences (Leon v Martinez, 84 NY2d 83, 87-88 [1994]). However, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration" (Quatrochi v Citibank, 210 AD2d 53, 53 [1st Dept 1994]).

A motion to dismiss based upon documentary evidence may be granted "only where the documentary evidence utterly refutes

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[1]The court notes that plaintiff did not oppose dismissal of the breach of fiduciary duty and breach of the covenant of good faith and fair dealing claims, or the demand for punitive damages. The court declines to address the defendants' arguments to strike certain portions of the complaint made for the first time in their reply papers.

plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen, 98 NY2d at 326).

In moving, defendants submit the affidavit of Patricia Alonzo, chief compliance officer of GGA. They also submit a blank identity theft services template (the template form). The template form is not a preprinted form agreement, such as the well-known "Blumberg" legal forms, but appears to have been printed from a word processing program. Alonso avers that the template form is the same type of agreement that GGA uses for its identity theft protection services, and the same type of agreement that would have been used for the type of identity theft protection services agreement at issue in this case. Alonso also avers that the identify theft assistance product described in the template form is not insurance, but a service.

GGA argues that the contract claims should be dismissed because: (1) they are equivocal and ambiguous; (2) they concern insurance, and plaintiff's commission as an insurance broker, when GGA is not an insurance company and did not provide insurance services; (3) they do not adequately address the formation or material terms of the contract, such as a description of what each party promised to pay or perform; (4) they do not adequately or properly allege that plaintiff is a third-party beneficiary of the identity theft agreement; and (5) they do not explain how plaintiff, as the agent of the nonparty

company, could be owed any contractual duty by GGA. GGA also argues that plaintiff cannot enforce the identity theft protection agreement because plaintiff is only the nonparty company's agent, so that there is no contractual duty flowing from GGA to plaintiff, and plaintiff cannot enforce an agreement on behalf of its disclosed principal.

The elements of breach of contract claim "include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (Harris v Seward Park Hous. Cor., 79 AD3d 425, 426 [1st Dept 2010]). The issue of the sufficiency of the specificity of a breach of contract claim is governed by CPLR 3013, and the primary purpose of a pleading is to ensure that defendants are provided adequate notice of the claim (see Cole v Mandell Food Stores, 93 NY2d 34, 40 [1999]).

Giving plaintiff's allegations the benefit of reasonable favorable inferences, as required on this motion, plaintiff alleges that it performed consulting services that culminated in a written contract to which plaintiff is a party. Plaintiff also alleges that the parties' conduct demonstrates an implied contract for services between GGA and the nonparty company. Plaintiff further alleges that the contract grants plaintiff the right to the payment of commissions of a specific percentage of the total payments made by the nonparty company to GGA for

identity theft protection services. Plaintiff claims that defendants breached the contract by refusing to pay what is owed thereunder, causing plaintiff to incur damages. As plaintiff alleges that it believes that there is a written contract under which plaintiff is owed fees, and that GGA has paid plaintiff commissions in the past and owes plaintiff certain fees, the reasonable inference to be drawn is that plaintiff is alleging that GGA has a duty to pay the commission. This sufficiently puts defendants on notice of the claims.

Defendants' CPLR 3211 (a) (1) motion rests on the premise that there is no agreement between GGA and plaintiff, and that plaintiff is not the third-party beneficiary of the agreement between GGA and the nonparty company. However, in the complaint, plaintiff alleges that there is a written contract that supports its claim, but that plaintiff is unable to locate a copy, and will need to obtain one from defendants or the nonparty company. Plaintiff also alleges payments, made over the course of years, first from the nonparty company, and then directly from GGA. While GGA's counsel claims that there is no contract, no evidence is submitted demonstrating this conclusively. Alonso does not aver that there was no commission agreement with plaintiff, or that GGA has no copy of a written contract that concerns plaintiff, nor does she address the basis for GGA's past payments to plaintiff.

Alonso states only that the template form submitted is the same type of agreement that would be used for identity theft services. With respect to the documentary evidence, the template form is blank, can be easily modified, and is not a copy of the actual identity theft agreement between GGA and the nonparty company, which GGA's counsel indicates exists. In addition, Alonso does not address whether GGA has other types of templates that concern or involve fees to intermediaries, nor does she state that GGA does not enter into such agreements in its identify theft services business dealings. Moreover, Alonso's assertion as to the basis of her knowledge is conclusory, as she does not state that she has personal knowledge of what occurred prior to 2015 or about records concerning the GGA payments to plaintiff listed in the complaint. Therefore, the documentary evidence GGA submits does not conclusively demonstrate that there is no contract claim.

The issue of whether plaintiff can enforce a contract, as the nonparty company's disclosed agent, presupposes that there is no applicable contract that includes specific payment terms concerning plaintiff, when such has not been established and, in any event, is inconsistent with the allegations in complaint.

GGA correctly states the general proposition, that an agent for a disclosed principal cannot enforce its principal's contract. However, this proposition must yield where an

agreement reflects otherwise (Horn v Toback, 44 Misc 3d 42 [App Term 2014] [stating "[a] person making or purporting to make a contract with another as an agent for a disclosed principal does not become a party to the contract absent an agreement or indication to that effect" (internal quotation marks and citation omitted)]; Glen Banks, Contract Law § 19:3 [West's NY Prac Series, vol 28, 2017] [citing Horn v Toback]). Thus, plaintiff's breach of contract claims shall not be dismissed pursuant to CPLR 3211 (a) (1) or (7) grounds.

Dismissal is likely unwarranted because plaintiff asserts that it requires disclosure, from GGA or the nonparty company, of a copy of an agreement that plaintiff believes supports its claims (CPLR 3211 [d]).

Turning to CPLR 3211 (a) (5), GGA argues that the contract claim should be dismissed because the alleged contract between plaintiff and GGA violates the statute of frauds, General Obligations Law § 5-701 (a) (1), which requires that contracts that cannot be performed within one year be in writing. As the statute of frauds is an affirmative defense, defendants bore the burden to demonstrate that there was no written contract concerning the transaction at issue (Subgar Realty Corp. v Gothic Lbr. & Millwork, 80 AD2d 774, 774 [1st Dept 1981]). As discussed above, defendants have not met this burden, and the motion to dismiss the contract claims is denied.

Defendants argue that the unjust enrichment claim should be dismissed as duplicative of the contract claim, as it arises from the same subject matter, and is insufficiently pled.

"[T]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties. An unjust enrichment claim is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. Thus, in order to adequately plead such a claim, the plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (Georgia Malone & Co., Inc. v Rieder, 19 NY3d 511, 516 [2012] [internal quotation marks and citations omitted]; Corsello v Verizon N.Y., Inc., 18 NY3d 777, 790 [2012] [internal quotation marks and citation omitted] ["The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in equity and good conscience should be paid to the plaintiff [and] . . . [t]ypical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled"]). "Generally, quasi-contractual remedies are unavailable where there exists a valid and enforceable agreement

governing the particular subject matter" (Kramer v Greene, 142 AD3d 438, 441 [1st Dept 2016]).

In the complaint, plaintiff alleges that defendants were unjustly enriched by plaintiff's work and services, as they increased their own profit under the resolution agreement by 20%, which represents the fees owed to plaintiff. Defendants argue that the claim is inadequately pled, because plaintiff fails to allege that it conferred some benefit upon defendants, at the plaintiff's expense, or identify specific services that it allegedly performed, when initially placing the business, that enriched GGA. Defendants contend that, because plaintiff alleges that it was a broker for the nonparty company, plaintiff's claim is only that its client, the nonparty company, received a benefit, in the form of broker or consulting services. Defendants also contend that plaintiff fails to allege that it would be against equity and good conscience for GGA to retain the amounts that plaintiff seeks to recover.

Citing to paragraphs 15 and 36 of the complaint, defendants also contend that the benefit, that plaintiff allegedly conferred upon them, is the performance of services in connection with the placement of the resolution agreement that commenced in 2007, and that plaintiff does not allege any later conduct that conferred a benefit on GGA with respect to renewals of the resolution agreement. Defendants contend that these

allegations fail because the decision to renew the resolution agreement after 2007 was solely at the discretion of the nonparty company, so that plaintiff has not alleged that plaintiff conferred a benefit upon defendants, at plaintiff's expense, in connection with the 2015 and 2016 resolution agreement renewals. GGA argues that plaintiff seeks to be compensated, based upon a theory of unjust enrichment, for having done little, or nothing with respect to the resolution agreement.

In opposition, plaintiff's counsel states that it seeks to plead unjust enrichment in the alternative. Plaintiff also argues that it has alleged the elements of unjust enrichment, and that if GGA is able to increase the annual fee it receives by 20%, the amount of plaintiff's bargained for commission, it is receiving money to which it knows it is not entitled.

On this record, the argument that defendants make about renewals is unpersuasive, as there has been no showing of the terms of any executed contract involving renewals. In addressing quasi-contract claims, such as unjust enrichment, the First Department has stated that: "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies" (Kramer, 142

AD3d at 441-42 [internal quotation marks and citation omitted]). Defendants' position is that there was no contract, but this issue remains unresolved at this juncture. While an unjust enrichment claim may be untenable as a substitute for a contract claim barred by the statute of frauds, no determination concerning a statute of frauds defense has been made. Consequently, on this undeveloped record, the unjust enrichment claim will not be dismissed as duplicative or barred by a written agreement.

As to the sufficiency of the complaint's allegations, plaintiff alleges that defendants received a benefit, the 20% commission amount, at plaintiff's expense, when plaintiff was, and is, due that money. Implicit here is plaintiff's contention that GGA received greater compensation from the nonparty company than that to which GGA was entitled for the provision of identify theft protection services, as a portion of the payment was intended as plaintiff's fee. Admittedly, the complaint is confusing, as plaintiff alleges that it was the nonparty company's broker or consultant, but does not explain why, beginning in 2009, GGA began paying plaintiff. Nonetheless, construing the complaint liberally, plaintiff alleges that the payments made by the nonparty company to GGA were comprised of two components: (1) a fee for the identify theft protection services; and (2) plaintiff's fee. Plaintiff is alleging that

defendants' retention of the entire amount paid by the nonparty company resulted in defendants' enrichment, at plaintiff's expense. As the complaint alleges that GGA has retained money that belongs to plaintiff (see Corsello, 18 NY3d at 790 ["[t]ypical [unjust enrichment] cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled"]), an inference may be drawn that plaintiff is alleging that it would be against equity and good conscience to permit GGA to keep the funds. On that basis, such claim shall not be dismissed.

However, the fiduciary duty claim is insufficiently pled. Such claim shall be dismissed because the complaint does not adequately state the basis for a fiduciary duty between plaintiff and defendants.

As for the accounting claim, plaintiff alleges that it seeks a percentage of the total fee paid by the nonparty company to GGA. Regardless of whether an accounting is an appropriate remedy or claim in the absence of a fiduciary duty claim, in this case, plaintiff claims only that it is entitled to a simple percentage of the sum paid by the nonparty company to defendants. Plaintiff does not suggest that the amount of this sum will not be ascertainable through ordinary disclosure devices. For this reason, and because the breach of fiduciary duty claim has been dismissed (Maor v Blu Sand Intl. Inc., 143

AD3d 579 [1st Dept 2016] ["The claim for an accounting should have been dismissed in the absence of a fiduciary relationship arising out of the contract between the parties"]), no basis for an accounting is stated.

The plaintiff's claim for breach of the covenant of good faith and fair dealing is predicated upon the same factual allegations as the breach of contract claim, seeking the same damages. Such claim does not lie as it duplicates the contract claim.

The punitive damages demand shall also be dismissed, as the claims that remain in this case are based upon contract and quasi-contract theories, and there are no allegations of the type of egregious, wanton conduct that would warrant such damages (Fischer v Machon Bais Yaakov, 176 AD2d 655, 656 [1st Dept 1991]) or conduct directed at the public (Quik Park W. 57, LLC v Bridgewater Operating Corp., 148 AD3d 444, 446 [1st Dept 2017]). In addition, the punitive damages claim is also pendent to the breach of fiduciary duty claim, which has been dismissed.

8/30/2018
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**

655484/2016 MMG AGENCY, INC. vs. GENERALI GLOBAL ASSISTANCE,
Motion No. 002