SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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DANA FRIEDMAN

Plaintiff,

Index No.: 655302/2017

Mot. Seq. No. 001

-against-

THE GIT GROUP, LLC, et al.

Defendant.

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MELISSA A. CRANE, J.S.C.:

Plaintiff Dana Friedman ("Friedman") moves for summary judgment pursuant to CPLR 3212 against defendant, the GIT Group, LLC ("GIT"), for a finder's fee of $30,000 plus 12% equity interest. Defendant filed opposition but did not cross-move on papers to dismiss plaintiff's complaint. On October 26, 2018 during oral argument, defendant asked the court to dismiss plaintiff's complaint. The court denied the request and told defendant to make a motion on notice (*see* October 26, 2019 Tr., p.6, lines 10-18).

Defendant disputes the validity of the contract between himself and plaintiff under the Statute of Frauds. Defendant also contends that, even if there is an enforceable contract, plaintiff failed to perform. Plaintiff claims that the emails between herself and defendant suffice under the Statute of Frauds as an enforceable agreement. She then asserts that defendant frustrated her ability to perform under the contract when he shut her out of negotiations.

Plaintiff is an independent consultant who matches private wealth management advisory firms and investors with entities seeking investment capital (Friedman Aff ¶ 2). Defendant, GIT Group, is a real estate development company founded in 2007. GIT's members are Benny Bern ("Bern"), Chief Executive Officer, and Olivier Fajga. Gideon Asset Management ("Gideon") is a privately held and managed investment platform (Friedman Aff ¶ 3).

In 2017, Gideon sought to acquire real estate in urban markets and tourist destinations in the United States (*id.*). Meanwhile, GIT sought investors to provide capital for the development of its third Manhattan hotel project in the Flatiron district[1] (hereinafter, the "GIT Flatiron Hotel Project").

In March of 2017, Benny Bern sent a text message to plaintiff:

> I'm raising money for my 3rd hotel. I'm looking for someone who could be interested to do that for me in exchange of shares of the hotel. Was wondering if you knew someone that could be interested since I know you know tons of people.
> (*see* Plaintiff's Motion, Exh D).

Bern and plaintiff continued to discuss possible investors for the Flatiron Hotel Project through phone conversations. Plaintiff and Bern also discussed her finder's fee. On March 23, 2017, Bern sent plaintiff an email:

> The deal is:
>
> Per every $100K raised (loan or equity) you get 2% of the hotel forever. So the total to raise is $500K, let s [sic] say you raise this amount, I will give you 10% shares of the company.
>
> You asked me yesterday if we were investing and yes, we put $200K in that project (maybe even more in the future)
>
> Please confirm you got this email and if you have questions
> (*see* Plaintiff's Motion, Exh F).

As plaintiff continued talking to Bern, she also contacted Aziz Syed, the Vice President of Acquisitions of Gideon. Plaintiff inquired whether Gideon wanted to invest in GIT's Flatiron Hotel Project (*see* Plaintiff's Motion, Exh H). On March 27, 2017, plaintiff told Bern that she

[1] The Flatiron district is a neighborhood in Manhattan. 14th Street, Union Square, and Greenwich Village to the south bound the Flatiron district.

knew of a family office[2] interested in the investment (Gideon). On April 3, 2017, plaintiff texted Bern, stating:

> I'd like to re-discuss compensation on success…I would like to discuss a combination of equity and a success fee. (*see* Plaintiff's Motion, Exh K).

On April 4, 2017, Bern sent an email to plaintiff titled "Agreement between you and me." Bern wrote:

> Here is the deal if you raise $500000 in exchange of 40% of the next project located on 23rst [sic] street between Park and Madison.
>
> You will received [sic] $25000 in commission right after the money is transferred to the business bank account.
> You will also get 10% of equity of the company
>
> If you can get us the $500000, you will get the same $25000 in commission (or 5% of the amount if it will be less or more than $500000)
> You will also get 10% of the shares bought buy [sic] the investor.
> Example: if this investor buys 30% of shares at $400000, you will get $20000 in cash and 3% of shares of that specific future project.
>
> Do we agree on those terms?
> Please confirm
>
> Thanks
> Benny
> (*see* Plaintiff's Motion, Exh L).

In response to the April 4th email, plaintiff telephoned Bern and accepted the terms of the April 4th email (Friedman Aff ¶ 8).

Plaintiff arranged for, and attended, the first in-person meeting between GIT and Gideon on April 6, 2017. Soon after, Bern told plaintiff he no longer wanted her involved in the negotiations between GIT and Gideon (Friedman Aff ¶ 9, 10). Bern wanted to negotiate directly

[2] According to plaintiff, "Family Office" as a private wealth management advisory firm that serves ultra-high-net-worth individual or family investors. A principal function of family offices is to invest assets in their control, typically belonging to such investor.

with Syed and Klein (a partner from Gideon). Plaintiff says she "…remained in touch with both GIT Group and Gideon Asset Management to ensure that efforts to consummate the deal were on track, but I stepped away from the negotiations" (Friedman Aff ¶ 10).

In May of 2017, GIT and Gideon closed the financing for GIT's Flatiron Hotel Project. Gideon agreed to put $600,000 in capital funding toward the Flatiron Hotel Project and would receive a 50% equity / ownership interest in exchange. $100,000 of the $600,000 that Gideon provided was a loan.

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; Dauman Displays v Masturzo, 168 AD2d 204, 205 [1st Dept 1990], lv dismissed 77 NY2d 939 [1991]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

Defendant contends that there is no writing that satisfies the Statute of Frauds. The question of whether an agreement satisfies the Statute of Frauds is a question of law (*Stevens v*

Publicis, S.A., 50 AD3d 253 [1st Dept 2008]). It is undisputed that the Statute of Frauds applies to an agreement between plaintiff and defendant for a finder's fee.

Under GOL Section 5-701(a)(10):

> 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…is a contract to pay compensation for services rendered in negotiating …of a business opportunity, business, its good will, inventory, fixtures or an interest therein…"
>
> Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman.

Electronic written communication, like emails and text messages, may satisfy the Statute of Frauds (*Naldi v Grunberg*, 80 AD3d 1, 6-7, 13 [1st Dept 2010]). A typed signature at the end of an email suffices as a signature under the Statute of Frauds (*Newmark & Co v 2615 East 17th Street Realty LLC*, 80 AD3d 476, 476 [1st Dept 2011] ["an e-mail sent by a party, under which the sending party's name is typed, can constitute a writing for purposes of the statute of frauds"]; *see also, Williamson v Delsener*, 59 AD3d 291, 291 [1st Dept 2009] [emails between counsel that contained counsel's printed names at the end of the emails constituted signed writings under the statute of frauds]). A writing satisfies the Statute of Frauds where it "sets forth the entire contract with reasonable certainty so that the substance appears from the writing alone" (*Atai v Dogwood Realty of NY, Inc.* 24 AD3d 695, 697 [2d Dept 2005]).

To satisfy the Statute of Frauds, a memorandum evidencing a contract and **subscribed by the party to be charged** must designate all parties, identify and describe the subject matter, and state all of the essential terms of a complete agreement (*see Kaplan v Lippman*, 75 NY2d 320,

235 [1990] [court held that the option agreement at issue satisfied the Statute of Frauds because the party to be charged, the sublessors, had signed the written sublease agreement that contained the option agreement]; *see also, Newmark & Co v 2615 East 17th Street Realty LLC,* 80 AD3d 476, 476 [1st Dept 2011]; *Beard v Chase,* 56 Misc3d 1202[A] at *4 [1st Dept 2017] [Statute of Frauds not met where receipts not signed by party to be charged]; *I.S. Design, Inc. v Gasho of Japan, International, Ltd.,* 269 AD2d 150, 151 [1st Dept 2000] [to satisfy the statute, promisee must prove a written agreement binding the alleged promisor, who must have subscribed to it]; *European American Bank & Trust Co. v Boyd*, 131 AD2d 629, 630 [2d Dept 1987] [that bank failed to subscribe to guarantee did not mean the guarantee was not binding on the guarantor, where the guarantor signed the guarantee]). The "essential terms" in finder's fee agreements include identification of the parties, the parties' objective, and the finder's compensation if the finder is successful.

The court reads the emails that defendant sent to plaintiff on March 23, 2017 and April 4, 2017, together. The emails involve the same transaction and represent a complete contract. Benny Bern, CEO for GIT, is "the party to be charged." Bern signed the April 4th email. He wrote: "do we agree on those terms? Please confirm. Thanks Benny" (Plaintiff's motion, Exh F). Plaintiff then telephoned Bern and said, "she did [confirm]" (Friedman Aff ¶ 8).

Plaintiff orally accepted the April 4th email (Friedman Aff ¶ 8). Defendant argues, however, that the oral acceptance does not satisfy the Statute of Frauds. Defendant contends plaintiff's failure to respond in writing shows no meeting of the minds or mutual assent. The court disagrees.

Plaintiff's acceptance of the terms over the telephone is inconsequential because Bern, the party to be charged, signed the April 4th email. Further, the two emails contain the essential

terms. The emails identify the parties as the GIT Flatiron Hotel, Bern who is CEO of GIT, and plaintiff Friedman. Bern explicitly states that the objective of the emails is to compensate plaintiff in return for procuring an investor to finance the Project. Therefore, the two emails together satisfy the Statute of Frauds and constitute an enforceable written contract.

However, as defendant aptly notes, this case contains more nuances than a straight-forward finder's fee deal. Defendant set $500,000 as the target capital to raise. Defendant explicitly states in the emails that the amount the investor provided to GIT could have been less or could have been more than $500,000. Bern wrote "If you [plaintiff] can get us the $500000, you [plaintiff] will get the same $25000 in commission (**or 5% of the amount if it will be less or more than $500000**)" (April 4, 2017 Email, plaintiff's Exh L) (emphasis added). Bern here contemplated different amounts of cash compensation in exchange for plaintiff finding an investor.

Irrespective of how much capital funding plaintiff procured from an investor, defendant insists that the agreement depended on plaintiff finding an investor to accept a 40% minority equity interest. Defendant asserts that "the deal was that plaintiff would be entitled to a 10% equity interest, plus a commission, on the express and sole condition that she obtained capital funding, in the amount of $500,000, for our hotel project from an investor, which investor, in consideration for providing $500,000 in capital would agree to accept only a 40% equity interest in the hotel project; not a single percentage more of equity" (Bern Aff ¶ 4). According to defendant, then, plaintiff failed to perform because Gideon took a 50% equity interest rather than 40%.

Plaintiff counters by arguing that Gideon received 50% equity because it invested more than $500,000. Plaintiff also claims that defendant's requirement that plaintiff find an investor

who would provide $500,000 in exchange for a 40% equity interest was merely illustrative, rather than an absolute condition. Thus, whether plaintiff failed to substantially perform because Gideon received a 50% equity interest is an issue of fact at this stage.

Further, plaintiff argues that Bern shut her out of negotiations with Gideon, thus frustrating her performance to find an investor to meet the specific condition of accepting a 40% minority equity interest. After that first meeting on April 6, Bern told plaintiff he did not want her involved in negotiations. Had plaintiff had more involvement in the negotiations, she arguably might have been able to secure a 40% interest from Gideon (*see* plaintiff's additional motion submission, letter dated 10.30.18, nyscef doc no 46).

Finally, text messages between plaintiff and defendant are in frequent contradiction. For instance, plaintiff argues in her papers that she is entitled to a $30,000 cash fee plus a 12% equity interest. But, in a text message to defendant, she writes "That is all I have to say. Please find a way to pay me. We are talking of only $25,000 as a fee for rais[ing] $500,000" (*see* Plaintiff's motion, Exh R). Plaintiff cannot even agree on what fee defendant should pay her – is it $30,000 or $25,000. In other places defendant Bern admits that he owes plaintiff a fee – "I will pay you asap and when we have…" (*see* Plaintiff's motion, Exh Q), and "If you get the fee now you will get zero shares. That's what you want" (*see* Plaitniff's motion, Exh R). For these reasons, and keeping in mind that discovery is in its very early stages, there is a disputed material issue of fact as to whether or not plaintiff substantially performed, that the court cannot determine at this juncture.

Accordingly, it is hereby

ORDERED that the court denies plaintiff's motion for summary judgment; and it is further

ORDERED that the parties are to appear for a conference on January 22, 2019 at 2:15p.m., at 71 Thomas Street, New York, New York.

Dated: 1/18, 2019

ENTER:

HON. MELISSA A. CRANE, J.S.C.

HON. MELISSA A. CRANE
J.S.C.