

<b>Ittman v Schlumberger</b>
2019 NY Slip Op 32155(U)
July 22, 2019
Supreme Court, New York County
Docket Number: 655976/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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INDEX NO. 655976/2018

DANIEL ITTMANN,

Plaintiff,

MOTION DATE 02/15/2019, 01/22/2019

- v -

MOTION SEQ. NO. 001 002

MARCEAU SCHLUMBERGER, CORAL REEF CAPITAL LP, CORAL REEF CAPITAL GROUP LP, CORAL REEF CAPITAL GROUP LLC

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 23, 26, 27, 28, 34

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16, 24, 30, 33

were read on this motion to/for COMPEL ARBITRATION

Motion sequences 001 and 002 are consolidated for disposition. Upon the foregoing documents and for the reasons set forth on the record (7/19/2019), Marceau Schlumberger, Coral Reef Capital L.P., and Coral Reef Capital Group L.L.C.'s (collectively, the Defendants) motion (Mtn. Seq. 001) to dismiss is granted solely to the extent that the complaint is dismissed without prejudice against Mr. Schlumberger, Coral Reef Capital L.P., and Coral Reef Capital Group L.P. The Defendants motion (Mtn. Seq. 002) to compel arbitration is denied with leave to renew.

This action arises from the Defendants' breach of an alleged oral agreement, pursuant to which the Defendants would provide Mr. Ittmann with compensation of 10% for gross fees regarding introductions that led to capital investments with Coral Reef Capital L.P. and Coral Reef Capital

Group L.L.C. (NYSCEF Doc. No. 1, ¶ 10, 12). Mr. Ittmann asserts that the parties' oral agreement was reduced to writing in an email exchange between Mr. Ittmann and Mr. Schlumberger (the **Ittmann Emails**). Mr. Ittmann claims that he was not adequately compensated for three transactions that he helped facilitate in breach of their alleged agreement (NYSCEF Doc. No. 1, ¶¶ 16-36).

Mr. Ittmann commenced this action on December 3, 2018 for: (1) breach of contract for the Seacrest Transaction (first cause of action), (2) quantum meruit for the Seacrest Transaction (second cause of action), (3) breach of contract for the Suntrust Transaction (third cause of action), (4) quantum meruit for the Suntrust Transaction (fourth cause of action), (5) breach of contract for the Shawnee Transaction (fifth cause of action), and (6) quantum meruit for the Shawnee Transaction (sixth cause of action).

#### **I. Motion Sequence 001 (Defendants' Motion to Dismiss the Complaint)**

The Defendants move to dismiss the complaint pursuant to CPLR § 3211 (a) (5) and (7). Under CPLR § 3211 (a) (5), a party may move to dismiss on the basis that an action is barred by the statute of limitations. Under CPLR § 3211 (a) (7), dismissal may occur where the pleading fails to state a cause of action. Dismissal under CPLR § 3211(a) (7) requires that a court take "the allegations asserted within a plaintiff's complaint as true and accord plaintiff the benefit of every possible inference, determining only whether the facts as alleged fit within any cognizable legal theory" (*Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008]).

### A. First, Third, and Fifth Causes of Action (Breach of Contract)

The Defendants argue that the claims for breach of contract are time barred by the six-year statute of limitations (CPLR § 213 (2)). In his opposition papers, Mr. Ittmann argues the doctrine of equitable estoppel tolled the statute of limitations because the defendants hid when the deals closed – *i.e.*, when his claims accrued (*Zumpano v Quinn*, 6 NY3d 666, 673-674 [2006]).

Mr. Ittmann has sufficiently pleaded that he was kept from timely bringing the suit because Mr. Schlumberger refused to advise whether the relevant transactions closed, removed transaction from the website, and deleted certain emails (NYSCEF Doc. No. 1, ¶¶ 30-32). As a result, it is unclear when Mr. Ittmann became aware that each transaction had closed. Under these circumstances, dismissal at this stage of the proceeding based on the statute of limitations is not appropriate.

With respect to the branch of the Defendants motion brought under CPLR § 3211 (a) (7), the Defendants argue that dismissal is required because (1) the Ittmann Emails do not support the existence of a contract and (2) the damages stated in the complaint are based on a percentage of the capital raised rather than fees earned by the Defendants. Both arguments fail. Simply put, the Ittmann Emails do not utterly refute the existence of a contract (and, in fact, suggest that some type of arrangement existed), and in any event, the Defendants did not move for dismissal under CPLR § 3211(a)(1) – *i.e.*, based on documentary evidence. With respect to the branch of the Defendants' motion based on the damages calculation, although the parties dispute the amount of damages that Mr. Ittmann may be entitled to – *i.e.*, 10% of gross fees or 10% of

capital raise – Mr. Ittmann has nevertheless pled damages sufficient to make out a claim for breach of contract at this stage of the proceedings. Accordingly, the Defendants’ motion to dismiss is denied as it relates to the first, third, and fifth cause of action for breach of contract.

**B. Second, Fourth, and Sixth Causes of Action (Quantum Meruit)**

The Defendants argue that the claims for quantum meruit be dismissed because Mr. Ittmann’s claims are brought pursuant to an express agreement. Mr. Ittmann argues that he has adequately pled the elements of quantum meruit. A claim for quantum meruit requires (i) the performance of services in good faith, (ii) the acceptance of the services by the person to whom they are rendered, (iii) an expectation of compensation, and (iv) the reasonable value of the services (*Martin H. Bauman Assoc, Inc. v H & M Intl. Transp., Inc.*, 171 A.D.2d 479, 484, 567 N.Y.S.2d 404 [1st Dept 1991]).

Here, the Defendants dispute the existence of any alleged oral or written agreement regarding Mr. Ittmann’s 10% compensation. Mr. Ittmann also sufficiently pled that he performed services accepted by the Defendants, he had an expectation of compensation, and that compensation would be 10%. As a result, Mr. Ittmann is entitled to assert quantum meruit as an alternative to breach of contract. Accordingly, the Defendants’ motion to dismiss is denied as it relates to the second, fourth, and sixth causes of action for quantum meruit.

**C. The Defendants Mr. Schlumberger, Coral Reef Capital Group, L.P., and Coral Reef Capital, L.P.**

The Defendants argue that the complaint be dismissed against Mr. Schlumberger because there is no basis to hold him individually liable for any alleged breach by the corporate defendants. The

court agrees. Mr. Ittmann does not provide any factual allegations that support a claim for piercing of the corporate veil (*see Sheridan Broadcasting Corp. v Small*, 19 AD3d 331 [1st Dept 2005]). Accordingly, the Defendants' motion to dismiss is granted without prejudice as it relates to Mr. Schlumberger.

The Defendants also argue that the complaint should be dismissed against (1) Coral Reef Capital Group, L.P. because no such entity exists and (2) Coral Reef Capital, L.P. because it was formed in October 2014 – *i.e.*, after the alleged agreement was entered into, where the allegations were simply that Mr. Ittmann entered into an agreement with certain entities that breached the agreement. The court agrees. In his opposition papers, Mr. Ittmann provides no factual allegations that Coral Reef Capital Group, L.P. was an entity related to this action, and fails to explain how Coral Reef Capital, L.P. could have been a party to the alleged agreement at issue when the company was created three years after the Ittmann Emails. Mr. Ittmann also failed to plead that Coral Reef Capital, L.P. expressly or impliedly assumed liability of any predecessor company in connection with the transactions at issue, all of which allegedly occurred between 2011 to 2012 (*see Kretzmer v Firesafe Prods. Corp.*, 24 AD3d 158, 158 [1st Dept 2005]). Accordingly, the Defendants' motion to dismiss is granted without prejudice and this case is dismissed as against Coral Reef Capital Group, L.P and Coral Reef Capital, L.P.

## II. Motion Sequence 002 (Defendants' Motion to Compel Arbitration)

The Defendants argue that the parties should be compelled to arbitration pursuant to a Consulting Agreement (the **Consulting Agreement**) that the Defendants claim was effective April 2010. In support of this motion, the Defendants proffer Mr. Schlumberger's affidavit and an unsigned

copy of the Consulting Agreement, which contains an arbitration provision. The Ittmann Emails do not evince an intent to arbitrate (*Helmsley v Wien*, 173 AD2d 280, 281 [1st Dept 1991] [explaining that before a court will order a party to arbitration, “there must be evidence ... of that party’s unequivocal intent to arbitrate the relevant dispute]) and the record is otherwise bereft of any such intent on behalf of Mr. Ittmann. Accordingly, the Defendants’ motion to compel arbitration is denied with leave to renew, by order to show cause, should discovery reveal an intent to arbitrate on behalf of Mr. Ittmann, either by the Defendants producing a signed copy of the Consulting Agreement or otherwise.

Accordingly, it is

ORDERED that defendants motion (Mtn. Seq. 001) to dismiss is granted solely to the extent that the complaint is dismissed without prejudice against Mr. Schlumberger, Coral Reef Capital L.P., and Coral Reef Capital Group L.P.; and it is further

ORDERED that defendants motion (Mtn. Seq. 002) to compel arbitration is denied with leave to renew.

7/22/2019  
DATE

  
ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE