SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

----------X

SONENSHINE PARTNERS LLC

Plaintiff,

- v -

DURAVANT LLC,

Defendant.

INDEX NO. 657208/2019

MOTION DATE 01/17/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 25
were read on this motion to DISMISS.

Upon the foregoing documents, it is

In Motion Sequence Number 001, defendant Duravant LLC (Duravant) moves, pursuant to CPLR 3211, to dismiss the December 5, 2019 complaint of plaintiff Sonenshine Partners LLC (SP) (*see* NYSCEF 12 [complaint]).

Background

The facts are taken from the complaint unless otherwise noted.

SP is a "global boutique investment bank" that, in 2018, "had access to a non-public, potentially lucrative deal involving the purchase of all or a portion of" nonparty entity M. J. Maillis Group (Maillis) (*id.* ¶ 2). SP had a close relationship with Maillis's board, senior management, and an undisclosed officer/director (Insider) (*id.*). SP alleges it offered the Maillis opportunity to Duravant, which expressed interest and "agreed, both verbally and in writing," that "Duravant would utilize SP as its buy-side investment banker" if a deal was reached in exchange for SP's information and access to Maillis (*id.*).

On May 3, 2018, SP and Duravant entered into a written agreement (NDA) which provides, in pertinent part, that SP would arrange a meeting between Duravant, SP, and the Insider regarding the potential Maillis opportunity (*id.* ¶ 3; NYSCEF 14 at 1 [NDA]). "In consideration for [Duravant's] attendance at the Meeting," and given the "sensitive nature" of the meeting, Duravant agreed not to disclose the existence of the meeting or any confidential information learned at the meeting (NYSCEF 14, ¶ 1). The NDA generally defines "Confidential Information" as all information learned at the meeting (*id.*).

In the NDA, Duravant further agreed:

> "In consideration of SP's coordination of the Meeting, [Duravant] will use commercially reasonable best efforts to ensure that SP is offered the opportunity to be engaged as Duravant's financial advisor with respect to a potential transaction involving [Maillis] on customary and market terms and conditions to be negotiated at the appropriate time"

(*id.* ¶ 2).

SP alleges that it provided Duravant with "non-public information and access" and, over the next several months, performed various investment banking services for Duravant upon request (NYSCEF 12, ¶ 4). Those services pertained to the potential Maillis deal and "included non-public financial information, market research, valuation information and advice, advice regarding competitive bidding and process information, [and] competitor intelligence and analyses of potential transactions regarding the potential deal" (*id.*). The potential deal contemplated over that span of time included the acquisition of Maillis in its entirety or the purchase of only a Mallis subsidiary, nonparty Wulftec International (Wulftec) (*id.*).

SP further states that, "towards the end of 2018, Duravant . . . proceeded to purchase Wulftec for approximately $250 million" without informing or involving SP, shortly after "SP

had conducted analyses regarding that potential scenario" and last provided services to Duravant with regard to the potential deal (*id.* ¶ 5).

Specifically, SP alleges that its Senior Managing Director, John Chrysikopoulos, had extensive previous experience with Maillis, which he "represented" in negotiations that resulted in the previous acquisition of Maillis by nonparty HIG Capital (HIG); thus, SP had "intimate knowledge of [the] operations, financial condition, and . . . relationships with members of [the] Board and Senior Management" of Maillis (*id.* ¶¶ 113).

On April 26, 2018, SP emailed a PowerPoint presentation it prepared regarding Maillis to two managing directors at nonparty private equity firm Warburg Pincus, the entity which owns Duravant (*id.* ¶ 20). In that communication and a detailed presentation, SP "pitched [its] relevant knowledge, relationships and other credentials that [it] could bring to a discussion concerning Maillis should [Duravant] have interest in considering an acquisition" (*id.* ¶¶ 21-22).

SP and Warburg/Duravant discussed a purchase of Maillis and, on April 27, 2018, SP sent "further proprietary, substantive, business information concerning the" opportunity (*id.* ¶ 22). Follow-up correspondence and meetings ensued between SP, Warburg, and Duravant, and SP coordinated a meeting with the Insider (*id.* ¶ 23). Prior to the meeting, Duravant entered into the NDA with SP (*id.* ¶¶ 25-32).

SP "delivered on its commitment" by scheduling the May 24, 2018 meeting with the Insider at Duravant's offices in Chicago (*id.* ¶ 33). SP then "began providing Duravant with investment banking services in connection with this potential transaction," was "task[ed]" by Duravant with "preparing an agenda for" the meeting, advised "how Duravant can position itself as a buyer," and provided information regarding Maillis's and HIG's operations, technologies, and growth potential (*id.* ¶ 34).

The Meeting was attended by SP, Duravant, and Maillis. The meeting concerned Maillis's business entities, including Wulftec, nonpublic financial information of Mailllis and its forecasted growth, and included an Insider-prepared presentation of sensitive business information (*id.* ¶ 35). SP alleges that it provided specific investment banking advisory services to Duravant, at its request, both before and after the meeting (*id.* ¶ 36).

The day following the Meeting, Duravant told SP that "[t]he discussion certainly helped [it] understand the business much better" and that it would review the opportunity further; on May 29, 2018, Duravant "tasked SP with creating a report outlining certain financial information of [Maillis] by business unit and a breakout of any savings" that would result from changing its "hub" business model (*id.* ¶ 37). In a series of emails in late-May 2018, SP informed Duravant that Wulftec "represented substantially all of [Maillis's] profits and . . . value" and that "any suitor considering a deal with [Maillis] . . . might consider a deal for the whole or a separation of [its business] divisions into separate transactions" (*id.* ¶¶ 38-39).

SP and Duravant continued corresponding from June through August regarding Maillis and SP provided various services during that time (*id.* ¶¶ 40-43). Specifically, in July 2018, Duravant directed SP to contact HIG "to discuss the possibility of . . . acquiring all or part of [Maillis]" and SP communicated with HIG through August (*id.* ¶¶ 44-45). In September 2018, SP presented to Duravant updated information regarding Maillis, including a "32-page book on Strategic Opportunities" in relevant industries and Duravant's competition for the deal (*id.* ¶ 46). After learning, in mid-September 2018, that HIG intended to sell Wulftec, alone, Duravant expressed to SP its interest in acquiring only Wulftec (*id.* ¶ 47).

While Duravant continued to express interest in the deal through November 2018, SP learned, through a public press release on December 21, 2018, that Duravant had acquired

Wulftec for approximately $250 million without SP's involvement as a financial advisor (*id.* ¶¶ 49-51). SP alleges that it is entitled to a 1% fee of the sale price (for a $2.5 million fee) plus reimbursement for expenses but Duravant has refused to honor its obligations under the NDA (*id.* ¶¶ 52-59).

SP asserts the following claims against Duravant in its complaint: (1) breach of the NDA regarding the purchase of Wolftec, entitling SP to $2.5 million as a "customary and market" fee for its services as the buy-side investment financial advisor; and (2) quantum meruit/unjust enrichment in the amount of $2.5 million for the value of the buy-side investment services rendered (*id.* ¶¶ 62-75).

Duravant now moves, pursuant to CPLR 3211, to dismiss the complaint.[1]

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff[] the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994] [internal citation omitted]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not "accorded their most favorable intendment" (*Summit Solomon & Feldman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]). Dismissal under subsection (a) (1) is warranted where the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon*, 84 NY2d at 88).

[1] While Duravant does not identify under which subsections of CPLR 3211 it moves, it apparently seeks dismissal under CPLR 3211 (a) (1) and (a) (7) based on its memoranda of law.

1. Breach of Contract

To state a viable claim for breach of contract, a plaintiff must allege facts establishing "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Markov v. Katt*, 176 AD2d 401, 401-402 [1st Dep't 2019] [internal citations omitted]). A valid, enforceable contract must contain "a manifestation of mutual assent to essential terms" of the agreement (*Cobble Hill Nursing Home, Inc. v Henry and Warren Corp.*, 74 NY2d 475, 483 [1989]).

Here, there is no dispute that the parties had an agreement relating to SP's employment as a financial advisor. The NDA required Duravant to "use commercially reasonable best efforts to ensure that [SP] is offered the opportunity to be engaged as Duravant's financial advisor . . . on customary and market terms and conditions to be negotiated at the appropriate time." SP argues this constitutes a binding agreement that it must be retained as a financial advisor for the proposed transaction. In response, Duravant argues that it is, at most, an unenforceable "agreement to agree." The Court finds that the answer lies between these two poles.

The NDA is not, on its face, a retention agreement. As Duravant correctly points out, the conditional language in the NDA cannot reasonably be read to impose an unconditional obligation upon Duravant to retain SP. If the parties intended that Duravant was *required* to retain SP, they easily could have done so. They did not. The Court will not accept SP's invitation to rewrite the contract to include such an unconditional retention provision.

That said, the NDA imposed an obligation upon Duravant to do *something* in exchange for SP's services. The issue is whether Duravant's promise to use commercially reasonable best efforts can, in these circumstances, be construed as something more than an unenforceable "agreement to agree." The Court finds that it can.

While "a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" (*Joseph Martin, Jr. Delicatessen Inc. v Schumacher*, 52 NY2d 105, 110 [1981]), an agreement will not necessarily fail for indefiniteness where "a methodology for determining the [cost] was to be found within the four corners of the [contract]" or where "it invite[s] recourse to an objective extrinsic event, condition or standard on which the amount was made to depend" (*id.*). The Court of Appeals has cautioned that the doctrine of indefiniteness, if "applied with a heavy hand[,] . . . may defeat the reasonable expectations of the parties in entering into the contract" (*Cobble Hill Nursing Home, Inc. v Henry and Warren Corp.*, 74 NY2d 475, 483 [1989] [internal citations and quotation marks omitted]). Indeed, "[i]t is to be sparingly used, as a 'last resort' and only when an agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear' " (*Cowen & Co., LLC v Fiserve, Inc.*, 41 AD3d 18, 21-22 [1st Dept 2016], quoting *Cobble Hill Nursing Home, Inc.*, 74 NY2d at 483).

Affording the Complaint its most liberal construction, SP states a viable claim that Duravant failed to use commercially reasonable efforts to ensure that it would give SP an opportunity be engaged as its financial adviser on customary market terms and conditions. Although Duravant argues that it seriously considered retaining SP as its financial advisor, that assertion is based on pre-answer, disputed factual assertions that cannot be considered in resolving a motion to dismiss. Moreover, the fact that the NDA references "customary market terms and conditions," rather than specific monetary terms, does not render the agreement unacceptably indefinite (*see Cowen & Co., LLC*, 41 AD3d at 21-22 [finding a fee provision based on "commercial practice or trade usage" was "sufficiently definite" to be enforceable]).

Given that Duravant had control over whether SP would be retained; that it allegedly accepted SP's introduction to the target and encouraged its follow-on work; that it allegedly proceeded with the transaction without ensuring SP the opportunity to be retained; and that the NDA described the terms of the proposed retention of SP with reference to identified commercial practice and/or trade usage, the Court finds that SP has adequately pleaded its contract claim to avoid a summary disposition via a motion to dismiss.

2. Quantum Meruit/Unjust Enrichment

SP's quantum meruit and unjust enrichment claims are duplicative of its contract claims and thus must be dismissed because the claims arise from the same facts and seek identical damages (*see e.g. Tozzi v Mack*, 169 AD3d 547, 548 [1st Dept 2019]).

Under New York law, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same transaction" (*Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 NY2d 382,388 [1987]). Although such claims may be pleaded in the alternative when there is a dispute as to the existence of an enforceable contract, here there is no question that there is an express contract governing the subject matter and arising out of the same transaction (*see Benham v eCommission Solutions*, 118 AD3d 605, 606-607 [1st Dept 2014] [dismissing unjust enrichment claim as duplicative of contract claim that had been dismissed as an "agreement to agree"]). To the extent SP has a viable claim to recover its proposed $2.5 million "customary" fee, it must establish that it was entitled to such a fee under the parties' express agreement governing their relationship.

Even if SP's claims were not duplicative, they would be barred under the Statute of Frauds. Specifically, "a contract to pay compensation for services rendered in negotiating . . .

the purchase, sale, [or] exchange[] . . . of a business opportunity, business, its good will, inventory, fixtures or an interest therein" is void unless it is in writing (GOL § 5-701 [a] [10]). "'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction" (*id.*). GOL 5-701 (a) (10) applies "to a contract implied in fact or in law" (*id.*).

As discussed above, the NDA is not an agreement that, on its face, entitled SP to be retained as Duravant's financial advisor in connection with the prospective sale; rather, the NDA procured a meeting with the Insider in exchange for the opportunity to be retained, subject to later negotiations. To the extent that SP's combined quantum meruit-unjust enrichment claim seeks to recover for services not encompassed in the unenforceable NDA, the claim is barred by the statute of frauds.

Under *JF Capital Advisors, LLC v Lightstone Group, LLC* (25 NY3d 759, 765-767 [2015]) and *Snyder v. Bronfman* (13 NY3d 504, 507-509 [2009]), claims for quantum meruit and unjust enrichment fall outside the scope of § 5-701 where services are performed by a plaintiff to enable a defendant to *determine whether to negotiate*, rather than *in furtherance of negotiation*. In *Snyder*, the plaintiff alleged, in connection with its equitable claim, that he performed various services, including "years of work" to find the multi-billion-dollar business interest that was ultimately acquired (*Snyder*, 13 NY3d at 507-509). Specifically, the *Snyder* plaintiff alleged that he "developed . . . a series of business relationships with key figures in the corporate and investment banking communities," "met with defendant and defendant's other business associates to discuss possible acquisitions," "worked on several aborted deals," and "was a major contributor" to the defendant's eventual acquisition the business (*id.*).

Distinguishing *Snyder*, the Court of Appeals held in *JF Capital* that "tasks performed so as to inform the defendants whether to partake in certain business opportunities were not performed within the meaning of assisting in the negotiation or consummation of a business opportunity" (*see Dorfman v Reffkin*, 144 AD3d 10, 16-20 [1st Dept 2016] [discussing *Snyder* and *JF Capital*], quoting *JF Capital Investors, LLC*, 25 NY3d at 765-767).

In *Dorfman*, contrasting *Snyder* and *JF Capital*, the court noted that the plaintiff's quasi contract claims involved a mixture of services performed in both the "whether to negotiate" and "assisting to negotiate" categories and found that the equitable claims were not barred by the statute of frauds "only insofar as they involved services that went beyond the negotiation or consummation of a business opportunity" (*Dorfman*, 144 AD3d at 19-20). The *Dorfman* plaintiff, however, assertedly performed services that "clearly extend[ed] beyond the negotiation of a business opportunity, including developing materials to secure investor backing, recruiting engineers and others to join [the venture], and developing the details of how [its] software product, web, and mobile applications would be 'architected' " (*Dorfman*,144 AD3d at 15).

Here, SP's alleged services for Duravant all involve SP's utilization of its "know-how" and "know-who" to prepare and assist Duravant to negotiate with Maillis/HIG and, ultimately, acquire Maillis or its subsidiary, Wulftec. Under the circumstances presented here, near all of the services for which SP seeks compensation were performed in the furtherance of Duravant's negotiations regarding an acquisition of Maillis and/or Wulftec and fall within the scope of § 5-701 (*see e.g. Eljm Consulting, LLC v Santoni S.P.A.*, 2018 N.Y. Slip Op. 31736[U], at 15-17 [Sup Ct, NY County 2018]). SP alleges that it brought the Maillis opportunity to Durvant and its parent entity, which expressed interest in the prospective deal, and that SP's services allegedly performed thereafter assisted Duravant to negotiate for and acquire Wulftec, Maillis's subsidiary

(*see generally* NYSCEF 12 [alleging that it connected Duravant with the Insider, used its connections to HIG and Maillis to obtain negotiating information and advantages, and prepared various financial reports regarding market, competition, and growth potential relating to the deal]).

In sum, SP introduced Duravant to the Insider, called on connections at HIG/Maillis, including Maillis's directors and officers, and provided strategic acquisition advice, market/industry valuation information, and generally used SP's connections and insight to give Duravant an advantage against its competitors, all towards the goal of procuring Duravant's acquisition. Thus, SP's alleged services were performed in the role of "an 'intermediary' " and it now "seek[s] recovery for its 'know-how' or 'know-who,' i.e., the 'use [of] 'connections', ... 'ability', and ... 'knowledge' to arrange for [defendants] to meet 'appropriate persons' in their business pursuits" (*JF Capital Advisors, LLC*, 25 NY3d at 767 [internal quotation marks omitted], quoting *Freedman v Chem. Const. Corp.*, 43 NY2d 260, 267 [1977]).

Further, the court, "analyzing the instant allegations, on a case-by-case basis, . . . cannot say that the application of the statute of frauds [to the equitable claims] produces a result that is against good conscience" (*ELJM Consulting, LLC v Santoni S.P.A.*, 2018 N.Y. Slip Op. 31736[U], at 16-17 [Sup Ct, NY County 2018] [noting that dismissal of even the *Snyder* plaintiff's claims, seeking a significant share of the $2.6 billion transaction, were not exempt from § 5-701 as causing an "egregious" result]). Accordingly, here, "while it may be unfair for plaintiff not to be compensated for its work, it is not unconscionable" and the equitable claims are not otherwise exempt from the statute of frauds (*see id.* ["(A)llowing one sophisticated business entity to escape its alleged promises to another sophisticated business entity under application of the Statute of Frauds does not render a result so inequitable and egregious as to

shock the conscience and confound the judgment."]; *cf. also Cohen v Trump Org. LLC*, 2019 N.Y. Slip Op. 32565[U], at 27 [N.Y. Sup Ct, New York County 2019] [reaching the same conclusion in the context of a promissory estoppel claim]).

The court rejects SP's argument that its entire quasi-contract claim is outside the reach of the statute of frauds because a principal partner of SP is an attorney in New York State. Mr. Sonenshine is not a party to any of the underlying transactions; rather, he was acting, when at all, on behalf of SP, not individually. The cases cited by SP on that issue all involve cases in which the attorney is an individual party, and a contrary ruling here would exempt entire industries and purported transactions from the statute of frauds simply by employing an attorney in good standing for some aspect of a transaction. In any event, SP's argument runs afoul of an ordinary reading of GOL § 5-701 (a) (10), which carves out this exception for "a contract to pay compensation to . . . an attorney at law," not an entity which employs or is owned by an attorney.

The court further rejects SP's argument that it's equitable claims are exempt from dismissal because the NDA is a qualifying writing that satisfies the statute of frauds. "In an action in Quantum meruit, . . . a sufficient memorandum need only evidence the fact of plaintiff's employment by defendant to render the alleged services" (*Morris Cohon & Co. v Russell*, 23 NY2d 569, 575-576 [1969]).

Here, even assuming that the NDA adequately "set forth an objective standard for determining the compensation to be paid to the plaintiff" and the payment structure was sufficiently "definite and enforceable" (*see Trueforge Glob. Mach. Corp. v Viraj Group*, 84 AD3d 938, 939 [2d Dept 2011], citing *Morris Cohon & Co.*, 23 NY2d at 576), the NDA fails to satisfy § 5-701 because the most fundamental element—the "fact of plaintiff's employment"—is

missing (*see Rouzani v Rapp*, 203 AD2d 446, 447 [2d Dept 1994]). Further, in opposition to this motion, SP submits no other writings to support its quasi contract claims.

The court has considered the parties' remaining arguments and finds that they are without merit.

Accordingly, it is

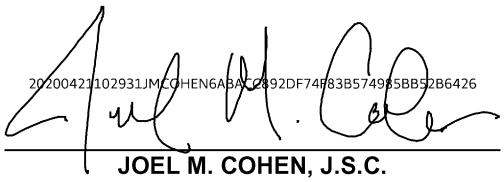
ORDERED that the motion of Defendant Duravant LLC is **denied** with respect to SP's first cause of action (breach of contract) and **granted** with respect to SP's second cause of action (quantum meruit-unjust enrichment); it is further

ORDERED that plaintiff's second cause of action is dismissed; it is further

ORDERED that defendant shall answer or otherwise respond to the complaint within 20 days of the court's filing of this decision & order on NYSCEF; and it is further

ORDERED that the parties will appear for a preliminary conference on June 9, 2020 at 11 AM.

This constitutes the decision and order of the Court.



4/21/2020
DATE

JOEL M. COHEN, 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