

**Henan Chengxin Overseas Affairs Servs. Co., Ltd. v
EEGH, L.P.**

2020 NY Slip Op 31672(U)

May 26, 2020

Supreme Court, New York County

Docket Number: 652391/2019

Judge: Joel M. Cohen

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

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HENAN CHENGXIN OVERSEAS AFFAIRS SERVICES
CO., LTD.,

Plaintiff,

- v -

EEGH, L.P., JOHN DOES 1-10, JANE DOES #1-10,
COMPANY ABC #1-10

Defendant.

INDEX NO.	652391/2019
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MOTION SEQ. NO.	002
DECISION + ORDER ON MOTION	

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 30, 31, 32, 33, 34

were read on this motion for DISMISSAL.

In January 2015, defendant EEGH, L.P (“EEGH”) hired plaintiff Henan Chengxin Overseas Affairs Services Co., Ltd. (“Henan”), a Chinese corporation, to find investors for EEGH’s real estate projects in the New York Metropolitan Area (the “Agreement”).

Pursuant to a copy of the Agreement submitted by EEGH, and not disputed by Henan, Henan was to receive a \$50,000 finder’s fee for each investor it successfully referred. In addition, Henan could receive additional “Success Fees” if it successfully referred at least five investors within the first four months or eight investors within the first eight months following the Agreement’s execution.

Henan alleges that it received the finder’s fees for eleven investors it referred to EEGH (See NYSCEF 19 [Am. Compl. ¶ 24]) but that EEGH refused to pay the applicable Success Fees with respect to those investors (*Id.* at ¶¶ 31, 46). Significantly, Henan does not allege that it successfully referred at least five of those investors within the first four months after the

Agreement's execution or at least eight investors within the first eight months after the Agreement's execution.

In motion sequence number 002, EEGH moves to dismiss Henan's Amended Complaint pursuant to CPLR §§ 3211(a)(1) and (7). For the reasons set forth below, EEGH's motion to dismiss is granted.¹

LEGAL ANALYSIS

On a motion to dismiss pursuant to CPLR §§ 3211 (a)(1) and (7), the Court must “accept the complaint’s factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within a cognizable legal theory.” (*Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 AD3d 367, 270-71 [1st Dept 2014] [internal quotation marks and citation omitted]; *see also Leon v. Martinez*, 84 NY2d 83, 88 [1994]). 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 CPLR § 3211 (a)(1) is warranted where documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law.” (*Leon*, 84 NY2d at 88). Here, EEGH offers the Agreement as documentary evidence in support of its motion.

A. The Agreement Submitted by EEGH is Documentary Evidence

To be considered as documentary evidence, a document's “content must be essentially undeniable and, assuming the verity of the paper, and the validity of its execution, will itself

¹ The Affirmation submitted by Henan's counsel does not comply with the Part 3 Practice Rules, which require that legal argument be contained in a Memorandum of Law. Counsel is cautioned to follow the Court's rules in the future.

support the ground on which the motion is based.” (*Amsterdam Hospitality Grp., LLC v. Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [internal quotation marks and citation omitted]).

Here, the copy of the Agreement submitted by EEGH is signed by a representative of Henan, but not by EEGH. Moreover, as Henan points out, the copy of the Agreement does not include the May 18, 2015 amendment that is referenced in the Complaint. Henan does not, however, suggest that the Agreement submitted with the motion to dismiss is inaccurate or that the May 2015 amendment is relevant to the dispute.

Given that Henan does not dispute that the document – which Henan itself signed – accurately sets forth the relevant terms of the parties’ agreement with respect to its entitlement to Success Fees, the Agreement (despite its imperfections) properly is considered documentary evidence for purposes of this motion. (*See Options Group, Inc. v. Vyas*, 91 AD3d 446, 447 [1st Dept 2012]; *see also Flores v. Lower East Side Service Center, Inc.*, 4 NY3d 363, 369 [2005] [“an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound”]; *see also* NYSCEF 33 [“Email from Plaintiff to Defendant - January 27, 2015” stating that Agreement was executed on January 1, 2015]).

B. Henan Has Not Pleaded Any Viable Causes of Action

To state a viable claim for breach of contract, Henan must allege facts sufficient to show the existence of a contract, plaintiff’s performance thereunder, and defendant’s breach thereof, resulting in damages to plaintiff. (*See Harris v. Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). According to the Agreement, Henan was entitled to Success Fees only if it successfully referred no less than five investors to EEGH within four months of the Agreement’s

execution or no less than eight investors within eight months. (*See* NYSCEF 25 [Agreement § 5]).

As noted above, although Henan alleges that it satisfied the obligations necessary for it to receive finder's fees pursuant to the Agreement (\$50,000 per referral), it does not allege that it successfully referred the required number of investors to EEGH within the specified amount of time to qualify for Success Fees. Therefore, Henan fails to state a claim for breach of contract.

Henan also fails to state viable claims for promissory estoppel and unjust enrichment. Where there is a valid and enforceable contract that governs a subject, recovery in quasi-contract, such as unjust enrichment and promissory estoppel, cannot be maintained for events arising out of that same subject. (*See Clark-Fitzpatrick, Inc. v. Long Is. R. R. Co.*, 70 NY2d 382, 388 [1987]).

The Court will grant Henan thirty days to seek leave to file a Second Amended Complaint if it believes it can remedy the deficiencies noted above.

CONCLUSION

In accordance with the foregoing, it is

ORDERED that EEGH's motion to dismiss is **granted** and Henan's complaint is dismissed without prejudice; it is further

ORDERED that Henan has thirty days to seek leave to amend and submit a Second Amended Complaint; and it is further

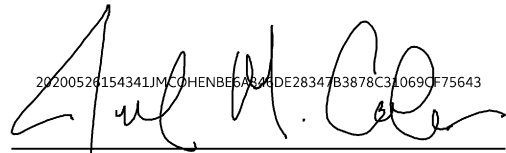
ORDERED that if after thirty days, Henan has not sought leave to amend and submitted a Second Amended Complaint, EEGH can submit a judgment dismissing the case with prejudice.

This constitutes the Decision and Order of the Court.

5/26/2020

DATE

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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE