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| Ostojic v Life Med. Tech., Inc. |
| 2020 NY Slip Op 33747(U) |
| November 10, 2020 |
| Supreme Court, New York County |
| Docket Number: 653446/2020 |
| Judge: Arlene P. Bluth |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

-----X

GORDON OSTOJIC,

Plaintiff,

- v -

LIFE MEDICAL TECHNOLOGIES, INC., CAROL
FITZGERALD

Defendant.

-----X

INDEX NO. 653446/2020

MOTION DATE 11/09/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISS.

The motion to dismiss by defendants is granted.

Background

This action arises out of a purported settlement agreement from case in federal court in Manhattan. In the underlying case, plaintiff (along with dozens of other plaintiffs) brought a lawsuit claiming that defendants improperly invested their money in Life Medical in relation to an allegedly fraudulent private offering.

Plaintiff claims that the case settled in 2017 but that defendant Fitzgerald refuses to execute her portion of the settlement contract and now plaintiff brings this litigation to enforce the settlement. Fitzgerald was the former CEO and President of Life Medical.

Defendants move to dismiss on the ground that plaintiff failed to get the settlement agreement finalized and executed and plaintiff failed to restore the case to the calendar of the federal judge that handled the underlying litigation. Defendants argue that they were compliant

with the settlement agreement but claim that plaintiff's law firm failed to get the approvals of all of the plaintiffs in order to create a binding agreement. They point out that the order in the federal case disposing of the underlying litigation directed that the parties should restore the action if the settlement was not finalized within 30 days.

Defendants attach correspondence between defendant Fitzgerald and the federal judge in which the judge stated that the Court did not retain jurisdiction to enforce the settlement and that the parties had not moved to reopen the case within the 30-day time limit contained in the court's dismissal order.

In opposition, plaintiff emphasizes that he signed and returned the settlement documents (including the release and Schedule B) on December 18, 2017. Plaintiff admits that certain of his co-plaintiffs did not sign the agreement and were considered "missing" and other plaintiffs passed away. He argues that after the settlement was reached in principle, defendants improperly tried to add in a provision that all plaintiffs' signatures had to be collected before defendants would sign. Plaintiff contends that "Defendants' motion is garbage" and that there was a valid and binding agreement.

Discussion

"On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

“In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1), the documents relied upon must definitively dispose of plaintiff’s claim” (*Bronxville Knolls, Inc. v Webster Town Ctr. Partnership*, 221 AD2d 248, 248, 634 NYS2d 62 [1st Dept 1995] [citations omitted]). “[S]uch motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

The Court grants the motion. The complaint alleges two causes of action: one for breach of contract and the other for breach of implied covenant of good faith and fair dealing, both of which are based on a contract that was alleged formed in an email sent by defendant Fitzgerald on February 8, 2018.

“The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant’s failure to perform; and (4) resulting damage. A contract is formed when there are at least two parties with legal capacity to enter into a contract give their mutual assent to the terms of a contract and there is consideration” (*John Anthony Rubino & Co., CPA, P.C. v Schwartz*, 28 Misc 3d 1233(A) [Sup Ct, NY County 2010]).

Here, there is no evidence that there was mutual assent to the terms of the contract. The email upon which plaintiff relies (NYSCEF Doc. No. 3) does not form the basis of a contract. In the email, defendant Fitzgerald states that “I would also like to have this not become antagonistic but this is jeopardizing Life Medical. . . .I realize it is difficult to get 55 signatures but it has been 8 weeks since you circulated the document and we have not seen the remaining documents or the settlement signatures completed” (*id.*). That cannot support a claim for a breach of contract. It

certainly demonstrates an intent to enter into a settlement agreement, but an intention is not the same as the formation of a contract. Clearly, this email (which plaintiff points to as the contract) identifies issues that need to be resolved before the agreement can be finalized.

“It is axiomatic that a party seeking to recover under a breach of contract theory must prove that a binding agreement was made as to all essential terms. Courts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract” (*Silber v New York Life Ins. Co.*, 92 AD3d 436, 439, 938 NYS2d 46 [1st Dept 2012]).

Although plaintiff complains that getting all signatures from the 55 plaintiffs was not a term of the settlement agreement, the fact is that according to plaintiff, defendants failed to execute the settlement agreement. And defendants may have had a good reason to wait for all the plaintiffs to sign off—finality over the previous case. Every plaintiff signing the agreement meant the dispute was over.

Plaintiff cannot seek to enforce a settlement agreement where it was never executed. Plaintiff’s counsel should have considered going back to the federal judge when it became clear that all signatures would not be obtained within 30 days or insisted that the federal court retain jurisdiction over the settlement. Instead, plaintiff seeks to hold defendants liable under an agreement that defendants never signed and that all of his co-plaintiffs never executed.

Plaintiff is understandably upset that he wanted the settlement to work out but that is not a basis to find that defendants are bound to settlement agreement with one of the 55 plaintiffs from a previous case.

The Court observes that the affidavit from defendant Fitzgerald, although not dispositive in this motion, depicts a timeline of events in which plaintiff’s counsel was simply unable to

finalize the settlement despite repeated requests from Fitzgerald (NYSCEF Doc. No. 8). It appears there were multiple changes in the attorney handling the case, which might explain why the settlement was never finalized although it does not provide a basis for plaintiff's causes of action in this case. The Court is unable to find that defendants breached a contract or the covenant of good faith and fair dealing where the evidence shows plaintiff's counsel simply did not get all of the clients' signatures to settle the underlying case.

Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss the complaint is granted, and the Clerk is directed to enter judgment accordingly along with costs and disbursements after presentation of proper papers therefor.

ARLENE P. BLUTH, J.S.C.

11/10/2020
DATE

CHECK ONE:

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APPLICATION:

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