Chun Ho Chung v William Schwitzer & Assoc., P.C.
2020 NY Slip Op 35199(U)
August 31, 2020
Supreme Court, New York County
Docket Number: Index No. 654961/2017
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
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CHUN HO CHUNG,

Plaintiff,

against-

WILLIAM SCHWITZER & ASSOCIATES, P.C.,

Defendants.
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DECISION & ORDER
Index No. 654961/2017

Mot. Seq. Nos.: 008-009

O. PETER SHERWOOD, J.:

The cases captioned *Chun Ho Chung v William Schwitzer & Associates, P.C.,* Index No. 654961/2017 ("Chung Action") and *William Schwitzer & Associates, P.C., v Chun Ho Chung*, Index No. 655049/2017 ("WSA Action") were consolidated for all purposes on September 10, 2018 and continue under Index No. 654961/2017 (*see* Doc. 99). [1] These motions are consolidated for disposition.

Under motion sequence number 008, defendant William Schwitzer & Associates, PC ("WSA") moves for summary judgment on its causes of action alleging faithless servant and misappropriation and for summary judgment to dismiss plaintiff's breach of contract, promissory estoppel, unjust enrichment, Civil Rights Law § 51 ("Section 51"), and declaratory judgment claims. Under motion sequence 009, plaintiff Chun Ho Chung ("Chung") in the Chung Action and defendants Chung and Napoli Shkolnik, PLLC ("Napoli") in the WSA Action, move for summary judgment on Chung's breach of contract, promissory estoppel, and unjust enrichment claims, and for summary judgment to dismiss WSA's misappropriation, slander, and faithless servant claims.[2] The facts are taken from the parties' rule 19-a statements.

[1] References to "Doc." followed by a number refer to documents e-filed in the action bearing index number 654967/2017 in New York Supreme Court Electronic Filing (NYSCEF) system unless otherwise indicated.

[2] Slander is the only claim asserted against Napoli. Accordingly, in this decision and order only the slander claim relates to Napoli.

I. BACKGROUND

William Schwitzer ("Schwitzer") is the sole equity partner of WSA, a personal injury law firm (Plaintiff's Counter Facts ¶¶ 1-5 [Doc. 216]). Chung is an attorney licensed to practice law in New York who had been practicing law in South Korea since graduating law school in 1999. In February 2014, Chung had a job interview in New York with Schwitzer (Defendant's Counter Facts ¶3, 6-7 [Doc. 206]). The parties dispute whether that interview was immediately followed by a meeting between Chung and WSA senior attorney John Merlino ("Merlino"), and whether the two discussed specific terms of the employment arrangement, specifically salary and origination fees to be paid as part of Chung's compensation (*id.* ¶¶ 8-10, 12-15). Following his return to South Korea, Chung and Merlino exchanged a series of emails regarding potential employment (*id.* ¶¶ 11-22).

The post-interview emails are at the heart of the parties' contentions as to the terms of Chung's employment, especially regarding the circumstances under which Chung would receive origination fees (Plaintiff's Counter Facts ¶¶ 22-24, 72-73 [Doc. 216]). In an email to Chung dated February 7, 2014, Merlino wrote, "I think its best to submit what we discussed at our last meeting in a written format which memorializes what you understood and what you expect as compensation so I can review with William" (Doc. 175). On March 21, Chung sent Merlino an email asking for proof of employment to be sent to an apartment rental agent: "Can you send me by e-mail the items we discussed and agreed during our last conversation? My annual base salary of $60,000 plus 25%-30% of firm's success fee on the clients that I bring in and May 1 starting date." (Doc. 181). Merlino responded on March 24, "Correct those are the terms Schwitzer stated regarding your employment at the firm starting May1st (sic)" (*id.*). WSA insists, however, that "the phrases 'bring in' and '25%-30% of firm's success fee' are facially ambiguous terms" such that there was no meeting of the minds between the parties (Defendant's Counter Facts ¶ 22 [Doc. 206]).

Chung began work at WSA on May 5, 2014. During his employment, Chung was listed as the referral source on registration statements filed with the Office of Court Administration ("OCA") in two-hundred and sixty-two cases. The parties dispute the significance of this fact given WSA's internal procedures (*id.* ¶¶ 36-38). The parties further dispute the number of cases

Chung brought in through his personal network, and whether or not Chung's arrival at the firm resulted in an increase in the volume of cases on behalf of clients of Korean extraction (*id.* ¶ 40; Plaintiff's Counter Facts ¶ 67).

Advertising using Chung's likeness began appearing in WSA ads placed in Korean newspapers in the summer of 2014 and was approved by Schwitzer (*id*. ¶¶ 24, 28). The parties dispute whether Chung had authorization to run the advertisements, including details of instructions, media outlets, purchasing, and total budget without Schwitzer's signoff (*id.* ¶¶ 25-27, 29; Plaintiff's Counter Facts ¶¶ 49-52, 77). Chung eventually added his name and cell phone number to the advertisements, but the parties dispute the circumstances as to how it came about (*id.* ¶¶ 32-33; Plaintiff's Counter Facts ¶¶ 53-54).

In June, 2017, Schwitzer learned that Chung had been referring cases to another attorney, Chrissy Grigoropoulos ("Grigoropoulos ") (*id.* ¶¶ 46-47). Chung disputes the number of referrals made, whether Grigoropoulos paid him for the referrals, and whether the clients came from Chung's personal network or through the ads (*id.* ¶¶ 37-45). Chung maintains WSA had already rejected the cases referred and that he had the authority to determine whether a matter should be referred (*id*. ¶¶ 45-48). Schwitzer confronted Chung about these cases but rather than fire him, paid Chung $50,000 to stay with the firm (Defendant's Counter Facts ¶¶ 49-55). Schwitzer described the payment as a "peace offering", while Chung recalled it as a "good faith payment of overdue attorney fees" (*id*. ¶¶ 56-59). Chung left WSA later in June, 2017, and began working for Napoli. Once with Napoli, Chung met with former WSA client Park (*id.* ¶70). The parties dispute whether Chung told Mr. Park that Schwitzer was "connected with the Mafia" and that WSA "does not pay settlement checks" (*id*. ¶¶ 73-76).

Chung filed his complaint against WSA on July 21, 2017. The complaint alleges five causes of action for breach of contract, promissory estoppel, unjust enrichment, violation of New York Civil Rights Law §51 and declaratory judgment (Doc. 1). WSA denied the allegations in the complaint and asserted affirmative defenses based on the Statute of Frauds, waiver and unclean hands. WSA also filed a separate complaint against Chung and Napoli on July 26, 2017, and an amended complaint on February 14, 2018 alleging unfair competition, misappropriation, slander, faithless servant, and unjust enrichment. On September 10, 2018, the court consolidated the two cases for all purposes (Stipulation, Doc. 99).

II. LEGAL STANDARD

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.,* 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez, supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver,* 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop,* 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.,* 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.,* 294 AD2d 348 [2d Dept 2002]).

III. DISCUSSION

A. Breach of Contract

To sustain a breach of contract cause of action, Chung must show: (1) an agreement; (2) his performance; (3) WSA's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . .. Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id*. at 67). Where the terms of a contract are susceptible to at least two reasonable interpretations, and the intent must be gleaned from disputed evidence or inferences outside the written words, it becomes a matter of fact that must be resolved by trial (*see Yanuck v Simon Paston & Sons Agency, Inc*., 209 AD 2d 207, 208 [1st Dept 1994]).

Chung's motion for summary judgment on the breach of contract claim shall be denied. The series of emails cited as evidence of offer and acceptance of a written contract do not establish a meeting of the minds because the referral fee term for cases that Chung "brings in" is susceptible to more than one reasonable interpretation and the fee structure of referrals of "25%-30%" is not fixed. Contemporaneous emails between Chung and his friend Alan Pahng illustrate that the phrase "brings in" is susceptible to multiple interpretations. Chung believed he should participate in fees earned from cases brought in through both personal contracts and ads. Pahng believed fee sharing was limited to the former (*see* Doc. 152). Moreover, evidence of how Chung was compensated once at the firm shows he was not being compensated on a fee sharing basis at any time. Instead, he received a salary and was issued a W-2 which Chung never questioned. Any reliance on an oral contract arising from the meeting with Merlino is barred by the Statute

of Frauds even if the existence and specific terms of an oral contract were not in dispute.[3] Because the terms of the alleged oral contract provided no time limitation on WSA's obligation to pay fees to Chung, the measure of compensation could not be fixed within one year. The alleged oral agreement sets an indefinite obligation and, in the context of a commission-based employment agreement, is unenforceable (*see Martocci v Greater N.Y. Brewery*, 301 NY 57, 62-63 [1950]; *see also Komlossy v Faruqi & Faruai, LLP*, 714 F Appx 11, 13 [2d Cir 2017]) where the Second Circuit barred enforcement of a similar oral contract between an attorney and her former firm that promised her twenty percent referral fees for cases she produced. The $50,000 payment to Chung in June 2017 does not constitute partial performance sufficient to overcome the Statute of Frauds because Chung cannot establish that the payment was "unequivocally referable to the [alleged] oral agreement and coupled with an element of detrimental reliance" (*Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v Aegis Grp. PLC*, 93 NY 2d 229, 235 [1999]. The absence of an enforceable oral agreement, however, does not require that WSA's motion to dismiss the breach of contact claim be granted. The 2014 email exchange between Chung and Merlino shows at least two reasonable interpretations to the terms of an agreement and Merlino's response that Chung had conveyed the terms correctly is at least an indication of agreement to terms sufficient to raise a dispute of material fact.

B. Equitable Claims for Referral Fees

1. Promissory Estoppel

The elements of a cause of action based upon promissory estoppel are: (1) a clear and unambiguous promise; (2) reasonable and foreseeable reliance by the party to whom the promise is made; and (3) an injury sustained in reliance on that promise (*see Williams v Eason*, 49 AD3d 866, 868 [2d Dept 2008]; *Guerri v Associates Ins. Co.*, 248 AD2d 356, 357 [1998]). Here, WSA's motion for summary judgment to dismiss the promissory estoppel claim shall be granted. New York law does not recognize promissory estoppel in the employment context, especially where, as here, plaintiff still received a salary (*see Bessemer Trust Co., N.A. v Branin*, 498 F

[3] Chung's deposition testimony that during a second meeting with Merlino in February, 2014, Merlino said Chung would receive 25% from the ad and 30% from any personal network (Doc. 167, p. 45-46), is not reflected in Chung's email to Merlino in March and is unsupported by any other evidence.

Supp 2d 632, 639 [SD NY 2007]). The First Department has "consistently held that a change of job or residence, by itself, is insufficient to trigger invocation of the promissory estoppel doctrine" (*Cunnison v Richardson Greenshields Secur.*, Inc., 107 AD2d 50, 53 [1st Dept 1985]). Accordingly, Chung's motion for summary judgment as to his second cause of action fails because there is insufficient evidence from which a reasonable jury could conclude that WSA made a clear and unambiguous promise, and testimony regarding the parties' intent is contradictory. Moreover, Chung's motion fails because the doctrine of unclean hands bars equitable claims where, as here, he breached the fiduciary duties owed to WSA as demonstrated by his faithless servitude (*see Ross v Moyer*, 286 AD2d 610, 611 [1st Dept 2001]).

2. Unjust Enrichment

WSA's motion for summary judgment to dismiss the unjust enrichment claim shall be granted and Chung's motion denied. "Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd*. 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead unjust enrichment, plaintiff must allege "that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co.*, 86 AD3d at 408).

It is undisputed that Chung received a salary through the entirety of his employment relationship with WSA and was compensated for the work he performed. A plaintiff cannot state a claim that his former employer was "unjustly" enriched at his expense when the employer compensated the plaintiff by paying him a salary (*see Levion v Societe Generale*, 822 F Supp 2d 390, 405 [SD NY 2011]). Further, Chung may not avoid the Statute of Frauds "by the simple expedience of recasting the action as one seeking damages for unjust enrichment" (*J.E. Cap. Inc. v Karp Family Assocs.*, 285 AD2d 361, 362 [1st Dept 2001]). Finally, as with the promissory estoppel claim, Chung's claim for unjust enrichment is barred by the doctrine of unclean hands due to his breach of fiduciary duties owed to WSA.

C. Faithless Servant

Under the faithless servant doctrine, "an employee who acts in any manner inconsistent with his agency or trust and fails to exercise the utmost good faith and loyalty in the performance of his duties is deemed a faithless servant and must account to his principal for secret profits [and forfeit] his right to compensation" (*Mosionzhnik v Chowaiki*, 41 Misc 3d 822, 831 [Sup Ct, NY County 2013] [internal quotation marks omitted]; *see also Feiger v Iral Jewelry, Ltd.*, 41 NY2d 928 [1977] ["One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary"]).

Here, WSA's motion for summary judgment on its affirmative faithless servant claim against Chung shall be granted and Chung's motion dismissing the claim fails. It is undisputed that while employed by WSA, Chung diverted more than 30 personal injury cases away from his employer to a competing attorney (Plaintiff's Counter Facts ¶¶ 37–45). Though the parties dispute whether the cases had come from Chung's personal network or whether WSA had rejected the cases, Chung "would not be free to take the business for himself or direct it to a competitor for his profit without the express consent and approval of [WSA]," (*Mar. Fish Prod., Inc. v World-Wide Fish Prod., Inc.*, 100 AD2d 81, 89 [1st Dept 1984]). The pattern of disloyalty persisted over the course of three to four months and would require forfeiture of approximately $50,000 of salary paid him during that period, according to WSA (see WSA Br. at 15). Salary paid during this period shall be forfeited. The firm would also have Chung return the $50,000 bonus and $50,000 in secret profits Chung received from Grigoropoulos. The salary reflects an estimation of earnings from March to June 2017 in which, according to OCA statements, Chung had made referrals to Grigoropoulos (Shapiro Aff., Ex. H [Doc. No. 146]). WSA may not recover the $50,000 bonus it paid to Chung because the payment was made after Schwitzer learned of the secret referrals, and therefore was outside the period of faithlessness (*see Visual Arts Found., Inc. v Egnasko*, 91 AD3d 578, 579 [1st Dept 2012]). Finally, the doctrine of *in pari delicto* does not bar WSA from recovery because even if WSA fails on its contract claims, Chung was the only wrongdoer in the instant claim and WSA had not engaged in nor perpetuated an underlying fraud.

If the parties are unable to agree on the amount of salary to be forfeited, the issue shall be referred to a special referee to hear and recommend.

D. Misappropriation of WSA Verdicts and Settlements

Following the United States Supreme Court's decision in *International News Service v. Associated Press* (248 US 215 [1918]), an unfair competition claim based on "[t]he principle that one may not misappropriate the results of the skill, expenditures and labors of a competitor has ... often been implemented in [New York] courts" (*ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 477 [2007], quoting *Electrolux,* 6 NY2d at 567). The First Department has held that the defendant must have "displayed some element of bad faith", which may be "established by a showing of fraud, deception, or an abuse of a fiduciary or confidential relationship." (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 30 [1st Dept 2015]).

Here, summary judgment shall be denied because the requisite element of bad faith cannot be conclusively established. Initially, WSA argues Chung's faithless servitude establishes the element of bad faith. Chung offers deposition testimony that initially WSA's misappropriation claim was based on the placement of WSA's verdicts and settlements in a Napoli ad (WSA Br. at pp. 17-18, Doc. 160). Chung responded that there has been no showing of bad faith as the advertisement displaying WSA settlements and verdicts was simply a mistake. Chung testified that when he left WSA, he informed the Korean media outlets he had used to stop running the WSA ad. When a draft was submitted to him that displayed WSA verdicts, he contacted the newspaper to correct the error. WSA has not disputed this explanation but now conflates its faithless servant and misappropriation claims by asserting that the unauthorized referrals to Grigoropoulos satisfies the bad faith requirement needed for the misappropriation claim (*see* WSA Reply Br. [MS008] at p. 8, Doc. 221 and WSA Opp Br. [MS 009] at p. 18, Doc. 237). Chung's motion for summary judgment on this claim likewise fails, as his uncorroborated testimony does not conclusively determine the ad was not published in bad faith.

E. Civil Rights Law § 51

"In order to establish liability under New York Civil Rights Law, plaintiff must demonstrate each of four elements: (i) usage of plaintiff's name, portrait, picture, or voice, (ii) within the state of New York, (iii) for purposes of advertising or trade, (iv) without plaintiff's

written consent." (*Molina v Phoenix Sound Inc.*, 297 AD2d 595, 597 [1st Dept 2002]). Here, WSA's motion for summary judgment on Chung's Civil Rights Law §51 claim shall be granted. In his opposition Chung concedes that he "edited the advertisements in question and added his own photo and phone number" (Plaintiff Brief at 24 [Doc. No. 236]; Chung Dep., Shapiro Aff. Ex. D [Doc. No. 142]). Further, Chung's written agreements with Korean media outlets show that he authorized the advertisements and their contents. As such, Chung cannot argue his image was used without his consent.

F. Slander

A "general defamation claim . . . requires allegations of special damages, i.e., "the loss of something having economic or pecuniary value, which must flow directly from the injury to reputation caused by the defamation and not from the effects of the defamation" (*Nolan v State*, 158 AD3d 186, 191 [1st Dept 2018], quoting *Franklin v Daily Holdings, Inc.,* 135 AD3d 87, 93 [1st Dept 2015], quoting *Agnant v Shakur,* 30 FSupp2d 420, 426 [SD NY 1998]). "A defamation plaintiff must plead special damages unless the defamation falls into any one of four per se categories: (1) statements charging the plaintiff with a serious crime; (2) statements that tend to injure the plaintiff in her trade, business or profession; (3) statements that impute to the plaintiff a "loathsome disease"; and (4) statements that impute unchastity to a woman" (*Nolan v State*, 158 AD3d 186, 195 [1st Dept 2018] citing *Liberman v Gelstein,* 80 NY2d 429, 435 [1992]).

WSA's slander claims are asserted against both Chung and his current employer, Napoli. The motion for summary judgment on the slander claim as against Napoli must be dismissed as WSA has failed to produce any evidence that Napoli instructed Chung to make slanderous statements, or even that the statements were made for Napoli's benefit. Plaintiff's motion with respect to Chung, however, shall be denied. There is conflicting evidence as to whether Chung made the statements, requiring a credibility determination between the testimony of Chung and Park that cannot be made on a motion for summary judgment. If Chung made the statements alleged, there still remains an issue of fact as to whether the statements were true or false.

G. Declaratory Judgment

"The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy

whether or not further relief is or could be claimed" (CPLR 3001). A court "may decline to hear the matter if there are other adequate remedies available" (*Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983]).

Here, WSA is entitled to summary judgment on Chung's declaratory judgment claim. Chung seeks a declaration that WSA must pay him attorney's fees which is an issue of material fact to be decided in the breach of contract claim. Declaratory judgment inappropriate.

IV. CONCLUSIONS

WSA's motion for summary judgement shall be granted as to liability on the faithless servant claim and for dismissal as to the promissory estoppel, unjust enrichment, declaratory judgment, and Civil Rights Law §51 claims. Its motion concerning the breach of contract and misappropriation claims shall be denied. Chung's motion for summary judgment on the breach of contract, promissory estoppel, unjust enrichment, faithless servitude, misappropriation, and slander claims all fail. Plaintiff's motion for summary judgment on the slander claim is granted as it relates to Napoli and that claim shall be dismissed.

It is hereby

ORDERED that the motion for summary judgment of defendant, William Schwitzer & Associates, P.C. (motion sequence number 008) is GRANTED to the extent the Second (Promissory Estopppel), Third (Unjust Enrichment), Fourth (Civil Rights Law §51) and Fifth (Declaratory Judgment) causes of action of plaintiff Chun Ho Chung are DISMISSED and the Second (Faithless Servant) cause of action of WSA is sustained; and it is further

ORDERED that the motion for summary judgment of plaintiff (motion sequence number 009) is DENIED except as to the slander claim against defendant Napoli Shkolnik, PLLC which is GRANTED and the claim against it is hereby DISMISSED; and it is further

ORDERED that counsel for the parties shall appear at a remote status conference on October 6, 2020 at a time to be stated in an invitation to be issued by the court.

Dated: August 31, 2020 **ENTER:**

O. PETER SHERWOOD, J.S.C.