

Mark Bruce Intl., Inc. v Dechert, LLP

2021 NY Slip Op 30351(U)

February 3, 2021

Supreme Court, New York County

Docket Number: 654253/2018

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

INDEX NO. 654253/2018

MARK BRUCE INTERNATIONAL, INC.,

10/10/2019,

Plaintiff,

MOTION DATE 10/16/2019

- v -

MOTION SEQ. NO. 001 002

DECHERT, LLP,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 45, 46, 47, 48, 49, 50

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 51, 52, 54

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, and upon due deliberation by the court, it is ordered that plaintiff's motion for summary judgment is denied (motion seq. no. 001), and that defendant's motion for summary judgment dismissing the complaint is granted (motion seq. no. 002), in accord with the reasoning set forth in the following memorandum.

PRELIMINARY STATEMENT

Plaintiff Mark Bruce International, Inc. (MBI), moves for an order, pursuant to CPLR 3212, granting it summary judgment on its complaint (motion seq. no. 001) in the amount of \$137,000, plus nine percent interest from July 31, 2018. Defendant Dechert, LLP (Dechert), moves for summary judgment (motion seq. no. 002), dismissing the complaint.

MBI seeks a recruitment fee in connection with the hiring by Dechert of an attorney named Gregory Chuebon (Chuebon), asserting that it was the procuring cause of such hiring. Dechert contends that the parties had a written agreement, pursuant to which no fee was owed for Chuebon's hiring because he was hired as counsel, not a partner.

BACKGROUND

MBI is an executive legal search firm, specializing in the placement of partners, attorney groups, and top caliber associates, as well as law firm mergers, and Mark Rosen is the founder and owner of MBI (NYSCEF Doc. No. 12, affidavit of Mark Rosen, dated August 19, 2019 [Rosen aff], ¶¶ 1, 3). Dechert is a large international law firm with an office in New York City (NYSCEF Doc. No. 17, affirmation of Theresa Gue, dated October 16, 2019 [Gue aff], ¶ 9).

Recruitment of Partners Noah Leibowitz and Katherine Helm

On April 24, 2017, MBI and Dechert entered into a written contract concerning the recruitment fees payable in the event that Dechert hired partners introduced to it by MBI (the Agreement) (NYSCEF Doc. No. 25). The Agreement required Dechert to pay fees to MBI "in the event that Dechert admits to partnership, as equity or income partners, one or more individuals ("Candidate" or "Candidates") introduced by [MBI] to Dechert" (*id.* at 1). It provided that if Dechert "admits to partnership" one or more of the candidates in one group as a partner as a result of MBI's introduction, MBI would earn fees equaling 25% of the first year compensation for the highest paid partner candidate's compensation, and then 20% of the first year compensation for the next highest paid partner, 15% for the next highest partner, and 10% for any other partners (*id.*). The

Agreement expressly states that “Dechert will owe no fee to [MBI] with respect to Dechert’s hiring of national partners, counsel, associates, paralegals, and/or staff as part of the transaction involving the admission to the Dechert partnership of one or more Candidates introduced by [MBI]” (*id.* at 2, ¶ 3).

Under the Agreement, the parties stipulated that where they had mutually identified a candidate whom, if hired, would be subject to the Agreement, they would memorialize such fact in an exhibit (Exhibit A) to the Agreement:

In order for [MBI] to be entitled to any fee in connection with any Candidate, Dechert and [MBI] must first identify that candidate and agree in a written agreement substantially in the form attached hereto as Exhibit A that [MBI] has introduced or will introduce that Candidate to Dechert as contemplated by the introductory paragraph of this Agreement and by paragraph 5 below.

(*Id.* at 2, ¶ 2.) The Agreement also provided that it “would not pertain to the hiring of national partner, counsel or associate level attorneys introduced to Dechert by [MBI] independently of any transaction that is the subject of this Agreement,” but that such hiring “shall be the subject of a separate agreement” (*id.* at 2, ¶ 4). It is undisputed that the parties never entered into such a separate written agreement (NYSCEF Doc. No. 17, Gue aff, ¶ 18). The Agreement further provided:

This Agreement . . . will expire on the first anniversary of the date of the agreement or any subsequent one-year renewal, provided that this Agreement shall continue to apply to any Candidate(s) with respect to whom Dechert and [MBI] executed a letter in the form of Exhibit ‘A’ for a period of twelve (12) months following [MBI’s] introduction of Candidate(s) to Dechert, as stated in paragraph 5 above.

(*Id.* at 4, ¶ 12.)

In late 2017, Dechert was seeking to expand its intellectual property practice and started discussions with MBI about partner candidates (*see* NYSCEF Doc. No. 27). In early 2018, MBI introduced two partner candidates specializing in intellectual property to Dechert: Noah Leibowitz, a Simpson Thatcher & Bartlett LLP (Simpson) partner, and Katherine Helm, then-Counsel at Simpson (NYSCEF Doc. No. 17, Gue aff, ¶ 20; NYSCEF Doc. No. 12, Rosen aff, ¶ 13). Gregory Chuebon worked closely with Leibowitz as an associate at Simpson on intellectual property matters, and Leibowitz also wanted Chuebon to move with him to Dechert (NYSCEF Doc. No. 12, Rosen aff, ¶¶ 5, 7, 15). Leibowitz informed MBI repeatedly that he needed Chuebon to join whatever firm Leibowitz ultimately joined because he needed Chuebon's expertise and his relationship with a particular Leibowitz client (NYSCEF Doc. No. 12, Rosen aff, ¶ 15).

On February 9, 2018, MBI and Dechert entered into Exhibit A to the Agreement concerning Leibowitz and Helm, indicating that if Leibowitz and Helm joined Dechert as partners, MBI would be entitled to fees for their placements (NYSCEF Doc. No. 26). While the Agreement expired by its terms on April 24, 2018, since the parties executed Exhibit A regarding Leibowitz and Helm, the terms of the Agreement continued to apply to them for 12 months following MBI's February 9, 2018 introduction of them (NYSCEF Doc. No. 25, Agreement at 4, ¶ 12).

In May 2018, Rosen of MBI spoke with Mark Thierfelder, a Dechert transactional partner, and James Leary, Dechert's then-Chief Operating Officer, and Dechert agreed to increase MBI's percentage of Leibowitz's compensation from 25% to 30%, but indicated

that it would pay 20% for Helm (*see* NYSCEF Doc. No. 24, deposition of Mark Rosen, dated April 24, 2019 [Rosen tr] at 64, 67-69, 108-109; NYSCEF Doc. No. 17, Gue aff, ¶ 29; NYSCEF Doc. No. 27; NYSCEF Doc. No. 12, Rosen aff, ¶¶ 11-12). Rosen had no discussions with Dechert about Chuebon (NYSCEF Doc. No. 24, Rosen tr at 69, 113). On June 20, 2018, Rosen sent a letter purportedly memorializing the parties' proposed new fee agreement (the Proposed Agreement) (NYSCEF Doc. No. 38, proposed agreement). This Proposed Agreement provided that MBI would earn a fee "in the acquisition by [Dechert] of a partner or partner groups, whether equity or non-equity, identified and presented to [Dechert] by MBI" equal to 30% of the projected first year's compensation for "the three most highest compensated partners in the group" (*id.*). It also provided that "[n]o fee is payable for associates or counsel" (*id.*). While Rosen signed this Proposed Agreement, Dechert did not agree to the terms or execute the Proposed Agreement (NYSCEF Doc. No. 24, Rosen tr at 71, 108-109).

In June 2018, Leibowitz became a partner of Dechert. Helm had become a partner earlier in May 2018 (NYSCEF Doc. No. 17, Gue aff, ¶ 26; NYSCEF Doc. No. 23, deposition of Noah Leibowitz, dated February 6, 2019 [Leibowitz tr] at 97, 135; NYSCEF Doc. No. 24, Rosen tr at 54).

On June 21, 2018, MBI sent an invoice to Dechert charging recruitment fees of 30% of projected first year compensation for Leibowitz (\$608,400), and 20% for Helm (\$161,352), for a total of \$769,752. The invoice indicated that it was "[a]s per our agreement" (NYSCEF Doc. No. 28). Dechert paid this invoice (NYSCEF Doc. No. 17, Gue aff, ¶ 30).

Recruitment of Gregory Chuebon

In March 2018, Leibowitz directly asked Dechert partner Martin Black, Chairman of Dechert's intellectual property group, to consider meeting Chuebon, who had already been looking to leave Simpson for a new position and had worked closely with Leibowitz there (*see* NYSCEF Doc. No. 29; *see also* NYSCEF Doc. No. 23, Leibowitz tr at 67-68). In late May 2018, Leibowitz again reached out to Black about meeting Chuebon (NYSCEF Doc. No. 30). In mid-June, Black scheduled interviews at Dechert for Chuebon and reached out to him directly for his availability (NYSCEF Doc. No. 31). Chuebon also had been working with MBI recruiter Michael Parrillo, who under Chuebon's direction was not representing Chuebon in connection with Dechert (NYSCEF Doc. No. 32; NYSCEF Doc. No. 20, deposition of Michael Parrillo, dated December 20, 2018, at 28). Parrillo was assisting Chuebon with his job search at other law firms. Rosen testified at his deposition that no one from MBI sent Chuebon's resume to Dechert, and MBI played no role in setting up meetings, preparing him for interviews with Dechert, negotiating terms of employment with Dechert, or reviewing offer letters (NYSCEF Doc. No. 24, Rosen tr at 79-82). He acknowledged that MBI's connection to the hiring of Chuebon was sending Leibowitz and Helm to Dechert (*id.* at 116). Black similarly testified that Dechert set up its own interviews and negotiated directly with Chuebon (NYSCEF Doc. No. 22, deposition of Martin Black, dated January 2, 2019 [Black tr] at 80-82). On June 21, 2018, Rosen reached out to Black asking "By the way, do you know what's going on with Greg Chuebon?" to which Black responded, "Nothing yet in Greg" (NYSCEF Doc. No. 12, Rosen aff, Exhibit C at 12 of 30).

On June 21, 2018, Dechert made its first offer to Chuebon, and Dechert and Chuebon directly negotiated employment terms over several weeks, with Dechert amending upward its offer of compensation (NYSCEF Doc. No. 17, Gue aff, ¶ 42; see NYSCEF Doc. Nos. 35, 36). On July 11, 2018, Chuebon accepted Dechert's last offer and was hired as Counsel (NYSCEF Doc. No. 37).

On July 31, 2018, MBI sent Dechert Executive Assistant Sandra Miller an invoice for the placement of Chuebon, charging a fee of 25% of Chuebon's first year's compensation in the amount of \$137,000 (NYSCEF Doc. No. 39). Miller responded by email that same day, that "I will forward to our lateral associate/counsel dept for processing" (NYSCEF Doc. No. 40). At her deposition, Miller stated that she was not responsible for recruitment of associates, rather, Yedida Hiller headed up that department (NYSCEF Doc. No. 21, deposition of Sandra Miller, dated January 23, 2019 [Miller tr] at 11-12). On August 16, 2018, Dechert sent MBI a letter refusing to pay the invoice, asserting that under their April 24, 2017 Agreement, it did not owe a fee for hiring Chuebon, who was hired as of Counsel (NYSCEF Doc. No. 27).

Pleadings and Present Motions

On August 27, 2018, MBI commenced this action asserting four causes of action: breach of contract; breach of the covenant of good faith and fair dealing; unjust enrichment, and account stated (NYSCEF Doc. No. 2, complaint).

On September 14, 2018, Dechert answered the complaint, denying the material allegations and asserting a number of affirmative defenses, including general defenses such as failure to state a claim, consent, waiver, estoppel, and ratification, and the more

specific contract defenses of lack of consideration, indefiniteness, lack of meeting of the minds on material terms, and lack of force and effect of oral agreement (NYSCEF Doc. No. 6).

MBI moves for summary judgment, urging that irrespective of the claims in its complaint, the main issue, which discovery has proven in its favor, is whether it was the procuring cause of Chuebon's placement at Dechert, entitling it to recruitment fees. MBI maintains that while it entered into the written Agreement, that Agreement was superseded by an oral agreement which entitled MBI to receive 30% commission for all attorneys placed as part of a group placement (that is, when MBI acts as the procuring cause of the group moving to Dechert). MBI asserts that it is undisputed that it was the procuring cause of Leibowitz and Helm moving to Dechert, and Dechert concedes that absent the retention of Leibowitz, it would not have hired Chuebon. MBI points to emails between Leibowitz and Martin Black (NYSCEF Doc. No. 13, affirmation of David Graff, dated October 10, 2019 [Graff aff], Exhibits L and M, at 45 and 47-48 of 163), and the deposition testimony of Leibowitz (*id.*, Exhibit K at 42-43 of 163, Leibowitz tr at 64-65) as proof that MBI generated a chain of circumstances leading to Chuebon's hiring, and, thus, was the procuring cause.

With regard to the written contract, MBI asserts that the documents, and Miller's and Black's testimonies demonstrate that MBI was paid 30% for Leibowitz's placement, and, therefore, the written contract could not have applied and is not applicable (*id.*, Exhibit LL at 120-126 of 163, Black tr at 114-115, and Miller tr at 102-104). Rosen attests that he had phone conversations with Thierfelder who, according to Rosen, agreed

to pay MBI 30% of the first year compensation for all lawyers in the group. Based on this, MBI urges that an oral contract was formed. MBI then alternatively argues that regardless of whether there was an oral contract, it is entitled to its fees as the procuring cause of Chuebon's hiring. Finally, it argues that because Dechert accepted MBI's invoice, it is entitled to its fee as an account stated. It contends that Miller testified that, in the 31 years she has been with Dechert working to pay vendors, she could not recall a single instance in which she emailed that an invoice would be processed but then the invoice was not paid (NYSCEF Doc. No. 13, Graff aff, Exhibit KK at 116-118 of 163, Miller tr at 8, 131). MBI asserts that Dechert holds Miller out to legal recruiters as the person who should receive such invoices, and Miller has previously received and processed invoices for MBI.

In opposition and in support of its own motion for summary judgment, Dechert contends that the parties' binding written Agreement expressly precludes a fee to MBI where a Counsel, like Chuebon, was hired, and the Agreement was still in effect. It argues that there was no oral contract, as Rosen admitted in his deposition (NYSCEF Doc. No. 24, Rosen tr at 64, 69-70, 110-115), much less one of sufficiently definite terms to permit an inference as to the parties' intent. Further, Rosen's and Black's email exchange in which Black tersely responded "[n]othing yet in Greg," (NYSCEF Doc. No. 12, Rosen aff, Exhibit C at 13) could not plausibly be interpreted to signal that MBI and Dechert agreed to proceed outside of their Agreement.

Dechert also maintains that the breach of the covenant of good faith claim is duplicative as a cause of action, and inconsistent with the parties' Agreement. Similarly,

that the unjust enrichment claim is precluded by the Agreement, and MBI did not perform any services for Chuebon. On the account stated claim, Dechert contends that it timely objected to the invoice. Further, contrary to MBI's assertion, Miller never stated that the invoice would be paid, only that she would forward it to the appropriate person/department. Finally, MBI's new theory of recovery of being the procuring cause is barred by the Agreement, and MBI cannot even raise a triable issue that there was a direct and proximate link between its minimal action and Chuebon's hiring.

In opposition to Dechert's motion, MBI argues that it set in motion a chain of circumstances leading to Chuebon's hiring. It points to Black's testimony that without Leibowitz and Helm joining the firm, Dechert would not have hired Chuebon, and that "we generally don't hire counsel-level people unless there is some specific need," and "supporting [Leibowitz's] practice was the principal need for Greg" (NYSCEF Doc. No. 13, Graff aff, Exhibit A at 14-16 of 163, Black tr at 73, 83-84). It contends that its introduction of Leibowitz and Helm is sufficient. It argues that because Dechert paid 30% for Leibowitz, the Agreement could not have applied, and an oral agreement must have applied, and that the oral agreement was definite (see NYSCEF Doc. No. 43, affirmation of Matthew J. Silverstein, dated November 18, 2019 [Silverstein aff], Exhibit 1, Rosen tr at 101-102). It asserts that the Proposed Agreement was not enforceable because it was unsigned.

In its reply, Dechert points to MBI's failure to address the binding Agreement, and contends that any bonus it paid to MBI for Leibowitz does not establish an oral agreement for the recruitment of associates. No oral agreement existed, and, in fact,

MBI's Proposed Agreement demonstrates its understanding on that issue. MBI fails to set forth any facts establishing an oral agreement. Dechert urges that to avoid the Agreement, MBI argues the unpleaded doctrine of procuring cause, which is inapplicable, and the undisputed facts show that MBI did nothing regarding Chuebon, except introduce Leibowitz.

DISCUSSION

The movant on a motion for summary judgment must make a *prima facie* showing that it is entitled to judgment as a matter of law, submitting admissible evidence demonstrating the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If it fails to make such a showing, the motion is denied regardless of the sufficiency of the opposing papers (*id.*). If the movant meets its burden, then the opposing party must present sufficient admissible evidence raising a triable issue of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). All reasonable inferences must be drawn in favor of the nonmoving party, and the motion will be denied if there is any doubt as to the existence of a material issue of fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]; *Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 481-482 [1st Dept 2018]).

Where a contract is unambiguous, its meaning is a question of law for the court (*W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Generally, “when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms [and extrinsic evidence] is generally inadmissible to add to or vary the writing” (*id.*). “[A] written agreement that is complete, clear and

unambiguous on its face must be enforced according to the plain meaning of its terms” (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). An agreement is unambiguous, if its language “has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion” (*id.* [internal quotation marks and citation omitted]).

In moving for summary judgment, MBI fails to make even a *prima facie* showing that the written Agreement did not apply, or that the parties entered into a clear, complete, and definitive oral agreement, or that, alternatively, it was the procuring cause of Chuebon’s hiring by Dechert. The parties entered into the written Agreement, which clearly and unambiguously provided that MBI would only be entitled to a fee for the placement of partners. “This letter is intended to set forth the terms of the agreement . . . regarding fees that would be due [MBI] in the event that Dechert admits to its partnership, as equity or income partners, one or more individuals” (NYSCEF Doc. No. 25). Further, it expressly made clear that “Dechert will owe no fee to [MBI] with respect to Dechert’s hiring of . . . counsel . . . as part of the transaction involving the admission to the Dechert partnership of one or more Candidates introduced by [MBI]” (*id.*).

Therefore, the written Agreement among the parties gave rise to, and governed, the earning of fees due to MBI in the event of the placement of a partner, and expressly precluded a fee for Dechert’s hire of associates who followed recruited partners to the firm. There is no dispute that Chuebon was not hired by Dechert as a partner, but as “Counsel,” and that he was part of the transaction involving the admission of Leibowitz

to the Dechert partnership. Thus, under the plain terms of the Agreement, MBI is not entitled to fees for his hiring.

In addition, the Agreement was in force in June and July 2018, when Leibowitz, Helm, and Chuebon were hired. While the Agreement otherwise expired “on the first anniversary of the date of the agreement or any subsequent one-year renewal,” it clearly provided that it “shall continue to apply to any Candidate(s) with respect to whom Dechert and [MBI] executed a letter in the form of Exhibit A for a period of twelve months following [MBI’s] introduction of Candidate(s) to Dechert” (NYSCEF Doc. No. 25). Thus, the Agreement otherwise expired on April 24, 2018, but because Dechert and MBI had entered into Exhibit A regarding Leibowitz and Helm in February 2018, the Agreement’s terms continued to apply until February 2019 (NYSCEF Doc. Nos. 25 and 26 [Exhibit A]). Since the Agreement was applicable in July 2018, it applied to the hiring of Counsel, such as Chuebon, as part of the transaction involving the admission to partnership of candidates Leibowitz and Helm, precluding a fee.

MBI fails to address the written Agreement, except to argue that it no longer applied because Dechert paid it 30% for Leibowitz, when the Agreement only required payment of 25%. The fact that Dechert paid an increased fee for Leibowitz does not invalidate the entire Agreement, and MBI does not even address the fact that it was paid, and never objected to the 20% fee for Helm, which was in accordance with the Agreement.

MBI’s contention that the parties subsequently entered into an oral agreement that superseded the written Agreement is unpersuasive and not supported by the evidence.

First, while the complaint asserts that there was an oral agreement to pay 25% for Chuebon, and MBI sent an invoice in that amount to Dechert, it abandons that claim to assert that the parties orally agreed to a 30% fee for the placement of all lawyers in a group (NYSCEF Doc. No. 12, Rosen aff ¶¶ 10-12; NYSCEF Doc. No. 24, Rosen tr at 101-102). As Dechert aptly points out, Rosen's own testimony is contradictory. Rosen testified that he reached an oral agreement regarding Chuebon with two representatives of Dechert, James Leary and Mark Thierfelder (NYSCEF Doc. No. 24, Rosen tr at 64), but then when asked if he had any discussions with Leary about Chuebon, he testified:

Zero. Because Mr. Chuebon was only involved in this as part of a group, not as an individual. And it would be unethical for me to have discussions about any associates coming to a firm with a partner.

(*Id.* at 69-70. *See also id.* at 113.)

Rosen also stated that when he spoke to Thierfelder, Thierfelder could not remember their conversation discussing any agreement different from their Agreement (*id.*, Rosen tr at 110-115). Further, Rosen admitted in his deposition that the purported oral agreement did not apply to lawyers hired by Dechert as counsel, only partner recruitments. He stated:

There was an oral agreement with Dechert covering Noah Leibowitz and Kassie Helm. Greg Chuebon is an associate under the ethics of New York law. There was no way that I could have entered into that kind of agreement with them. Partners are not supposed to speak to associates, talk to associates while they're talking to another firm. So my agreement was for Noah Leibowitz, and then my agreement was for Kassie Helm. They were partners.

(*Id.*, Rosen tr at 57.) He also stated “Greg Chuebon wasn’t part of the oral agreement. He couldn’t be. He was an associate” (*id.*, Rosen tr at 60). MBI’s own actions belie this alleged oral agreement of a 30% fee for all three lawyers: MBI did not submit for such amount for Helm, for whom it was paid 20% in accordance with the written Agreement (*id.*, Rosen tr at 108-109), or even for Chuebon, charging only 25% (NYSCEF Doc. No. 39, invoice; *see* NYSCEF Doc. No. 12, Rosen aff, ¶¶ 25-26). In addition, ambiguity pervades the alleged terms of any oral agreement being espoused in this case, and there is no documentary proof supporting an inference of the terms of such agreement.

Moreover, contemporaneous with this alleged oral agreement, Rosen signed and sent the Proposed Agreement to replace the expired Agreement. This Proposed Agreement, like the Agreement, specifically provided that “No fee is payable for associates or counsel” (NYSCEF Doc. No. 38). Regardless of whether this Proposed Agreement could be enforced, it is evidence of MBI’s intent, particularly given that MBI drafted and signed it during the same time period in which it now claims it reached an oral agreement with Dechert (NYSCEF Doc. No. 38). There is no legitimate material dispute as to the facts that the parties did not agree to terms for any oral agreement displacing, and different from, the terms of the Agreement. The court notes that MBI’s contention that Dechert failed to present affidavits or evidence contradicting MBI’s assertion that there was an oral agreement, is wrong. Dechert submitted the Agreement, other documents, and deposition testimony on these motions, which is entirely appropriate on summary judgment.

MBI's argument that it is entitled to its fee as the procuring cause of Chuebon's hire, is also insufficient as a matter of law. This doctrine is based on an implied contract theory and does not apply where the parties have an agreement that provides otherwise. The Appellate Division, First Department, in *SPRE Realty, Ltd. v Dienst* (119 AD3d 93 [1st Dept 2014]), relied upon by MBI, specifically held that "[I]n the absence of an agreement to the contrary, a . . . broker will be deemed to have earned his commission when he . . . produces a buyer who is ready, willing and able to purchase at the terms set by the seller" (*id.* at 97 [internal quotation marks and citation omitted]). "A contract cannot be implied in fact where there is an express contract covering the subject matter involved" (*SPRE Realty, Ltd. v Dienst*, 2016 WL 392708, 2016 NY Slip Op 30186[U] at * 3 [Sup Ct, NY County 2016], *affd* 155 AD3d 433 [1st Dept 2017]). In addition, to establish procuring cause, there must be a "direct and proximate link" between the broker's introduction of the parties and their agreement (*Greene v Hellman*, 51 NY2d 197, 206 [1980]). Simply calling the buyer's attention to the property or merely introducing the parties is not enough (*id.*; *see Good Life Realty, Inc. v Massey Knakal Realty of Manhattan, LLC*, 93 AD3d 490, 491 [1st Dept 2012]), nor is just creating an "amicable atmosphere" (*SPRE Realty, Ltd. v Dienst*, 119 AD3d at 99).

Here, the Agreement was to the contrary – clearly foreclosing MBI from collecting a fee for the placement of Chuebon as counsel. Further, MBI's asserted proof that it was a procuring cause is based solely on Leibowitz's actions in: introducing and providing Chuebon's contact information to Dechert; requesting that Dechert interview him; and advising Chuebon on providing his business plan to Dechert (NYSCEF Doc. No.

13, Graff aff, Exhibits J, K, L, M, O, R, and U). Chuebon himself scheduled his interviews and negotiated the terms of his hiring (NYSCEF Doc. No. 17, Gue aff, ¶ 42; see NYSCEF Doc. Nos. 35, 36). MBI did not present proof that it significantly, or in any way actively participated in, or that its actions directly and proximately lead to, Chuebon's hiring. MBI's actions in introducing Leibowitz to Dechert, and in asking Dechert partner Martin Black "By the way, do you know what's going on with Greg Chuebon?," are not sufficient to establish or even raise a triable issue that MBI was the procuring cause (see *SPRE Realty, Ltd. v Dienst*, 2016 NY Slip Op 30186[U] at * 3 [summary judgment to defendants, broker not procuring cause even though it brought buyers to building several times and introduced them to developer]; *Good Life Realty, Inc. v Massey Knakal Realty of Manhattan, LLC*, 93 AD3d at 491 [summary judgment granted dismissing complaint, broker not procuring cause where did not show unit to buyer, did not personally see unit, did not negotiate sale price, did not attend closing and had no contact with listing broker]; *Douglas Elliman, LLC v Corcoran Group Marketing*, 2011 WL 10893904 at * 7 [Sup Ct, NY County 2011], *affd* 93 AD3d 539, 540 [1st Dept 2012] [must show more than just calling property to attention of buyer and introducing to seller]).

MBI's claim for breach of the covenant of good faith and fair dealing is dismissed. It asserts the same facts and seeks the same damages as the breach of contract claim (see *Polaris Venture Partners VI L.P. v AD-Venture Capital Partners L.P.*, 179 AD3d 548, 548-549 [1st Dept 2020]; *Berkeley Research Group, LLC v FTI Consulting, Inc.*, 157 AD3d 486, 489 [1st Dept 2018]; *Amcan Holdings, Inc. v Canadian Imperial Bank of*

Commerce, 70 AD3d 423, 426 [1st Dept], *lv denied* 15 NY3d 704 [2010]). In addition, the duty of good faith cannot imply an obligation that is inconsistent with other terms of the contract (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]). Here, MBI's allegations that Dechert is obligated to pay fees in connection with the hiring of Chuebon as counsel is plainly inconsistent with the Agreement.

Similarly, MBI's unjust enrichment claim duplicates its insufficient breach of contract claim (*Galopy Corp. Intl., N.V. v Deutsche Bank, A.G.*, 150 AD3d 416, 417 [1st Dept 2017], *lv denied* 30 NY3d 912 [2018]; *Brown v Brown*, 12 AD3d 176, 177 [1st Dept 2004] [dismissing unjust enrichment claim as duplicative of insufficient contract claim]). The existence of the Agreement, an express contract governing the subject matter, precludes MBI's claim (*Polaris Venture Partners VI L.P. v AD-Venture Capital Partners L.P.*, 179 AD3d at 548; *Russo v Heller*, 80 AD3d 531, 532 [1st Dept 2011]).

Finally, MBI's account stated claim is dismissed. "An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 [1st Dept 2007] [internal quotation marks and citation omitted]). The agreement can be either express or implied from retention of an account rendered for an unreasonable amount of time without objection (*see Interman Industrial Prods., Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 153-154 [1975]; *Russo v Heller*, 80 AD3d at 532 [account stated exists where party to an agreement receives invoice and does not protest within a reasonable time]).

Here, Dechert demonstrates that MBI sent the invoice on July 31, 2018 (NYSCEF Doc. No. 39) to Sandra Miller, a Dechert employee who does not handle its recruitment of associates. Miller responded that she would “forward to our lateral associate/counsel dept for processing” (NYSCEF Doc. No. 21, Miller tr at 11-12). On August 16, 2018, about two weeks later, Dechert sent a letter objecting to MBI’s invoice for Chuebon, asserting that Dechert “does not owe [MBI] anything on account of our hiring of Greg Cheubon [sic]” (NYSCEF Doc. No. 27). Dechert’s objection was within a reasonable time (*see Russo v Heller*, 80 AD3d at 532; *Joe O’Brien Investigations, Inc. v Zorn*, 263 AD2d 812, 815 [3d Dept 1999] [summary judgment dismissal of account stated because defendant objected within reasonable time]). Moreover, because the parties had entered into the Agreement which covers the issues at hand, the account stated claim also is dismissed as duplicative of the breach of contract claim (*Hagman v Swenson*, 149 AD3d 1, 4 [1st Dept 2017]).

Accordingly, it is

ORDERED that the plaintiff’s motion for summary judgment is denied, the defendant’s motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This shall constitute the decision and order of the court.

ENTER:

Louis L. Nock

<u>2/3/2021</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE