Goldstein v Glass

2024 NY Slip Op 32397(U)

July 2, 2024

Supreme Court, New York County

Docket Number: Index No. 654474/2023

Judge: Nicholas W. Moyne

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** **PART** **41M**

Justice

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ERIC GOLDSTEIN,

Plaintiff,

- v -

GARY GLASS, TALENTHUB WORLDWIDE INC.

Defendant.

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INDEX NO. 654474/2023

MOTION DATE 11/08/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is

This is a dispute involving an alleged oral profit-sharing agreement in which the plaintiff, Eric Goldstein, claims the defendant, Gary Glass, breached. The alleged agreement concerns the operation and management of the additional named defendant, a temporary employment agency, known as: TalentHub Worldwide Inc. ("Worldwide"). Plaintiff is seeking to recover the profit-driven compensation he is allegedly owed due to his efforts, undertaken over the course of eight years, while serving as the full-time manager of Worldwide.

FACTUAL BACKGROUND:

Goldstein claims that since 1980, he worked in the temporary employment industry and had previous experience managing and/or developing temporary staffing businesses. Goldstein claims that in November of 2013, he approached Glass- who at the time was Goldstein's personal accountant- and asked if Glass would be interested in procuring funding for a new business that would provide temporary employment solutions to business-clients in the New York area.

According to the complaint, Goldstein offered Glass and his potential investors full, or 100%, ownership of the company and in exchange for Goldstein managing and growing the business full-time, Glass offered him 50% of all the company's profits once the initial investors' capital investments were paid back. Goldstein claims that on the same day he pitched the idea to Glass, he accepted the 50-50 profit split in exchange for managing the company full-time. Goldstein alleges that this agreement, his entitlement to 50% of the company's profits, was communicated to prospective employees of said to-be-formed company and was reflected in the business plan Glass

used to pitch the company to potential investors. The plaintiff has attached to the complaint, various e-mails sent by Glass to these various investors and prospective employees. Plaintiff claims that these e-mails demonstrate Glass's intent to be bound by the terms of the alleged oral profit-sharing agreement. For example, in one such email dated November 25, 2013, Glass announced that Goldstein would "be entitled to 50% of the profits" for his "introduction and management of the group" (NYSCEF Doc. No. 3 ¶ 4). Additionally, in another email to potential investors, dated November 29, 2013, Glass stated,

> "I am in the process [of] forming an investment group to raise approximately 500 K. I want 4 investors in addition to myself to contribute 100 K each. The business is an employment agency. Without getting into too many specifics unless you wish, I expect the business to be profitable by the 3rd quarter of year 1. Optimum sales are estimated at 9 million and will not be realized until quarter 10 of formation. Estimated income is 5% of sales. Whenever the cash flow is positive the investors will have their capital returned. **When the investors have all their capital returned there will be a 50-50 split of the profit between the investment group and the person who is bringing in the talent and assisting in the development of the business**. Upon sale of the business in at least 4 years, the investors will receive 60% of the proceeds. There will be an investment meeting at 1 PM this Wednesday. I will be preparing a spread sheet by this Sunday for all who wish to view it.
>
> NYSCEF Doc. No. 4 (**emphasis added**).

Plaintiff contends that on December 1, 2013, Glass allegedly circulated this spreadsheet to the investors that outlined his business plan and again reiterated that Goldstein would be entitled to 50% of the profits pursuant to his role as manager of the business (NYSCEF Doc. No. 5). The spreadsheet includes that, identified under "Weekly Salary Cost" as "E", and identified under the "Investment infrastructure" column as "B", B was entitled to 50% of profits (NYSCEF Doc. No. 5 at 4-6). Goldstein alleges that the agreement also indicated that he would be paid what was termed to be an "advance draw" of $10,000 per month until the company became profitable. Additionally, assuming the company did well and the value of Goldstein's profit share exceeded his monthly draw, the spreadsheet includes he would be given additional catch-up payments (NYSCEF Doc. No. 5 at 6). However, the complaint is silent as to what agreement that parties reached, if any, as to what would happen to the "draw" if the company suffered losses instead of becoming profitable. On December 2, 2013, the Articles of Incorporation for Worldwide were filed with the New York Department of State and the company became operational and began pursuing clients. Beginning from the time of the company's formation, Goldstein claims he was employed at Worldwide as a full-time, at-will employee and served in the role of Worldwide's lead manager for eight years.

Plaintiff claims that the company became profitable beginning sometime in the fall of 2014 and continued to be profitable through January of 2022. In the complaint, Goldstein claims that from the time he began in December 2013 until early 2022, he was paid $10,000 per month as an advance draw against his profit share and also received approximately $10,000 per year in catch-up payments. Plaintiff claims that on multiple occasions, including in late 2021, he approached Glass regarding the company's profits and alleged profit-sharing agreement. Then, at some point in 2021 and as outlined in further detail in the complaint, the parties' relationship began to substantially deteriorate. Goldstein allegedly stopped working for and being paid by Worldwide on January 19, 2022.

Goldstein alleges that after his employment at Worldwide ceased, he never received payments from Glass or Worldwide regarding his profit share or otherwise. Additionally, Goldstein claims that during a November 2021 conference call, Oren Glass, the defendant's son and a shareholder/owner of Worldwide, when referencing Goldstein's profit-share allegedly acknowledged that, "conservatively speaking, [Goldstein] was owed north of $1,000,000" (complaint at ¶ 61). Goldstein claims that during this period, Glass and his son transferred nearly $ 3 million from Worldwide bank accounts into their personal accounts or to third parties on Glass's behalf. Goldstein claims that while making these withdrawals and while admitting Goldstein was entitled to a share, the defendant and his son did not conduct any formal reconciliation, and/or refused to calculate or provide any accounting regarding the amount of profits due to Goldstein under the agreement.

Based on these factual allegations, plaintiff, in September 2023, commenced this action against both Glass and Worldwide with the complaint asserting four causes of action. The first cause of action is for breach of contract. The second cause of action is for breach of the implied covenant of good faith and fair dealing. The third cause of action is for unjust enrichment. The fourth cause of action is for promissory estoppel. In Motion Sequence 001, defendants move for an order, pursuant to CPLR §§ 3211(a)(5) and (a)(7), dismissing the complaint in its entirety on the grounds that the claims are time-barred and/or the complaint fails to state a cause of action.

MOTION TO DISMISS STANDARD:

On a motion to dismiss pursuant to CPLR § 3211(a)(7), the pleadings are to be afforded a liberal construction, the facts alleged in the complaint accepted as true, accord plaintiffs the benefit of every favorable inference, and determine whether the facts alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

DISCUSSION:

BREACH OF CONTRACT CLAIM:

Plaintiff is asserting a breach of contract claim arising out of the parties' oral profit-sharing agreement in which Glass allegedly agreed that in exchange for Goldstein working as a full-time manager of Worldwide, Goldstein would receive 50% of the profits. To adequately allege a breach of contract claim, a plaintiff must plead the following elements: (1) a contract exists; (2) the plaintiff's performance in accordance with the terms; (3) the defendants' breach thereof; and (4) resulting damages (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022]; see also *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Defendants first argue that the plaintiff's breach of contract claim should be dismissed because the plaintiff has not alleged the existence of an enforceable contract, as required to adequately plead a cause of action. If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract (*Edelman v Poster*, 72 AD3d 182, 184 [1st Dept 2010]). According to the defendants, the complaint fails to plead any sufficiently definitive terms of the alleged agreement so as to demonstrate the existence of a binding and enforceable contract. Specifically, plaintiff failed to provide the essential terms and conditions that the parties would have needed to agree to in order to have mutually assented as to such. In an attempt to highlight this, for example, the defendants claim that the complaint is silent as to what, if anything, Goldstein would receive or have to pay if the company suffered losses instead of becoming profitable. As compensation for his work, Goldstein alleges he was entitled to be paid $10,000 per month as an "advance draw" on anticipated profits (complaint ¶¶ 23; 26; 66). Thereafter, Goldstein alleges he was entitled to a payment of money which, in combination with the "advance draw" of $10,000 of profits, would then equal "50% of profits" of Worldwide (*Id.*). However, defendants assert that the complaint is silent as to what the parties allegedly agreed would happen to the money Goldstein had received as an advance in the event the expected profits did not materialize. Defendants believe that this is an essential term, which the absence of, renders the purported oral agreement unenforceable as a whole. They point to the fact that the company only became profitable, according to the complaint, sometime in the fall of 2014 and thus, by implication, was not profitable before then. Defendants maintain that the lack of any details in the complaint concerning the effect of these purported losses on Goldstein's right to keep his advance draw payments and/or his rights to future profits renders the alleged oral agreement indefinite and unenforceable.

Defendants also argue that the complaint does not provide any specifics as to what constituted profits, how and by who these profits were to be calculated, and as stated above, who would be held responsible for any losses. In short, the defendants argue that a profit-sharing agreement, in order to be definite and enforceable, must account for not only profits but must also account for how losses should be allocated or shared as well. Defendants insist that these omissions mean any purported oral profit-sharing agreement between the parties is too vague and/or indefinite to be enforceable.

The problem for the defendants is that the pleading standards for breach of contract in New York are not so strict or onerous so as to preclude claims like those

alleged under the circumstances herein. "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound" (*Kolchins v Evolution Mtks., Inc.*, 128 AD3d 47, 59 [1st Dept 2015]). That meeting of the minds must include agreement on all essential terms (*Id.*, relying on *Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]). To create an enforceable contract under New York law, there must be "a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Express Indus. and Terminal Corp. v N.Y. State Dep't. of Transp.*, 93 NY2d 584, 589 [1999]; *Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105, 109 [1981]). The doctrine of definiteness is well established in contract law and, in short, it means that a court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to (*Korff v Corbett*, 18 AD3d 248, 250 [1st Dept 2005]). Nevertheless, New York courts have acknowledged that "the concept of definiteness cannot be reduced to a precise, universal measurement" (*Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989]). The Court of Appeals has instructed lower courts to apply the "definiteness doctrine" sparingly, because "at some point virtually every agreement can be said to have a degree of indefiniteness, and if the doctrine is applied with a heavy hand it may defeat the reasonable expectations of the parties in entering into the contract" (*Id.* at 483). Only as a last resort should a court determine that a party's promise is so vague or indefinite as to be unenforceable as a matter of law (*Id.*)

At least for the purposes of having sufficiently stated a breach of contract claim so as to withstand a motion to dismiss, the plaintiff need not have alleged the exact end date to the profit-sharing agreement, the effect of losses on the plaintiff's ability to receive advance draws, the allocution of responsibility for losses, or a mechanism for determining the exact amount of the plaintiff's rightful share of the profits. To require all these terms and conditions to be laid out in the complaint in such specific detail would run afoul of the clear instructions of the Court of Appeals not to apply a heavy hand when determining whether a party's alleged promise is sufficiently definite to be enforceable. It would also run afoul of the liberal pleading standards cited above. Therefore, applying these principles, the Court finds that plaintiff has adequately alleged definiteness of the material terms of the alleged agreement to support the existence of an enforceable contract.

Here, the complaint alleges that "Goldstein would receive 50% of all Company profits . . . in exchange for managing the Company full-time" (complaint ¶¶ 20, 23, 66, 77, 91, 100). Goldstein seeks damages for his share of Worldwide profits from December 2, 2013, when he began working for Worldwide on a full-time basis, until January 19, 2022, when he stopped working and being paid by the company (complaint ¶¶ 33, 8, 20, 51, 60). Further, in his complaint, Goldstein sufficiently alleges his entitlement to 50% of the Worldwide profits from that time-period. Plaintiff does so through the allegation that, "over eight years, Goldstein fully performed his obligations under that oral agreement, by providing managerial services to Worldwide on a day-to-day basis" (complaint ¶¶ 68, 73, 79, 86, 92, 97, 102). Importantly, the complaint sets forth the percentage of profits Goldstein was allegedly entitled to (50%), the

consideration given by Goldstein (his full-time management of the company) and the time-period or duration of the agreement (while Goldstein was employed- alleged to be from December 2, 2013, to January 19, 2022). It also alleges that until the company became profitable, Goldstein would receive a draw of $10,000 per month. Accordingly, these allegations are sufficient to establish the existence of a valid and enforceable agreement regarding sharing profits of Worldwide.

Additionally, in the complaint and the email from Glass to a potential investor which the complaint incorporates by reference, includes that Glass emailed "announcing that Goldstein would 'introduc[e] and manage[]' the Company, and in exchange, Goldstein would 'be entitled to 50% of the profits'" and that, "[u]ntil the Company became profitable, however, Goldstein would 'receive a **draw** of $10,000 per month'" (complaint ¶ 23, quoting NYSCEF Doc. No. 3 at 2). The complaint also incorporates the email sent by Glass on December 1, 2013, which includes the spreadsheet business plan, allegedly prepared by Glass himself (complaint at ¶ 25; NYSCEF Doc. No. 5). This spreadsheet business plan defines profits as "Gross Profits," clarified as meaning, "...Net of all VMS [vendor management services] fees and any client discounts" (NYSCEF Doc. No. 5 at 4, 11). Under the circumstances presented here, it is unnecessary for plaintiff to allege anything more in the complaint concerning the agreement to share profits equally.

The Court must resolve a separate issue concerning the allocation, not of profits, but of losses. As noted above, the defendants are correct in their contention that neither the complaint nor the alleged agreement contains anything concerning the allocation of any incurred losses. Plaintiff claims the complaint does allege what would happen in the event Worldwide suffered losses by claiming that it provided that "until the Company became profitable" plaintiff would simply be paid $10,000 per month and pay for no losses of any kind (NYSCEF Doc. No. 33 at 14; complaint ¶¶ 23, 25). However, that interpretation is inconsistent with the actual allegations in the complaint. The complaint alleges Goldstein was entitled to a $10,000 advance "monthly draw" against future profits (complaint ¶¶ 5, 26). This is not a salary or compensation for already-performed services as plaintiff now attempts to argue in his opposition brief. It is clearly an advance draw against his future profit-share. The compensation was the profit-share itself. In the complaint, plaintiff alleges he "was paid $10,000 per month as an advance draw against his Profit Share" (complaint ¶ 42). The complaint also alleges that plaintiff was to receive "50% of all Company profits" as compensation for managing and growing the business full-time (*see e.g.* complaint ¶¶ 20, 21, 23). The clear import is that the $10,000 per-month amount the plaintiff was paid was intended to be an advance draw and/or possibly a loan against future compensation, which would come in the form of a share of the profits.

The complaint does not state with any specificity how the advance draw payments would be impacted or modified in the event of company losses. The November 25, 2013-email, attached to the complaint and allegedly from defendant Glass, states, "Eric [Goldstein] will continue to receive a draw of $10,000 per month. If Walsh #3 does not have minimum sales of 30 K by week 13 of their commencement,

Eric's draw will be reduced" (NYSCEF Doc. No. 3 ¶ 1). This email seems to indicate that plaintiff's "draw" was based on an assumption about sales (and, as plaintiff alleges, profits) which, if they did not occur, would reduce or eliminate plaintiff's "advance draw."

It also appears from the complaint that plaintiff acknowledged that Worldwide did sustain some losses prior to the fall of 2014. Thus, the terms of any agreement regarding repayment of plaintiff's advance draw, in the event of losses, is not set forth in the complaint. Notwithstanding that this might pose problems for the plaintiff down the road, it does not warrant dismissal of the complaint at this time. Contrary to the defendants' contention, the treatment of advance draws, while perhaps relevant to damages or a possible counterclaim, is not an essential or material term of an enforceable agreement. The spreadsheet, attached as "Exhibit C" to the complaint, demonstrates both an agreement that losses would be deducted or taken back from Goldstein's advance draw and that losses were to be allocated (*see* NYSCEF Doc. No. 5). Again, the fact that the complaint does not specifically allege or define the entirety of the terms outlined or mentioned in the attachments does not make the allegations in the complaint vague or insufficient.

Accordingly, what matters here is whether the treatment of losses is a material or essential term in an oral agreement to split profits equally. The Court finds that it is not. Putting it another way, there is no requirement that a breach of contract cause of action involving an oral agreement to share profits equally must also include allegations regarding the treatment of any purported losses in order to survive a motion to dismiss pursuant to CPLR § 3211 (a)(7); particularly where the complaint otherwise sets forth all of the necessary elements to plead a breach of contract cause of action. There is sufficient definiteness as to the material terms of the alleged profit-sharing agreement between the parties here so as to establish an enforceable contract as to the sharing of profits (*see Martin*, 52 NY2d at 109; *Dee v Rakower*, 112 AD3d 204, 212 [2d Dept 2013]). The Court finds that anything else is irrelevant at this time. Therefore, the defendants' motion to dismiss the plaintiff's breach of contract claim is denied.

ADDITIONAL CLAIMS:

Next, with respect to the plaintiff's separate causes of action for breach of the implied covenant of good faith and fair dealing, unjust enrichment, and promissory estoppel, defendants maintain these claims should be dismissed as they are duplicative of the plaintiff's breach of contract claims. Where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies (*Sabre Intern. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438-39 [1st Dept 2012]). In this case, there is a genuine dispute as to the existence of a valid and enforceable contract and the plaintiff is thus permitted to put forth quasi contract causes of action as an alternative (*see Safariland, LLC v H.B.A. Agencies, Ltd.*, 198 AD3d 519, 521 [1st Dept 2021]. However, the complaint must still set forth all of the required elements of the quasi-contract claim (*see MatlinPatterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]).

IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING:

Defendants argue that the cause of action for breach of the implied covenant of good faith and fair dealing is duplicative of the plaintiff's breach of contract claim and should be dismissed. A cause of action for breach of the covenant of good faith and fair dealing "cannot create new contract rights or defeat express contract provisions...." (*Rapson Invs. LLC v 45 E. 22nd St. Prop. LLC,* 180 AD3d 614, 614-15 [1st Dept 2020]). It does not operate to rewrite the agreement or modify its purported terms (*see Core Group Mktg. LLC v MIP One Wall St. Acquisition LLC*, 213 AD3d 444, 445 [1st Dept 2023]; *Gottwald v Sebert,* 193 AD3d 573, 582 [1st Dept 2021]). Rather, the covenant embraces a pledge that "neither party shall do anything which have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). For a complaint to state a cause of action for breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff (*see Aventine Inv. Mgmt., Inc. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 [2d Dept 1999]). The Court agrees with the defendants that the plaintiff has failed to adequately allege such facts or circumstances here and the claim is duplicative of that for breach of contract. Accordingly, the cause of action for breach of the implied covenant of good faith and fair dealing should be dismissed.

UNJUST ENRICHMENT:

For a cause of action for unjust enrichment, a plaintiff must demonstrate that (1) the defendant was enriched; (2) at plaintiff's expense, and (3) it is against equity and good conscience to permit defendant to retain what is sought to be recovered (*Farina v Bastianich*, 116 AD3d 546, 548 [1st Dept 2014]). A party may be unjustly enriched not only where they receive money or property, but also where they otherwise receive a benefit (*Id.*). Here, plaintiff has adequately alleged the elements of a claim for unjust enrichment and contrary to defendants' assertions, the claim is not duplicative of that for breach of contract. In the complaint, plaintiff alleges that he provided defendants with extensive managerial services for over eight years and devoted thousands of hours to that effort (complaint ¶ 92). Plaintiff also alleges that defendants accepted and utilized his services, and as a result of his work, Worldwide grew from a startup to a multimillion dollar business (complaint ¶ 94). Reasonably expecting to be paid for his services through the promise of the profit-share, and despite his demand for payment, defendants have failed to provide Goldstein with his portion of the profit-share (complaint ¶ 95). Finally, plaintiff has alleged that equity and good conscious require that defendants pay him the amount of his profit-share (complaint ¶ 97). Accordingly, plaintiff has sufficiently stated a claim that defendants were unjustly enriched at Goldstein's expense, based on the non-payment of what he was allegedly owed under the profit-share and by the benefit of Goldstein's efforts and/or work at the company. As plaintiff has adequately alleged a claim of unjust enrichment for purposes of

withstanding a motion to dismiss, the defendants' motion to dismiss is denied as to this claim.

PROMISSORY ESTOPPEL:

To establish a claim for promissory estoppel, a plaintiff must show: "(1) promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance" (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 842 [1st Dept 2011]). Defendants argue that the promissory estoppel claim is duplicative of the breach of contract claim and/or plaintiff does not plead an actual promise that is definite enough to be enforceable. The Court disagrees. As detailed above, the complaint alleges an unambiguous and clear promise to give plaintiff a 50% share of the profits in exchange for him performing management services. Since the terms of the oral profit-sharing agreement were adequately alleged, plaintiff's promissory estoppel claim that he reasonably relied on the agreement to his detriment is also adequately pleaded (*see CIP GP 2018, LLC v Koplewicz*, 194 AD3d 639, 640 [1st Dept 2021]; *Castellotti v Free*, 138 AD3d 198, 204-205 [1st Dept 2016]). Since there is a bona fide dispute as to the existence of a contract regarding profit-sharing in Worldwide, the plaintiff may proceed upon this theory of quasi contract as well as breach of contract and is not required to elect his remedies at this stage (*see Sabre Intern. Sec., Ltd. v Vulcan Capital Management, Inc.*, 95 AD3d 434, 438-439 [1st Dept 2012]). Any other issues such as justifiable reliance or damages must await discovery and/or trial and/or summary disposition.

STATUTE OF LIMITATIONS:

Here, defendants maintain that all of Goldstein's claims for damages that accrued prior to September 13, 2017, should be dismissed as time-barred. On a motion to dismiss a cause of action as barred by the applicable statute of limitations, pursuant to CPLR § 3211(a)(5), a defendant must establish, prima facie, that the time within which to sue has expired. Once that showing has been made, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, an exception to the limitations period is applicable or the plaintiff actually commenced the action with the applicable limitations period (*see Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman LLP*, 188 AD3d 530, 531 [1st Dept 2020]).

Defendants assert that Goldstein's claims for damages for the time period of 2013 through 2017 should be dismissed as barred by the applicable six-year statute of limitations for actions based on a breach of contract and/or quasi-contract claims. "A breach of contract action must be commenced within six years from the accrual of the cause of action (*see Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1030 [2013]). The six-year limitations period for breach of contract begins to run from the time when the breach occurs even if the injured party does not learn about the breach until later (*see Ace Securities Corp. v DB Structured Products Inc.*, 25 NY3d 581, 594 [2015]; *Ely-Cruikshank Co., Inc. v Bank of Montreal*, 81 NY2d 399, 403 [1993]). This is a bright-line rule that New York courts must apply even when the result is harsh, unjust

and/or manifestly unfair because it is objective, predictable, and generates certainty among parties engaged in commercial or business transactions (*see Ace Securities*, 25 NY3d at 594).

Here, Goldstein alleges that he entered into an agreement in November 2013 (complaint ¶ 66). Under that supposed agreement, Goldstein was due to receive 50% of the profits Worldwide earned, which profits were allegedly to be paid to Goldstein each month (*Id.*). Goldstein claims that he is owed profits starting from no later than December 2, 2013 (complaint ¶ 73; ["Defendants have breached the parties' oral agreement by failing to pay Goldstein his full share of Company profits [less the advance draws and catch-up payments already paid to him] from December 2, 2013 to January 19, 2022]").

Clearly, Goldstein cannot recover damages for claims arising as far back as December 2013. Under the most liberal reading of the complaint, Goldstein's claims accrued, at the latest, in the fall of 2014 when the complaint alleges Worldwide first became profitable and Goldstein did not receive his equal share (complaint ¶ 31). The fall of 2014 began on September 1, 2014, and ran through November 30, 2014. Accordingly, Goldstein's claim for profits accrued no later than November 30, 2014, nine years ago. Therefore, the earliest that plaintiff could assert a claim for damages arising out of a breach of contract claim, and that would not be time-barred, would be for damages resulting from the failure to pay plaintiff his share of the profits that accrued on or after September 13, 2017. Accordingly, the Court must dismiss all parts of the plaintiff's claims that fall outside the six-year statute of limitations, i.e., all claims that accrued prior to September 13, 2017.

In opposition to the motion to dismiss, the plaintiff argues that the breach did not actually occur until January of 2022 when he was fired from Worldwide and first demanded his share of the profits. Until his employment ended, the plaintiff maintains he had no reason to think that Worldwide would refuse to ever pay him his share of the profits. Plaintiff points to the fact that he continued to receive, what he has termed, a monthly advance draw of $10,000 and therefore had no reason to think that the defendants would not eventually make good on their promise to pay him. Goldstein also maintains that the oral agreement did not require the defendants to pay his profit shares on a monthly basis. The problem for plaintiff is that this contention contradicts the allegations in the complaint which state that both the plaintiff and defendants believed and/or knew that the plaintiff was owed profit-sharing money on a monthly basis, long before his termination in 2022 (*see* complaint ¶43 ["On multiple occasions, including in late 2021, Goldstein approached Glass about the Company's profits, including on October 26 and 27, 2021, when Glass had checks deposited to his own account for $1,000,000.00"]; ¶ 42 [Starting from December 2013 until early 2022, Goldstein was paid "catch-up payments" in addition to his monthly advance draw]; ¶ 61 [Glass's son allegedly admitted Goldstein was owed "north of" one million dollars]; ¶ 66 [" In November and December 2013, Glass, acting on behalf of himself individually and on behalf of Worldwide, agreed with Goldstein, in clear and definite terms, that in exchange for Goldstein's services as a full-time manager of Worldwide, Goldstein would

receive 50% of Worldwide's profits [less the advance draws already paid to him], **to be paid monthly**"][**emphasis added**]). The complaint does not contain any allegations that would even suggest that payment of the share of the profits under the agreement could have been resolved with a cumulative payment in the future as the plaintiff's counsel now suggests in his opposition brief. The terms of an oral contract as stated in the complaint cannot now be modified or changed by the arguments of counsel in a brief or at oral argument. Accordingly, the complaint itself alleges a breach starting the fall of 2014. Thus, any claims for profit-share payments accruing between the fall of 2014 and September 13, 2017, are time-barred and therefore dismissed.

EQUITABLE ESTOPPEL:

Plaintiff also argues that the defendants should be equitably estopped from asserting the statute of limitations as a defense. "Equitable estoppel is an extraordinary remedy which applies where a party is prevented from filing an action within the applicable statute of limitations due to his or her reasonable reliance on deception, fraud or misrepresentations by the other" (*Pulver v Dougherty*, 58 AD3d 978, 979–980 [3d Dept 2009] [internal quotation marks, brackets and citations omitted]; *City of Binghamton v Hawk Eng'g P.C.*, 85 AD3d 1417, 1420 [3d Dept 2011]). It is plaintiff's burden to plead facts establishing his entitlement to equitable estoppel by alleging specific actions and affirmative wrongdoings by the defendants that prevented him from timely commencing suit (*see Zumpano v Quinn*, 6 NY3d 666, 674 [2006]; *Cellupica v Bruce*, 48 AD3d 1020, 1021 [3d Dept 2008]; *Dombroski v Samaritan Hosp.*, 47 AD3d 80, 82 [3d Dept 2007]). A plaintiff seeking to equitably estop the defendant from asserting statute of limitations as a defense must demonstrate both that he reasonably relied on the defendant's misrepresentations in not asserting a timely claim, and that he exercised due diligence in ascertaining the relevant facts and commencing the action (*see Zumpano*, 6 NY3d at 674; *Pahlad v Brustman*, 33 AD3d 518, 519 [1st Dept 2006]).

The complaint does not plead any allegations suggesting that the defendants made affirmative misrepresentations or took affirmative steps of any kind to prevent the plaintiff from bringing this suit. The allegations in the complaint do not show that the defendants deceived the plaintiff, in any manner, regarding the statute of limitations or even suggest an attempt to do so. The complaint alleges that the defendants refused to pay (complaint ¶ 9), that defendants made an agreement to pay profit shares on a monthly basis (*Id.* ¶¶ 21, 66), that documents evidenced this supposed agreement (*Id.* ¶¶ 23-26), and that Glass told investors he had made such a deal (complaint ¶ 28) yet refused to pay (complaint ¶ 64). None of these allegations constitute concealment or an affirmative misrepresentation on which the plaintiff could have reasonably relied in failing to bring suit. In fact, the complaint alleges that the plaintiff was perfectly aware that he was owed money pursuant to the purported oral agreement and that the defendants had refused to pay him as such. Other than allegations of the defendants' vague assurances that the plaintiff would be "made whole" and/or a subsequent refusal to provide an accounting, the complaint does not allege a single communication or interaction with the defendants regarding the alleged promise to pay the plaintiff 50% of the profits. For equitable tolling to apply, a plaintiff may not rely on the same act that

forms the basis for the claim—the later fraudulent misrepresentation must be for the purpose of concealing the former tort (*see Zumpano*, 6 NY3d at 674). Equitable tolling "'is triggered by some conduct on the part of the defendant after the initial wrongdoing; mere silence or failure to disclose the wrongdoing is insufficient'" (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491–92 [2007], quoting *Zoe G v Frederick F.G.*, 208 AD2d 675, 675–676 [2d Dept 1994]). The complaint falls far short of alleging grounds for equitable estoppel to apply. Accordingly, the motion to dismiss is granted to the extent that any breach of contract or quasi-contract claims that accrued prior to September 13, 2017, are hereby dismissed as time-barred.

CONCLUSION:

Accordingly, it is hereby

ORDERED that the portion of defendants' motion to dismiss the complaint for the failure to state a cause of action is GRANTED IN PART; to the extent that the plaintiff's second cause of action for breach of implied covenant of good faith and fair dealing is DISMISSED, and is DENIED as to the plaintiff's first cause of action for breach of contract, third cause of action for unjust enrichment, and fourth cause of action for promissory estoppel; and it is further

ORDERED that the portion of defendants' motion seeking to dismiss the plaintiff's claim for damages which accrued outside the applicable statute of limitations is GRANTED, and the plaintiff's claims for damages arising prior to September 13, 2017, are DISMISSED; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 327, 80 Centre Street, New York, NY 10013, on October 3, 2024, at 2:15 PM.

This constitutes the decision and order of the court.

7/2/2024
DATE

NICHOLAS W. MOYNE, 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