

**Calvert Consulting, Inc. v Pomp & Whimsy, Inc.**

2024 NY Slip Op 32675(U)

July 15, 2024

Supreme Court, New York County

Docket Number: Index No. 656385/2021

Judge: Judy H. Kim

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 04

Justice

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CALVERT CONSULTING, INC.,

Plaintiff,

- v -

POMP & WHIMSY, INC.,

Defendant.

-----X

INDEX NO. 656385/2021

MOTION DATE 01/19/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISS

Upon the foregoing documents, defendant's motion to dismiss is granted, in part, to the extent set forth below.

On or about January 27, 2021, the parties entered into an Independent Contractor Agreement (the "Agreement") in which defendant hired plaintiff to seek out new retail accounts for defendant's gin liqueur and oversee these accounts (NYSCEF Doc. No. 1 [Compl. at ¶8, Ex. 1]). Under the Agreement, plaintiff would "be compensated and reimbursed for the Services as set forth on Exhibit B. Completeness of work product shall be determined by [defendant] in its sole discretion, and [plaintiff] agrees to make all revisions, additions, deletions or alterations as requested by [defendant]" (Id. at §1.4). Exhibit B provided, in turn, that

[Defendant] shall pay [plaintiff] a base fee of eight thousand dollars (\$8,000) per month "Base Fee", which shall be due and payable on the last business day of each calendar month of service If the agreement is terminated before the full term of the agreement as under Section 8 of the Independent Contractor Agreement, the Base Fee, expenses and Goal Fees (as defined below) will be paid up until the date of termination on a pro rata basis, and within 7 days of the termination.

In addition to the Base Fee, the following goal related fees (“Goal Fees”) will apply

- \$8.50 per (physical) case to a new national/regional retail account
  - Within pre-assigned / pre-approved retail account chains
  - Activated with opening order and remains active 12 months from first order, including beyond the Term
  - Payable quarterly
- \$6,000 one-time bonus for the achievement of 4,000 physical cases through the retail chain channel during the term of the contract

(Id. at Ex. B).

The Agreement further provided that plaintiff was an independent contractor and that the Agreement “could be terminated by either party at any time, or without cause, effective upon notice to the other party” (Id. at §1.3).

Plaintiff alleges that, after the parties executed the Agreement, plaintiff secured large corporate and retail clients for defendant which led to a 423 percent increase in sales of cases of its gin in March 2021, according to defendant’s April 2021 newsletter sent to investors (NYSCEF Doc. No. 1 [Compl. at ¶¶11, 13]). However, in June 2021, defendant terminated the Agreement effective June 30, 2021 (Id. at ¶15). Plaintiff nevertheless continued to work for Defendant into July 2021 (Id. at ¶18). Defendant never paid plaintiff the goal fees or bonus payment contemplated by the Agreement (Id. at ¶20).

Plaintiff also alleges in May 2020 Allison Evanow of Square One Organic Spirits made inquiries to defendant about hiring plaintiff as a consultant, but that defendant’s founder and CEO, Nicola Nice, responded that plaintiff was defendant’s full-time employee that Square One Organic Spirits could not hire (when, in fact, Nice was aware that plaintiff was an independent contractor) and that Square One did not hire plaintiff as a result (Id. at ¶¶50-53).

In light of the foregoing, plaintiff asserts claims for breach of contract, unjust enrichment, quantum meruit, and tortious interference with prospective business relations and seeks money damages for unpaid goal fees and bonus payments and as attorney's fees pursuant to section 9.3 of the Agreement. Plaintiff also seeks as an accounting and the imposition of a constructive trust on all funds that defendant allegedly wrongfully retained.

Defendant now moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss this action, arguing that plaintiff's breach of contract claim does not lie because defendant had sole discretion to award goal fees and bonus payment, plaintiff's unjust enrichment and quantum meruit claims are precluded by the existence of the Agreement, plaintiff fails to state a tortious interference claim fails because plaintiff does not allege that defendant acted wrongfully and solely to harm plaintiff and, finally, that neither an accounting are constructive trust are appropriate because there is no fiduciary relationship between plaintiff and defendant.

In opposition, plaintiff asserts that defendant's argument that it had the power to unilaterally determine whether to award goal fees is belied by the plain language of the Agreement. Plaintiff also argues that its unjust enrichment and quantum meruit claims are not barred by the existence of the Agreement because there is a dispute as to whether the Agreement covers the scope of the work at issue and, in any event, plaintiff is also asserting these claims as to work it performed after the Agreement was terminated at the end of June 2021. As to its tortious interference with prospective business relations claim, plaintiff argues it has sufficiently alleged that defendant "was motivated solely by a desire to harm the plaintiff." Finally, plaintiff argues that equity compels an accounting and constructive trust, even absent a fiduciary relationship, because such relief is necessary for plaintiff to establish the amounts improperly withheld by defendant and secure same.

## DISCUSSION

### *Breach of Contract*

Defendant's motion to dismiss plaintiff's breach of contract claim pursuant to CPLR 3211(a)(1) is denied. On a CPLR 3211(a)(1) motion, "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (Schmidt-Sarosi v Offices for Fertility and Reproductive Medicine, P.C., 195 AD3d 479, 480 [1st Dept 2021] [internal citations omitted]).

Section 1.4 of the Agreement does not establish a defense to this claim. Defendant's argument that this provision permits it to decline to pay goal fees if it determines that plaintiff's work is not complete is unavailing. The Court agrees with plaintiff that, reading section 1.4 as a whole and in conjunction with Exhibit B, the only reasonable interpretation of this provision is that defendant could request changes to the work performed by plaintiff and that plaintiff could not refuse such a request.<sup>1</sup> Defendant's position that despite the specific, measurable, benchmarks for plaintiff's financial bonuses set forth in the Agreement, it may nevertheless unilaterally assert that plaintiff's work was not "complete" and decline to pay such goal fees is far from commercially reasonable.

The Court of Appeals' decision relied on by defendant to support this argument, Namad v. Salomon Inc., 74 NY2d 751 (1989) undercuts it, presenting an instructive contrast. The employment agreement at issue in that case did not, as here, provide specific bonuses if certain specified goals were met but dictated that the amounts of bonuses "shall be at the discretion of the management" and that "[s]uch bonuses as are awarded will be consistent with the customary policy of the company" (Namad v Salomon Inc., 74 NY2d 751 [1989]).

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<sup>1</sup> Notably, defendant does not assert that any such request was ever made.

*Unjust Enrichment*

Defendant's motion to dismiss plaintiff's unjust enrichment and quantum meruit claims is also denied. Although "[t]he existence of a valid and enforceable contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter, 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] [internal citations and quotations omitted]).

As an initial matter, the Court agrees with plaintiff that no unjust enrichment claim lies as to the period before the Agreement was terminated, as the Agreement comprehensively addresses how plaintiff's compensation is to be calculated. Contrary to plaintiff's claim, defendant's argument that the Agreement permits it to decline to pay plaintiff goal fees or a bonus payment is not equivalent to an argument that the Agreement does not apply such that is a case "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."

However, to the extent plaintiff seeks to recover for work performed after the termination of the Agreement under these theories, these claims survives (See e.g., Rubin v Napoli Bern Ripka Shkolnik, LLP, --- NYS3d ----, 2024 WL 3187302, at \*1 [1st Dept June 27, 2024] [triable issues of fact precluded summary judgment on quantum meruit claim based on plaintiff's performance of work for law firms after plaintiff's employment was terminated]).

*Tortious Interference with Prospective Business Relations*

That branch of defendant's motion, pursuant to CPLR 3211(a)(7) to dismiss plaintiff's tortious interference claim is also denied. On a motion to dismiss under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (See Leon v Martinez, 84 NY2d 83 [1994]).

“A claim for tortious interference with a prospective business relationship (i.e., an economic advantage) must allege: (1) the defendant's knowledge of a business relationship between the plaintiff and a third party; (2) the defendant's intentional interference with the relationship; (3) that the defendant acted by the use of wrongful means or with the sole purpose of malice; and (4) resulting injury to the business relationship” (534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541, 542 [1st Dept 2011]) [citations omitted]. “Wrongful means include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract” (GMX Tech., LLC v Pegasus Capital Advisors, L.P., 2020 NY Slip Op 32634[U], 11-12 [Sup Ct, NY County 2020] [emphasis added] quoting Carvel Corp. v Noonan, 3 NY3d 182, 191 [2004]).

The complaint's allegations that defendant's CEO made an intentional misrepresentation to someone interested in hiring plaintiff, thereby preventing plaintiff from being hired satisfies these elements (See Freedman v Pearlman, 271 AD2d 301, 305 [1st Dept 2000] [“plaintiffs set forth sufficient allegations of an intentionally fallacious communication with prospective

employer York Capital Management by defendant Pearlman to survive dismissal at this juncture”]; see also Smith v Meridian Technologies, Inc., 52 AD3d 685 [2nd Dept 2008]).

At this juncture, according the plaintiff every reasonable favorable inference, the Court cannot conclude that the complaint establishes that the alleged interference was motivated by defendant’s normal economic interest such that dismissal would be appropriate (Cf. Advanced Glob. Tech., LLC v Sirius Satellite Radio, Inc., 44 AD3d 317, 318 [1st Dept 2007] [allegations that defendant persuaded manufacturer of its satellite radio receivers to cease negotiations with plaintiff to develop high-definition radios for plaintiff to distribute did not allege tortious interference with prospective economic relationship absent evidence that defendant was wrongful or motivated solely by malice as opposed to normal economic interest]).

*Accounting and Constructive Trust*

Finally, defendant’s motion to dismiss plaintiff’s claims for an accounting and constructive trust claims is granted.

“[A]bsent circumstances which otherwise call for equitable relief,” the “essential elements which must be shown to establish a constructive trust” are: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, (4) breach of the promise, and (5) unjust enrichment” (Reingold v Bowins, 180 AD3d 722, 724 [2d Dept 2020] [internal citations omitted]; see also Kaufman v Cohen, 307 AD2d 113, 127 [1st Dept 2003]).

An accounting requires “a fiduciary or confidential relationship, money entrusted to the defendant imposing the burden of an accounting, the absence of a legal remedy, and in some cases a demand and refusal” (Metro. Bank & Tr. Co. v Lopez, 189 AD3d 443, 446 [1st Dept 2020] [internal citations and quotations omitted]; see also Waldman v. Englishtown Sportswear, Ltd., 92 A.D.2d 833 [1st Dept 1983]). However, similarly to a constructive trust, “the right to an accounting

applies even where there is no fiduciary relationship where special circumstances are present warranting equitable relief in the interest of justice” (Bull Hill, LLC v HFZ Member RB Portfolio LLC, 2024 NY Slip Op 30649[U], 20 [Sup Ct, NY County 2024] [internal citations and quotations omitted omitted]).

It is undisputed that no fiduciary relationship existed between the parties, neither of these remedies are available (See e.g., Front, Inc. v Khalil, 103 AD3d 481, 483 [1st Dept 2013], affd, 24 NY3d 713 [2015]; Saunders v AOL Time Warner, Inc., 18 AD3d 216, 217 [1st Dept 2005]). Neither are special circumstances alleged that would warrant such relief, even in the absence of a fiduciary duty, as a matter of equity. To the extent plaintiff argues that an accounting is necessary to determine defendant’s sales in order to calculate goal fees owed under the Agreement, this information will be obtained during discovery. Neither has plaintiff established that a constructive trust is appropriate, as no specific assets are at risk of misappropriation or conversion; should plaintiff prevail it can be fully compensated through money damages.

Finally, in light of the foregoing, defendant’s motion for attorney’s fees is denied.

Accordingly, it is

**ORDERED** that defendant’s motion is granted to the limited extent that plaintiff’s claims for a constructive trust and accounting are dismissed, and is otherwise denied; and it is further

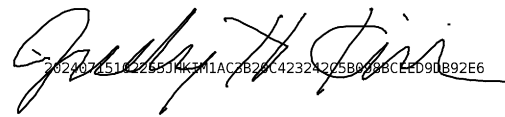
**ORDERED** that plaintiff shall, within ten days from the date of this decision and order, serve a copy of this decision and order with notice of entry upon defendant and the Clerk of the Court; and it is further

**ORDERED** that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

*Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

**ORDERED** that the parties are to appear for a preliminary conference on September 13, 2024 in Part 4 (80 Centre Street, room 308) at 10:00 am.

This constitutes the decision and order of the Court.



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7/15/2024

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE