

<b>Ovsyannikov v Monkey Broker, LLC</b>
2011 NY Slip Op 33909(U)
August 12, 2011
Supreme Court, New York County
Docket Number: 651453/2010
Judge: Eileen Bransten
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## SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. EILEEN BRANSTEN**PART 3

Index Number : 651453/2010

OVSYANNIKOV, DMITRIY

vs

MONKEY BROKER, LLC

Sequence Number : 001

DISMISS ACTION

INDEX NO.

651453/10

MOTION DATE

3/22/11

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

## PAPERS NUMBERED

123Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 8-12-11**HON. EILEEN BRANSTEN** J.S.C.Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITIONCheck if appropriate: ☐ DO NOT POST ☐ REFERENCE☐ SUBMIT ORDER/JUDG.☐ SETTLE ORDER /JUDG.MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 3

-----X  
DMITRIY OVSYANNIKOV,

Plaintiff,

- against-

MONKEY BROKER, LLC and CARLOS  
MORENO,

Index No.: 651453/10  
Motion Date: 03/15/11  
Motion Seq. No.: 001

Defendants.  
-----X

**BRANSTEN, J:**

Defendants Monkey Broker, LLC (“Monkey Broker”) and Carlos Moreno (“Moreno”) (collectively, “Defendants”) move pursuant to CPLR 3211 (a) (1) and (7) to dismiss Plaintiff Dmitriy Ovsyannikov’s (“Plaintiff” or “Ovsyannikov”) claims for breach of a partnership agreement, breach of oral contract and breach of fiduciary duty. Plaintiff opposes.

**BACKGROUND**

Defendant Monkey Broker is a New York limited liability company organized under the laws of the State of New York. Monkey Broker’s principal place of business is in the County of New York. *See* Affidavit of Carlos Moreno (“Moreno Aff.”), ¶ 4. Defendant Carlos Moreno is a member of Monkey Broker. Moreno Aff., ¶ 4. Plaintiff Dmitriy Ovsyannikov performed employment services for Monkey Broker from June 2007 through his termination on January 18, 2010. Complaint, ¶¶ 9, 25.

Plaintiff alleges that on or around August of 2007, Moreno verbally offered Plaintiff a thirty percent share in Monkey Broker's profits. Plaintiff contends that the offer of the profit-share was in exchange for Plaintiff undertaking additional responsibilities in developing an online banner advertising business. Complaint, ¶¶ 10, 12, 13, 15.

Plaintiff further alleges that in exchange for Plaintiff's completion of the agreed-upon services, Moreno was to deliver a partnership agreement to Plaintiff. Complaint, ¶¶ 13, 14. Defendants, despite continued promises to do so, never proffered the agreement. Complaint, ¶¶ 13, 14.

Plaintiff contends that he relied upon Moreno's promise of a partnership agreement in contributing his "unique knowledge and experience in web design and computer programming" to the Monkey Broker enterprise. Complaint, ¶¶ 17, 19. Plaintiff alleges that he worked ten to twelve hours each day on web design and programming, and that his contribution directly resulted in Monkey Broker's successful development of an online banner advertising business. Complaint, ¶¶ 16, 18, 19. Plaintiff further states that this successful development constitutes fulfillment of his duties under the alleged oral partnership agreement. Complaint, ¶ 35.

On January 18, 2010, Moreno informed Plaintiff that Monkey Broker would no longer require Plaintiff's services. Complaint, ¶¶ 25, 26. Moreno allegedly stated that the company would rehire Plaintiff as soon as Monkey Broker became profitable. *Id.*

Plaintiff alleges that Defendants never contacted him to rejoin Monkey Broker. Complaint, ¶ 27.

Monkey Broker was not profitable when Plaintiff was terminated. Complaint, ¶ 24. Plaintiff alleges that the company has since become profitable, and that the company's online banner advertising business generates current revenues of \$4,800,000 per year. Complaint, ¶ 22. Plaintiff alleges that he has not received any share of Monkey Broker's profits. Complaint, ¶¶ 31, 37, 42.

Plaintiff brings three causes of action against Defendants: (1) breach of partnership agreement; (2) breach of oral contract; and (3) breach of fiduciary duty. Complaint, ¶¶ 28-42. Plaintiff contends that he suffered damages amounting to thirty percent of Monkey Broker profits as a direct result of (1) his wrongful termination, and (2) Defendants' failure to distribute thirty percent of Monkey Broker's profits to Plaintiff as allegedly agreed to by Moreno. Complaint, ¶¶ 31, 37, 42.

Defendants move to dismiss the complaint in its entirety for failure to state a cause of action. *See* Defendants' Memorandum of Law in Support of Motion to Dismiss Verified Complaint Against Defendants ("Defendants' Memo") at 8.

### **ANALYSIS**

#### **1. Standard of Law**

CPLR 3211 (a)(7) permits the court to dismiss a complaint for failure to state a cause of action:

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts alleged fit within any cognizable legal theory. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the claim has a cause of action, not whether he has stated one.

*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994) (internal quotations and citations omitted); *see also Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002); *Prichard v. 164 Ludlow Corp.*, No. 600828/06, 2006 WL 3626306, at \* 3 (Sup. Ct., N.Y. County, Dec. 12, 2006) (Fried, J.).

“It is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence ... are not presumed to be true on a motion to dismiss for legal insufficiency.” *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The court is “not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts.” *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 496 (1st Dep't 2006) quoting *Robinson v. Robinson*, 303 A.D.2d 235, 235 (1st Dep't 2003). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.” *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19-22, (2005). “The criterion is whether the

proponent of the pleading has a cause of action, not whether [it] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate.” *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 273 (1977).

“Dismissal is [therefore] proper only when it appears that a plaintiff can prove no set of facts which would entitle [it] to relief.” *Icahn v. Lions Gate Entertainment Corp.*, No. 651076/2010, 2011 WL 1233362, at \*6 (Sup. Ct., N.Y. County, March 30, 2011) (Sherwood, J.).

## **2. Plaintiff’s First Cause of Action for Breach of Partnership Agreement**

Plaintiff first alleges that he entered into a binding oral partnership agreement with Defendants. Complaint, ¶¶ 12, 30. Plaintiff avers that the oral agreement set forth the terms of the partnership such that Plaintiff would receive a thirty percent share in Monkey Broker’s income in exchange for the contribution of his services and unique expertise. Complaint, ¶¶ 12,13,15,19. Plaintiff further alleges that Moreno promised Plaintiff a “written partnership agreement,” but that Moreno never delivered the agreement. Complaint, ¶¶ 13, 14.

Plaintiff claims to have fulfilled his obligations to Monkey Broker until his termination, in reliance of, and in compliance with, the alleged oral partnership agreement. Complaint, ¶ 35. Plaintiff complains that his termination from Monkey Broker therefore breached the alleged oral agreement and directly resulted in damages of thirty percent of Monkey Broker’s \$4,800,000 profits. Complaint, ¶ 22.

In response, Defendants argue that Plaintiff failed to state a claim for breach of a partnership agreement and that this cause of action should be dismissed pursuant to CPLR 3211 (a) (1) and (a) (7). Defendants' Memo at 1. Defendants contend that Plaintiff has failed to allege both the essential ingredients for a contract and the terms upon which liability is predicated. *Id.* at 4. Defendants argue, alternatively, that the statute of frauds acts as an affirmative defense to the formation of an oral partnership agreement. *Id.*

"A partnership is defined to be a contract of two or more persons, to place their money, effects, labor or skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions." *Joachim v. Flanzig*, 3 Misc. 3d 371, 375 (Sup. Ct., Nassau County, 2004) (Austin, J.) quoting *Pattinson v. Blanchard*, 5 N.Y. 186, 189 (1851). The elements required to plead a breach of partnership agreement are akin to those necessary for a breach of contract claim. To state a cause of action for a breach of partnership agreement, Plaintiff must show: (1) the existence of an agreement to enter into a partnership in exchange for a contribution of cash or services; (2) that Plaintiff performed his duties under such agreement; (3) that Defendant breached an obligation imposed by the agreement; and (4) that Plaintiff sustained direct damages as a result of the breach. *See J.P. Morgan Chase v. J.H. Elec. Of New York, Inc.*, 69 A.D.3d 802, 803 (2nd Dep't 2010).



**A. Existence of a Partnership Agreement**

Plaintiff must first show the existence of an agreement in order to state his claim. In order to form a valid agreement, there must be an offer, acceptance, consideration and a mutuality of intent to be bound. *See Icahn v. Lions Gate Entertainment Corp.*, No. 651076/2010, 2011 WL 1233362, at \*6 (Sup. Ct., N.Y. County, March 30, 2011) (Sherwood, J.). Plaintiff alleges that Moreno offered him a thirty percent share in Monkey Broker's profits in consideration for Plaintiff's undertaking of additional services. Further, Plaintiff alleges that in reliance on Moreno's promise, he accepted the offer by performing his specified obligations in developing an online banner advertising business. Plaintiff has therefore sufficiently pleaded an offer, acceptance and consideration, the prospect of future profits, sufficient to show the basis of an agreement.

Defendants however contend that Moreno intended an offer only for a profit-sharing agreement and not for a partnership. Defendants thus argue that the alleged agreement lacked mutuality of intent to be bound in a partnership. The court recognizes that a distinction exists between a profit-sharing agreement and a partnership. However, at this stage of the pleadings, Plaintiff has properly plead the existence of an oral partnership agreement. Simple statements to the contrary, without more, are insufficient to overcome the allegations as pleaded. Plaintiff has sufficiently plead a prima facie case that Moreno offered Plaintiff a partnership by stating that Moreno intended to share Monkey Broker's profits with Plaintiff in exchange for his services. Given that Monkey

Broker generated no profits during Plaintiff's tenure, it is not to dismiss Plaintiff's pleading by the fact that he did not receive a share of Monkey Broker's then non-existent profit distributions.

Further, Plaintiff has pleaded that he fulfilled his obligations under the alleged agreement by devoting his time and expertise to the successful development of Monkey Broker's online banner advertising business. The court must therefore next examine whether Plaintiff's termination breached the alleged partnership agreement and resulted in direct damages to Plaintiff.

### **B. Plaintiff's Termination**

Defendants argue that Plaintiff's termination was not a breach of the pleaded partnership agreement. Defendants argue that Plaintiff does not point to a specific provision in the agreement prohibiting Monkey Broker from terminating Plaintiff's employment.

Upon the existence of a written contract, a claimant must specify the contractual provisions that were violated in order to posit a claim for breach of contract. *Kraus v. Visa Intern. Service Ass'n*, 304 A.D.2d 408, 408 (1st Dep't 2003). Plaintiff does not specify the terms of the partnership agreement that forbid Defendants from terminating his employment. However, neither do Defendants come forward with any evidence to the contrary.

Plaintiff has adequately pleaded the breach of the alleged oral agreement. The parties agree that some agreement may have existed. Plaintiff has adequately pleaded a breach of the alleged agreement in contending that he was terminated in violation thereof. Plaintiff's breach of contract claim for his wrongful ouster as a Monkey Broker member and the subsequent loss of the opportunity to share in profits is sufficiently particular for pleading purposes. *See Cogent Film Finance LLC v. Brown*, No. 602575/07, 2008 WL 5478810 (Sup. Ct., N.Y. County, Dec. 22, 2008) (Gische, J.) (upholding counterclaim for breach of an LLC agreement where breach was adequately pleaded and where "no party [] produced any written agreement or written amendments thereof, which might constitute irrefutable documentary proof of what they actually agreed to").

Plaintiff's claim asserting that Defendants wrongfully forced him out of Monkey Broker while failing to compensate Plaintiff for his share of profits in the company therefore suffices to state a cause of action for breach of partnership agreement.

### **C. Statute of Frauds**

Alternatively, Defendants assert that the Statute of Frauds requirement applies here and Defendants argue that Plaintiff thus has no basis for an agreement upon which to claim breach. In New York, the Statute of Frauds is no bar to oral partnership agreements continuing for an indefinite period. *Sterling v. Sterling*, 21 A.D.3d 663, 665 (3rd Dep't 2005). However, "General Obligations Law 5-701 (a) (1) [does] require an agreement to

be in writing if it cannot be performed within one year from the date of its making. *Kestenbaum v. Suroff*, 268 A.D.2d 560, 561 (2nd Dep't 2000). The applicability of this provision is limited only "to those contracts \* \* \* which by their very terms have absolutely no possibility in fact and law of full performance within one year." *Id.* "Thus, [w]herever an agreement has been found to be susceptible of fulfillment within that time, in whatever manner and however impractical, the one-year provision of the statute is inapplicable, and the agreement is not barred." *Id.*, citing *D & N Boening v. Kirsch Beverages*, 63 N.Y.2d 449, 454 (1984).

Applying the principles of law discussed above, the court notes that the pleadings allege no specified term of partnership for greater than one year in duration. As such, the alleged oral partnership is deemed to have been at-will and may have been fulfilled within a one year period. Therefore the enforcement of the alleged oral partnership agreement is not barred by the Statute of Frauds.

Defendants' motion to dismiss Plaintiff's first cause of action is therefore denied.

### **3. Ovsyannikov's Second Claim for Breach of Oral Contract**

Plaintiff's second cause of action alleges that he entered into a binding oral contract with Defendants, and that the oral contract was breached. Plaintiff asserts that Moreno orally agreed to distribute thirty percent of Monkey Broker's profits in exchange for Plaintiff's performance of specified services. Complaint ¶¶ 32-37. Plaintiff contends that he fully performed his requisite obligation under the oral agreement and that

Defendants failed to compensate him with thirty percent of Monkey Broker's profits.

Complaint ¶¶ 35-37. Plaintiff contends that Defendants thus breached the oral contract.

*Id.*

Defendants move to dismiss Plaintiff's second cause of action on the grounds that (1) Plaintiff failed to allege the essential elements of a contract and (2) that Plaintiff's claim is duplicative of the first claim for a breach of partnership. Defendants' Memo at 7.

Oral contracts can be valid and enforceable as long as they do not fall within the Statute of Frauds. *See Ferrer v. Samuel*, 192 Misc.2d 533, 534 (Dist. Ct., Nassau County, 2002) (Fairgrieve, J). As discussed above, the Statute of Frauds does not apply to the alleged agreement at issue. *See* Section 2.C, *supra*. Furthermore, Plaintiff has validly pleaded the existence of an oral agreement to share in Monkey Broker profits in exchange for Plaintiff's services. *See* Section 2.A, *supra*. In doing so, Plaintiff has pleaded the essential elements of a contract – offer, acceptance, consideration, and mutuality of intent to be bound. *Ferrer v. Samuel*, 192 Misc.2d at 534.

Plaintiff's claim that Defendants forced him out of the Monkey Broker enterprise and failed to compensate him for his agreed-upon share of profits therefore sufficiently states a cause of action for a breach of oral contract. *Id.* Plaintiff avers that the alleged breach resulted directly in damages in the amount of his uncompensated portion of Monkey Broker profits. Therefore, in applying the principles of law noted above, Plaintiff has sufficiently pleaded a breach of oral contract claim.

Defendants further argue that Plaintiff's breach of contract claim is duplicative of Plaintiff's first claim for breach of partnership agreement. Nonetheless, while on its face duplicative, a Plaintiff may plead a breach of contract claim in the alternative to a breach of partnership claim. See *Andersen ex rel. Andersen, Weinroth & Co., L.P. v. Weinroth*, 48 A.D.3d 121 (1st Dep't 2007). The breach of contract claim will therefore not be dismissed on grounds of redundancy.

Defendants' motion to dismiss Plaintiff's breach of contract claim is thereby denied.

#### **4. Ovsyannikov's Third Claim for Breach of Fiduciary Duty**

Plaintiff's third cause of action alleges that Moreno breached his fiduciary duty owed to Plaintiff. Plaintiff alleges that Moreno engaged in fraudulent conduct toward Plaintiff and forced Plaintiff out of the alleged Monkey Broker partnership without reasonable compensation for his interest therein. Complaint, ¶¶ 38-42.

Defendants move to dismiss Plaintiff's third cause of action on the grounds that Plaintiff's claim is duplicative of his cause of action for breach of contract. Defendants' Memo at 7-8.

Claims are duplicative when both arise from the same set of facts and do not seek distinct or different damages. *Thompson v. Baier*, 84 A.D.3d 1062, 1064 (2nd Dep't 2011). Furthermore, "a cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand," unless the duty is

“independent of the contract itself.” *William Kaufman Org., Ltd. v. Graham & James LLP*, 269 A.D.2d 171, 173 (1st Dep’t 2000).

Plaintiff does not assert any distinction in the facts or basis of his claim for breach of fiduciary duty and his claim for breach of contract. Indeed, Plaintiff’s alleged ouster from the partnership without compensation constitutes the basis of both claims. Therefore, the breach of fiduciary duty is duplicative of the breach of contract claim and is thereby dismissed.

(Order on following page.)

**CONCLUSION**

Accordingly, it is

ORDERED that defendants Monkey Broker LLC and Carlos Moreno's motion to dismiss plaintiff Ovsyannikov's first and second causes of action for breach of partnership agreement and breach of oral contract is hereby denied; and it is further

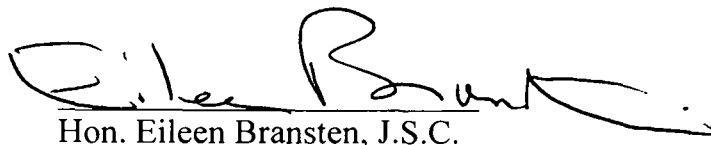
ORDERED that the defendants Monkey Broker LLC and Carlos Moreno's motion to dismiss plaintiff Ovsyannikov's third cause of action for breach of fiduciary duty is granted; and it is further

ORDERED that the defendants Monkey Broker LLC and Carlos Moreno are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

Dated: New York, New York  
August 12, 2011

ENTER:



Hon. Eileen Bransten, J.S.C.