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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD F. BRAUN J.S.C. PART 23

Index Number : 102517/2011

EATON & WINKLE LLP

vs

WAMPLER, JOHN

Sequence Number : 001

DISM ACTION/ INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE 7/21/11

MOTION SEQ. NO. _____

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No(s). 1

Answering Affidavits — Exhibits _____ No(s). 2

Replying Affidavits _____ No(s). 3, 4

Upon the foregoing papers, it is ordered that this motion is granted to the extent of dismissing the first, second and third causes of action as against the moving defendants, and it is further

ORDERED that the remaining claims are severed and shall continue.

This constitutes the decision and order of this Court, see separate Opinion.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JUN 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York June 6, 2012

ENTER: _____ J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

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EATON & VAN WINKLE LLP,

Index No. 102517/11

Plaintiff,

OPINION

-against-

JOHN WAMPLER, MARK GASARCH, PETRO-SUISSE LIMITED, BARBADOS, PETRO-SUISSE LIMITED, NEW YORK, TRINCAN OIL LIMITED, SWISS PETROLEUM INVESTMENTS LIMITED, WEST INDIES EXPLORATION COMPANY LIMITED, LOS BAJOS OIL LIMITED, DRILLING INTERNATIONAL SERVICES AND SUPPLY LTD., CONTINENTAL DRILLING CORPORATION, GASMARK CORP.,

Defendants.

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RICHARD F. BRAUN, J.:

This is an action for damages for breach of contract, fraud, promissory estoppel, quantum meruit, and an account stated. Defendant John Wampler (Wampler) moves to dismiss the complaint for failure to state a cause of action (CPLR 3211 [a] [7]). Defendants Mark Gasarch (Gasarch), Petro-Suisse Limited, New York (Petro-Suisse NY), and Gasmark Corp. (Gasmark) separately move to dismiss the first, second, third, and fifth causes of action of the complaint, pursuant to CPLR 3211 (a) (1) and (7). Defendants Petro-Suisse Limited, Barbados (Petro-Suisse Barbados), Trincan Oil Limited, Swiss Petroleum Investments Limited, West Indies Exploration Company Limited, Los Bajos Oil Limited, Drilling International Service and Supply Ltd., and Continental Drilling Corporation separately move, pursuant to CPLR 3211 (a) (7), for an order dismissing the complaint

as against them.

On a motion pursuant to CPLR 3211 (a) (1) and (7), a complaint must be liberally construed, the factual allegations therein must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998]; *see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). To succeed on a CPLR 3211 (a) (1) motion to dismiss, the documents upon which the movant relies must definitively dispose of the cause(s) of action of the opposing party (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 [1st Dept 2001]; *Fischbach & Moore v Howell Co.*, 240 AD2d 157 [1st Dept 1997]). All of the motions have been made at the pleading stage of this action.

Plaintiff pleads causes of action for breach of contract, fraud, promissory estoppel, quantum meruit, and an account stated. The second and third causes of action do not lie.

The elements of a breach of contract cause of action are (1) the formation of a contract between a plaintiff and a defendant, (2) performance by the plaintiff under the contract, (3) the defendant's failure to perform thereunder, and (4) resulting damage to the plaintiff (*see Noise In The Attic Prods., Inc. v London Records*, 10 AD3d 303, 307 [1st Dept 2004]). Plaintiff has set forth such a claim in the complaint. Only defendants Gasarch, Petro-Suisse NY, and Gasmark have moved to dismiss under CPLR 3211 (a) (1), but, as the essence of the CPLR 3211 (a) (1) ground has been argued by all defendants, and plaintiff has argued in opposition thereto, there is no prejudice to plaintiff in this court's deciding all motions on that ground (*see Dean R. Pelton Co. v Moundsville Shopping Plaza*, 173 AD2d 201 [1st Dept 1991]). The written retainer agreement was only between plaintiff and defendants Wampler and Petro-Suisse Barbados for an action prior to the 2009 and

2010 actions. Although a written retainer agreement pursuant to 22 NYCRR 1215.1 (a) is not required for an attorney's legal services "of the same general kind as previously rendered to and paid for by the client" (22 NYCR 1215.2), the subsequent services performed by plaintiff in the 2009 and 2010 actions were not of that nature so as to eliminate plaintiff's need to obtain a subsequent retainer agreement. Thus, the CPLR 3211 (a) (1) branch of the motion must be granted, and plaintiff is relegated to its claims for quantum meruit and an account stated against defendants (*see Roth Law Firm, PLLC v Sands*, 82 AD3d 675, 676 [1ST Dept 2011]; *Kramer Levin Naftalis & Frankel LLP v Canal Jean Co., Inc.*, 73 AD3d 604, 605 [1st Dept 2010]).

Plaintiff's fraud cause of action grows out of the contract cause of action and is not so distinct therefrom as to be able to be separately maintained (*see Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 302 [1st Dept 2008]; *Orix Credit Alliance v Hable Co.*, 256 AD2d 114, 115 [1st Dept 1998] ["(a) fraud claim that only restates a breach of contract claim may not be maintained (citation omitted)."]; *Krantz v Chateau Stores of Canada*, 256 AD2d 186, 187 [1st Dept 1998]; *Metropolitan Transp. Auth. v Triumph Adv. Prods.*, 116 AD2d 526, 527 [1st Dept 1986]). The same rule applies to the promissory estoppel cause of action (*Celle v Barclays Bank P.L.C.*, 48 AD3d at 303).

None of the meritless causes of action of plaintiff are saved by its alter ego or pierce the corporate veil arguments. To succeed on such a theory, the party asserting the concept has a heavy burden (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). Evidence of domination of a corporation alone is insufficient. (*id.*) The party must demonstrate the domination was fraudulent or caused wrongful or inequitable results to the plaintiff (*id.*; *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; *Fisher v Zaks*, 48 AD3d 251 [1st Dept 2008]; *Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005]). Plaintiff has not alleged that here.

To prevail on a claim for quantum meruit, a "plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services (citation omitted)." (*Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487, 488-489 [1st Dept 2009].) Plaintiff has pled such a claim.

An account stated cause of action consists of sending bills to a party who retains them and does not object to them within a reasonable time period (*Bartning v Bartning*, 16 AD3d 249, 250 [1st Dept 2005]). Plaintiff has alleged such a claim against all defendants. Furthermore, as to defendant Wampler, plaintiff has shown that he made what can be construed as an admission of liability in relation to the invoices (*see Marchi Jaffe Cohen Crystal Rosner & Katz v All-Star Video Corp.*, 107 AD2d 597, 599 [1st Dept 1985]). The submissions by defendants Gasarch, Petro-Suisse NY, and Gasmark are not adequate to support the dismissal of this claim against them because the invoices are only made out to Petro-Suisse Ltd., which could either be Petro-Suisse NY or Petro-Suisse Barbados, and the invoices do not contain amounts to show that all of the invoices that were sent are included in the submission.

Therefore, by this court's May 30, 2012 decision and order, the first, second, and third causes of action were dismissed as against defendant Wampler. By this court's June 1, 2012 decision and order, the first, second, and third causes of action were dismissed as against defendants Gasarch, Petro-Suisse NY, and Gasmark. By this court's other June 1, 2012 decision and order, the first, second, and third causes of action were dismissed as against the other moving defendants.

Dated: New York, New York
June 4, 2012

RICHARD F. BRAUN, J.S.C.