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

PRESENT: LUCY BILLINGS J.S.C. Justice — PART 46

W. DREW FASTNER

INDEX NO. 100379/2011

MOTION DATE

- v -

MALCOLM MACLEAN, HAWK EYE FISHING CORPORATION, and EAGLE EYE II CORPORATION

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 4, were read on this motion to/for change venue and dismiss the complaint

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

The court grants defendants' motion to dismiss plaintiff's first claim, for a declaratory judgment, but otherwise denies defendants' motion to dismiss the complaint, and denies their motion to change the venue of this action, C.P.L.R. §§ 511(b), 3211(a)(7) and (8), pursuant to the accompanying decision.

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

Dated: 7/5/12

Lucy Billings J.S.C.

LUCY BILLINGS

Check one: FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
----------x

W. DREW KASTNER, Index No. 100379/2011

Plaintiff

- against - DECISION AND ORDER

MALCOLM MACLEAN, HAWK EYE FISHING CORPORATION, and EAGLE EYE II CORPORATION,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff, a New Jersey attorney, sues to recover damages from defendants' breach of an oral agreement to compensate plaintiff for negotiating contracts with a television series producer on behalf of the two defendant corporations and their single defendant principal. The original contract provided for the producer to exercise an option to extend defendants' role in the series for additional seasons. Plaintiff claims an oral agreement with defendants that he would be paid a commission for any additional seasons for which the producer exercised its option. Since there was no written retainer agreement between plaintiff and defendants, he claims quantum meruit, unjust enrichment, and an account stated, as well as breach of contract.

Defendants move to change the venue of this action to Nassau County, because plaintiff's designation of New York County is without basis, C.P.L.R. §§ 510(1), 511(a) and (b), and to dismiss

the complaint due to lack of personal jurisdiction and failure to state a claim. C.P.L.R. § 3211(a)(7) and (8). In moving to dismiss all claims, defendants deny any agreement to pay for additional seasons and deny that plaintiff provided services or conferred any benefit in securing the additional seasons. Because defendants rely on their affidavits and inadmissible documents for their defense of failure to state a claim, rather than any conclusive admissible documents, defendants achieve little more than simply disputing plaintiff's complaint and supplemental evidence. Defendants have withdrawn their motion insofar as it was based on inadequate service, but still claim lack of jurisdiction over the two defendant corporations in New York. C.P.L.R. § 3211(a)(8).

II. VENUE

Although plaintiff designated venue in New York County, C.P.L.R. § 509, because the parties' transactions occurred here, where the parties' transactions occurred is not a basis for venue. C.P.L.R. § 503. Since the only New York resident is defendant MacLean, who resides in Nassau County, venue would lie there. C.P.L.R. § 503(a).

To change venue on that basis, defendants must serve a demand to change venue before or with service of their answer. C.P.L.R. § 511(a); Simon v. Usher, 17 N.Y.3d 625, 628 (2011); Herrera v. R. Conley Inc., 52 A.D.3d 218 (1st Dep't 2008); Kurfis v. Shore Towers Condominium, 48 A.D.3d 300 (1st Dep't 2008); Singh v. Becher, 249 A.D.2d 154 (1st Dep't 1998). Defendants

then may move to change venue within 15 days after service of a demand to which plaintiff fails to respond. C.P.L.R. § 511(b); Simon v. Usher, 17 N.Y.3d at 628; Banks v. New York State & Local Employees' Retirement Sys., 271 A.D.2d 252 (1st Dep't 2000); Singh v. Becher, 249 A.D.2d 154; Newman v. Physicians' Reciprocal Insurers, 204 A.D.2d 210 (1st Dep't 1994). Defendants must strictly comply with these time requirements. Collins v. Greenwood Mgt. Corp., 25 A.D.3d 447, 449 (1st Dep't 2006); Banks v. New York State & Local Employees' Retirement Sys., 271 A.D.2d 252; LaMantia v. North Shore Univ. Hosp., 259 A.D.2d 294 (1st Dep't 1999); Philogene v. Fuller Auto Leasing, 167 A.D.2d 178, 179 (1st Dep't 1990).

Here, defendants served their answer March 28, 2011, pleading an affirmative defense of improper venue. but neither specifying a proper venue, nor seeking a change. Then, in a letter dated March 30, 2011, defendants demanded a transfer of venue to Nassau County. Defendants acknowledge that their demand was untimely, but maintain that the untimeliness renders their motion to change venue subject to the court's discretion.

The court's discretion regarding defendants' motion following an untimely demand to change venue, when based only on commencement of the action in a county outside C.P.L.R. § 503's scope, is limited to conformance with a contract provision regarding venue, policy dictates that place venue in another county, and consolidation. Newman v. Physicians' Reciprocal Insurers, 204 A.D.2d 210; Pittman v. Maher, 202 A.D.2d 172, 175

(1st Dep't 1994). See Herrera v. R. Conley Inc., 52 A.D.3d at 219; Kurfis v. Shore Towers Condominium, 48 A.D.3d at 301; Howard v. New York State Bd. of Parole, 5 A.D.3d 271, 272 (1st Dep't 2004); Banks v. New York State & Local Employees' Retirement Sys., 271 A.D.2d at 253. Otherwise the court may not grant the venue change when the demand was untimely. Herrera v. R. Conley Inc., 52 A.D.3d 218; Newman v. Physicians' Reciprocal Insurers, 204 A.D.2d 210; Pittman v. Maher, 202 A.D.2d at 175.

Defendants do not claim that plaintiff misled defendants as to the propriety of the venue he selected, which would absolve defendants' failure to comply with the statutory time frames. Kurfis v. Shore Towers Condominium, 48 A.D.3d 300; Peretzman v. Elias, 221 A.D.2d 192 (1st Dep't 1995); Pittman v. Maher, 202 A.D.2d at 175; Koschak v. Gates Constr. Corp., 275 A.D.2d 315, 316 (2d Dep't 1996). See Collins v. Greenwood Mgt. Corp., 25 A.D.3d at 449; LaMantia v. North Shore Univ. Hosp., 259 A.D.2d 294; Philogene v. Fuller Auto Leasing, 167 A.D.2d at 179. Rather than misleading defendants into believing venue was adequately premised, the complaint readily disclosed the lack of basis for the designated venue. Defendants' failure to follow the statutory procedure deprives them of their right to a change and preserves plaintiff's right to his choice of venue. C.P.L.R. §§ 509, 511(b); Herrera v. R. Conley Inc., 52 A.D.3d 218; Kurfis v. Shore Towers Condominium, 48 A.D.3d 300; Collins v. Greenwood Mgt. Corp., 25 A.D.3d at 449; Howard v. New York State Bd. of Parole, 5 A.D.3d at 272.

III. DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

A. PERSONAL JURISDICTION OVER THE CORPORATE DEFENDANTS

The complaint alleges that defendant corporations may purport to be corporations, but are in fact unincorporated business entities. Plaintiff's summons lists the same address, 240 Causeway, Lawrence, New York, for MacLean and defendant corporations. Defendants contend that the court lacks personal jurisdiction over defendant corporations, because they are nondomiciliaries without any connection to New York State. C.P.L.R. § 302(a). Upon defendants' showing, plaintiff concedes that defendant entities are in fact incorporated, but not their lack of connection to the state.

MacLean's affidavit dated April 7, 2011, attests that MacLean is the president and a shareholder of both Eagle Eye II and Hawk Eye Fishing Corporations, both Delaware corporations with an "official business address" in Wilmington, Delaware. Aff. of Malcolm Maclean ¶¶ 2-3 (Apr. 7, 2011). Defendants also present certificates issued by the United States Department of Homeland Security that the fishing vessels Eagle Eye II and Seahawk are owned by Delaware corporations Eagle Eye II and Hawk Eye Fishing respectively.

On the other hand, defendants present a letterhead and a vessel use agreement that shows Eagle Eye II's address as 240 Causeway, Lawrence, New York. While MacLean denies that the corporate defendants maintain a bank account in New York, defendants also present a check showing Eagle Eye II's address as

240 Causeway, Lawrence, New York. The Department of Homeland Security certificates, moreover, indicate the corporate defendants' managing officer is at 240 Causeway, Lawrence, New York.

Defendants' equivocal evidence that the corporate defendants are nondomiciliaries of New York is an insufficient basis to dismiss the action against them due to lack of personal jurisdiction. E.g., Fischbarg v. Doucet, 9 N.Y.3d 375, 380-81 (2007); Shaltiel v. Wildenstein, 288 A.D.2d 136, 137 (1st Dep't 2001). The burden thus does not shift to plaintiff to establish long arm jurisdiction over nondomiciliary defendants. See C.P.L.R. § 302; Richbell Info. Servs. v. Jupiter Partners, 309 A.D.2d 288, 307 (1st Dep't 2003); Fisher v. McClain, 216 A.D.2d 210 (1st Dep't 1995).

B. FAILURE TO STATE A CLAIM

Upon defendants' motion to dismiss claims pursuant to C.P.L.R. § 3211(a)(7), the court may not rely on facts alleged by defendants to defeat the claims unless the evidence demonstrates the absence of any significant dispute regarding those facts and completely negates the allegations against defendants. Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Yoshiharu Igarashi v. Shohaku Higashi, 289 A.D.2d 128 (1st Dep't 2001). The court must accept the complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiff's favor.

Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010); Vig v. New York Hairspray Co., L.P., 67 A.D.3d 140, 144-45 (1st Dep't 2009). In short, the court may dismiss a claim based on C.P.L.R. § 3211(a)(7) only if the allegations completely fail to state a claim. Leon v. Martinez, 84 N.Y.2d at 88; Harris v. IG Greenpoint Corp., 72 A.D.3d at 609; Frank v. DaimlerChrysler Corp., 292 A.D.2d 118, 121 (1st Dep't 2002); Scott v. Bell Atl. Corp., 282 A.D.2d 180, 183 (1st Dep't 2001).

Plaintiff seeks unpaid fees based on defendants' agreement to pay him 15% of the value of the contracts he negotiated on their behalf and a declaratory judgment of his entitlement to that recovery, claiming breach of contract, quantum meruit, unjust enrichment, and an account stated. Defendants seek dismissal of all plaintiff's claims against defendants Maclean and Hawk Eye Fishing because plaintiff fails to allege that he was hired to negotiate a contract for those defendants. Viewed in a light most favorable to plaintiff, his allegations that he negotiated the contracts on all defendants' behalf and was all defendants' agent allow a reasonable inference that all defendants retained him.

Defendants further maintain that the statute of frauds, N.Y. Gen. Oblig. Law (GOL) § 5-701(a)(10), bars plaintiff's claims based on an oral agreement to retain him. While the statute of frauds would bar plaintiff's claims seeking compensation for

negotiating a business opportunity, as the statute of frauds applies to implied or express contracts, id.; Snyder v. Bronfman, 13 N.Y.3d 504, 508 (2009); MP Innovations, Inc. v. Atlantic Horizon Intl., Inc., 72 A.D.3d 571, 572 (1st Dep't 2010); Stephen Pevner, Inc. v. Ensler, 309 A.D.2d 722, 723 (1st Dep't 2003); Fitz-Gerald v. Donaldson, Lufkin & Jenrette, 294 A.D.2d 176 (1st Dep't 2002), GOL § 5-701(a)(10) specifically exempts from its application "a contract implied in fact or in law . . . to pay compensation to . . . an attorney at law."

1. Plaintiff's Declaratory Judgment Claim

To sustain a declaratory judgment claim, plaintiff must plead facts entitling him to the declaratory relief sought. E.g., ABN AMRO Bank, N.V. v. MBIA Inc., 81 A.D.3d 237, 245 (1st Dep't 2011); United States Fire Ins. Co. v. American Home Assur. Co., 19 A.D.3d 191, 192 (1st Dep't 2005). Plaintiff's specific allegations supporting his declaratory judgment claim are not conclusory, see Ahead Realty LLC v. India House, Inc., 92 A.D.3d 424, 425 (1st Dep't 2012), as they set forth facts demonstrating entitlement to a declaration that the contract for his services is enforceable. United States Fire Ins. Co. v. American Home Assur. Co., 19 A.D.3d at 192. Insofar as this claim duplicates plaintiff's breach of contract claim, however, the declaratory relief is unnecessary and therefore unsustainable. Id.

2. Plaintiff's Breach of Contract Claim

To establish breach of a contract, plaintiff must show a contract, that he performed and defendants breached it, and that

defendants' breach caused him to sustain damages. Harris v. Seward Park Hous. Corp., 79 A.D.3d 425, 426 (1st Dep't 2010). See Tutora v. Siegel, 40 A.D.3d 227, 228 (1st Dep't 2007). Plaintiff must plead the specific terms of the agreement that defendants breached. Marino v. Vunk, 39 A.D.3d 339, 340 (1st Dep't 2007); Giant Group v. Arthur Andersen LLP, 2 A.D.3d 189, 190 (1st Dep't 2003); Kraus v. Visa Intl. Serv. Assn., 304 A.D.2d 408 (1st Dep't 2003). The complaint alleges each of these elements and thus supports a breach of contract claim based on the oral agreement.

3. Plaintiff's Quantum Meruit Claim

To establish a quantum meruit claim, plaintiff must show that he performed services in good faith, which defendants accepted, and for which he reasonably expected to be compensated, and the services' reasonable value. Fulbright & Jaworski, LLP v. Carucci, 63 A.D.3d 487, 489 (1st Dep't 2009); Soumayah v. Minnelli, 41 A.D.3d 390, 391 (1st Dep't 2007); Freedman v. Pearlman, 271 A.D.2d 301, 304 (1st Dep't 2000). Plaintiff may recover based on quantum meruit if the contract for his services is unenforceable. Ellis v. Abbey & Ellis, 294 A.D.2d 168, 170 (1st Dep't 2002). Plaintiff permissibly pleads his quantum meruit claim alternatively to his breach of contract claim, given the dispute over the validity and terms of the oral agreement, Veritas Capital Mgt., L.L.C. v. Campbell, 82 A.D.3d 529, 530 (1st Dep't 2011); IIG Capital LLC v. Archipelago, L.L.C., 36 A.D.3d 401, 405 (1st Dep't 2007). He also pleads the elements necessary

to support the quantum meruit claim: he performed valuable services for defendants in negotiating the contracts, and defendants were aware of his efforts and that he was to be compensated and accepted the services, which were worth $196,234.20. Balestriere PLLC v. Banxcorp, 96 A.D.3d 497, 498 (1st Dep't 2012); Wilmoth v. Sandor, 259 A.D.2d 252, 255 (1st Dep't 1999).

Defendants maintain that plaintiff may not recover fees for performing legal services in New York because he is not admitted to practice in this state. N.Y. Jud. Law § 478. Although practicing law without authorization may be penalized by denying recovery of a fee, see Shulman v. Grinker, 184 A.D.2d 306, 307 (1st Dep't 1992), or striking a pleading signed by an unauthorized person, without prejudice, Salt Aire Trading LLC v. Sidley Austin Brown & Wood, LLP, 93 A.D.3d 452, 453 (1st Dep't 2012), plaintiff's allegations do not indicate he practiced law in New York. Only the summons states that the place of the "transaction," likely referring not to his negotiations for defendants, but to his agreement with defendants, was in New York County, as the misguided basis for venue.

4. Plaintiff's Unjust Enrichment Claim

To sustain a claim for unjust enrichment, plaintiff must establish that defendants were enriched at his expense, and it is inequitable and unconscionable to allow them to retain the enrichment. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182 (2011); Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d 472, 473 (1st

Dep't 2010). See Sterlacci v. Gurfein, 18 A.D.3d 229, 230 (1st Dep't 2005); Wiener v. Lazard Freres & Co., 241 A.D.2d 114, 119 (1st Dep't 1998). Again, the complaint alleges facts that establish an unjust enrichment claim: that defendants were enriched at plaintiffs' expense by accepting his services and profiting from the contracts, so that it would be against equity and good conscience to allow defendants to retain those benefits. Rab Contrs. v. Stillman, 266 A.D.2d 70, 71 (1st Dep't 1999); Wiener v. Lazard Freres & Co., 241 A.D.2d at 120-21. Like plaintiff's quantum meruit claim, plaintiff permissibly pleads his unjust enrichment claim alternatively to the breach of contract, given the dispute over that agreement. IIG Capital LLC v. Archipelago, L.L.C., 36 A.D.3d at 405. See Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc., 95 A.D.3d 434, 438-39 (1st Dep't 2012).

5. Plaintiff's Account Stated Claim

The key element of a prima facie account stated claim is transmission of an invoice to defendants, forming the predicate for defendants' failure to object to the invoice within a reasonable time. RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d 618, 619 (1st Dep't 2009); Miller v. Nadler, 60 A.D.3d 499 (1st Dep't 2009); Rothstein & Hoffman Elec. Serv., Inc. v. Gong Park Realty Corp., 37 A.D.3d 206, 207 (1st Dep't 2007); Ferraioli v. Ferraioli, 8 A.D.3d 163, 164 (1st Dep't 2004). See Bartning v. Bartning, 16 A.D.3d 249, 250 (1st Dep't 2005); Federal Express Corp. v. Federal Jeans,

Inc., 14 A.D.3d 424 (1st Dep't 2005); Morrison Cohen Singer & Weinstein, LLP v. Waters, 13 A.D.3d 51, 52 (1st Dep't 2004); Mulitex USA, Inc. v. Marvin Knitting Mills, Inc., 12 A.D.3d 169, 170 (1st Dep't 2004). Failure to object constitutes an assent to pay the invoice. Morrison Cohen Singer & Weinstein, LLP v. Brophy, 19 A.D.3d 161, 162 (1st Dep't 2005). See RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d at 619; Henry Loheac, P.C. v. Children's Corner Learning Ctr., 51 A.D.3d 476 (1st Dep't 2008); Public Broadcast Mktg. v. Trustees of Univ. of Pa., 216 A.D.2d 103 (1st Dep't 1995).

Plaintiff's allegations that plaintiff sent all defendants his invoice April 21, 2010, and that they retained it without objection set forth a prima facie account stated claim. IIG Capital LLC v. Archipelago, L.L.C., 36 A.D.3d at 402. See Digital Ctr., S.L. v. Apple Indus., Inc., 94 A.D.3d 571, 573 (1st Dep't 2012). Insofar as he may have sent the invoice only to MacLean and Hawkeye Fishing, albeit for services on Eagle Eye II's behalf, plaintiff alleges that MacLean so instructed and further agreed to pay the fee on all defendants' behalf.

Although defendants did not move to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(1), they support their motion with Maclean's affidavit laying the foundation for the admissibility of plaintiff's invoice that MacLean received and objected to. This evidence, however, simply disputes, but does not conclusively negate, plaintiff's allegation that defendants did

not object to the invoice.

C. PLAINTIFF'S NEED FOR DISCLOSURE TO SUPPORT PIERCING THE CORPORATE VEIL

In further opposition to dismissal, plaintiff claims he needs additional disclosure to sustain his claims under a theory of piercing the corporate veil, as defendants claim plaintiff was not hired to negotiate a contract for MacLean and Hawk Eye Fishing and did not send his invoices to Eagle Eye II. Believing when he filed his complaint simply that defendant entities were not true corporations, plaintiff now contends that, if defendants are incorporated, disclosure will show MacLean's use of the corporate defendants together simply as his alter ego, disregarding corporate formalities, and co-mingling their collective funds, without adequate capitalization.

Plaintiff specifically attests, for example, that MacLean represented first that he owned the vessels and then that the corporations owned them. Thus, through MacLean's own statements, plaintiff adequately demonstrates potential evidence exclusively in defendants' possession to support piercing the corporate veil, which warrants a denial of dismissal to allow disclosure on this question. C.P.L.R. § 3211(d); Amsellem v. Host Marriott Corp., 280 A.D.2d 357, 359 (1st Dep't 2001); Banham v. Stanley & Co., 178 A.D.2d 236, 238 (1st Dep't 1991). See Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d 135, 141 (1993); Stewart Tit. Ins. Co. v. Liberty Tit. Agency, LLC, 83 A.D.3d 532, 533 (1st Dep't 2011); ABN AMRO Bank, N.V. v. MBIA Inc., 81 A.D.3d at 245; Shisgal v. Brown, 21 A.D.3d 845, 848-49 (1st Dep't 2005).

Before that disclosure, therefore, dismissal of plaintiff's claims is premature. C.P.L.R. § 3211(d); Peterson v. Spartan Ind., 33 N.Y.2d 463, 466 (1974); Vasquez v. Heidelberg Harris, 265 A.D.2d 225 (1st Dep't 1999); Cerchia v. V.A. Mesa, 191 A.D.2d 377, 378 (1st Dep't 1993); Bordan v. North Shore Univ. Hosp., 275 A.D.2d 335, 336 (2d Dep't 2000).

IV. CONCLUSION

For the reasons explained above, the court denies defendants' motion to (1) change venue, C.P.L.R. § 511(b), and (2) dismiss plaintiff's complaint, except insofar as it claims entitlement to a declaratory judgment. C.P.L.R. §§ 3001, 3211(a)(7) and (8). The court grants defendants' motion to the extent of dismissing plaintiff's first claim for a declaratory judgment. C.P.L.R. § 3211(a)(7). This decision constitutes the court's order.

DATED: July 5, 2012

LUCY BILLINGS, J.S.C.