

**Benedetto v Mercer**

2012 NY Slip Op 33347(U)

July 30, 2012

Supreme Court, New York County

Docket Number: 150122/2012

Judge: Ellen M. Coin

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

HON. ELLEN M. COIN

63

PRESENT: \_\_\_\_\_  
Justice

PART \_\_\_\_\_

Index Number : 150122/2012  
BENEDETTO, JAMES  
vs.  
MERCER, DIANA  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ANNEXED DECISION  
AND ORDER.**

*This constitutes the decision and order of the Court.*

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

Dated: 7/30/12

EMC, J.S.C.

HON. ELLEN M. COIN

- 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

-----X

JAMES BENEDETTO,

Plaintiff,

Index No.: 150122/2012

Subm. Date: July 17, 2012

Motion Seq.: 001

-against-

**DECISION AND ORDER**

DIANA MERCER, JENNIFER MERCER and  
EQUINIMITY LLC,

Defendants.

-----X

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Papers submitted in review of this pre-answer motion to dismiss:

<b>Papers</b>	<b>Number</b>
Notice of Motion with Affid. Annexed.....	<u>1</u>
Memorandum of Law in Support.....	<u>2</u>
Memorandum of Law in Opposition.....	<u>3</u>
Memorandum of Law in Reply.....	<u>4</u>

ELLEN M. COIN, J.:

In this lawsuit plaintiff, an equestrian, horse trainer and owner of an equestrian center, sues Diana Mercer, her daughter Jennifer Mercer, and Equinimity, LLC. The complaint alleges that the Mercers established Equinimity, which owns 13 horses (the "Horses") that were boarded for four years at stables owned by plaintiff's corporation, Stonyhill Equestrian Center, Inc. ("Stonyhill"). Plaintiff concedes that Stonyhill was paid for the Horses' boarding, grooming and other services, but alleges that Stonyhill never billed Equinimity or the Mercers for plaintiff's personal services. This case arises out of plaintiff's claims for those alleged personal services.

Plaintiff pleads four causes of action. In the first, for breach of contract, he alleges that in 2006 he entered into an oral agreement with defendant Diana Mercer to develop the Horses in exchange for 20% of any proceeds generated by their sale. Although plaintiff does not allege that the Horses were ever sold, he nevertheless claims “substantial damages.”

As an alternative to his breach of contract claim, plaintiff pleads in quantum meruit for the services he provided to the Horses from 2006 through January 2011. He also asserts claims for promissory estoppel and unjust enrichment. Defendants now move for an order pursuant to CPLR 3211(a)(7) dismissing the complaint.

### **Discussion**

Plaintiff’s First Cause of Action for breach of contract fails to allege facts to establish that defendants Jennifer Mercer or Equinimity were parties to the contract. He now argues that Jennifer Mercer “reiterated” the contract five years later, in 2011. However, he cites to no legal authority that would support his theory that Jennifer Mercer thereby became a party to the contract.

Plaintiff’s claim for breach of contract against Equinimity also falls of its own weight. Indeed, the complaint alleges that Equinimity was not incorporated until 2007, the year following the formation of the contract that is the subject of this claim. Since Equinimity did not exist at the time of the formation of the contract, it could not have been a party to it, and plaintiff fails to allege any facts that would support any other theory of the corporation’s liability. Thus, the First Cause of Action must be dismissed as against defendants Jennifer Mercer and Equinimity.

Defendants also seek dismissal of the breach of contract claim as against defendant Diana Mercer. They argue that the complaint fails to allege that the Horses were sold, a pre-condition

to plaintiff's entitlement to a percentage of the proceeds. However, the complaint alleges that in 2011 the Mercers told plaintiff that they did not intend to sell the Horses, but were going to buy more horses. This allegation supports plaintiff's claim that defendant Diana Mercer repudiated her contractual duties, constituting a material breach of the contract (Compl., paras. 22, 33)(*Norcon Power Partners v Niagara Mohawk Power Corp.*, 92 NY2d 458, 462-3 [1998]).

Defendants contend that the doctrine of repudiation and anticipatory breach is inapplicable here. Thus, they argue that the complaint fails to allege that they "definitely and unequivocally" terminated the contract, only that they indicated that they were not interested in selling the Horses at the time of their statement. However, the complaint alleges that after Diana Mercer advised plaintiff that she did not intend to sell the Horses, she offered him a salary for his services, but promptly, only days later, terminated his services altogether (Compl., paras. 27, 28). Thus, the complaint adequately supports plaintiff's claim of Diana Mercer's repudiation. (*See Winick Realty Group, LLC v Austin & Assocs.*, 17 Misc 3d 1134A, \*3-7 [Sup Ct, New York County 2007], *aff'd* 51AD3d 408 [1<sup>st</sup> Dept 2008]).

Defendants also argue that there was never the requisite meeting of the minds as to the material terms of the contract. This argument relies on the allegation in the complaint that in 2011 Diana Mercer stated that she had been under the impression that plaintiff had been billing for his services throughout the relationship (Compl., para. 26). While this allegation may be some evidence of lack of mutual assent, the statement was made five years after the alleged formation of the contract and is insufficient to overcome plaintiff's allegations of the terms of the contract at the time of its formation.

Defendants also point to the lack of clarity in the complaint about the nature of plaintiff's services. They argue that in the absence of clarity as to the contract's material terms, there is no contract. Plaintiff contends that the material terms were his agreement to train and ride the Horses, and to give the Mercers regular lessons in exchange for 20% of the Horses' sale proceeds, allegations that are incorporated in his complaint.

As the Court of Appeals noted in *Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.* (93 NY2d 584, 590 [1999]), "not all terms of a contract need be fixed with absolute certainty; 'at some point virtually every agreement can be said to have a degree of indefiniteness....'" (citation omitted). Plaintiff notes that he and Diana Mercer did not discuss every detail about how he would develop the Horses for competition, but his complaint alleges in broad strokes both his services and the promise of payment. Thus, accepting the allegations of the complaint as true (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 [2001]), it alleges a meeting of the minds on the essential terms of the contract sufficient to withstand the instant motion to dismiss this cause of action as to defendant Diana Mercer. (*See Dimario v Coppola*, 10 F Supp 2d 213, 220-23, 225 [EDNY 1998]).

Plaintiff's Second Cause of Action, for quantum meruit, seeks to recover money damages for his training, competing and overall maintenance of the Horses; and for providing personal riding lessons to members of the Mercer family (Compl., paras. 12, 37-40).

Defendants seek dismissal of this claim on the ground that it is duplicative of his breach of contract claim. However, where, as here, there is a bona fide dispute as to the existence of a contract, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract,

and will not be required to elect his remedies. (*Sabre Intl Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438-39 [1<sup>st</sup> Dept 2012]).

In order to establish a quantum meruit claim, plaintiff must show (1) the performance of services in good faith; (2) acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation; and (4) the reasonable value of the services rendered. (*Georgia Malone & Co. v Ralph Rieder*, 86 AD3d 406, 410 [1<sup>st</sup> Dept 2011]; *Freedman v Pearlman*, 271 AD2d 301, 304 [1<sup>st</sup> Dept 2000]).

Notwithstanding defendants' argument to the contrary, the complaint adequately alleges that plaintiff performed the training services in good faith reliance on the promises that he would receive compensation in the future; that the Mercer defendants and Equinimity accepted those services; and the bases for the value of his services.

Plaintiff concedes that he is not seeking to recover for riding lessons he provided to defendant Diana Mercer's sister and grandchildren, but asserts a claim for payment in quantum meruit for his lessons to Diana Mercer and Jennifer Mercer (Compl., paras. 17, 19). Defendants argue that he cannot recover for the lessons in quantum meruit, as they were not part of his alleged agreement with Diana Mercer. However, plaintiff alleges that he performed these services without compensation due to the alleged verbal contract (Compl., para. 12). To the extent that plaintiff seeks recovery in quantum meruit for riding lessons, the complaint fails to support his claim, as it is predicated on the allegations in paragraph 11, which makes no reference to riding lessons among the services for which plaintiff expected to be compensated.

However, to the extent that plaintiff seeks compensation for the additional personnel he hired to assist in the training, competing and maintenance of the Horses, dismissal is

unwarranted. He effectively alleges that he hired those persons in order to perform adequately the services for the Horses (Compl., paras. 16, 40).

Similarly, so much of the motion as seeks to dismiss plaintiff's claim in quantum meruit for training the Horses is denied. Defendants contend that since plaintiff did not expect to receive payment for those services until the Horses were sold, and the Horses have not been sold, plaintiff could not reasonably expect payment. However, a quantum meruit claim does not depend on an intent or promise to pay, but rather is based on an implied contract to pay for the reasonable value of the services. (*Matter of Alu*, 302 AD2d 520, 520 [2d Dept 2003]).

Defendants Jennifer Mercer and Equinimity are entitled to dismissal of plaintiff's Third Cause of Action for promissory estoppel. "To establish a claim for promissory estoppel, a plaintiff must allege '(1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise'" (*Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 439 [1<sup>st</sup> Dept 2012] (citation omitted)). The complaint fails to allege that Jennifer Mercer or Equinimity made any promise upon which plaintiff relied. Instead, it alleges that in 2011, five years after the alleged making of the agreement, Jennifer Mercer "reminded" defendant Diana Mercer of the agreement. (Compl., para. 26). This allegation is inadequate to establish a claim for promissory estoppel as to Jennifer Mercer. Similarly, since Equinimity was not formed until 2007, the year **after** the alleged agreement was made, it cannot be liable for the alleged 2006 promise, and plaintiff's promissory estoppel claim cannot stand as to the corporation.

However, the allegations of the complaint are sufficient to set forth the elements of the claim as to Diana Mercer. Plaintiff alleges her promise in 2006, his reasonable and foreseeable



reliance that he would be compensated for his work, and the damage he sustained, at least to the extent of his taking on additional employees. Thus, the motion to dismiss the Third Cause of Action as against defendant Diana Mercer must be denied.

To state a claim for unjust enrichment, plaintiff must allege facts demonstrating (1) that the defendants were enriched; (2) at plaintiff's expense; and (3) that it is against equity and good conscience to permit the defendants to retain what is sought to be recovered. (*Clark-Fitzpatrick, Inc. v Long Isl. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Defendants argue that plaintiff has alleged no facts to establish that the Mercer defendants were enriched. While they concede that the complaint alleges that as a result of plaintiff's actions, the Horses won competitions (Compl., para. 48), they contend that his allegation that the Horses thereby increased in value is conclusory, lacking factual support. As plaintiff correctly notes, the complaint alleges his services and the fact that he provided them without receiving compensation, thus satisfying the "enrichment" element of this claim.

Defendants contend that plaintiff fails to allege facts to support the third factor for unjust enrichment—i.e., the equity and good conscience factor—because he would not be entitled to recover until such time as the Horses were sold. However, this cause of action is not dependent on the alleged contract, which contained the promise of recompense on sale. Instead, it alleges that defendants have been enriched by an increase in the value of the Horses as a result of plaintiff's services. Thus, it sufficiently alleges that it would be inequitable for defendants to retain the fruit of plaintiff's services.

In light of the foregoing, it is

ORDERED that the motion to dismiss the First Cause of Action as to defendants Jennifer Mercer and Equinimity LLC is granted, and is otherwise denied; and it is further

ORDERED that the motion to dismiss the Second Cause of Action is denied; and it is further

ORDERED that the motion to dismiss the Third Cause of Action as to defendants Jennifer Mercer and Equinimity LLC is granted, and is otherwise denied, and it is further

ORDERED that the motion to dismiss the Fourth Cause of Action is denied; and it is further

ORDERED that defendants shall serve and file their answer to the complaint within 30 days from the date of this order; and it is further

ORDERED that counsel for the parties are directed to appear for a preliminary conference in Room 311, 71 Thomas Street, on September 5, 2012 at 2:00 PM.

This constitutes the Decision and Order of the Court.

Date: 7/30/12

ENTER:

  
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Ellen M. Coin, A.J.S.C.