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

PRESENT: BERNARD J. FRIED PART 60
HON. BERNARD J. FRIED Justice

E-FILE

JONATHAN DAVID MANELA,
Plaintiff,

- v -

WILLIAM LAWRENCE BARKOW.,
Defendant.

INDEX NO. 653549/2011
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

This motion is decided in accordance with the accompanying Memorandum Decision.

SO ORDERED.

Dated: 7/9/2012

J.S.C.
HON. BERNARD J. FRIED

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check 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: PART 60

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JONATHAN DAVID MANELA,

Plaintiff,

Index No.: 653549/2011

-against-

WILLIAM LAWRENCE BARKOW,

Defendant.

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APPEARANCES:

For the Plaintiff:
THE ROTH LAW FIRM, PLLC
295 Madison Avenue
New York, NY 10017
By: Richard A. Roth, Esq.

For the Defendant:
JOHN E. LAWLOR, ESQ.
129 Third Avenue
Mineola, NY 11501
By: John E. Lawlor, Esq.

Fried, J.:

By this motion, Defendant, William Lawrence Barkow ("Barkow"), moves to dismiss all five causes of action asserted in the Complaint of Plaintiff, Jonathan David Manela ("Manela"). Defendant contends that the agreement alleged by Manela was not reduced to writing and is therefore barred by the Statute of Frauds, and that, since all five causes of action arise out of such agreement, all five causes of action must be dismissed.

Briefly, Plaintiff alleges that, in March 2007, he, Barkow, and non-party, Frank Mazzola ("Mazzola"), entered into an agreement whereby Plaintiff would refer prospective investors to Barkow and Mazzola. In the event that any of these referrals became customers,

Plaintiff would receive a finder's fee. Similarly, Plaintiff would receive a finder's fee if any of the referred customers, themselves, referred other customers who subsequently became investors. (*See* Compl.[1] ¶¶ 3-11.)

Plaintiff alleges that in October 2008, the agreement was amended so as to exclude Mazzola, and to provide Manela with 25% and Barkow with 75% of the revenues generated from Manela's referred customers and their subsequent referrals. Plaintiff alleges that throughout this time period, he received the agreed upon fees on a timely basis. (*Id.* ¶ 13.)

Subsequently, in September 2009, Plaintiff alleges that Barkow left Advanced Equities, Inc., the registered broker-dealer where he had been employed, and that although he continued to generate revenues through Manela's referred customers and their referrals, he ceased making payments to Manela. (*Id.* ¶¶ 14-16.) Having demanded payment, and having said demand refused, Manela brings this action, asserting causes of action for breach of contract, declaratory judgment, accounting, breach of fiduciary duty, and breach of the covenant of good faith and fair dealing.

Barkow argues that each of these causes of action must be dismissed, first, because under New York General Obligations Law § 5-701(a)(10), agreements for finder's fees must be in writing and signed by the party to be charged. Barkow argues that there is no such writing here, nor is there one alleged. Moreover, Defendant argues that § 5-701(a)(1) of the G.O.L also prohibits oral agreements where such agreement is unable to be performed within one year. Barkow contends that any agreement whose performance is dependent upon the

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[1]Complaint, December 21, 2011.

will of a third party is incapable of being performed within one year. Since, under the terms of Manela's alleged agreement, Manela would only collect finder's fees in the event that certain actions were taken by the referred customers, or by the investors referred by the referred customers, Barkow argues that performance is dependent upon the whims of third-parties, and is thus incapable of being performed within a year.

In response, Plaintiff argues, first, that, contrary to Defendant's contention, there is a written agreement reflecting the terms of the parties' relationship (the "Split Agreement"). The Statute of Frauds (G.O.L. § 5-701) therefore does not apply. Moreover, Plaintiff asserts that there is another written agreement, in the possession of Defendant, which will be produced in the course of discovery, as well as e-mails and other documents which all confirm the existence of the agreement and the terms of the Split Agreement. Finally, Plaintiff further argues that Barkow had made payments to Manela, pursuant to the terms of their agreement, for 18 months, and that this performance is sufficient to satisfy the Statute of Frauds under the doctrine of partial performance.[2]

On a motion to dismiss, the allegations contained in the complaint are to be taken as true, and the plaintiff provided the benefit of every possible inference. *EBC I., Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). However, those "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly

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[2]Plaintiff does not dispute that the agreement is within the Statute of Frauds, and it is clear that G.O.L. § 5-701(a)(1) applies. *See, e.g., Zupan v. Blumberg*, 2 N.Y.2d 547 (1957) ("A service contract of indefinite duration, in which one party agrees to procure customers or accounts or orders on behalf of the second party, is not by its terms performable within a year and hence must be in writing . . .").

contradicted by documentary evidence, are not entitled to such consideration." *Kliebert v. McKoan*, 228 A.D.2d 232, 232 (1st Dep't 1996). Affidavits submitted in opposition to the motion "may be used freely to preserve inartfully pleaded, but potentially meritorious, claims." *Rovello v. Orofino Realty Co. Inc.*, 40 N.Y.2d 633, 635-36 (1976). However, on a motion to dismiss based on CPLR § 3211(a)(5), the Statute of Frauds, such affidavits are "immaterial to the threshold issue," which is whether any documents submitted in opposition to the motion "are sufficient on their face to satisfy the Statute of Frauds." *Bazak International Corp. v. Mast Industries, Inc.*, 73 N.Y.2d 113, 117-118 (1989). This threshold issue may not be determined by consideration of the parol evidence, but rather, it "must be determined from the documents themselves, as a matter of law." *Id.; see also DeRosis v. Kaufman*, 219 A.D.2d 376, 379 (1st Dep't 1996).

In opposition to this motion, Plaintiff has submitted an affidavit, along with certain documents, which, he contends, provide evidence of the agreement sufficient to satisfy the Statute of Frauds. Manela has submitted, *inter alia*, e-mails between the parties, a spreadsheet that purports to be a list of the references Plaintiff provided to Defendant, a signed document entitled, "Authorization and Directive for Joint FC Number 6T6" (which Plaintiff refers to as the "Split Agreement"), and a spreadsheet listing transactions, commission amounts, and payments to Manela and Barkow. (*See* Manela Aff. Exs. A-F.) Although Plaintiff urges me to consider his affidavit, and to accept all allegations therein as true, I must, instead, consider only the documents, themselves. *Bazak*, 73 N.Y.2d 117-18. Upon such consideration, I conclude that the e-mail communications and other documents submitted provide sufficient evidence of the parties' agreement to satisfy the Statute of

Frauds.

Under G.O.L. § 5-701(b)(3), there is sufficient evidence that a contract has been made if there is "evidence of electronic communication . . . sufficient to indicate that in such communication a contract was made between the parties;" or there is a "note, memorandum or other writing sufficient to indicate that a contract has been made, signed by the party against whom enforcement is sought . . ." G.O.L. § 5-701(b)(3)(a) and (d). Furthermore, the Statute continues, evidence of a communication, confirmation, memorandum, writing, etc. "is not insufficient because it omits or incorrectly states one or more material terms agreed upon, so long as such evidence provides a reasonable basis for concluding that a contract was made." G.O.L. § 5-701(b)(3)(d).

Defendant is correct in that the e-mail communications between the parties do not, on their own, provide sufficient evidence of the agreement. Taken together with the rest of the documents, however, they are sufficient to take the agreement outside of the Statute of Frauds, even without consideration of Manela's affidavit. The March 23, 2007 e-mail correspondence between Manela and Barkow, wherein Barkow writes that, "the only thing stopping us from raising our billions is me waiting for your spreadsheet . . . c'mon buddy . . .", and Manela responds with a message setting forth the amount of his commission (at that point, 33.3%), and how the payments will be made ("through a rep number created for me at Advanced Equities"), set forth some of the initially agreed upon terms. (Manela Aff. Exs. A and B1.) *See Trueforge Global Machinery Corp. v. Viraj Group*, 84 A.D.3d 938, 939 (1st Dep't 2011) (concluding that certain e-mail correspondence was sufficient to defeat summary judgment sought on the basis of the Statute of Frauds, because it set forth an objective

standard for determining the compensation to be paid to plaintiff as a finder's fee.)

Subsequently, in October 2008, both parties signed the so-called Split Agreement, which clearly sets forth the parties' allegedly amended agreement to split the commissions due under Joint FC Number 6T6, with 75% payable to Barkow and 25% payable to Manela. (Manela Aff. Ex. F.) These are the terms alleged by Manela, and this document provides a reasonable basis for concluding that a contract was made. *See* G.O.L. § 5-701(b)(3)(d).

Moreover, the transaction spreadsheet, which was sent to Manela on September 3, 2008, by Christine Cardi, at Advanced Equities, Inc., shows this number, "6T6," along with the commission earned, which is divided between the parties in a manner that corresponds to the division on the Split Agreement. (*See* Manela Aff. Ex. D.) Since the e-mails refer to the "rep number," and the Split Agreement and the transaction spreadsheet each use the rep number "6T6," I conclude that these documents may be pieced together to defeat the Statute of Frauds. *See Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 55 (1953) ("the signed and unsigned writings [may] be read together, provided that they clearly refer to the same subject matter or transaction.")

Furthermore, the February 3, 2009 e-mail from Rhonda Dixon, the Payroll/Commission Manager at Advanced Equities, Inc., refers to the Joint FC Number (6T6) and states that the "December payout was paid under the original agreement. Barkow 70% [and] Manela 30%." (Manela Aff. Ex. G.) The e-mail goes on to state that the amounts will be adjusted, and that the "split has been changed going forward to reflect the new agreement. Barkow 75% [and] Manela 25%." (*Id.*) This e-mail, together with the Split Agreement, provides sufficient evidence of the parties' agreement as to defeat a motion to

dismiss on the basis of the Statute of Frauds, since, together, they show the amount of the fees (in percentage) to be received by Manela, and that the agreement was continuing as of February 3, 2009. *See, e.g., Schleger v. Treiber Group*, 303 A.D.2d 335, 335-36 (1st Dep't 2003) (holding that a subsequent letter memorialized the parties' agreement and satisfied the Statute of Frauds where the "amounts of the commissions are determinable by reference to the parties' past practices, and the duration of the agreement is determinable by reference to the continued existence of the accounts.")

Since I have concluded that the documents submitted are sufficient to satisfy the Statute of Frauds, at least for the purpose of defeating the motion to dismiss, I need not address the parties' arguments concerning the doctrine of partial performance.

I turn, now, to the claims set forth in the Complaint. Defendant contends that all claims must be dismissed, since they are all based upon the alleged agreement, which, Defendant argues, is not enforceable. In light of my conclusions above, however, it is clear that the breach of contract claim (the first cause of action), survives, since Plaintiff has alleged the existence of a contract, the performance of one party thereunder, a breach by the other party, and resulting damages. *See JP Morgan Chase v. J.H. Electric of New York, Inc.*, 69 A.D.3d 802 (2d Dep't 2010).

Similarly, the breach of fiduciary duty claim (the third cause of action), survives, since the agreement alleged would form the basis for a fiduciary relationship between Manela and Barkow, and a breach of contract claim is not inconsistent with a claim for breach of fiduciary duty allegedly owed as part of a relationship formed by the contract. *Sally Lou Fashions Corp. v. Camhe-Marcille*, 300 A.D.2d 224, 225 (1st Dep't 2002) (*quoting*

Mandelblatt v. Devon Stores, Inc., 132 A.D.2d 162, 167-168 (1st Dep't 1987).)

The remaining causes of action, however, are all dismissed.

The second cause of action is for a declaratory judgment. Since a claim for declaratory judgment may not be brought where other remedies are available, and since I have sustained the claim for breach of contract, this cause of action is dismissed. *Wells Fargo Bank, Nat. Ass'n v. GSRE II, Ltd*, 92 A.D.3d 535, 536 (1st Dep't 2012).

The Plaintiff's third cause of action is for an accounting to "determine the amount of money that Defendant earned" from the transactions made as a result of the list of contacts purportedly provided by the plaintiff to the defendant. (Compl. ¶¶ 31-32.) While profits from a joint venture that are wrongfully diverted may be the subject of an accounting, *Chipman v. Steinberg*, 106 A.D.2d 343, 344 (1st Dep't 1984), *aff'd,* 65 N.Y.2d 842 (1985), Manela's claim for an accounting relies upon the same factual allegations as his breach of contract claim, and any damages owed would be the same under either measure. Thus, the accounting claim is dismissed as duplicative of the breach of contract claim.

Finally, the fifth cause of action, for breach of the covenant of good faith and fair dealing, is also dismissed, since, as an implied contract claim, it is duplicative of the claim for breach of contract. *See Fesseha v. TD Waterhouse Investor Services,* 305 A.D.2d 268, (1st Dep't 2003) ("While the covenant of good faith and fair dealing is implicit in every contract, it cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights.")

Accordingly, it is

ORDERED that Defendant's motion to dismiss is GRANTED in part and DENIED in part; and it is further

ORDERED that the second, third and fifth causes of action are dismissed; and it is further

ORDERED that Defendant is directed to serve an Answer to the Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on September 24, 2012, at 9:30 a.m.

Dated: 7/9/2012

ENTER:

J.S.C.

HON. BERNARD J. FRIED