SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BERNARD J. FRIED E-FILE PART 60
Justice

Index Number : 107095/2009
PRYOR, SHERRY
vs.
WITTER, INGER K
SEQUENCE NUMBER : 005
DISMISS

INDEX NO. 107095/09
MOTION DATE _____
MOTION SEQ. NO. 005

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

This motion is decided in accordance with the attached memorandum decision. A Status Conference will be held in Part 60 on Wednesday, June 13, 2012 at 10 a.m.

SO ORDERED

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

Dated: 5/4/2012

_____, J.S.C.
HON. BERNARD J. FRIED

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 60

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SHERRY PRYOR, GLENN CUNNINGHAM, PETER TSU, STEPHEN WANG, MICHAEL D. WITTER, KATY LIU, MARSHA BROWN, REID ELLISON, ALBERT MEYER, and DANIEL C. PRYOR,

Plaintiffs,

Index No. 107095/09

-against-

INGER K. WITTER, Individually, INGER K. WITTER, as Trustee of THE MARITAL ELECTION TRUST I, THE MARITAL ELECTION TRUST, INGER K. WITTER, AS Trustee of THE MARITAL ELECTION TRUST II, THE MARITAL ELECTION TRUST II, and WILLIAM D. WITTER, INC.,

Defendants.

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For Plaintiffs:

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Derek T. Smith

For Defendants:

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Samuel D. Levy

FRIED, J.:

In this action to recover unpaid sums allegedly due plaintiffs as a result of work provided to defendant William D. Witter, Inc. (WDW), defendants move, pursuant to CPLR

3211 (a) (7), for an order dismissing the complaint.

WDW was the general partner of nonparty Pine Creek Advisors Limited Partnership, which was the general partner of Penfield Partners, L.P., a hedge fund, making WDW, essentially, the manager of the hedge fund. Many of the investors in the hedge fund were members of the Witter family. This action stems from an ugly family feud, which has effected two generations of the Witter family.

Defendant Inger K. Witter (Inger) is the mother of plaintiff Michael D. Witter (Witter). Plaintiff Sherry Pryor (Pryor) is Witter's wife. Plaintiff Daniel C. Pryor is Pryor's ex-husband, while plaintiff Peter Tsu is Pryor's brother. Inger is the sole director and officer of WDW.

Plaintiffs claim that they were employed to work for WDW pursuant to direct oral promises made by Inger that she would pay for their employment, and that they deserve a recovery because Inger has failed to make good on her promise. Inger claims that plaintiffs ran WDW into the ground, and are not owed anything.

There are no written agreements between plaintiffs and defendants.[1] Inger argues that the alleged oral agreements are barred by the statute of frauds (General Obligations Law [GOL] § 5-701 [a] [1]), in that the alleged agreements are not such as can be performed within one year. Plaintiffs, in opposition, pressing at considerable length an argument which Inger did not raise, argue that the agreements are not agreements to guarantee payment of

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[1] Plaintiffs provide three written employment agreements in which WDW offered employ to Reid W. Wilson, Peter Tau, and Daniel C. Pryor. These agreements are signed by Witter, for WDW. They are not executed by Inger.

WDW's debt, as would be unenforceable under the applicable statue of frauds (GOL § 5-701 [a] [2]), but are direct promises by Inger to pay plaintiffs to work for WDW, and to be personally liable for that debt. Inger, responding to this new issue in her reply, argues that the alleged oral agreements are only agreements guaranteeing payment owed by WDW, and so, are unenforceable under GOL § 5-701 (a) (2).

Plaintiffs also bring causes of action for quantum meruit; unjust enrichment; "personal liability"; unpaid wages/salary under New York Labor Law § 191 (3); and fraud.

> On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.

Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 (2001); *see also Leon v Martinez*, 84 NY2d 83 (1994). "'Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.'" *Ginsburg Development Companies, LLC v Carbone*, 85 AD3d 1110, 1111 (2d Dept 2011), quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005).

Plaintiffs' causes of action for breach of contract and anticipatory breach are not barred by GOL § 5-701 (a) (1).

> New York law provides that an agreement will not be recognized or enforceable if it is not in writing and subscribed by the party to be charged therewith when the agreement by its terms is not to be performed within one year from the making thereof (General Obligations Law § 5-701 [a] [1]). We have long interpreted this provision of the Statute of Frauds to encompass only those contracts which, by their terms, have absolutely no possibility in fact and law of full performance within one year. As long as the agreement may be fairly and reasonably interpreted such that it may be performed within a year, the Statute of Frauds will not act as a bar however unexpected,

> unlikely, or even improbable that such performance will occur during that time frame [internal quotation marks and citations omitted].

Cron v Hargro Fabrics, Inc., 91 NY2d 362, 366 (1998); *see also Ryan v Kellogg Partners Institutional Services*, ___NY3d___, 2012 NY Slip Op 02248 (2012).

An alleged oral employment agreement without a fixed duration is capable of performance within one year, and is not barred by the statute of frauds. *Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038 (2d Dept 2009); *see also Hayden v P. Zarkadas, P.C.*, 18 AD3d 500 (2d Dept 2005)(oral contract of at-will employment not subject to statute of frauds). All of the oral employment agreements alleged herein lack fixed durations and thus, regardless of the fact that plaintiffs may have been actually employed for more than one year, the statute of frauds does not apply.

It cannot be determined at this time whether the alleged oral agreements are barred by GOL § 5-701 (a) (2). It is important to note that plaintiffs never expressly or impliedly allege that they were employees of Inger. They seemingly allege that they were employees of WDW, but that their salaries were paid by Inger, pursuant to an express, if oral, agreement, made by Inger, to be personally liable for the payment of plaintiffs' salaries and other compensation. Thus, it could be found that Inger personally guaranteed that plaintiffs would be paid for their work with WDW. Without a writing, such an arrangement runs afoul of the statute of frauds.

Witter, in his affidavit, admits to this possibility when he says:

> [Inger] specifically agreed to, herself, pay me and Sherry Pryor for our services. [Inger] promised us that she would personally pay Sherry Pryor and me a significant percentage of the amount we saved the company. She did not say that WDW would pay this amount. She told me that she personally would pay this amount to us. In short, *she was guaranteeing our pay in the*

> *event WDW did not pay*. She agreed to pay at least 10% out of her own pocket, separate and apart from any obligation by WDW [emphasis added].

Aff. of Witter, ¶ 10.

Witter further admits that Inger chose to pay plaintiffs

so that her company WDW would continue on so that:

> she, personally, could make a lot of money from WDW once the company's financial situation improved. She also told me that her reputation was on the line and that her name was associated with the firm and for her own personal good will in the community, she needed us there to carry on her late husband's company and her name.

Id., ¶ 7. He states that Inger "told me that she was happy to pay us that amount because by us staying on and remaining with WDW, we could help her personal reputation" (*id.*, ¶ 11), and that Inger was "the sole shareholder of WDW, any liabilities of WDW would be hers personally as well." *Id.*

In short, Witter's affidavit seemingly underscores the fact that he and the other plaintiffs worked for WDW, but that their remuneration would come from Inger, on WDW's behalf, as well as her own, as WDW's sole shareholder. He does not further his case by admitting that "[Inger] made multiple promises to each of us Plaintiffs to personally pay us what we were owed by WDW." *Id.*, at 33.

Be that as it may, the issue is unresolvable at this point. As in *Hafez Fine Rugs & Antique Arts, Inc. v Parvizian, Inc. of Texas* (67 AD3d 428, 429 [1st Dept 2009]), a party may create a "primary and independent" obligation to pay a plaintiff for work performed for another that is not a guarantee. *See also Concordia General Contracting v Peltz*, 11 AD3d 502 (2d Dept 2004).

An exception exists to the rule concerning oral guarantees, if it can be alleged that oral promise is "supported by a new consideration moving to the promisor and beneficial to [the promisor] and that the promisor has become in the intention of the parties a principal debtor primarily liable [internal quotation marks and citation omitted]," the agreement will be enforceable. *Perini v Sabatelli*, 52 AD3d 588, 588-589 (2d Dept 2008); *see also Carey & Associates v Ernst*, 27 AD3d 261 (1st Dept 2006). Based on a liberal reading of the pleadings, it appears that theplaintiffs may be able to prove the existence of a direct agreement with Inger which did not involve a guarantee, or an agreement carrying sufficient consideration to Inger to justify enforcing the agreement. This requires the denial of the motion to dismiss.

The plaintiffs' quasi-contract claims fail. The claims are duplicative of the breach of contract claim. *Goldstein v CIBC World Markets Corp.*, 6 AD3d 295, 296 (1st Dept 2004)(plaintiff's claim for quasi-contractual relief is invalid as "'indistinguishable from the breach of contract claim'" [internal citation omitted]). Further, a cause of action in quantum meruit cannot be used to circumvent the statute of frauds. *Strauss v Fleet Mortgage Corp.*, 282 AD2d 736 (2d Dept 2001); *American-European Art Associates, Inc. v Trend Galleries, Inc.*, 227 AD2d 170 (1st Dept 1996).

The cause of action for "personal liability" states no recognizable cause of action, and is a mere reiteration of the breach of contract claim. It is dismissed.

Plaintiffs fail to support their claim for unpaid wages and salary in response to the motion, and the claim is dismissed as abandoned.

Plaintiffs' fraud allegations are duplicative of their breach of contract claims. They

do not do more than allege that defendants "ent[tered] into a contract they purportedly did not intend to honor" (*767 Third Avenue LLC v Greble & Finger, LLP*, 8 AD3d 75, 76 [1st Dept 2004]), and so, fail to state a cause of action.

In conclusion, because it unclear whether Inger's alleged promise to pay plaintiffs for work they performed for WDW constituted an unenforceable guarantee, or a promise to personally take on the burden of paying plaintiffs for work performed for WDW, dismissal of the complaint is denied. However, the remaining claims are without merit, and the action should proceed purely for breach of contract.

Accordingly, it is

ORDERED that the motion to dismiss the complaint is denied; and it is further

ORDERED that plaintiffs are directed to serve an answer to the complaint within 10 days of receipt of a copy of this order with notice of entry.

DATED: 5/4/2012

ENTER:

J.S.C.

HON. BERNARD J. FRIED