SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

THE LAUREL HILL ADVISORY GROUP, LLC

INDEX NO. 651832/11

-v-

MOTION DATE

AMERICAN STOCK TRANSFER + TRUST COMPANY, LLC, et al

MOTION SEQ. NO. 003

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 by counterclaim defendants to dismiss all counterclaims against them (Counts I - VII) is GRANTED per the attached Decision and Order.

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

Dated: August 23, 2012

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 : PART 45

THE LAUREL HILL ADVISORY GROUP, LLC,	:	
	:	
Plaintiff,	:	Index No. 651832/11
	:	
-against-	:	DECISION AND ORDER
	:	
AMERICAN STOCK TRANSFER & TRUST COMPANY, LLC, LINK SHAREHOLDER SERVICES, LLC, PHOENIX ADVISORY PARTNERS, LLC, MICHAEL SHARPE, JOHN SIEMANN and DAVID WEEKS,	:	Sequence No. 003
	:	
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

John Siemann (Mr. Siemann) resigned from a senior executive position at Laurel Hill Advisory Group LLC (Laurel Hill) on June 29, 2010. On July 5, 2011, Laurel Hill filed a complaint against Mr. Siemann alleging that he did so to create and join American Stock Transfer & Trust Company and Phoenix Advisory Partners LLC, competitors of Laurel Hill, and stole and destroyed Laurel Hill's business in the process.

On September 2, 2011, defendants submitted a motion to dismiss, which was granted in part and denied in part on March 2, 2012. The breach of fiduciary duty, tortious interference with business relations, unfair competition, and unjust enrichment causes of action against Mr. Siemann survived this motion to dismiss.

The instant decision concerns the amended counterclaims Mr. Siemann filed on May 21, 2012. Mr. Siemann filed counterclaims against Laurel Hill and its founders William J. Catacosinos (Dr. Catacosinos), William W. Catacosinos, and James Catacosinos, (collectively,

the Catacosinoses) alleging that Mr. Siemann has a 10% membership interest in Laurel Hill as the result of an alleged oral agreement.

Counterclaim defendants Laurel Hill and the Catacosinoses have submitted a motion to dismiss all counterclaims, Counts I-VII, pursuant to CPLR 3211(a)(1) and (7). For the reasons set forth below, Laurel Hill and the Catacosinoses' motion to dismiss all counterclaims is granted.

Background

Laurel Hill was established on July 12, 2007 by a certificate of formation filed pursuant to the Delaware Limited Liability Company Act. Under Schedule A of the operating agreement, filed the same day, is the list of members and their interests. Dr. Catacosinos with a 20% membership interest, William W. Catacosinos with a 40% membership interest, and James Catacosinos with a 40% membership interest are listed. Dr. Catacosinos is the designated Manager. On August 28, 2007, the original operating agreement was amended and restated (the Written Agreement). The sole change was in membership. The only member of the Written Agreement is the Laurel Hill Advisory Group I, Inc., with a 100% membership interest, signed for by its President, Dr. Catacosinos.

Section 3.2 of the Written Agreement governs Admission of Additional Members. Under this provision, the manager is authorized to admit additional members and to do all things necessary to effectuate the admission of such additional members. Section 3.2 also requires that each such additional member become a signatory to the Written Agreement by executing a Certification Signature Page. After signing, the additional member is deemed to have adopted and agreed to be bound by all of the provisions of the Written Agreement.

Any amendments to the Written Agreement are governed by Section 9.9. This section permits the Written Agreement to be amended but requires the consent of the manager and sixty-six percent of the membership interests. It further provides that no amendment can take effect without the *written* consent of each member adversely affected by the proposed amendment. Section 9.9 specifically identifies one such adverse affect to be an "alter[ation of] the voting or other rights of any member." The manager may amend the Written Agreement without consent of the members if the sole purpose and effect of such amendment is to preserve the tax treatment of Laurel Hill.

Mr. Siemann alleges that an oral agreement (the Oral Agreement) was entered into sometime after the Written Agreement. This alleged Oral Agreement was supposed to have established a limited liability company (Laurel Hill) and have given Mr. Siemann, Tom Kies, Glenn Keeling, Jon Einsidler, and Tom Cronin (collectively the Minority Members), ownership interests in Laurel Hill. Mr. Siemann alleges that because of the Oral Agreement, he left his prior employment and began working for Laurel Hill. Mr. Siemann asserts that as a result of the Oral Agreement, he has a 10% membership interest in Laurel Hill.

According to the alleged Oral Agreement, each member received his percentage membership in Laurel Hill in return for a contribution. The Catacosinoses' contribution was $4.5 million. The Minority Members' contributions were their services. The Minority Members were also treated as employees and paid a salary in addition to their membership interest.

Mr. Siemann does not allege that any of the Minority Members were ever paid based on their membership interests. Allegedly, the Catacosinoses were to receive all of the profit distributions from Laurel Hill until their cash contributions were repaid. Once that occurred, the Minority Members would receive a percentage of the profit distributions equal to their respective

percentage ownership. Mr. Siemann alleges that this never happened because the Catacosinoses ordered that their contribution be repaid by a preferred equity return paid from the Minority Members' share of the profits.

In his counterclaim, Mr. Siemann alleges seven counts. Count I requests a declaratory judgment that he owns a 10% interest in Laurel Hill because the alleged Oral Agreement is valid. In the alternative, Count II requests a declaratory judgment that Mr. Siemann owns a 10% interest in Laurel Hill under the Written Agreement, which is valid. Count III alleges breach of the Oral Agreement. In the alternative, Count IV alleges breach of the Written Agreement. As an alternative to Counts III and IV, Count V alleges the creation of an LLC via promissory estoppel. Count VI alleges fraud against the Catacosinos, and Count VII alleges breach of fiduciary duty against the Catacosinos.

Discussion

On a motion to dismiss pursuant to CPLR 3211, the court must take the facts alleged in the counterclaim as true. "The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail." (*Ackerman v 204 E. 40th Owners Corp.*, 189 AD2d 665 [1st Dept 1993].) Documentary evidence that is presented as a defense must resolve all factual issues as a matter of law and conclusively dispose of a claim in order to warrant dismissal. (*See Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *Parekh v Cain*, 96 AD3d 812 [2d Dept 2012].)

Breach of Contract

Mr. Siemann cannot maintain a cause of action for breach of contract because he has not alleged that he is party to an enforceable contract. Mr. Siemann is not party to the Written

Agreement, and the Oral Agreement, taken as true, is not enforceable because the preexisting Written Agreement included provisions prohibiting oral amendments.

Under Delaware law, "[l]imited liability companies are creatures of contract," and their ownership interests are defined by the operating agreement. (*Kuroda v SPJS Holdings LLC*, 971 A2d 872, 880 [Del Ch 2009]; *Travel Centers of Am. LLC v Brog*, No Civ A 3751-CC, 2008 WL 5272861, at *2, *4 [Del Ch Dec 5 2008] ["LLC agreement is the contract"].) If a person is not party to a contract, he cannot recover on that contract. Mr. Siemann is not party to the Written Agreement and therefore cannot use it as a basis for claiming membership.

While Mr. Siemann specifically states that he does not concede the validity of the Written Agreement, he also offers no reason why it might not be valid. It is a typed, twenty-five-page document that has been signed by Dr. Catacosinos, President of Laurel Hill Advisory Group I, Inc., the sole member. Mr. Siemann does not allege that he owns any part of Laurel Hill Advisory Group I, Inc. Neither Mr. Siemann nor any of the Minority Members are listed on either the original operating agreement or the amended and restated Written Agreement.

Mr. Siemann contends that he has alleged enough facts regarding the Oral Agreement so that dismissal is not warranted. This argument is not persuasive. While Mr. Siemann does not provide a specific date or an approximation of when the Oral Agreement allegedly was entered into, he does concede that it happened *after* the Written Agreement was in effect. This chronology precludes the possibility that the Oral Agreement might be enforceable.

Section 3.2 of the Written Agreement states that it may only be amended in *writing*, not orally. As Mr. Siemann notes, Dr. Catacosinos, as Manager, "is authorized to do all things necessary to effectuate the admission of such additional Members (including the recomputation and revision of Schedule A hereto)." However, the sentence continues:

> ". . . each of whom *shall become signatory hereto upon executing a Certification Signature Page,* whereby each such additional Member shall be deemed to have adopted and to have agreed to be bound by all of the provisions of this Agreement. The original copy of this Agreement, and any *duly executed Certification Signature Pages*, taken together, shall constitute a single instrument."

Mr. Siemann does not allege a Certification Page whereby the Oral Agreement was fused to the Written Agreement.

Section 9.9 of the Written Agreement states that "This Agreement may be amended from time to time upon the written consent of i) the Manager and ii) sixty-six & 2/3 (66.67%) percent in interest of the Members . . . [N]o amendment of this Agreement shall be made without the *written consent of each Member adversely affected* thereby." A decrease in the Catacosinoses' collective ownership interest, allegedly from 100% to 60%, would surely constitute an adverse effect with respect to each of the Catacosinoses and would require written consent of each of them. Mr. Siemann does not allege that this requirement was met. Thus, the Oral Agreement did not effectively amend the Written Agreement to create a membership interest for Mr. Siemann.

What was effectively a no-oral modification clause might have been waived had there been partial performance that was unequivocally referable to the oral modification. (*See Rose v Spa Realty Assocs.*, 42 NY2d 338 [1977]; *Citibank, N.A. v Silverman*, 85 AD3d 463, 464 [1st Dept 2011].) Mr. Siemann has not alleged any facts that unequivocally point to such an Oral Agreement. Everything he alleges is completely consistent with the Written Agreement.

Mr. Siemann alleges that he was never included in the Written Agreement. He alleges he was not provided with such detailed financial information as were the Catacosinoses. He alleges that he was not paid from profit distributions (they went only to the Catacosinoses). When one Minority Member left Laurel Hill, Mr. Siemann alleges that the departing Minority Member was

never paid for his interest and his rights were reassigned to the Catacosinoses. Each of these allegations is entirely consistent with Mr. Siemann and the other Minority Members never having been members of Laurel Hill in the first place.

The case law Mr. Siemann cites does not support his contention that the alleged Oral Agreement provides the basis for a valid cause of action for breach of contract. In *Cottone v Selective Surfaces, Inc.* (68 AD3d 1038 [2d Dept 2009]), the oral agreement alleged to have created a minority membership interest for the plaintiff in an LLC was entered into not after a *signed* written agreement containing a no-oral modification clause, but rather was entered into after an *unsigned* written agreement was drafted by an attorney. In *Parekh v. Cain* (96 AD3d 812 [2d Dept 2012]), an oral agreement to form a business was allegedly entered into *before* the signed written LLC agreement.

Thus, Mr. Siemann has not stated a claim for breach of contract of either the Written Agreement or of the alleged Oral Agreement.

Declaratory Judgment

Mr. Siemann seeks a declaratory judgment that the alleged Oral Agreement controls the relationship between himself and Laurel Hill and that he owns a 10% interest in Laurel Hill. In the alternative, Mr. Siemann requests a declaratory judgment that the Written Agreement controls the relationship between himself and Laurel Hill and that he owns a 10% interest in Laurel Hill. Both of these requests are denied because Mr. Siemann has not alleged facts that indicate a possibility of his having a membership interest in Laurel Hill either through the Written Agreement or the Oral Agreement.

Breach of fiduciary duty

To state a claim for breach of fiduciary duty, Mr. Siemann must allege the existence of a legal relationship that creates a fiduciary duty. (*See Burry v Madison Park Owner, LLC*, 84 AD3d 699 [1st Dept 2011].) Because Mr. Siemann has not alleged a valid way for him to be a member of Laurel Hill, he has not alleged a relationship that creates a fiduciary duty and therefore has not sufficiently pled a breach of it.

Promissory Estoppel

Mr. Siemann has not sufficiently pled a cause of action for promissory estoppel. To plead promissory estoppel, Mr. Siemann must allege (1) a promise that is sufficiently clear and unambiguous, (2) reasonable reliance on the promise, and (3) injury caused by the reliance. (*MatlinPatterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 841-42 [1st Dept 2011].)

Promissory estoppel is "reserved for a limited class of cases where it would be 'unconscionable not to enforce th[e] agreement.'" (*IMG Int'l Mkt. Group, Inc. v SDS William St. LLC*, No 652264, 2011 WL 3610789, at *4 [Sup Ct, NY County, June 29, 2011], quoting *Richter v Zabinsky*, 257 AD2d 397, 398-99 [1st Dept 1999] [alteration in original].) A change of jobs is not such a situation.

"The fact that defendant promised plaintiff employment at a certain salary with certain other benefits, which induced him to leave his former job and forego the possibility of other employment . . . does not create a cause of action for promissory estoppel." (*Cunnison v Richardson Greenshields Securities*, 107 AD2d 50, 53 [1st Dept 1985]; *Ginsberg v Fairfield-Noble Corp.*, 81 AD2d 318, 320-21 [1st Dept 1981] ["a change of job, even with increased emoluments and advanced status, is not sufficient to call promissory estoppel into play"]; *Dalton*

v Union Bank of Switzerland, 134 AD2d 194, 176-77 [1st Dept 1987].) Mr. Siemann does not allege that he paid a contribution to obtain his alleged membership interest. He alleges that his contribution was his service. He admits he was treated as an employee and paid a salary, and he does not allege that he was not compensated for his work. Mr. Siemann has not pled sufficient injury to establish a cause of action for promissory estoppel.

Fraud

Mr. Siemann has not stated a claim for fraud because he has not pled facts constituting fraud with sufficient particularity. To state a cause of action for fraud, Mr. Siemann must plead (1) misrepresentation of a material fact, (2) falsity, (3) scienter, (4) reasonable reliance by the plaintiff, and (5) injury. (*NY Univ. v Cont'l Ins. Co.*, 87 NY2d 308, 318 [1995]; *Waggoner v Caruso*, 68 AD3d 1, 6 [st Dept 2009].) Under CPLR 3016[b], "the circumstances constituting the wrong shall be stated in detail, including specific dates and items." (*Orchid Constr. Corp. v Gonzalez*, 89 AD3d 705, 707-08 [2d Dept 2011], quoting *Moore v Liberty Power Corp. LLC*, 72 AD3d 660, 661 [2d Dept 2010].)

While Mr. Siemann pleads the Oral Agreement's provisions with relative detail, he does not allege that those were misrepresentations. He has not alleged any misrepresentations with particularity. Mr. Siemann alleges that when he asked for a written agreement, he was told that one was being drafted. Such a claim is not a sufficient pleading for fraud. (*See Morales v AMS Mortg. Servs. Inc.*, 69 AD3d 691, 692 [2d Dept 2010] [reversing denial of dismissal motion where "plaintiff failed to allege or provide dates or details of any misstatements or misrepresentations made specifically by [defendant's] representatives to him"].)

Despite a thirty-page complaint, Mr. Siemann does not give even an approximate date, time, or location of the alleged misrepresentation (or for the Oral Agreement). This is fatal to his

claim. (*See Eastman Kodak Co. v Roopak Enters.*, 202 AD2d 220, 222 [1st Dept 1994] [dismissal of counterclaim warranted where "defendant alleged neither the time nor the place of the purported misrepresentations nor which employee of the plaintiff purportedly made them"].) Mr. Siemann does not even allege that any misrepresentation occurred before he joined Laurel Hill and therefore has not pleaded facts showing he relied on a misrepresentation in changing jobs. (*See High Tides LLC v DeMichele*, 88 AD3d 954, 958 [2d Dept 2011] ["[A]llegations of fraudulent misrepresentations and omissions which occurred after [plaintiff] made investments . . . may not form the basis for the plaintiff's fraud claims to the extent they were made after any such investment, since the element of reliance is necessarily absent"].)

Mr. Siemann's fraud claim must also be dismissed because it is duplicative of his breach of contract claims. He is alleging that the Minority Members made an agreement with Dr. Catacosinos which Dr. Catacosinos never intended to carry out. This is not fraud. Mr. Siemann has alleged "no more than that defendants did not intend to honor their contract, which is insufficient to state a claim for fraud." (*Brown v Wolf Group Integrated Commc'ns, Ltd.*, 23 AD3d 239, 240 [1st Dept 2005]; *Eastman Kodak Co. v Roopak Enters., Ltd.*, 202 AD2d 220, 222 [1st Dept1994].)

Accordingly, it is

ORDERED that plaintiff's motion to dismiss defendant's counterclaims is granted.

Dated: August 23, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.