SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
----------x
ARTHUR E. RONDEAU,

Plaintiff, Index No. 654181/2015

- against -

MARC BERMAN, NEW YORK POST, NYP HOLDINGS, INC., and NEWS CORP.

Defendant.
----------x

Hon. C. E. Ramos, J.S.C.:

In motion sequence 001, Defendants Marc Berman("Berman"), New York Post ("New York Post"), NYP Holdings, INC. ("NYP"), and News Corp ("News Corp") (collectively, "Defendants") move to dismiss the complaint ("Complaint") filed by Plaintiff Arthur E. Rondeau ("Plaintiff"), in its entirety, pursuant to CPLR 3211(a)(5) and (7).

For the reasons set forth below, the Court grants Defendants' motion to dismiss on the grounds that Plaintiff has failed to state a cause of action.

Background

According to the Complaint, Plaintiff, an athletic performance coach, created a program (the "Free Throw Program") to assist basketball players in improving their free throw shooting. The Free Throw Program consisted of a mental component that utilized neuro-linguistic programming, which eventually evolved into its own program ("Mental Zone Program").

Berman is a resident of the State of New York and is

employed as a sports reporter for the New York Post.

In April 1999, Plaintiff alleges that he began to work with Allan Houston ("Houston"), a former player of the New York Knickerbockers ("The Knicks") to help him improve his shooting through the Mental Zone Program. Prior to working with Plaintiff, Houston was scoring less than fourteen (14) points per game and making less than forty percent (40%) of his shots. After they started working together, Houston's performance purportedly started to improve. The Knicks experienced tremendous success that season, ultimately making it to the NBA Finals. Plaintiff attributed Houston's success to the Mental Zone Program.

In February 2009, Plaintiff met with officials from The Knicks with the hope of securing employment. These officials informed him that he would not receive an offer of employment.

In June 1999, Plaintiff first met Berman, when Berman was covering The Knicks during the NBA Finals. Plaintiff and Berman did not have any further contact until December 2007.

On June 22, 2009, Plaintiff alleges that he contacted Berman via e-mail, notifying him that he had newsworthy information that Berman may be interested in. Plaintiff and Berman met in person on July 2, 2009 and Plaintiff notified Berman of his willingness to give Berman "exclusive" entitlement to a newsworthy article ("Newsworthy Article"). Plaintiff had indicated that the publication of the Newsworthy Article would greatly benefit him

financially and allow him to rebuild his career. In response, Berman allegedly agreed that the Newsworthy Article was potentially newsworthy and that he would begin the research and writing process. This conversation was not memorialized in writing, and the parties did not further discuss additional guidelines or a timeline for publication.

On July 14, 2009, Berman notified Plaintiff that Houston had made a "disparaging" comment about Plaintiff, which Houston would publicize if the Newsworthy Article were published. During this conversation, Berman also expressed reluctance in publishing the Newsworthy Article and notified Plaintiff that he was being pressured by the head of Public Relations ("PR") for The Knicks to not publish the article.

Between July 2009 and December 2009, Plaintiff allegedly reached out to Berman to request updates on the status of the Newsworthy Article. On December 15, 2009, Berman contacted Plaintiff, indicating that if he were to publish the Newsworthy Article, he would have to stipulate that Plaintiff and Houston were on the "same page." According to Plaintiff, this condition precedent to publication had not been previously discussed.

After the December 15, 2009 correspondence, Plaintiff and Berman's communication significantly decreased. In April 2010, Berman and Plaintiff ceased all communications.

On January 24, 2011, Plaintiff commenced a lawsuit against

Houston and The Knicks, entitled *Rondeau v. Allan Houston et al.*, Index No. 650198/2011, arising from the same set of alleged facts. This Court dismissed the action without prejudice, reasoning that "there is [no] remedy for not having a good article written about you." (NYSCEF Doc Nos. 154-157).

On December 14, 2015, Plaintiff commenced the instant action, seeking to recover under theories of breach of contract and promissory estoppel against Berman, and vicarious liability against the New York Post and NY Holdings, Inc., and News Corp.

Discussion

Defendants move to dismiss Plaintiffs' claims for breach of contract and promissory estoppel in their entirety.

In deciding a motion to dismiss under CPLR 3211 (a)(7), this Court must consider whether the complaint states a cause of action (*Ackerman v 305 East 40th Owners Corp.*, 189 AD2d 665, 666 [1st Dept 1993]). On a motion to dismiss, a court must accept the facts as alleged to be true and determine whether the [defendant's] facts fit within any cognizable legal theory (*Morone v Morone*, 50 NY2d 481 [1980])(internal quotations omitted).

A. Whether Plaintiff's Complaint Should be Dismissed as Untimely

As a preliminary matter, Defendants argue that Plaintiff's Complaint is time-barred pursuant to CPLR 213(2) because the

alleged breach occurred on July 14, 2009, more than six years prior to the commencement of this action.

Under CPLR 213(2), breach of contract claims are subject to a six year statute of limitations. Once a contract comes to an end, either by operation of its terms or by declaration of an anticipatory breach, the statute of limitations begins to run (*Rachmani Corp v 9 East 96th Street Apartment Corp.*, 211 AD2d 262 [1st Dept 1995]).

The Court finds that Plaintiff's complaint is timely. The alleged breach occurred on December 15, 2009, when Berman notified Plaintiff of a condition precedent that the Newsworthy Article must contain a statement that Plaintiff and Houston were on the "same page."

B. Whether New York Post and News Corp. Are Proper Parties to this action

Defendants also assert that the New York Post is merely a trade name of the newspaper that NYP owns and publishes and is therefore not a jural entity (*See* Lippner Aff ¶ 2). Plaintiff does not contest to dropping the New York Post from the caption, and to this extent, Plaintiff's claims against the New York Post are dismissed.

C. Whether Plaintiff has set forth a cause of action for breach of contract

Plaintiff's first cause of action alleges that Defendant

breached the oral contract that was entered into on July 2, 2009. Plaintiff asserts that Berman held himself out as having full and unfettered authority to publish the Newsworthy Article in the New York Post's Sports Section. Further, according to Plaintiff, Berman had authority to bind the New York Post and NYP Holdings, Inc. to the alleged oral contract. According to Defendants, News Corp. is a party to this action simply because of its ownership of NYP and not because of its relationship with Berman. Plaintiff fails to allege that Berman had authority to bind News Corp. or NYP. Accordingly, this Court finds that News Corp. and NYP are not proper parties to this action, and therefore the Complaint is dismissed as against them.

I. Existence of a contract

The issue is whether the terms of the alleged oral contract are sufficiently definite to give rise to an enforceable agreement. Although a manifestation of intention may be perceived as an offer, it cannot be considered a contract unless its terms are "reasonably certain" (Restatement [Second] of Contracts § 33). Thus, a mere agreement to agree, in which a material term is left open for future negotiations, is too vague to be enforceable (*Joseph Martin, Jr., Delicatessen, Inc., v Schumacher*, 52 NY2d 105 [1981]).

Here, Plaintiff alleges that Berman agreed to write an article containing newsworthy information regarding Plaintiff's

success with the Knicks, his meeting with The Knicks' executive Glen Grunwald ("Grunwald"), Grunwald's decision to not hire Plaintiff, and The Knicks' recent downfall. However, Plaintiff fails to allege that there was an agreement as to the date of publication, the length of the Newsworthy Article, whether it would appear in the New York Post, specific research guidelines, and the content of said article, which are all material terms. Further, Plaintiff does not allege that there was an agreement as to Plaintiff's remedy should the Newsworthy Article not be published. The alleged contract was merely an agreement to agree that Berman would publish an article in exchange for exclusivity.

Because the alleged oral contract is too vague to ascertain its material terms, it is not capable of being enforced (*Dillon v Peretti*, 176 AD2d 497 [1st Dept 1991]).

II. Whether Plaintiff Properly Pleaded Damages

Defendants argue that Plaintiff fails to allege damages, an essential element of the claim, resulting from Defendants' decision to not publish the Newsworthy Article (*J.R. Loftus, Inc. v White*, 85 NY2d 874 [1995]). In order to sustain a breach of contract claim, a party must establish that the particular damages sustained were fairly within the contemplation of the parties to the contract at the time it was made (*Digital Broadcast Corp. v Ladenburg, Thalmann & Co., Inc.*, 63 AD3d 647 [1st Dept 2009]).

Here, it must be alleged that the parties contemplated that Plaintiff would experience a specific type of financial hardship if the Newsworthy Article was not published. Plaintiff asserts that, as emphasized in the second amended complaint, the damages sustained as a result of Defendants' decision to not publish the Newsworthy Article can be measured using a formula sent by a Public Relations expert ("PR Expert"). The PR Expert provides that "the minimum dollar value of an article is the equivalent of the cost to purchase advertising space of the same size in the same location within the publication" (*See* Exhibit L to Def. Opp to Motion). This method does not provide a way to determine, with specificity, the precise financial harm that Plaintiff experienced as a result of Defendants' decision to not publish the Newsworthy Article.

There is no plausible way to ascertain what job opportunities he would have had or whether his relationship with Houston and the Knicks would have improved. As such, the Court agrees with Defendants' assertions, and finds that Plaintiff's claim for breach of contract is without merit.

D. Whether Plaintiff has set forth a cause of action for promissory estoppel

Plaintiff also asserts a theory of promissory estoppel, alleging that he relied on Berman's repeated assurances that he would publish the Newsworthy Article to his detriment, as it

prohibited him from approaching other media outlets with the newsworthy information. Plaintiff further asserts that such reliance was reasonable given the ongoing relationship between Plaintiff and Berman as well as the existence of an oral contract between them.

The elements of a claim for promissory estoppel are (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) an injury caused by the reliance (*Schroeder v Pinterest Inc.*, 133 AD3d 12 [1st Dept 2015]). Detrimental reliance is considered a necessary element of a promissory estoppel claim, and failure to adequately plead such a claim warrants dismissal (*Thome v Alexander & Louisa Calder Foundation*, 70 AD3d 88 [1st Dept 2009]).

I. Whether the oral agreement between Plaintiff and Berman was sufficiently clear and unambiguous

Just as Plaintiff's breach of contract action is likely too vague to give rise to a cause of action, Plaintiff's promissory estoppel claim will also likely be deemed too vague to support a cause of action (*See Sanyo Electric, Inc. v Pinros & Gar Corp.*, 174 AD2d 452 [1st Dept 1991]).

II. **Plaintiff's reasonable reliance on the oral agreement**

Defendants assert that Plaintiff could not and should not have reasonably relied on the alleged oral promise. It is unreasonable to assume that an employee like Berman at such a

large corporation would have the authority to guarantee publication of a specific article.

It is undisputed that Berman agreed to research the Newsworthy Article and conduct interviews of relevant individuals. Defendants assert that the Newsworthy Article would have to be researched, drafted, sourced, and edited by attorneys, all before it was sent to a publisher to determine whether it should be published. Thus, even if Berman researched and wrote the Newsworthy Article, there is no way to ascertain if it would have actually been published. Accordingly, Plaintiff fails to allege that he reasonably relied on Berman's oral promise that he would publish the Newsworthy Article.

III. **Whether Plaintiff's Reasonable Reliance Resulted in Unconscionable Injury**

In order to satisfy this element of a promissory estoppel claim, a plaintiff must establish that it would be unconscionable to deny enforcement of the alleged oral promise (*See Laurel Hill Advisory Group, LLC v American Stock Transfer & Trust Co., LLC*, 112 AD3d 486 [1st Dept 2013]). Here, Plaintiff's allegations of injury do not rise to the level of unconscionability. The injury alleged was simply that Plaintiff did not approach other news outlets. Plaintiff further asserts, without any supporting evidence, that his inability to approach other news outlets contributed to his ongoing financial struggle.

However, as previously mentioned, there is no plausible way to measure Plaintiff's damages as well as the potential financial success resulting from publication. Further, Plaintiff failed to establish that his Newsworthy Article would otherwise have been published had Plaintiff approached other news outlets.

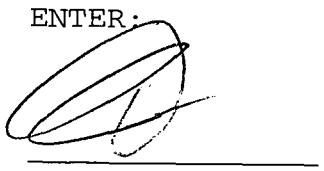
In the absence of any quantifiable and identifiable injury, the second element of the promissory estoppel claim fails for the same reason that Plaintiff is unable to establish damages under a breach of contract claim. Thus, Plaintiff's cause of action for promissory estoppel warrants dismissal (*Castellotti v Free*, 138 AD3d 198 [1st Dept 2016]).

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted, and the Complaint is dismissed, and the Clerk is directed to enter judgment accordingly.

Dated: January 13, 2017

ENTER:



J.S.C.