SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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MORGAN JOSEPH TRIARTISAN LLC,

Plaintiff,

-against-

NETLIST, INC., CHUN KI HONG and GAIL M. SASAKI

Defendants.

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Index No. 651722/2016
Motion Seq. No. 003
Motion Date: 9/15/2016

BRANSTEN, J.:

This action is brought by Plaintiff Morgan Joseph TriArtisan LLC, an investment and merchant bank, against Defendant Netlist, Inc., a technology company specializing in high-performance memory solutions and its officers Chun Hong ("Hong") and Gail Sasaki ("Sasaki"). Plaintiff seeks to recover a "success fee" pursuant to a contract between the two parties. Defendants now seek dismissal of the Complaint, pursuant to CPLR 3211(a)(7). For the reasons that follow, Defendants' motion is Granted.

I. Background[1]

On May 2, 2014, Netlist engaged Morgan Joseph TriArtisan LLC ("MJTA") to provide financial advisory and investment banking services pursuant to a written agreement (the "Agreement"). MJTA was engaged on an exclusive basis. (First Amended Compl. ¶ 10). Pursuant to the Agreement, Netlist agreed to pay MJTA a "success fee" in an amount equal to "6.75% of the aggregate equity capital raised from

[1] The facts cited in this section are drawn from the First Amended Complaint, unless otherwise noted.

the strategic parties as listed on Schedule B for either Netlist or any of it subsidiaries if the amount raised was between $0 - $20 million …if a "Transaction" as that term is defined in the Agreement, occurs during term of the Agreement, or within nine (9) months of the end of the Term (the "Tail Period"). (*Id.* ¶ 11).

The initial term of the Agreement was for a period of six (6) months ending on November 2, 2014 with the Tail Period expiring on August 2, 2015 (*Id.* ¶ 12). On or about December 4, 2014, after the expiration of the initial 6-month term, MJTA and Netlist engaged in discussions concerning extending the Agreement. (*Id.* ¶ 13). It was proposed by MJTA the Agreement be extended and continued in effect until June 2, 2015. (*Id.* ¶ 13). On or about January 5, 2015 Netlist responded with changes to MJTA's proposal concerning the length of the term and tail period. (*Id.* ¶ 14). Included in Netlist's response was a reduction of the proposed tail period by 3 months, ending instead on December 2, 2015. The Netlist response also limited the Agreement to cover "any of the strategic parties listed on Schedule B identified by MJTA". (*Id.* ¶ 15).

MJTA, through Rex Sherry, an individual and independent contractor, continued to provide financial advisory and investment-banking services through most of 2015 during which time e-mails were exchanged. Rex Sherry was the only representative from MJTA who continued to interact with Netlist during this 2015 period. (*Id.* ¶ 18).

In early 2015 Netlist retained Rex Sherry as a consultant directly. Netlist did not advise MJTA of Sherry's retention. (*Id* ¶ 33, 34) On or about November 19, 2015 Netlist entered into a Technology Partnership joint venture with Samsung Electronics Co., Ltd.

that consisted of a Senior Secured Convertible Promissory Note and Warrant Purchase Agreement for $15 million. As the transaction was completed during what plaintiff purports to be the applicable tail period, it seeks a Success Fee of $1,012,500 or 6.75% of the $15 million Netlist received. (*Id.* ¶ 19-20).

A. *MJTA's Proposed Extension of the Agreement*

Plaintiff submit a proposed extension of the Agreement to Defendant Chun Ki Hong, the Chief Executive Officer of Netlist, on or about December 4, 2014. ("MJTA extension proposal"). (First Amended Complaint ¶ 13). The MJTA extension proposal was signed by its co-President Gerald Cromack. *Id.* In it, MJTA proposed modifying the May 2, 2014 Agreement such that the term of the engagement shall be extended and shall continue in effect until June 2, 2015. It proposed all other provisions to the initial Agreement would remain in full force and effect. *Id.* The MJTA extension proposal was signed by Mr. Cromack and a space was left for Netlist to countersign. (Exhibit "2" to the First Amended Complaint).

B. *Netlist's Response to the MJTA Extension Proposal*

On or about January 5, 2015, Rex Sherry sent an email to MJTA advising Netlist came back with proposed modifications. Netlist interlineated its changes to the December 4, 2014 MJTA extension proposal, essentially creating a revised document. Included in the modifications was that the tail period would continue until December 2, 2015 (as opposed to March 2, 2016) and shall cover any "covered transactions which may occur with any of the strategic parties listed on Schedule B identified by MJTA".

(Exhibit "4" to the First Amended Complaint; First Amended Complaint ¶15). Netlist did not countersign the December 4, 2014 letter. *Id.*

C. *The Instant Litigation*

Plaintiff MJTA commenced the instant action on May 23, 2016, filing a four-count Complaint asserting a range of contractual and tort claims against Defendants: (1) Breach of Contract against Netlist; (2) Quantum Meruit against Netlist; (3) Fraud against all defendants; and (4) Prima Facie Tort against Hong and Sasaki. In addition, MJTA seeks punitive damages for its tort claims.

II. Discussion

Defendants now move to dismiss MJTA's Complaint pursuant to CPLR 3211(a)(7).

On a motion to dismiss for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

A. *Claims Against Netlist*

Netlist seeks dismissal of three causes of action asserted against it in MJTA's First Amended Complaint – Breach of Contract, Quantum Meruit and Fraud. These claims will be addressed in turn.

1. Breach of Contract

Plaintiff's breach of contract claim is based on a May 2, 2014 Agreement which was allegedly extended beyond its expiration date of November 2, 2014, with a tail period expiring on August 2, 2015. MJTA contends its written proposal to extend, met with Netlist's interlineated response, resulted in an extension of the May 2, 2014 Agreement by way of a binding written agreement. The first question before this Court is whether Netlist's written response to MJTA's extension proposal constitutes a written contract between the two parties, thus extending the tail period to December 2, 2015? If yes, the analysis of whether a contract was formed can end there. If no, the next question the Court must addresses is whether Netlist's written response was in fact a counter proposal to MJTA which was accepted by MJTA by way of its performance, thus creating a contract. Each question will be addressed separately.

a. MJTA's written proposal and Netlist's written response

It is undisputed the Tail Period on the initial Agreement between the parties expired on August 2, 2015. It is also undisputed on or around December 4, 2014 MJTA explored the possibility with Netlist of extending the Agreement. In so doing, MJTA submit a written proposal, which was signed by MJTA, with terms extending the

Agreement until June 2, 2015 with a tail period extending until March 2, 2016. It is also undisputed on or about January 5, 2015 Netlist responded to MJTA's proposal with changes material to the contract (i.e. date the tail period would expire and the limitations on which transactions would warrant payment of the success fee). It is also undisputed MJTA did not provide Netlist with a written response to these new terms.

It is a fundamental tenet of contract law that a counteroffer constitutes a rejection of an offer as a matter of law. *Jericho Group, Ltd. v Midtown Dev., L.P.,* 32 A.D.3d 294, 299 (1st Dep't 2006); *J. Grotto & Assoc. v Hiro Real Estate Co.*, 271 A.D.2d 360, 360 (1st Dep't 2000); *Kleinberg v Ambassador Assoc.*, 103 A.D.2d 347, 348 (1st Dep't 1984), *affd* 64 NY2d 733 (1984). Rejection by counteroffer extinguishes the offer and renders any subsequent acceptance thereof inoperative. *Jericho Group* 32 A.D.3d 294, 299. A qualified acceptance such as this is nothing more than a counteroffer. *Homayouni v Paribas*, 241 A.D.2d 375, 376 (1st Dep't 1997). Indeed, whenever a purported acceptance is even slightly at variance with the terms of an offer, the qualified response operates as a rejection and termination of--and substitution for--the initially offered terms. *Id* at 376; *New Hampshire Ins. Co. v. Wellesley Capital Partners,* 200 A.D.2d 143, 148, (1st Dep't 1994). To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (22 NY Jur 2d, Contracts § 9). That meeting of the minds must include agreement on all essential terms (*Id.* § 31); *Kowalchuk v. Stroup*, 61 AD 3d 118, 121 (1st Dept 2009).

Here, it is evident the initial proposal made by MJTA was rejected by Netlist and replaced by other material terms. While the response did keep many of the same terms, i.e. the end date of June 2, 2015 for the agreement, the length of the tail period and the identification of transactions to be covered varied. That is, MJTA proposed the tail period be extended to March 2, 2016 while Netlist proposed the tail period only go to December 2, 2015. Because Netlist's response proposed "different extensions on different terms", the response was a counteroffer and thus a rejection of defendant's earlier offer. *Jericho Group, Ltd.*, 32 A.D.3d 294 at 299. *See also, Metro. Steel Indus. v. Citanalta Const. Corp.*, 302 A.D.2d 233, 233 (1st Dept 2003) (affirming dismissal of breach of contract claim where defendants returned a proposed contract with modified terms, which thus "constituted a counteroffer, and as such, a rejection of [the] offer").

Further narrowing the initial proposal made by MJTA, Netlist's counter offer indicated the shorter tail period would cover transactions with only those "strategic parties listed on Schedule B identified by MJTA." (First Amended Complaint ¶4). The proposal first made by MJTA was silent as to which transactions would result in a "success fee" whereas Netlist's response specified which transactions. There is no evidence there was the requisite meeting of the minds on this issue germane and material to the enforcement of the contract – that is, which transactions are to be covered. *Kowalchuk v. Stroup*, 61 AD 3d 118 at 121.

MJTA did not respond to Netlist's counter offer in writing nor does it contend it provided written acceptance. As such, this Court concludes the parties did not did not enter into a written contract extending the initial May 2, 2014 Agreement.

b. MJTA's performance based on Netlist's counter-offer

Next, however, the Court must address plaintiff's argument that, if there was no contract created by writing, there was one created by the parties' performance. That is, while MJTA did not accept Netlist's counter-offer in writing, it did so by action. It is well settled an offer or counteroffer may be accepted either by words or by actions. *John William Castillo Assocs. v. Std. Metals Corp.*, 99 A.D.2d 227, 331 (1st Dept 1984) ("an offer may be accepted by conduct or acquiescence"). However, under New York law, "when a party gives forthright, reasonable signals that it means to be bound only by a written agreement," that intent is honored. *Jordan Panel Sys. Corp.*, 45 A.D.3d. 165, 169 (1st Dept 2007), quoting *R.G. Group, Inc. v Horn & Hardart Co.*, 751 F.2d 69, 75 (2d Cir 1984) (applying New York law). *See also, Scheck v.* Francis, 26 N.Y.2d 466, 469-470 (1970) ("It is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed").

Here, there does not appear to be any question the parties agreed in the initial May 2014 written contract that any modifications to the agreement had to be "approved in writing by both parties". Netlist's counteroffer was not "approved" by MJTA in writing. As such, any arguments advanced by MJTA that it's performance created and confirmed

a binding agreement between the two parties is not supported by the parties' plain intent as expressed in the May 2014 agreement or related case law. Going one step further, it is also clear before a contract can be created by way of performance, there needs to be a meeting of the minds of the material terms of the agreement. *Kowalchuk v. Stroup*, 61 AD 3d 118 at 121. In this case, one key provision of Netlist's counteroffer was left unresolved at the time of its issuance back to MJTA. That is, which of the transactions would be covered by this agreement. Insomuch as the counter proposal indicated the agreement and tail period would cover "any covered transactions which occur with any of the strategic parties listed on Schedule B identified by MJTA." (Emphasis added). Even if this Court considered the agreement one which could be amended and extended by way of performance (as opposed to in writing), the terms of the extension are unclear and were not made any clearer by virtue of the alleged performance.

As such, for the above reasons, Defendant's motion to dismiss Plaintiff's First Cause of Action for Breach of Contract is granted.

2. Quantum Meruit

MJTA's Second Cause of Action seeks recovery based on *Quantum Meruit*, in the alternative to its breach of contract claim. Plaintiff alleges if a contract between it and Netlist is not found to exist, it is entitled to recover damages under Quantum Meruit. To state a claim for quantum meruit, Plaintiff must allege: (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered,

(3) an expectation of compensation therefor, and (4) the reasonable value of the services. *Soumayah v. Minelli*, 41 A.D.3d 390, 391 (1st Dep't 2007).

Defendant Netlist argues this cause of action must be dismissed as Plaintiff fails to state a cause of action and has failed to plead all requisite elements of *quantum meruit.* This Court agrees. A plain reading of Plaintiff's Complaint claims an entitlement to this relief based on its rendering financial advisory and investment banking services to Defendant Netlist at the "request and consent of its Chief Executive Officer and Chief Financial Officer, Defendants Hong and Sasaki". (Amended Compliant ¶27). Plaintiff asserts the reasonable value of services allegedly rendered was $1,012,500 (Comp. ¶28, 29), making a prima facie showing of prong number 4. What this Court does not see clearly alleged, however, is the element of good-faith performance and expectation of compensation. It is concerning to this Court that, because this remedy is sought in the alternative of an existing contract, it is unclear under what premises Plaintiff could have had an expectation of compensation. That is, why would it believe it would be compensated for the services it was allegedly rendering? Presuming the extension negotiation did not form a contract, the only contract in existence was the one formed on May 2, 2014 which expired on November 2, 2014 (with a tail period for any transactions which close prior to August 2, 2015). Absent an extension, which for purposes of Plaintiff's *quantum meruit* claim there was not an agreement to extend, it is difficult to understand why plaintiff had a good faith belief it would be compensated for any services it allegedly rendered to Defendant after November 2, 2014. Without satisfying these two

elements of *quantum meruit*, that is good faith performance and an expectation of compensation, Plaintiff fails to state a claim of action sufficient to defeat Defendant's motion.

Further, this Court finds while there was not an active agreement when Plaintiff allegedly rendered services, the "subject matter" at the heart of the parties' dispute is governed by a written agreement, albeit expired. A plaintiff may not assert a quantum meruit claim where a valid agreement governs the same "subject matter" as the parties' dispute. *Hunter v. Deutsche Bank AG*, 56 A.D.3d 274, 274 (1st Dept 2008) (affirming summary judgment for defendant where written contracts governed the subject matter of plaintiff's entitlement to a bonus"). Here, plaintiff seeks damages in its quantum meruit claim mirroring those sought in connection with its breach of contract claim; a claim for entitlement to a "success fee" of $1,012,500. This subject – that is, the entitlement of a "success fee" – is governed by the May 2, 2014 Agreement which this Court finds was not validly extended. Plaintiff's Second Cause of action is based on the same facts, seeking the same damage and concerning the same subject matter as the First Cause of Action and is duplicative. Plaintiff's opposition brief even concedes both the First and the Second Cause of Action "seek to vindicate a contractual right". (Plaintiff's Opposition Memo, p. 12). As such, even though this Court finds plaintiff's breach of contract claim fails, plaintiff may not nevertheless recover under a different, quantum meruit based, theory. See, *Armienti & Brooks, P.C. v. Acceleration Nat. Ins. Co.*, 274 A.D.2d 319, 320 (1st Dept 2000).

Therefore, Defendant Netlist's motion to dismiss the Second Cause of Action is granted.

3. Fraud

To plead a claim for fraud under New York law, Plaintiff must allege: a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages. *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 558 (2009). A claim rooted in fraud must be plead with the requisite particularity under CPLR 3016(b). *Id.* Firm factual pleadings are necessary to support a "reasonable inference" that allegations of fraud are true. *Id* at 559-60. In the absence of any affirmative misrepresentation or any fiduciary obligation, a party may still be liable for nondisclosure where it has special knowledge or information not attainable by plaintiff, or when it has made a misleading partial disclosure. *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 (1st Dept 2014); *see Williams v. Sidley Austin Brown & Wood, L.L.P.*, 38 A.D.3d 219, 220 (1st Dept 2007); *L.K. Sta. Group, LLC v. Quantek Media, LLC*, 62 A.D.3d 487, 493 (1st Dept 2009).

Defendant Netlist seeks dismissal of Plaintiff's fraud claim on the basis that it fails to state a cause of action and that it is duplicative of the breach of contract action. Defendant argues Plaintiff MJTA is unable to satisfy each of the prongs requisite for its claim for Fraud to withstand a motion to dismiss.

Plaintiff responds by alleging Defendant Netlist had a legal duty to disclose the fact that it entered into a direct relationship with non-party Rex Sherry (First Amended

Complaint ¶34). To the contrary, Defendant Netlist argues absent this bare legal conclusion, there is no other information, contracts or otherwise support provided by Plaintiff to support this proposition. Defendant argues, therefore, Plaintiff failed to plead with particularity the existence of any specific duty to disclose warranting dismissal. (Defendant's Memo in Support, p. 24). This Court agrees there has been no affirmative duty to disclose demonstrated by Plaintiff MJTA. A conventional business relationship, without more, does not become a fiduciary relationship by mere allegation. *Oursler v. Women's Interart Center, Inc.*, 170 A.D.2d 407, 407 (1st Dept 1991). "An omission is only actionable as fraud where there is something akin to a fiduciary duty between the parties." *S'holder Representative Servs. LLC v. Sandoz Inc., 46 Misc. 3d 1228(A) * 7* (Supreme Court, New York County 2015).

In the alternative, Plaintiff argues Defendant Netlist was in possession of "special knowledge" not otherwise attainable by Plaintiff MJTA, therefore imposing a tacit duty on Defendant Netlist to disclose its arrangement with Rex Sherry to Plaintiff MJTA. This Court does not agree with that position. The "special facts" doctrine requires "satisfaction of a two-prong test: that the material fact was information peculiarly within [the] knowledge of [the defendant], and that the information was not such that could have been discovered by [the plaintiff] through the exercise of ordinary intelligence." *S'holder Representative Servs. LLC*, 46 Misc. 3d 1228(A) * 7; *Jana L. v. W. 129th St. Realty Corp.*, 22 A.D.3d. 274, 278 (1st Dept 2005). The *Jana L.* Court further noted that "[if] the other party has the means available to him of knowing . . . he must make use of those

means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations." *Jana L*, 22 A.D.3d. at 278. While on one hand Plaintiff argues to this Court it relied heavily on Mr. Sherry and considered him its "agent" (Plaintiff's Opposition Memo, p.14), Plaintiff offers no explanation as to why it could not have had a conversation with Mr. Sherry shoring up his proposed allegiance and "loyalty" to Plaintiff or explore any potential opportunities Mr. Sherry may have been considering with other companies, including Defendant Netlist. Such an inquiry would have satisfied the requisite prongs. Plaintiff has not proffered any case law that convinces this Court it was incumbent upon Netlist to advise Plaintiff MJTA of its intentions to hire Mr. Sherry. Nor has Plaintiff alleged it made use of the means available to it to discover Defendant and Mr. Sherry's arrangement. See, *S'holder Representative Servs. LLC*, 46 Misc. 3d 1228(A) * 7.

Moreover, the rationale behind Plaintiff's alleged injury is also questioned by this Court. Plaintiff spends a great deal of time in its Complaint alleging the formation of a contract which established the basis for Plaintiff continuing to provide services to Defendant Netlist "throughout most of 2015". (First Amended Complaint ¶¶15, 18, 27). That is, according to Plaintiff's arguments, the purported existence of the contract was the very reason Plaintiff continued to render services to Netlist. In support of its Third Cause of Action, however, plaintiff appears to pivot and alleges the "direct and proximate *result*" of Netlist's nondisclosure of the Sherry retention was the very same rendering of services to Defendant Netlist. (First Amended Complaint ¶35). It is inconsistent to

allege that Plaintiff rendered services because it believed the May 2, 2014 agreement had been extended, yet claims, on the other hand, it was actually Netlist's nondisclosure of the Sherry retention which spurred Plaintiff's actions. Plaintiff has, therefore, failed to plead how Netlist's omission, if it is to be considered an omission at all, would have been inherently material to preventing the injury about which it complains; that is, the allegedly lost "success fee".

Finally, in light of our finding there was no contract extension consummated as a result of the negotiations; the counter offer proposed by Defendant Netlist had not been accepted in writing by Plaintiff MJTA (the only way to amend this agreement), and the May 2, 2014 agreement expired on November 2, 2014 - Defendant Netlist would have been free to retain Sherry (or anyone else) without broadcasting such a decision to Plaintiff as it was not required to by contract or law.

Therefore, this Court finds Plaintiff has failed to properly state a cause of action for Fraud against Defendants Netlist, Hong and Sasaki and that branch of Defendants' motion seeking dismissal is granted.

B. Claims against Defendants Hong and Chan

1. Fraud

Defendant argues Plaintiff has failed to alleged specific facts in support of a duty to disclose owed by Defendants Hong or Sasaki. A review of Plaintiff's opposition and Complaint confirm this to be true. Insomuch as the only allegation of any "duty to disclose" is contained as one interconnected pleading and is alleged against all

"defendant". (First Amended Complaint ¶34). In its opposition, Plaintiff fails to provide any opposition detailing why or how the individually named Defendants owed Plaintiff a duty separate and apart from the allegations made against Defendant Netlist. See, *S'holder Representative Servs. LLC*, 46 Misc. 3d 1228(A) * 8. (dismissing claim where allegations supporting scienter were "made collectively as to all Defendants").

Therefore, Defendant's motion seeking dismissal of Plaintiff's Third Cause of Action as against Defendants Hong and Sasaki is granted.

2. Prima Facie Tort

As Plaintiff has voluntarily withdrawn this aspect of its Complaint, (Plaintiff's Opposition Memo, p. 16) Defendants' motion to dismiss this Fourth Cause of Action is granted.

C. *Punitive Damages*

Finally, all Defendants seek dismissal of Plaintiff's request for punitive damages with regard to his tort claims. Exemplary damages are "permitted only when a defendant's wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations." *Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 85 A.D.3d 457, 458 (1st Dep't 2011) (citations omitted). Plaintiff must demonstrate "circumstances of aggravation or outrage, or a fraudulent or evil motive on the part of the defendant." *Id.*

In the instant case, MJTA has not alleged that Defendants' wrongdoing "evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a

criminal indifference to civil obligations". *Ross v. Louise Wise Services, Inc.* 8 N.Y.3d 478, 489 (2007).

Therefore, Defendants' motion seeking dismissal of Punitive Damages is Granted.

III. Conclusion

Therefore, for the reasons stated herein, Defendants motion seeking dismissal is granted in its entirety.

Dated: New York, New York
February 14, 2017

ENTER

Hon. Eileen Bransten, J.S.C.