SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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FRANK BARNES,

Plaintiff,

-against-

ALAN MRUVKA, STORAGEBLUE EQUITIES, LLC, THE MURRAY MRUVKA FAMILY TRUST

Defendants.

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DECISION/ORDER
Index No. 651163/2016

HON. DAVID B. COHEN, J.:

Plaintiff Frank E. Barnes III, brought this action against defendants Alan Mruvka, StorageBlue Equities, LLC and the Murray Mruvka Family Trust, alleging several causes of action relating to work allegedly performed by plaintiff on behalf defendants. The Complaint alleges six causes of action: 1) breach of contract; 2) unjust enrichment; 3) violation of the implied covenant of good faith and fair dealing; 4) promissory estoppel; 5) *quantum meruit* and 6) fraudulent inducement. The facts, as alleged in the complaint, are that the parties had a relationship that went back many years and that in connection with the formation and funding of StorageBlue Equities, plaintiff performed many services for StorageBlue Equities, at the behest of Alan Mrukva. Plaintiff alleges that between March 2014 and May 2015 he spent several thousands of hours rendering services such as visiting sites, due diligence, creating and producing financial models, investigating violations and negotiating contracts and insurance policies. Plaintiff also alleges that he played a key role in securing financing on a $31,275,000 mortgage and that all of these actions occurred in New York.

Throughout the relevant time period, the parties never agreed to a specific compensation schedule. In the complaint, plaintiff alleges that at an initial meeting in March 2014, the parties agreed that he would be paid "on a traditional advisory fees basis" but also states later that he raised the issue several times and asked for a monthly salary of $10,000 plus a success fee/bonus but that the parties never actually came to an agreement. In response to the requests for compensation, defendant Mrkuva acknowledged that plaintiff would be a due a bonus and that the parties should continue discussing the terms of said bonus. However,

several times as an "advance" on the bonus, defendant loaned money to plaintiff, to be credited against the expected bonus.

Upon closing of the mortgage, On June 1, 2015, plaintiff submitted an invoice to defendants seeking $274,324 as a success fee. Defendants immediately rejected the amount sought by plaintiff but lent plaintiff additional monies. The total of the loans made to plaintiff was $52,500. According to the complaint, the parties continued to discuss plaintiff's compensation through a portion of June, including the bonus. On June 22, 2015, plaintiff received a letter from defendant along with a check in the amount of $20,400. The letter states "Thank you for all of your work.... As a bonus for helping us to close the loan, I am offering you an additional $20,400 bonus....By cashing the enclosed check of $20,400, you are accepting this as a total and final payment and agreeing that there are no other monies owed or due to you." The memo portion of the check stated "Once Cashed, Check Constitutes Total Final Payme" [sic]. On June 23, 2015, plaintiff crossed off the words "final payme" and deposited the check. On June 26, 2015, plaintiff sent defendants a letter rejecting the offer and expressly stating that cashing the check was not a waiver of his rights. This action followed.

Defendants' moved to dismiss this action on several theories. This Court holds that (1) the documentary evidence mandates dismissal and (2) that an accord and satisfaction occurred, the Court does not reach the question of whether the Court has long-arm jurisdiction. The documentary evidence, as well as the complaint, show that at no time was there in fact an actual agreement to pay an annual salary of any amount and that the parties never agreed to a bonus structure. In plaintiff's May 9, 2014 memo, plaintiff self-described his role as gofer with an increasing role. Plaintiff's own proposed compensation acknowledged that StorageBlue had no revenue or capability to pay expenses and that he not be paid a fee or salary. Rather plaintiff would receive a $20,000 loan which would either be paid back by plaintiff or in the event of a successful transition, as a repayment from closing costs allocations. In plaintiff's follow-up June 9, 2014 memo, plaintiff discussed his expanded role and that discussions were underway about a more permanent role. Plaintiff again proposed that he not be paid a fee or salary but would enter into another loan under the same turns. Nowhere in any of these memos did the parties agree to a compensation

schedule or even a bonus. Follow up communications by email also show that the parties never agreed to any salary or set compensation or even a bonus structure. However, it is clear that StorageBlue did indicate an openness to pay a bonus.

The documentary evidence and complaint both show that there was a dispute in this matter regarding the amount of the proposed bonus. The documentary evidence also shows that on June 23, 2015, after receipt of defendants' letter offering a bonus of $20,400 and the accompanying letter clearly stating that cashing the check would constitute acceptance of the offer of final payment on everything owed, plaintiff nevertheless cashed the check. Cashing the check, constituted an accord and satisfaction of the clearly disputed question as to the amount of the bonus.

Plaintiff argues that the common law rules of accord and satisfaction have been superseded by Uniform Commercial Code Law § 1-308 (*formerly* UCC § 1-207) (*see Horn Waterproofing Corp. v Bushwick Iron & Steel Co., Inc.*, 66 NY2d 321 [1985]). However, in this matter, UCC § 1-308 does not apply. UCC § 1-308 states that "A party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest,' or the like are sufficient." Here, plaintiff did not explicitly reserve his rights in the proper manner. Only three days after cashing the check did plaintiff send his letter objecting and reserving his rights. Plaintiff did not do so contemporaneously or prior to cashing the check. The facts here are analogous to *Sarbin v Southwest Media Corp.* (179 AD2d 567 [1st Dept 1992]). In *Sarbin* plaintiffs claimed that defendants owed them $125,000. Plaintiffs accepted and deposited a check for $30,000, explicitly tendered by defendants in full settlement of all claims, without any restrictive endorsement or other contemporaneous or prior reservation of rights. Less than a week later plaintiffs attempted to reserve their rights by letter. The Court wrote:

> While a letter can be sufficient to reserve rights under UCC 1–207 (*Ayer v. Sky Club, Inc.*, 70 A.D.2d 863, 418 N.Y.S.2d 57, *appeal dismissed*, 48 N.Y.2d 705, 422 N.Y.S.2d 68, 397 N.E.2d 758), we are unaware of any case that has ever expressly interpreted that provision to allow a reservation of rights by letter several days after a settlement check had already been accepted without any contemporaneous reservation of rights. While certain sections in Article 2 of the Uniform Commercial Code do allow a protest to be made within a reasonable time after delivery, similar language is not employed in UCC 1–207. The deliberate omission

> of words from a statute indicates a specific legislative intent (*see Matter of Blatnicky v. Ciancimino,* 1 A.D.2d 383, 388, 151 N.Y.S.2d 267, *affd,* 2 N.Y.2d 943, 162 N.Y.S.2d 38, 142 N.E.2d 211), and we decline to read into UCC 1–207 what the Legislature intended to omit (*see Matter of Prospect v. Cohalan,* 109 A.D.2d 210, 218, 490 N.Y.S.2d 795, *affd,* 65 N.Y.2d 867, 493 N.Y.S.2d 293, 482 N.E.2d 1209, *rearg. denied,* 65 N.Y.2d 1026, 494 N.Y.S.2d 306, 484 N.E.2d 669). Accordingly, we agree with the IAS court that a letter purporting to reserve rights under UCC 1–207 is untimely and ineffective if it does not precede or accompany the unrestricted acceptance of the settlement check.
> *Sarbin v Southwest Media Corp.* 179 AD2d 567 [1st Dept 1992].

Accordingly, all causes of action must be dismissed. Additionally, the documentary evidence shows that the parties never entered into a contract specifying payment terms, that defendants never promised anything specific to plaintiff or even promise with certainty any amount of bonus. Although the Complaint alleges that there was some sort of traditional advisory fee arrangement, plaintiff's own memo contradicts this allegation as he specifically agreed to work without compensation. In addition, the Complaint also states that plaintiff unsuccessfully tried to obtain a monthly salary. It is similarly clear from the submitted emails that no bonus structure was ever formalized. Because, the evidence shows that no agreement or statements were made promising a salary or structure of the bonus, the first, second, fourth and sixth causes of action must also be dismissed on this ground.

For all of the above reasons, it is hereby

ORDERED, that this matter is dismissed.

DATE : 2/24/2017

COHEN, DAVID B., JSC