Sterling Resources Intl. LLC v Leerink Swann LLC
2010 NY Slip Op 33856(U)
July 13, 2010
Supreme Court, New York County
Docket Number: 602906/2009
Judge: Bernanrd J. Fried
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 60

E-FILE

Index Number : 602906/2009

STERLING RESOURCES INTERNATION

VS.

LEERINK SWANN LLC

SEQUENCE NUMBER : 002

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

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

Dated: 7/13/2010

HON. BERNARD J. FRIED J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIV. PART 60

----------X

STERLING RESOURCES INTERNATIONAL LLC,

Plaintiff,

- against - Index No. 602906/2009

LEERINK SWANN LLC,

Defendant.

----------X

APPEARANCES:

Attorneys for the Plaintiff:

SACK & SACK, ESQS.
110 East 59th Street, 19th Floor
New York, NY 10022
By: Jonathan S. Sack, Esq.
Eric R. Stern, Esq.

Attorneys for Defendant:

CURLEY & MULLEN LLP
5 Penn Plaza, 23rd Floor
New York, NY 10001
By: Michael A. Curley, Esq.

FRIED, J.:

Defendant Leerink Swann LLC (Leerink Swann) moves to dismiss the complaint brought by Plaintiff Sterling Resources International, LLC (Sterling) for failure to state a cause of action under CPLR §3211(a)(7), and on the basis of a defense founded upon documentary evidence pursuant to CPLR §3211(a)(1). Because I grant the motion for the first claim, a breach of contract claim, under CPLR §3211(a)(1), I will not reach the argument regarding CPLR §3211(a)(7). The second claim, unjust enrichment, which was pled in the alternative, is also dismissed for failure to state a cause of action under CPLR §3211(a)(7).

Leerink Swann is an investment banking firm specializing in healthcare. Sterling is an international executive search firm specializing in the placement of investment banking professionals in financial institutions. In January of 2009, Leerink Swann retained Sterling to assist in its search for a new Head of Investment Banking. Sterling prepared a written agreement, dated December 24, 2008, which both parties signed. A "Multiple Hires" provision within the agreement, and its correct meaning, is at dispute and crucial to resolution. Plaintiff alleges the provision was intended to apply to all additional hires with which Sterling assisted Leerink Swann, while Defendant contends the parties' intent was only for it to apply to the possible hiring of multiple individuals for the Head of Investment Banking position (co-heads). Additionally, this agreement included an exclusivity provision, which required payment to Sterling if an individual was found and hired without its help.

In March of 2009, Leerink Swann's Chairman and CEO, Mr. Jeffrey Leerink, began discussions with Mr. Mark Robinson, a Managing Director from Merrill Lynch, regarding Mr. Robinson's potential employment as the Head of Investment Banking. On March 20, 2009, Mr. Robinson informed Mr. Leerink that, in addition to his assuming the executive position, he would bring his team of junior investment banking professionals and support staff from Merrill Lynch's healthcare division (the Robinson Group) along with him to Leerink Swann.

Shortly thereafter, Mr. Leerink notified Ms. Laura Lofaro, Sterling's CEO, of his negotiations with Mr. Robinson and the possible hiring of the Robinson Group. Discussions

commenced between the two regarding an appropriate fee to be paid to Sterling in the event of a group hiring. On March 27, 2009, Ms. Lofaro wrote the following e-mail to Mr. Leerink in reference to these discussions:

> As per our conversation, [t]his would delineate the fees in regard to moving additional hires from Merrill Lynch Healthcare.
> The first Managing Director placement will be full fee as per our agreement.
> In a team move, of four or more additional follow on Managing Directors; the Managing Directors cost would be $50,000.00 each
> Directors would be $ 40,000.00 each
> Vice Presidents would be $30,000.00 each
> Associates would be Gratis

(Am. Compl. Ex. B). Plaintiff insists that this fee arrangement is only applicable in the case of a Robinson-led group hire. Defendant denies the existence of such a condition precedent, citing the plain writing of the email. Subsequently, Mr. Robinson did not take the Head of Investment Banking position, (it was later filled by Mr. Jim Boylan), but Mr. Leerink proceeded to hire his Merrill Lynch Healthcare team for various additional positions.

On October 15, 2009, Sterling filed this action against Leerink Swann seeking payment for the entire group, which was ultimately hired. Plaintiff asserts a claim for breach of contract, and in the alternative, a claim for unjust enrichment (*quantum meruit*). Plaintiff's breach of contract claim stems from its interpretation of the "Multiple Hires" provision, which it contends is applicable to all hired individuals, regardless of position. Leerink Swann asserts that the relevant provision only applies to individuals hired for the Head of Investment Banking position, while the appropriate fees for all other hired positions were explicitly detailed in the March e-mail (with no condition precedent regarding Mr. Robinson's hiring). Alternatively, Plaintiff filed a claim for unjust enrichment based on the

assertion that Defendant refuses to pay fair and customary compensation for services provided by Sterling. Leerink Swann claims that a valid agreement exists regarding all fees, as specified in both the December agreement and the March e-mail. Defendant moved to dismiss the complaint in its entirety, pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7). This is the motion before me now.

Upon a motion for CPLR §3211 dismissal, the nonmoving party's pleadings are "necessarily afforded a liberal construction. Indeed, the court must accord plaintiff's the benefit of every possible favorable inference." *Prichard v. 164 Ludlow Corp.*, No. 600828/06, 2006 WL 3626306, at *3 (N.Y. Sup. Ct. Dec. 12, 2006) (internal quotation marks and citations omitted). However, the court need not accept as true conclusory legal statements that are flatly contradicted by documentary evidence. Dismissal premised on CPLR §3211(a)(7) is appropriate where there is no cognizable cause of action as stated in the pleadings. "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one." *Kyle v. Heiberger & Assoc., P.C.*, No. 300760/07, 2009 WL 3417851, at *3 (N.Y. Sup. Ct. Oct. 16, 2009) (internal quotation marks and citations omitted).

A motion to dismiss under CPLR §3211(a)(1) depends upon the defendant's ability to show documentary evidence which "resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." *Prichard,* 2006 WL 3626306, at *3 (internal citations omitted). Specifically, where there is a written agreement which "unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the [CPLR §3211(a)(1)]

dismissal . . . regardless of any extrinsic evidence or self-serving allegations offered by the [claimant]." *Kyle*, 2009 WL 3417851, at *3 (internal quotation marks and citations omitted).

Defendant relies on basic rules of contract interpretation and the express terms of both the December 24, 2008 agreement and the March 27, 2009 e-mail to support its motion. The first cause of action is for breach of contract. Defendant argues that the Court must "enforce a clear and complete written agreement according to the plain meaning of its terms without looking to extrinsic evidence to create ambiguities not present on the face of the document." *Id.* Leerink Swann asserts that the language of the December 24, 2008 agreement is unambiguous, clearly stating the intent of the parties was to contract regarding a search for a Head of Investment Banking, with the "Multiple Hires" provision applying to the Wall Street practice of hiring co-heads, or more than one individual for that single position. Plaintiff insists, however, that this provision applies to any and all additionally hired employees regardless of position.

The December 24, 2008 agreement (signed by Ms. Lofaro) starts with a typed greeting to Mr. Robert Kiely, the Head of Human Resources at Leerink Swann in which she writes: "The following is a brief outline of our understanding of Leerink Swann LLC's *hiring needs for the Head of Investment Banking*. In addition, we have also provided a synopsis of Sterling Resources International LLC's recruiting strategy and the fees associated with *the search*." (Am. Compl. Ex. A, at 1) (emphasis added). A thorough "Candidate Profile" for the Head of Investment Banking position follows, which includes detailed descriptions of the responsibilities associated with the job and the experience a successful candidate should demonstrate. The position is described as "a key member of the Leerink Swann senior

management team [who will have] a significant equity stake in the Firm. The position is responsible for developing the overall strategy, direction and implementation for the Firm's investment banking business. . . . The successful candidate will join a cadre of talented senior leaders. . . ." *Id.* "Mentoring", "coaching", and "training" lower level employees are specifically listed as duties associated with the position. Under the heading "Experience", the first bullet point asserts that the hired candidate must have "[p]rior senior leadership experience in building and managing a high performing healthcare investment banking organization." *Id.* at 1-2. There is no mention of hiring to occur for any other position throughout the document. The December agreement abounds with references to "the candidate", "the position", and "the hired executive" not once referring to the hiring of lower level positions. *Id.*

The complete "Multiple Hires" provision at dispute between the parties says: "We will apply a reduced fee of 27% of the total first year compensation package with a cap of $450,000 per candidate." *Id.* at 1. There is no need to resort to an analysis of common Wall Street practices (as Defendant suggests) because the basic rules of contract interpretation are clear. No ambiguity exists as to the agreed upon fees when looking within the four corners of the two documents before me. The December agreement applies to fees related to the hiring of a Head of Investment Banking position, while the fees delineated in the March e-mail regard all other hiring without their applicability hinging upon Mr. Robinson's hiring.

In the case of a written agreement, the parties' intentions are best evidenced by what was written. *Prichard,* 2006 WL 3626306, at *3. What a party may have meant, but misstated or failed to state in the clear language of the document is irrelevant. *Id.* at *6;

W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157, 162 (1990). Ultimately, if the written agreement is complete and unambiguous on its face, the court must enforce it according to the plain meaning of its terms. *Id.* This rule carries great significance in the context of business transactions such as this,

> where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length . . . . In such circumstances, courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include. Hence, courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.

Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004) (internal quotation marks and citations omitted). Accordingly, the "Multiple Hires" provision in the December agreement can only be interpreted as applying to multiple hires for the Head of Investment Banking position.

Looking to the language of the agreement and its plain meaning, it is clear the parties did not contemplate the possibility of a team move, which would include lower level personnel, prior to its execution. There is no mention of such a possibility anywhere in the five-page agreement. Where savvy businesspeople have negotiated and executed such an agreement, potentially worth millions of dollars, it should be assumed that a great deal of care went into drafting the document. New York courts have been faced with similar contractual disputes many times over, and the approach taken to resolution is consistent:

> Contingencies which could readily be anticipated but which were never mentioned can fairly be ignored as not within the contemplation of the parties. . . . The subjective interpretation of the parties is of no moment when the words of the agreement, viewed in proper context, provide an unmistakable meaning.

IBM Credit Fin. Corp. v. Mazda Motor Mfg. (USA) Corp., 170 Misc. 2d 15, 22 (1996). In addition, it is extremely significant that the agreement itself was prepared by Sterling. The longstanding rule is that any "doubt or ambiguity" within the terms of a contract must be construed against the drafter, especially between parties comprised of sophisticated, competent businesspeople. *Herbil Holding Co. v. Commonwealth Land Title Ins. Co.*, 183 A.D.2d 219, 227 (2d Dept 1992); 22 N.Y. Jur. 2d, *Contracts* §257 (2009).

It appears to me as though Plaintiff is attempting to rewrite the deal. Common sense does not allow for the same fees to be paid for recruiting a Head of Investment Banking and a low level associate. Even if it were feasible, such a provision would create inconsistencies throughout the document. Only one position is mentioned throughout the agreement, which opens with the clear assertion that its terms apply only to that position – the Head of Investment Banking. The only construction to be adopted is that which harmonizes all provisions and avoids creating inconsistencies within the document or rendering any language within the contract superfluous. *James v. Jamie Towers Hous. Co., Inc.*, 294 A.D.2d 268, 269-270 (1st Dept 2002); *Chimart Associates v. Paul*, 66 N.Y.2d 570, 573 (1986).

Perhaps the strongest indication of the original intent of the parties is the March 27 e-mail sent from Sterling's CEO, Ms. Lofaro, to Leerink Swann's CEO, Mr. Leerink. Plaintiff's argument that the terms of the e-mail only applied to a Robinson Group team hire is unconvincing. If the original agreement had in fact applied to additional junior positions, as Plaintiff contends, there would have been no reason or need for Ms. Lofaro to have written

the e-mail laying out fees for just that. Ms. Lofaro's e-mail is dispositive in contradicting Plaintiff's contentions and completely resolves any ambiguity Plaintiff seeks to inject into the December agreement.

Ms. Lofaro wrote the March e-mail when the parties were in talks with Mr. Robinson to assume the Head of Investment Banking position, with the possibility of bringing his team along from Merrill Lynch's healthcare division (the same group that was ultimately hired without Mr. Robinson). The language is unmistakable, clear, and written, once again, by Sterling's own CEO. The first line states: "[a]s per our conversation, [t]his would delineate the fees in regard to moving *additional hires from Merrill Lynch Healthcare*." (Am. Compl. Ex. B) (emphasis added). At no point does Ms. Lofaro mention Mr. Robinson's hiring as a condition precedent, triggering fees as laid out in the e-mail. Express terms such as this must be applied. New York law disfavors the finding of a condition where it is not explicitly stated; and where contract language is unambiguous, a condition will not be found. 28 N.Y. Prac., *Contract Law* § 10:11 (2010). The "[m]ere assertion by [a party] that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not . . . enough to raise a triable issue of fact." *Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y.2d 456, 460 (1957).

If Sterling had intended for the revised fee arrangement to apply only to a group hire led by Mr. Robinson, Ms. Lofaro should and could have explicitly stated that. "Where [as here,] variance exists between the written contract and the conclusion drawn by the pleader, the writing must prevail over the allegations of the complaint." *Prichard,* 2006 WL 3626306, at *4. Obviously, Plaintiff would prefer the December agreement's fees to apply rather than

the March e-mail's revised fees – the difference is millions of dollars. However, because no ambiguity exists as to the appropriate fees to be paid according to either the December or March agreements, the first cause of action must dismissed pursuant to CPLR §3211(a)(1). Because documentary evidence has been shown that irrefutably defeats Plaintiff's first cause of action, an analysis under CPLR §3211(a)(7) is unnecessary.

In the alternative to its breach of contract claim, Plaintiff pled a second cause of action for unjust enrichment. There exists a valid agreement between the two parties for the fees associated with additional hires as memorialized in Ms. Lofaro's March 27 e-mail. The theory of *quantum meruit* can only be applied where there is "an absence of any agreement [between the parties]. . . . [W]here . . . the terms of a valid and enforceable contract control the matter in question", a claim for unjust enrichment must be dismissed. *Hunnicut & Co. v. Thinkstrategy Capital Mgt., LLC*, 2010 Slip Op 50805[U], at *11 (N.Y. Sup. Ct. Apr. 27, 2010) (citations and internal quotation marks omitted). Therefore, Plaintiff's second cause of action fails to state a claim and Defendant's motion to dismiss is granted pursuant to CPLR §3211(a)(7).

Accordingly, Plaintiff's first cause of action is dismissed per CPLR §3211(a)(1), and Plaintiff's second cause of action is dismissed per CPLR §3211(a)(7).

DATED:

7/13/2010

J.S.C.

HON. BERNARD J. FRIED