SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

SCOTT MORRELL and ROSELEE MORRELL,

Plaintiff,

- against -

THE GOLDEN GOSLINGS, INC. d/b/a MYZIVA, MZ CONSULTING COMPANY, LLC, MZ NATIONAL, LLC, ROBERT ABRAMS, HOWARD FENSTERMAN, ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, GREENBERG FORMATO & EINIGER, LLP,

Defendants.

TRIAL/IAS PART 9
NASSAU COUNTY

INDEX NO. 16231/10

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MOTION SUBMISSION
DATE: 4/4/12

MOTION SEQUENCE
NO. 4

The following papers read on this motion:

Notice of Motion and Affidavits.....	X
Memorandum of Law in Support of Motion.....	X
Notice of Cross-Motion and Affidavits.....	X
Memorandum of Law in Support of Cross-Motion....	X
Memorandum of Law in Support of Reply.....	X
Affirmation in Opposition.....	X
Reply Affirmations.....	X

RELIEF REQUESTED

The defendants, Robert Abrams ("Abrams"), Howard Fensterman ("Fensterman"), and Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP (the "AF Firm"), (collectively with Fensterman and Abrams, the "AF defendants"), The Golden Goslings, Inc. ("Golden Goslings"), MZ Consulting Company, LLC ("MZ Consulting"), and MZ National" (collectively with Golden Goslings, MZ Consulting, MZ National, and the AF defendants, the "defendants"), move for an order pursuant to CPLR §3212 dismissing plaintiffs' Amended Verified Complaint. The defendants submit a Memorandum of Law in support of the motion. The plaintiffs cross-move for an order compelling the defendants to fully respond to plaintiffs' First and Second

Notice for Discovery and Inspection, and to appear for depositions, and oppose defendants' motion. The plaintiffs submit a Memorandum of Law in support of the cross-motion. The defendants submit opposition to the cross-motion, and in reply to defendants' motion, and a Memorandum of Law in support of the defendants' opposition and reply. The plaintiffs submit a reply affirmation.

BACKGROUND

The plaintiffs initiated this action for breach of contract, unjust enrichment, breach of fiduciary duty, legal malpractice, fraud and accounting. The plaintiff, Scott Morell, (hereinafter referred to as "S. Morrell), and his mother, plaintiff, Roselee Morrell, (hereinafter referred to as "R. Morrell"), allege, essentially that defendant, Fensterman, their longtime attorney, induced them into investing in an internet business venture that was controlled by the AF Firm which defrauded plaintiffs for their own benefit.

The plaintiffs allege that Fensterman and the AF Firm acted as plaintiffs' counsel in business and personal affairs for over twenty (20) years, that Fensterman and Abrams solicited the plaintiffs to invest in MYZIVA, and made misrepresentations to the plaintiffs prior to the abandonment of plaintiffs' shares. The complaint provides that Fensterman said that MYZIVA is a "great opportunity", MYZIVA would engage an accountant other than the one used by Fensterman, and the AF defendants, that Abrams and Fensterman represented that if the Abandonment Agreement was signed, S. Morrell would receive ten percent, (10%), of MYZIVA profits. The complaint alleges breach of contract in failing to satisfy the balance due, unjust enrichment based on defendants' selfish interests, breach of fiduciary duty based on material misrepresentations, malpractice on post-investment advise, fraud in the inducement based on representations that the investment opportunity had a likelihood of success, and an accounting.

On or about September 30, 2002, S. Morrell, ("Purchaser"), entered into a "Stock and Membership Interest Purchase Agreement" with Golden Goslings, MZ Consulting and MZ National, ("Sellers" and also referred to as "MYZIVA"). S. Morrell, Purchaser, agreed to purchase ten (10) shares of Golden Goslings, a five percent, (5 %), membership interest in MZ Nationals for one hundred thousand and 00/100 dollars, ($100,000.00), and agreed to advance the sum of four hundred thousand and 00/100 dollars, ($400,000.00), to the Sellers. The Purchase Agreement provided, *inter alia*, that the Purchaser acknowledges that he is purchasing an investment, that he has sufficient available resources to provide adequately for his current needs and "can bear the economic risk for a complete loss of his investment hereunder", and acknowledges the substantial risk involved in Seller's operations. The Purchaser and Seller also agreed that "there are no promises, agreements, conditions, undertakings, warranties or representations, oral or written, expressed or implied between them, other than as set forth herein".

On or about June 22, 2005, R. Morrell,("Purchaser"), entered into a "Stock Purchase Agreement" with Golden Goslings, ("Seller"). R. Morrell agreed to purchase certain shares of Golden Goslings for one hundred thousand and 00/1oo dollars, ($100,000.00). As Purchaser, R. Morrell acknowledged that she purchased the shares for investment purposes only, that she has sufficient available financial resources to provide adequately for her current needs, and could bear the substantial risks involved with the company's operations.

On or about December 31, 2008, R. Morrell and S. Morrell, executed a "Share Abandonment Agreement" acknowledging that MYZIVA no longer had any business operations, and that its shareholders were surrendering their shares.

DISCUSSION

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sullivan v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 413 NYS2d 141). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 200 NYS2d 627. The role of the court is to determine if bonafide issues of fact exists, and not to resolve issues of credibility. (*Gaither v. Saga* Corp., 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665).

Once a movant has met its initial burden of proof on a summary judgment motion, the burden shifts to the opponent to provide evidence in admissible form to demonstrate an issue of fact. (*Gaddy v. Eyler*, 582 NYS2d 990). It is well established that a party opposing a summary judgment motion must "lay its proof" and present evidence, in admissible form, demonstrating the existence of triable issues of fact which preclude summary judgment. (*Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 NY2d 1065; *Zuckerman v. City of New York*, 49 NY2d 557; *Morgan v. New York Telephone*, 220 AD2d 728). Bald, conclusory allegations, speculation and surmise are insufficient to defeat a motion for summary judgment. (*Shapiro v. Health Ins. Plan of Greater NY*, 7 NY2d 56; *Skouras v. New York City Transit Authority*, 48 AD3d 547; *Gelesko v. Levy*, 37 AD3d 528).

Here, the defendants have made a *prima facie* showing of entitlement to summary judgment. As to plaintiffs' cause of action for breach of contract as and against the defendants, Fensterman and Abrams, the defendants have demonstrated that neither Fensterman or Abrams are a party to the subject contract, the Purchase Agreement, which is between S. Morrell and Golden Goslings, MZ Consulting and MZ National. It is well established that a party may not assert a contractual cause of action against a party absent privity. (*Hampton Living, Inc. v. Carlton on the Park, Ltd.*, 286 AD2d 664; *Outrigger Construction Company v. Bank of Leumi Trust*, 240 AD2d 382). Additionally, S. Morrell testified that he believed Golden Gosling would repay the loan.

As to plaintiffs' cause of action for unjust enrichment, as it is based on the Abandonment Agreement, it must fail as the express contract governs the matter, precluding recovery in quasi contract for events arising out of the same subject matter. (*Whitman Realty Group, Inc. v. Galano*, 41 AD3d 590).

As to plaintiffs' causes of action for breach of fiduciary duty, and legal malpractice with respect to the 2005 Purchase Agreement, such actions are time-barred. (*McCormick v. Favreau*, 82 AD3d 1537). Moreover, the defendants have demonstrated that S. Morrell testified that "he" initiated the investment loan to MYZIVA, that Abrams and Fensterman told him it was a "great opportunity". R. Morrell testified that she did not recall the substance of what was said by either Fensterman or Abrams concerning her investment in MYZIVA, or her execution of the Abandonment Agreement. S. Morrell testified that he sought the advise of his accountant who told him that it was a good investment and worth the risk. The defendants refer to an "opinion letter" written by S. Morrell's

accountant concerning the investment, whereby, within twenty-four hours, S. Morrell emailed his "offer" thereto. In order to recover damages on a breach of fiduciary duty theory, the plaintiff must prove the existence of a fiduciary duty between the parties, a breach of that duty and identifiable damages suffered by the plaintiff as a proximate cause of the breach. (*Fitzpatrick House II, LLC v. Neighborhood Youth & Family Services*, 55 AD3d 664; *Kurtzman v. Bergstol*, 40 AD3d 558). Plaintiffs must demonstrate that "but for" the breach of duty, plaintiff would not have sustained ascertainable damages. (*Boone v. Bender*, 74 AD3d 1111).

Assuming that plaintiffs rely on the attorney-client relationship, or shareholder status, the alleged breach is premised on the same facts, and as so, the breach of fiduciary duty will be dismissed. (*Town of North Hempstead v. Winston & Strawn, LLP*, 28 AD3d 746). Moreover, plaintiffs cannot recover on a legal malpractice action where plaintiff admittedly relied on his accountant's opinion letter, as S. Morrell sought professional advise from his accountant. Here confidence was not one-sided resulting in superiority and influence on the other. (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553). The unilateral belief of a plaintiff that an attorney-client relationship exists is not sufficient. There must be an "explicit undertaking to perform a specific task". (*Wei Chang v. Pi*, 288 AD2d 378; *Volpe v. Canfield*, 237 AD2d 282). Failure to prove the existence of such a relationship warrants dismissal of a claim for legal malpractice. (*Wei Chang*, supra).

The moving defendants have also demonstrated that the plaintiffs' claims for malpractice concerning the MYZIVA investment are time-barred, and the continuous representation doctrine is not applicable. (*Shumsky v. Eisenstein*, 96 NY2d 164). As already provided, R. Morrell testified that she could not recall anything Abrams told her, and could only remember Fensterman told her sometime in 2005 "it is going to be great". R. Morrell testified Fensterman did not give her any other "advice" and she let her son, S. Morrell, handle it. Assuming, *arguendo*, Fensterman and S. Morrell had an attorney-client relationship concerning the MYZIVA investment in 2005, upon Fensterman's remark that it was a "great opportunity" sometime in 2005, the action is time-barred.

S. Morrell's claim that he was fraudulently induced to enter into a Purchase Agreement is time-barred. (*Oggioni v. Oggioni*, 46 AD3d 646). The cause of action for fraud in the inducement of a contract accrues at the time of the execution of the contract. (*Ply* Gem of Laurel, Inc. v. Lee*, 91 AD2d 513). As the Purchase Agreement was entered into in 2005, the action is time-barred. Should plaintiff seek to argue that he is entitled to rely on the two-year discovery rule, (two years from when he discovered the fraud), the claim fails as S. Morrell, by his own admission, testified that he knew of MYZIVA's deteriorating financial condition upon his review of its tax returns sometime in 2005, and knew that his investments were not performing well.

Here, plaintiffs' claims concerning fraud in the inducement, is based upon Fensterman's statement that "it's going to be great", "it's a great investment", and "it's a great opportunity". In order to prevail on a claim of fraud in the inducement, plaintiffs must prove a misrepresentation of a material fact which was false and known to be false by the party making it, the misrepresentation was made for the purpose of inducing them to rely on it, they justifiably relied upon it, and a resulting injury. (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173). A mere expression of opinion of present or future expectations, nor representation of expected performance not realized, does not constitute fraud. (*Channel Master Corp. v. Aluminum Sales, Inc.*, 4 NY2d 403). Additionally, here, as in *Danann Realty Corp. v. Harris*, 5 NY2d 317, the agreement between the parties specifically provides that plaintiff is not relying upon representations that fall outside of the agreement.

As the defendants have met their initial burden of proof on this summary judgment motion, the burden shifts to the plaintiffs to provide evidence in admissible form to demonstrate the existence of a triable issue of fact with respect to the alleged causes of action contained in the summons and complaint. (*Gaddy v. Eyler*, 582 NYS2d 990). The plaintiffs have failed to do so.

The plaintiffs argue that the instant motion for summary judgment is premature and further discovery is necessary. The argument that more discovery will help plaintiff oppose the motion is unavailing. "The mere hope that somehow plaintiff will uncover evidence that will prove a case provides no basis pursuant to §3212(f) for postponing a determination of a summary judgment motion." (*Plotkin v. Franklin*, 179 AD2d 746). The motion may not be thwarted by a "fishing expedition" predicated on the mere hope or speculations that discovery would produce relevant evidence. (*Prado v. Bowne & Sons*, 207 AD2d 875; *Williams v. Village of Endicott*, 202 AD2d 885).

The parties herein, at a conference before the undersigned, agreed to the submission of defendants' summary judgment motion prior to conducting defendants' depositions. Thereafter, plaintiffs' counsel requested to modify the motion schedule. Plaintiffs' counsel provides it's associate did not agree, rather objected. In any event, the request to modify the motion schedule was denied. Moreover, as already provided, the mere argument that more discovery will help plaintiffs' motion is unavailing. (*Plotkin v. Franklin, supra*; *Prado v. Bowne & Sons, supra*; *Williams v. Endicott, supra*).

Here, plaintiffs have not provided an evidentiary basis upon which to show that discovery may lead to relevant evidence. (*Auerbach v. Bennett*, 47 NY2d 619). Plaintiffs have not offered what facts, necessary to oppose the motion, are "uniquely in the defendants' possession. (*Id.*, *Nash v. Baumblit Construction Corp.*, 72 AD3d 1037).

Additionally, here, the plaintiffs, in opposition, have failed to present evidence in admissible form to warrant denial of this summary judgment motion. While plaintiffs, in opposition, claim that they relied on Fensterman's advise, plaintiffs do not offer what the advise was, other than Fensterman's apparent vouch of confidence, and do not dispute that sometime in 2005, Fensterman stated it was a "great investment". Arguably, any purported claims for fraudulent inducement, breach of fiduciary duty, or malpractice are time-barred. Plaintiffs do not dispute that S. Morrell sought advise from his accountant concerning the MYZIVA investment. Plaintiffs' contention that he relied on Fensterman's confidence does not constitute fraud. As already provided, a mere expression of opinion or future expectations of a performance does not constitute fraud. (*Channel Master Corp., supra*). In any event, the plaintiffs' allegations and assertions that they relied on Fensterman, a long time attorney, with respect to the MYZIVA investment, are unsubstantiated. Additionally, the plaintiffs do not dispute that the subject agreements do not contain personal guarantees, or that the subject agreements provide and acknowledge the purchase of an investment which bears an economic risk, and the agreement was made without representations outside the agreement.

CONCLUSION

In light of the foregoing, defendants' motion for summary judgment is granted in its entirety, and the plaintiffs' cross-motion to compel discovery is denied in its entirety.

Therefore, plaintiffs' Amended Verified Complaint is hereby dismissed.

ENTER:

J.S.C.

Dated: May 30, 2012

cc: Jaspan Schlesinger LLP
Zeichner Ellman & Krause LLP