

**PWC M&A Advisory Group, Inc. v Halls Magazine
Research, LLC**

2012 NY Slip Op 32981(U)

December 17, 2012

Sup Ct, Richmond County

Docket Number: 150367/12

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:150367/12
Motion No.:001, 002**

PWC M&A ADVISORY GROUP, INC.,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**HALLS MAGAZINE RESEARCH, LLC,
ALAN SERAITA,
QUEUE, INC.,
HALLS MAGAZINE REPORTS, LLC,
RALPH KANTROWITZ,
MONICA KANTROWITZ, and
JONATHAN KANTROWITZ,**

Defendants

The following items were considered in the review of the following pre-answer motion to dismiss or compel arbitration; and cross-motion to amend the complaint.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Memorandum of Law in Support	2
Affidavit in Opposition	3
Notice of Cross-Motion and Affidavits Annexed	4
Reply Affirmation in Further Support and in Opposition to Plaintiff's Cross-Motion	5
Affirmation in Further Support of Cross-Motion	6
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion and Cross-Motion is as follows:

Hall's Magazine Research, LLC and Alan Seraita, ("Defendants") move for an order 1) compelling arbitration; dismissal of the complaint as against them and/or staying this action pending the arbitration. The plaintiff cross-moves to amend its complaint. The defendants' motion is denied. The plaintiff's cross-motion to amend its complaint is granted.

Facts

Plaintiff entered into an Agreement for Services with Alan Seraita of Halls Magazine Research, LLC for the sole an exclusive right to act as broker “. . . to sell the assets of [Halls Magazine Research, LLC], including all fixtures, equipment, goodwill, trademarks, trade names and inventory associated therewith.” The contract was to run from its execution on January 11, 2010 until December 1, 2010. Included in that contract at paragraph seven was a provision requiring that any and all disputes be resolved by binding arbitration. However, both the plaintiff and the moving defendants agree that the contract executed on January 11, 2010 was not extended beyond the termination date of December 1, 2010. The plaintiff maintains that it introduced Queue, Inc., Jonathan Kantrowitz, Ralp Kantrowitz and Monica Kantrowitz (“the Buyers”) to its client Halls Magazine Research, LLC as prospective buyers during the contract period. Notwithstanding the expiration of the written contract, the plaintiff maintains that it continued to work toward closing the sale of Halls Magazine Research, LLC with the Buyers.

Samuel Maldonado, a vice-president of the plaintiff corporation, avers that the plaintiff continued to provide services to the Defendants to close the sale of the company until approximately May 15, 2012. The plaintiff maintains that the sale of the business closed pursuant to the terms that it negotiated on or about July 20, 2012. Consequently, the plaintiff maintains that it is entitled to compensation.

Discussion

Arbitration

The defendants maintain that the court should compel the arbitration of this action pursuant to the terms of the January 11, 2010 Agreement for Services. The policy of this State encourages the use of arbitration where parties include such clauses in contracts governing their

relationship.¹ In this instance, the contract requiring arbitration expired on December 1, 2010. While the actions of the parties may have created an implied contract with respect to the services used to sell the Defendants' business, the lack of any clear intention to extend the arbitration provision of the contract renders that provision inoperable.² Consequently, the Defendants motion to compel arbitration is denied.

Pre-Answer Motion to Dismiss

The defendants move to dismiss the plaintiff's complaint pursuant to CPLR § 3211(a)(1) and (7). The motion to dismiss the plaintiff's complaint is denied.

In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1), the moving party must show that the documentary evidence conclusively refutes the plaintiff's allegations.³ Here, the Defendants argue that the January 11, 2010 Agreement of Services executed by Seraita was executed only in his capacity as a corporate officer, and is therefore ineffective as to him individually. To successfully oppose a motion to dismiss under CPLR 3211 a plaintiff need only show that facts unavailable to the plaintiff may exist sufficient to warrant the denial of the motion. Plaintiff need not demonstrate the actual existence of such facts.⁴ Here, the plaintiff demonstrated that its relationship with the Defendants extended beyond the expiration date of the written contract. Consequently, facts may exist which could impute individual liability on Seraita. Therefore, dismissal is not appropriate at this time.

¹ *Matter of Nationwide General Ins. Co. of Am. v. Investors Ins. Co. of Am.*, 37 NY2d 91, 95 [1975].

² *Hayes v. Biedermann, Reif, Hoenig & Ruff, P.C.*, 94 AD3d 680 [1st Dep't. 2012].

³ *AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 5 NY3d 582 [2005].

⁴ *Cherchia v. V.A. Mesa, Inc.*, 191 AD2d 317 [1st Dep't. 1993].

The Defendants also move to dismiss the plaintiff's claim of fraud pursuant to CPLR § 3211(a)(7). A fraud claim must be pleaded with the requisite particularity required by CPLR 3016(b). Upon review of the plaintiff's complaint and subsequently submitted amended complaint, this court finds that this cause of action is pleaded appropriately. Consequently, the Defendant's motion to dismiss the fraud claim is denied.

Cross-Motion to Amend the Complaint

The plaintiff cross-moves for leave to amend the complaint. Leave to serve an amended complaint is to be liberally granted unless the proposed amendment contains prejudice or surprise resulting from the delay in interposing the new claim. A moving party must make some evidentiary showing that a proposed amendment has merit, as a palpably meritless claim will not be permitted. However, the merits of a proposed amendment will not be examined unless the insufficiency or lack of merit is clear and free from doubt.⁵ Here the plaintiff has met requirements to amend its complaint. Therefore, the cross-motion is granted.

Accordingly, it is hereby:

ORDERED, that the motion made by Halls Magazine Research, LLC and Alan Seraita is denied in its entirety; and it is further

ORDERED, that the plaintiff's cross-motion to amend the complaint is granted and the amended complaint shall served forthwith; and it is further

⁵ *USA Nutritionals, Inc. v. Pharmalife, Inc.*, 293 AD2d 526 [2d Dep't. 2002].

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor,
on **Friday, January 18, 2013** at 9:30 a.m.

ENTER,

DATED: December 17, 2012

Joseph J. Maltese
Justice of the Supreme Court