SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: PAUL G. FEINMAN Justice

PART 12

Index Number : 651725/2011
HAYN, ANDREAS
vs
ROBERT A. SIEGEL AUCTION
Sequence Number : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

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

Dated: JUL 06 2012

_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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ANDREAS HAYN,

Plaintiff,

against

ROBERT A. SIEGEL AUCTION GALLERIES, INC.,
Defendant.

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Index Number 651725/2011E
Mot. Seq. No. 002

DECISION AND ORDER

For the Plaintiff:
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E-filed papers considered in review of this motion to dismiss:

Papers	E-filing Document Numbers
Notice of Motion, Memo of Law, exhibits	6, 6-1 - 6-3
Memo of Law in Opposition	8
Memo of Law in Reply	10
Transcript of oral argument	15

PAUL G. FEINMAN, J.:

In this claim seeking recovery of commissions due and owing, defendant Robert A. Siegel Auction Galleries, Inc., moves pre-answer to dismiss the amended complaint pursuant to CPLR 3211 (a) (1), (5), and (7). For the reasons which follow, the motion is granted in its entirety.

Background

Plaintiff is a stamp collector and philatelist, and resides in Bernau, Germany (Am. Compl. ¶¶ 3, 5).[1] Defendant Robert A. Siegel Auction Galleries, Inc. ("Siegel Auction Galleries") is a New York City-based corporation (Am. Compl. ¶ 4). Plaintiff was the "sole

[1]Unless stated otherwise, all factual allegations are derived from the amended complaint, which has been efiled in the NYSCEF system as Doc. 5, and is also appended as Doc. 6-3, exhibit B to defendant's motion to dismiss.

advisor" on matters of buying and selling stamps to a wealthy fellow stamp collector also living in Germany, Edgar Kuphal (Am. Compl. ¶¶ 7, 9). In the late 1980s, plaintiff met Frank Mandel, a Philadelphia stamp collector who introduced him to Siegel Auction Galleries and its principal, Scott Trepel (Am. Compl. ¶¶ 11). In about 1995, plaintiff and Mandel entered into an oral agreement in which Mandel would pay plaintiff 50 percent of all of Mandel's commissions earned by purchasing stamps for Edgar Kuphal sold by Siegel Auction Galleries (Am. Compl. ¶¶ 11-13). That agreement is not at issue here.

Plaintiff introduced defendant's principal Scott Trepel to Edgar Kuphal in 1995, and Trepel soon understood the relationship between plaintiff and Kuphal as concerned Kuphal's stamp collecting and selling (Am. Compl. ¶ 16). In about 1998, Trepel and plaintiff "discussed for the first time" the idea that plaintiff would assure that "all of Kuphal's selling transactions" would go through Siegel Auction Galleries, and that plaintiff would share a "portion of the benefit" from Siegel Auction Galleries' profits on these transactions (Am. Compl. ¶ 17). Thereafter, in 1999, plaintiff discussed with Scott Trepel that Kuphal might be selling a particular collection to Siegel Auction Galleries (Am. Compl. ¶¶ 18-19). They agreed orally that plaintiff would "receive 25% commission on all of [Siegel Auction Galleries'] profits on the sale of any and all of Kuphal's stamp collection through [Siegel Auction Galleries]," and that Frank Mandel would also receive 25 percent of the profits (Am. Compl. ¶ 20).

On plaintiff's advice, Kuphal sold a particular stamp collection to defendant for $750,000; Scott Trepel "personally picked up" that collection from Kuphal in Berlin, and Siegel Auction Galleries sold the collection by auction on December 13, 1999, for $1.2 million (Am. Compl. ¶ 23). In April 2000, plaintiff received from Siegel Auction Galleries a commission of 141,029.33 German Marks payable to his bank account in Germany (Am. Compl. ¶ 24).

In early 2001, plaintiff contacted Scott Trepel about a possible Kuphal transaction and reminded him that plaintiff remained Kuphal's sole advisor and could direct Kuphal's business toward the gallery (Am. Compl. ¶ 25). On about March 23, 2001, plaintiff and Trepel exchanged e-mails, although it is not completely obvious which e-mail precedes the other, both with the subject line, "Re: Collection" (Am. Compl. ex. A). Scott Trepel wrote to plaintiff that "Frank [Mandel] has told me in the past that on all transactions involving Mr. K[uphal], he owes you half of his commission," and continued by saying he would not "say anything about this," but that he "want[s] to make sure that the division of commissions and profits on collections sold for Mr. K[uphal] continues as in the past: Siegel 50% / Mandel 25% / Hayn 25%" (Am. Compl. ¶ 27; ex. A). Plaintiff's e-mail asked that if Trepel spoke with Frank Mandel, who had "no idea . . . about this deal," to handle it as "absolutely confidential!!!" (Am. Compl. ¶ 26; ex. A).

In April 2006, plaintiff visited Edgar Kuphal and suggested that he sell a particular collection of stamps (Am. Compl. ¶ 28). The ultimate sale, "unbeknownst to" plaintiff, was consummated through Siegel Auction Galleries in November 2006, and plaintiff only learned of it in 2008 by reading a review on the gallery's website (Am. Compl. ¶¶ 28-31). Plaintiff then inquired by e-mail about his commission, but Siegel Auction Galleries refused to pay a commission (Am. Compl. ¶¶ 32-33). In October 2009, plaintiff commenced litigation in the Regional Court of Berlin, Germany, but the action was dismissed in February 2011 based on lack of personal jurisdiction over the gallery (Am. Compl. ¶¶ 34-35).

Plaintiff's amended complaint filed in New York Supreme Court contains six causes of action: (1) breach of contract under Section 652 [1], sentence 1, of the German Civil Code; (2) breach of contract; (3) unjust enrichment; (4) quantum meruit; (5) breach of fiduciary duty; and (6) bad faith. Defendant Siegel Auction Galleries moves to dismiss the entirety of the amended

complaint on the grounds that it fails to state a cause of action (CPLR 3211 [a] [7]), based on documentary evidence (CPLR 3211 [a] [1]), and based on the statute of frauds (CPLR 3211 [a] [5]).

Discussion

On a motion to dismiss pursuant to CPLR 3211, the court accepts as true the facts as alleged in the complaint and the submissions in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001], citing *Tenuto v Lederle Labs.*, 90 NY2d 606, 609-610 [1997]; *Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). The standard is whether the complaint states a cognizable cause of action (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]).

1. **BREACH OF CONTRACT AND THE STATUTE OF FRAUDS**

For purposes of this motion, it is held that the complaint sufficiently alleges a cause of action sounding in breach of contract. Plaintiff argues that the March 23, 2001 e-mail from Scott Trepel definitely shows the existence of the oral agreement, in that Trepel seems to memorialize the terms of the commissions payable to him and Frank Mandel for their role in acquiring and selling stamps from and to Siegel Auction Galleries. Defendant argues that this e-mail refers solely to the agreement between plaintiff and Mandel concerning commissions earned by Mandel's acquiring stamps for Edgar Kuphal from the gallery. Because the writing is susceptible to different interpretations, the branch of defendant's motion to dismiss the claim of breach of contract pursuant to CPLR 3211 (a) (1), is denied. Only where a writing unambiguously contradicts the allegations supporting a claim for breach of contract will the breach of contract claim be dismissed based on documentary evidence (*see 150 Broadway NY*

Assocs. LP v Bodner, 14 AD3d 1, 5 [1st Dept 2004]).

The Statute of Frauds, formally known as General Obligations Law § 5-701 (a), provides in relevant part that an agreement is void "unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith . . . if such agreement . . . [b]y its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime" (General Obligations Law § 5-701 [a] [1]). Defendant argues that the alleged agreement at issue is a service contract of an indefinite nature and falls within the statute, similar to that in *Zupan v Blumberg*, 2 NY2d 547 (1957), where the plaintiff orally agreed to procure advertising accounts on behalf of the agency and receive a commission on any account that he brought in for as long as the account remained active. That agreement was held not capable of being performed within one year, based on its indefinite length and because the commissions were payable based not on the actions of the parties to the contract, but upon a third party continuing to renew its account (2 NY2d at 549). Here also, defendant argues, the alleged agreement was of indefinite duration and premised solely on the decision by Edgar Kuphal to sell his stamps, not on the will of the parties to the agreement (Doc. 6-1, Memo of Law p. 10). In particular, defendant argues that the complaint does not allege that the agreement allowed the gallery to decline to sell stamps presented by Kuphal through plaintiff without it breaching its agreement with plaintiff (Doc. 10, Reply Memo of Law, pp. 3-4).

In opposition, plaintiff's attorney maintains, without pointing to anything alleged in the amended complaint or supplementing the complaint with an affidavit by plaintiff, that the gallery "was free to decline to accept any sales of stamps by Kuphal at any time and thus end [its] obligations toward[]" plaintiff (Doc. 8, Memo of Law in Opp. p 4). This statement cannot be

understood from even a broad reading of the complaint's description of the agreement. The complaint alleges only that the parties agreed that plaintiff would make sure that Kuphal's stamp sales would go through the gallery, and that he would share in the profit made by the sale (Am. Compl. ¶ 17). This alleged agreement notably differs from that discussed in *North Shore Bottling v Schmidt & Sons, Inc.*, 22 NY2d 171 (1968), which was held not to fall within the Statute of Frauds. In *North Shore Bottling*, the parties agreed that the plaintiff would be the exclusive distributor of the defendant's beer in Queens County as long as the defendant sold beer in the New York area. The Court held that because the agreement contained the contingency that should the defendant discontinue sales in New York, the plaintiff's distributorship would end, the defendant remained in control of the contract's terms which could be performed within one year. Here, there is no contingency alleged. The claimed agreement does not allow the gallery to decline to sell a collection of Kuphal stamps that plaintiff proffers, and thus the agreement is indefinite in length and outside of defendant's control.

Plaintiff points to *Apostolos v RDT Brokerage Corp.*, which sets forth the longstanding rules that the Statute of Limitations will be "strictly construed" to apply only to those "contracts which by their very terms have absolutely no possibility . . . of full performance within one year," and that where "a contract is terminable at will, it is capable of performance within a year" (159 AD2d 62, 64 [1st Dept 1990], citing *D&N Boening, Inc. v Kirsch Beverages, Inc.*, 63 NY2d 449, 454 [1984]; *Nat Nal Serv. Stations, Inc. v Wolf*, 304 NY 332 [1952]). *Apostolos* concerned an oral agreement between an insurance broker and an insurance brokerage company, wherein the brokerage company would pay the broker a commission on policies that he produced and placed through the brokerage company, and also would pay the broker commissions based on renewals of the policies originally placed through by the broker. After the brokerage

company terminated the agreement, the broker sued for an accounting and recovery of his share of commissions on the original policies as well as commissions on renewals of previously placed policies. The *Apostolos* Court found that as the facts revealed that the defendant was always free to decline to accept new business brought in by plaintiff, the portion of the overall agreement concerning new policies was terminable at will and did not fall within the statute (159 AD2d at 65).[2]

Here, by contrast, as already noted, there is nothing alleged to show that the oral agreement included the freedom of the gallery to turn down an offer through plaintiff to sell any Kuphal stamp collections. Thus, as the agreement was for an indefinite length without Siegel Auction Galleries' ability to terminate it without breaching its terms, it is void under the Statute of Frauds. The second cause of action sounding in breach of contract is thus dismissed.

2. QUANTUM MERUIT AND UNJUST ENRICHMENT

Even where a contract is void under the statute of frauds, recovery may sometimes be had in the same action in quantum meruit (*Davis & Mamber, Ltd. v Adrienne Vittadini, Inc.*, 212 AD2d 424 [1st Dept 1995]). To sufficiently plead quantum meruit, the complaint must allege that the plaintiff performed services in good faith, the defendant accepted the services, the plaintiff expected compensation, and the reasonable value of the services (*Balestriere PLLC v BanxCorp.*, ___ AD3d ___, 2012 NY Slip Op 4675, *2 [1st Dept 2012]).

Unjust enrichment contemplates "an obligation imposed by equity to prevent injustice, in

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[2] *Apostolos* also held, however, that the promise to pay a percentage of the commission earned every time one of the original policies was renewed was subject to the Statute of Frauds, as there was no allegation either that the defendant was liable only for renewal commissions made during the pendency of the agreement, or that it could decline to accept these third-party renewals (159 AD2d at 65). This portion of the agreement in essence allowed the brokerage company's liability to be indefinite and solely within the control of the account holders. Although the general rule is that where part of a contract is void under the Statute of Frauds, then the entire contract is void, the Court in *Apostolos* found that the oral agreement was susceptible of division and apportionment, and that therefore the part not required to be in writing could be enforced (159 AD2d at 66).

the absence of an actual agreement between the parties" (*Georgia Malone & Co., Inc. v Rieder*, ___ NY3d ___, **4, 2012 NY Slip Op 5200 (2012) (citation and quotation omitted). The complaint must allege that the defendant was enriched at the plaintiff's expense, and that it would be against equity and good conscience to permit the defendant to retain that claimed by the plaintiff (*id.*, citation and quotation marks omitted).

The complaint insufficiently alleges what services plaintiff actually performed on behalf of defendant for which he could have expected payment and from which defendant was unjustly enriched.. The contrast between the amended complaint's specificity in its allegations concerning the unfolding of the 1999-2000 sale and the 2006 sale is striking. Although the complaint alleges that in April 2006 plaintiff suggested to Kuphal that he sell a particular stamp collection, it does not allege that plaintiff suggested that Kuphal again work with Siegel Auction Galleries, or that plaintiff would contact the gallery. Nor does it allege that plaintiff himself contacted the gallery or had any involvement in the sale which occurred later that year. Indeed, the complaint is clear that plaintiff did not even know about the sale. In other words, there are no allegations that plaintiff performed an actual service which defendant accepted. At best, the complaint alleges that because plaintiff introduced Kuphal to the gallery's Trepel and helped negotiate a deal in 1999, and this working relationship between the parties was reaffirmed in 2001, he was entitled to compensation for anything Kuphal might ever do, independently or not, with Siegel Auction Galleries. This is insufficient to sustain a claim that defendant was unjustly enriched or is indebted to plaintiff. Accordingly, the third and fourth causes of action are dismissed.

3. BREACH OF FIDUCIARY DUTY

The general rule is that a fiduciary duty does not exist when the relationship between the parties is an arm's length business transaction (*see EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d

11, 20 [2005]; *Sahagen v Kelley Drye & Warren*, 292 AD2d 298, 300 [1st Dept 2002]). Although the complaint alleges that Scott Trepel "went out of his way to schmooze Plaintiff in order to gain access to Kuphal's business and . . . be able to sell off Kuphal's collections," and that plaintiff and Trepel had dinner to discuss this idea (Am. Compl. ¶¶ 17, 19), there are no allegations to suggest that the relationship between the parties was other than a typical business relationship, despite the arguments presented by plaintiff in his opposition (Doc. 8, Memo of Law in Opp. pp. 5-6). There is nothing alleged to show that defendant was under any duty to act for or give advice for the benefit of plaintiff (*HF Mgmt Servs, LLC v Pistone,* 34 AD3d 82, 84 [1st Dept 2006]). As the complaint does not allege any fiduciary duty between plaintiff and defendant, the fifth cause of action is dismissed.

4. BAD FAITH

The sixth cause of action alleges that Siegel Auction Galleries acted in bad faith by not informing plaintiff of the sale of Kuphal stamps and paying plaintiff a commission (Am. Compl. ¶ 68). Defendant argues that this cause of action should be dismissed as it is derived from the breach of contract claim. In New York, the parties to "an express contract" are bound "by an implied duty of good faith" (*Fasolino Foods Co. v Banca Nazionale Del Lavoro*, 961 F2d 1052, 1056 [2d Cir NY 1992]). The breach of the duty of good faith "is merely a breach of the underlying contract" (*Fasolino* at 1056, citing among others New York Uniform Commercial Code § 5-109 ["An issuer's obligation to its customer includes good faith and observance of any general banking usage "]; NY UCC § 1-203 ["duty of good faith applies to enforcement and performance of contracts"]). As this cause of action is in essence duplicative of the breach of contract claim, and as plaintiff does not oppose this branch of defendant's motion, the sixth cause of action is dismissed.

5. **BREACH OF CONTRACT UNDER GERMAN LAW**

Plaintiff argues that if the New York breach of contract claim is deemed insufficient, then under law of conflicts, the court must apply German law, because the law of New York would lead to a different result than would German law, citing *Matter of Allstate Ins. Co. v Stolarz*, 81 NY2d 219 (1993) (Doc. 8, Memo of Law in Opp. p. 6). Plaintiff argues that there is an applicable German statute which should apply because the contract was negotiated and entered into in Germany; the stamp collections were located in Germany; at least for the 1999 sale, defendant flew to Germany to take the stamp collections out of Germany; plaintiff and Kuphal are German citizens, and plaintiff was paid in German Marks (Doc. 8, Memo of Law in Opp. p. 7). Conversely, defendant argues that New York is the "center of gravity," as both the 1999 and 2006 auction sales took place here, the city where defendant is domiciled, plaintiff's 2000 commission was earned here, although paid to him in his home country, and because the case was dismissed by the German courts for lack of personal jurisdiction over defendant.

The cause of action asserted by plaintiff is Title 10, § 652 of the German Civil Code, pertaining to Brokerage Contracts, specifically the accrual of the fee. According to the translated statute as provided by plaintiff from the website of the Bundesministerium der Justiz, the statute provides:

> "(1) A person who promises a brokerage fee for evidence of the opportunity to enter into a contract or for negotiating a contract is obliged to pay the fee only if the contract comes into existence as a result of the evidence or as a result of the negotiation of the broker. If the contract is entered into subject to a condition precedent, the brokerage fee may only be demanded if the condition is fulfilled."
>
> "(2) The broker is only to be reimbursed for expenses if this has been agreed. This also applies even if the contract does not come about."

(Am. Compl. ex. B; from the German Civil Code, § 652 [1]).[3]

Choice of law analysis requires applying the law of the state with the "most significant relationship to the transaction and the parties" (*Certain Underwriters*, at 22, citing *Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 317 [1994], quoting Restatement [Second] of Conflict of Laws [hereinafter, Restatement] § 188 [1]). To determine which jurisdiction's law should apply, New York courts analyze the case using the "center of gravity" or "grouping of contacts" approach (*see Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 AD3d 17, 22-23 [1st Dept 2006], *affd* 9 NY3d 928 [2007]). In addition to the "traditionally determinative choice of law factor of the place of contracting," the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties are factors to be considered in establishing the "most significant relationship" (*Zurich Ins.* at 317, citing Restatement [Second] Conflict of Laws § 188 [2]). In addition, there are instances where "the policies underlying conflicting laws in a contract dispute are readily identifiable and reflect strong governmental interests, and therefore should [also] be considered" (*Zurich Ins.* at 319, citing *Matter of Allstate Ins. Co.*, *supra,* 81 NY2d at 226).

Based on the facts as alleged in the complaint, this court does not agree that Germany has the more significant relationship to the transaction and the parties. Of crucial importance is that plaintiff and Kuphal both sought out Siegel Auction Galleries to sell stamps in New York (Doc. 10, Reply Memo of Law, p. 6, citing Am. Compl. ¶¶ 4, 11). As noted, the Court of Appeals has stated that "New York 'has a strong interest in regulating commercial transactions which take

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[3]According to the amended complaint, the German statute is from a website maintained by the German Ministry of Justice on http://www.gesetze-im-internet.de/bgb/_652.html, and translated by Langenscheidt Translation Service, provided at the same website by the German Ministry of Justice, http://www.gesetze-im-internet.de/englisch_bgb/.html#BGBengl_000P652. (Am. Compl. ¶ 37 n 1).

place largely within its boundaries'" (Doc. 10, Reply Memo of Law p. 6, quoting *Pandick, Inc. v Sandusky Plastics, Inc.*, 160 AD2d 236 [1st Dept 1990], *citing Israel Discount Bank v Rosen*, 59 NY2d 428, 433, n 1 [1983]). Thus, New York contract law applies to this transaction, not German law, and this breach of contract cause of action premised on the German Civil Code is also dismissed.

Conclusion

Accordingly it is

ORDERED that the defendant's motion to dismiss is granted and the complaint is dismissed, with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: July 6, 2012
New York, New York

Saul H. Feinman
J.S.C.