SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

RICHARD KAHN

INDEX NO. 654542/12

-v-

MOTION DATE

LEO SCHACHTER DIAMONDS, LLC et al

MOTION SEQ. NO. 001

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 by defendants to dismiss the complaint is granted to the extent of dismissing (i) the first and seventh causes of action (ii) all causes of action against defendant Elliot Tannenbaum who is severed from the complaint (iii) all causes of action against defendants Leo Schachter Diamonds India Pvt. Ltd and Leo Schachter Diamonds East Ltd., without prejudice

The motion is DENIED in all other respects all as per the attached Decision and Order.

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

Dated: September 19, 2013

MELVIN L. SCHWEITZER 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: COM. DIV. PART 45

RICHARD KAHN, Plaintiff, - against - LEO SCHACHTER DIAMONDS, LLC, LEO SCHACHTER DIAMONDS LTD., LEO SCHACHTER DIAMONDS INDIA PVT. LTD., LEO SCHACHTER DIAMONDS EAST LTD., and ELLIOT TANNENBAUM, Defendants.	Index No. 654542/12 DECISION AND ORDER Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

Defendants Leo Schachter Diamonds, L.L.C. (LSD-NY), Leo Schachter Diamonds Ltd. (LSD-Israel), and Elliot Tannenbaum (Tannenbaum) move to dismiss the complaint pursuant to CPLR 3211 (a) (1), (7) and (8). Defendants also contend that since the summons and complaint were never served on the two remaining defendants, Leo Schachter Diamonds India Pvt. Ltd. (LSD-India) and Leo Schachter Diamonds East Ltd. (LSD-East), they should be dismissed from this action.

Factual Allegations

The complaint in this action describes a dispute between plaintiff Richard Kahn and the Leo Schachter Diamond (LSD) companies over the payment of salary, commissions, and/or an ownership interest for plaintiffs' alleged work in introducing and selling defendants' diamond products in Brazil and other South American and Central American countries.

Prior to his involvement with the defendants, plaintiff alleges that he had extensive experience and contacts in the Brazilian import/export jewelry market, and specifically in the international sales of high end watches (Cmplt., ¶¶ 10-11). Allegedly, Brazil has very complex customs rules and import duties, making it very difficult and expensive to import diamonds into the country, but plaintiff alleges that one of his contacts enjoyed a special duty-free exemption (*id.*, ¶¶ 12-13). The complaint describes this contact as the "Brazil Duty-Free Entity" (*id.*, ¶ 13).

Plaintiff alleges that he met with Tannenbaum in March 2011 about doing business together, and it was agreed that plaintiff would work with defendants to develop business in Brazil and other South and Central American countries (Cmplt., ¶¶ 14, 16). The complaint describes Tannenbaum as the "managing member of Defendants" (*id.*, ¶ 14), and the four-named LDS companies as "closely related companies under common ownership and control" (*id.*, ¶ 7). Additional allegations include that: Tannenbaum agreed to the following compensation for plaintiffs' consulting services:

> --plaintiff would be "a partner in the Brazil Partnership";
>
> --plaintiff would receive $10,000 per month plus all expenses (including business class travel and all travel expenses);
>
> --plaintiff would receive a commission of 2% on gross sales of defendants' diamonds in the Brazil Market; and
>
> --plaintiff would own a 15% interest in any partnership or joint venture that defendants developed in South and Central America.

When Tannenbaum made these representations, he had no intention of honoring his agreement with plaintiff and his promises were a "complete ruse" to gain insight into plaintiff's knowledge, contacts and experience (*id.*, ¶¶ 17-20).

Plaintiff allegedly began consulting for defendants in April 2011, and devoted substantial time and effort on defendants' behalf through May 2012 (Cmplt., ¶¶ 21-22, 29). He claims he was provided business cards for LSD-NY, LSD-Israel, and LSD-East and a credit card for his travel needs (*id.*, ¶ 24). He made several trips to Brazil and introduced defendants' representatives, including Tannenbaum's brother-in-law, to his contacts (*id.*, ¶¶ 26-27). Plaintiff claims he "established business relationships between defendants and certain Brazilian companies" (*id.*, ¶ 28).

Plaintiff claims he was not paid for the first six months, and even then he was not fully compensated (Cmplt., ¶ 30). He then alleges:

> "It was agreed between Tannenbaum on behalf of both Defendants that if Plaintiff was to be terminated from his work with Defendants for any reason, Plaintiff was to receive 2% commissions on gross sales for five years by Defendants for all Brazilian and Argentinean clients, as well as all clients which Plaintiff marketed to in other Central and South American countries during his time with Defendants."

(*id.*, ¶ 31). In May 2012, defendants terminated their relationship with plaintiff (*id.*, ¶ 32).

Plaintiff claims he is owed all post-termination "commissions and related monies" and some pre-termination commissions (Cmplt., ¶¶ 33, 35). He also claims that defendants have continued to work with many of the clients presented by plaintiff "and have a 'special' and 'personal' working agreement with [the Brazil] Duty Free entity," who is in charge of defendants' local inventory and who is marketing and distributing LSD diamonds in Brazil (*id.*, ¶ 36).

This action was filed on December 27, 2012. The complaint asserts the following seven causes of action against each of the defendants: (1) failure to pay sales commissions in violation

of New York Labor Law § 191-; (2) breach of contract to pay, pre-termination, "2% gross on all sales in Brazil, Argentina, and other Central and South American territories for which plaintiff introduced clients to Defendants" (the 2% Commission") (Cmplt., ¶ 47); (3) breach of contract to pay the 2% Commission post-termination; (4) a declaratory judgment that defendants owe plaintiff the 2% Commission for five years following his termination; (5) unjust enrichment; (6) an accounting; and (7) fraud.

In support of their motion to dismiss the complaint, defendants proffer: an affidavit from Tannenbaum in which he denies that defendants owe plaintiff any monies; and a series of emails between the parties from May 2011 through January 9, 2013, to establish that nothing further is owed to plaintiff for his consulting services. Tannenbaum claims he only initially agreed, in June 2011, to pay plaintiff $10,000 a month for two months, beginning July 2011, and that if the relationship continued, plaintiff's compensation would be $5,000 a month with a 2% commission (Tannenbaum Aff., ¶ 7). However, later in 2011, Tannebaum claims he and plaintiff agreed to a "short-term agreement" whereby LSD-NY would pay plaintiff as an independent contractor a fixed fee as follows: (i) $10,000 per month from July 15 to September 15, 2011; (ii) $7,500 per month from September 15 to November 15, 2011; (iii) $5,000 per month from November 15, 2011 to January 15, 2012; and (iv) from September 15, 2011 to January 15, 2012, a commission of 2% of sales made by LSD-Y in Brazil and any other South or Central American country that the parties agreed upon, with a separate commission structure for two existing LSD-NY customers in Brazil (*id.*, at 11 & Ex. D thereto). Tannenbaum denies that he ever agreed to offer plaintiff a 15% partnership interest in "an eventual Brazilian office" (*id.*, ¶ 9) or any post-

termination or "tail-end protection" (*id.*, ¶¶ 13-14). LSD-NY allegedly paid plaintiff all fees and commissions due and owing under this agreement (*id.*, ¶ 15 & Exs. E and F thereto).

Tannenbaum further alleges that he met with plaintiff in mid-January 2012 to discuss the possibility of continuing this agreement, at which time plaintiff presented a proposed term sheet (Tannenbaum Aff., ¶ 16 & Ex. G thereto). However, that document was never executed, and Tannenbaum avers that the only agreement the parties reached was that LSD-NY would pay plaintiff, from January 15, 2012, until June 15, 2012, "fees" of $10,000 per month plus 2% commissions for customers in Brazil to whom he had introduced LSD-NY and to whom LSD-NY made sales during this period (*id.*, ¶ 17).

Tannenbaum admits that LSD-NY terminated plaintiff on May 9, 2012 (Tannenbaum Aff., ¶ 18 & Ex. I thereto). He then describes some further email communications about the parties executing a "separation agreement" and a final trip to Brazil to collect some of LSD-NY's merchandise, however, such an agreement was never finalized or signed and Tannenbaum avers that LSD-NY's merchandise remains in the plaintiff's possession, custody or control (*id.*, ¶¶ 20-33).

In support of defendants' motion to dismiss LSD-Israel from the action, Tannenbaum avers that LSD-Israel is a foreign company, organized under the laws of Israel with its principal place of business in Ramat Gan, Israel (Tannenbaum Aff., ¶ 36; *see also* Cmplt., ¶ 3). Allegedly, LSD-Israel is not authorized to do business in New York, not subject to taxation here, and has no employees or offices in New York, and does not own, lease or possess any property in New York, except for one bank account, allegedly used for payments by a small number of U.S.-based customers (*id.*, ¶¶ 36-37, 41). Although LSD-Israel sells diamonds to LSD-NY and

to other third-party customers in New York, Tannenbaum claims that the volume of sales to New York customers is very small, amounting to only 2.5% of its global sales (*id.*, ¶¶ 38-39). LSD-NY is allegedly not a subsidiary of LSD-Israel, although the two companies "have partially common, but not identical, ownership" (*id.*, ¶ 42). Tannenbaum further avers that LSD-NY and LSD-Israel maintain their own bank accounts and corporate records; are each responsible for their own operations, marketing plans, and personnel; and enter into their own sale and supply contracts with customers and suppliers (*id.*, ¶¶ 42-44).

In opposition to defendants' motion to dismiss, plaintiff submits an affidavit in which he claims that, when he met with Tannenbaum in the Spring of 2011 to discuss a potential working relationship, at no time did Tannenbaum represent that he was making offers solely in his capacity as an officer of LSD-NY and claims that it was agreed, and in fact, plaintiff was reimbursed for, travel insurance and his trip expenses by LSD-Israel (Kahn Aff., ¶¶ 16, 18). Although the complaint alleges that both plaintiff and Tannenbaum are residents of New York (Cmplt., ¶¶ 1, 6), plaintiff admits in his affidavit that his meetings with Tannenbaum were at the latter's home and office, both located in Israel (Kahn Aff., ¶¶ 9, 13). His counsel also contends that plaintiff, too, is a resident of Israel (*see* Pls. Mem. of Law in Opp., at 8), and plaintiff avers that he made trips *to*, not *from*, New York on behalf of LSD (Kahn Aff., ¶ 18). Plaintiff points to emails from August 2011 between plaintiff and Tannenbaum in which the latter discusses how plaintiff would be paid. In these emails, Tannenbaum states: "[t]his is the normal way salaries are discussed in Israel. I did offer that you get paid in NY for your advantage" (Tannenbaum Aff., Ex. B). Plaintiff further claims that the website for the various LSD companies indicates that they are part of one company (*id.*, 16 & Ex. A thereto).

Plaintiff also submits: counsel's affirmation attesting that "the various Leo Schachter defendants may in fact be subsidiaries of a non-party foreign corporation, licensed pursuant to the laws of Delaware, Leo Schachter & Company" (Schneck Affirm., ¶ 2); and a print-out from the New York State Department of State, Division of Corporation's website for "Leo Schachter & Co., Inc.," a Delaware corporation licensed to do business in New York (*id.*, Ex. A thereto).

Plaintiff attests that: he always made it clear that he had no interest in being a diamond salesman and "would need a long-term interest in the profits realized from [his] efforts to secure a distribution platform in the Brazilian and South American marketplace" (Kahn Aff., ¶¶ 14-15); the parties reached an agreement in the Spring of 2011 regarding his compensation, as described in the complaint, but that in July 2011, Tannenbaum attempted to unilaterally alter the terms of their initial agreement (*id.*, ¶ 19); following numerous discussions both through email and in person with Tannenbaum, a "compromise was reached whereby I would receive a combination of $5,000 per month (changed to 7,500 than [sic] again to 10,000 and then again to 7,500 per month) plus the 2% commission on gross sales" (*id.*, ¶ 20); he agreed to these changes "only because I believed that my long-term agreement and partnership remained unaffected" (*id.*, ¶ 22); "LSD sales more than tripled in the short period of [his] involvement in Brazil and [LSD] increased their client base by 300%" (*id.*); and after plaintiff successfully arranged for a shipment of diamonds to the Brazil Duty-Free Entity in May 2012, plaintiff claims that Tannenbaum realized that he could now negotiate directly with that entity and shortly thereafter his engagement with the defendants was terminated (Kahn Aff., ¶¶ 23-24).

Discussion

Personal Jurisdiction Over LSD-Israel

Defendants move to dismiss the complaint as to LSD-Israel for lack of personal jurisdiction. Defendants maintain that LSD-Israel lacks the continuous and systematic contacts with New York that would give rise to general jurisdiction under CPLR 301, and that personal jurisdiction under CPLR 301 cannot be imputed to LSD-Israel through LSD-NY. Plaintiff, in opposing the motion, argues that he has alleged sufficient facts that provide an adequate start in establishing that LSD-Israel and LSD-NY operate as a single company and are alter egos of one another, and that he should be granted jurisdictional discovery to prove his case. Plaintiff does not, however, contend that long-arm jurisdiction over LSD-Israel exists pursuant to CPLR 302.

CPLR 301 gives this court jurisdiction over those "engaged in such a continuous and systematic course of 'doing business' in New York as to warrant a finding of its 'presence' in this jurisdiction" (*Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY2d 426, 430-431 [1972], quoting *Frummer v Hilton Hotels Intl.*, 19 NY2d 533, 536 [1967]). The test for such presence requires that "[t]he court . . . be able to say from the facts that the corporation is 'present in the State' not occasionally or casually, but with a fair measure of permanence and continuity" (*Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33–34 [1990], quoting *Tauza v Susquehanna Coal Co.*, 220 NY 259, 267 [1917]). Whether a corporation itself may be deemed to be present in the State with permanence and continuity is evaluated using a number of factors (*Landoil*, 77 NY2d at 33), including conducting business affairs in New York, and/or maintaining an office, bank accounts, property or employees in the state (*Frummer v Hilton Hotels Intl.*, *supra* at 537). "Solicitation of business alone will not justify a finding of corporate

presence in New York with respect to a foreign manufacturer or purveyor of services, but when there are activities of substance in addition to solicitation there is presence and, therefore, jurisdiction" (*Laufer v Ostrau*, 55 NY2d 305, 310 [1982]).

In this case, Tannenbaum admits that LSD-Israel maintains a single bank account in New York and that the company sells some of its diamonds to third-party customers located in New York, and also to LSD-NY, but claims that the volume of sales is very small, accounting for only 2.5% of its global sales. "[C]ourts have generally found that a foreign corporation is not present in New York where the corporation derives less than 5% of its overall revenue from New York customers" (*Yanouskiy v Eldorado Logistics Sys., Inc.*, 2006 WL 3050871, at *5 [ED NY Oct. 20, 2006] [collecting cases]). Absent any of the other indicia of doing business, the single bank account and the small amount of sales in New York is insufficient to predicate jurisdiction over LSD-Israel pursuant to CPLR 301.

Nevertheless, a foreign corporate defendant, which is not itself present in this State, may be held to be present by virtue of an agent or related company's activities here on its behalf. "[I]n order for the subsidiary's activities to warrant the exercise of jurisdiction over the parent, the parent company's degree of control over the subsidiary's activities 'must be so complete that the subsidiary is, in fact, merely a department of the parent'" (*Amsellem v Host Marriott Corp.*, 280 AD2d 357, 359 [1st Dept 2001], quoting *Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY2d at 432; *see also FIMBank P.L.C. v Woori Fin. Holdings, Co. Ltd.*, 104 AD3d 602, 602-603 [1st Dept 2013]). A "significant and pivotal factor" is whether LSD-NY "does all the business which [LSD-Israel] could do were it here by its own officials" (*Frummer*, 19 NY2d at 537).

To obtain jurisdictional discovery under CPLR 3211 (d), a plaintiff must first demonstrate that "facts essential to justify opposition may exist but cannot then be stated," and then must offer "some tangible evidence which would constitute a 'sufficient start' in showing that jurisdiction could exist, thereby demonstrating that its assertion that a jurisdictional predicate exists is not frivolous" (*SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 354 [1st Dept 2004], quoting *Mandel v Busch Entertainment Corp.*, 215 AD2d 455, 455 [2d Dept 1995]; *see de Capriles v Lugo*, 293 AD2d 405, 405 [1st Dept 2002]).

Although plaintiff has not alleged a sufficient basis for the court to exercise personal jurisdiction over LSD-Israel, he has offered some tangible evidence that LSD-NY is the alter ego of LSD-Israel, and that LSD-Israel conducts business in New York through either LSD-NY or Leo Schachter & Co., Inc. First, the website for "Leo Schachter & Co." suggests that LSD operates globally as one company, and that it has a "New York office" (Kahn Aff., Ex. A thereto). Second, plaintiff alleges that, at no point in his negotiations with Tannenbaum did the latter make it clear that he was acting solely on behalf of LSD-NY (Kahn Aff., ¶ 16). Third, it appears that the LSD entity paying salaries is determined based on the convenience of either the recipient or payor (Tannenbaum Aff., Ex. B thereto). Fourth, the email signatures of Tannenbaum and other LSD employees identify them only as representatives of "Leo Schachter Diamonds," without distinguishing their title or the exact corporate entity on whose behalf they are acting (*see* Tannenbaum Aff., Exs. A and N). Finally, while Tannenbaum avers that LSD-NY is not a subsidiary of LSD-Israel, he does not explain the corporate structure of the LSD entities (Tannenbaum Aff., ¶ 42). Nor does Tannenbaum explain how LSD-Israel conducts sales in New York to third-party customers if it does not utilize the offices, staff or facilities of LSD-NY.

For these reasons, the motion to dismiss the complaint as against LSD-Israel for lack of personal jurisdiction pursuant to CPLR 3211 (a) and (8) is denied, without prejudice, to renewal after limited jurisdictional discovery, the scope of which shall be determined at a preliminary conference.

Dismissal Based on Documentary Evidence

Defendants' motion seeks dismissal of the entire complaint based on CPLR 3211 (a) (1), which authorizes dismissal based on documentary evidence. Such a motion may only be granted if that evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Affidavits are not considered documentary evidence under CPLR 3211 (a) (1) (*Solomons v Douglas Elliman LLC*, 94 AD3d 468, 469-470 [1st Dept 2012]; *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]). In addition, emails are generally not considered the types of documentary evidence that would support dismissal under CPLR 3211 (a) (1) (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]; *see Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012]; *see also Fontanetta v John Doe 1*, 73 AD3d 78, 85 [2d Dept 2010]; *but see David v Hack*, 97 AD3d 437, 438 [1st Dept 2012] [court considered, among other documents, an email sent by plaintiff in granting motion to dismiss on documentary evidence]).

Defendants' motion to dismiss the complaint based on documentary evidence is denied. Neither Tannenbaum's affidavit nor the emails attached thereto are sufficient to support dismissal of the complaint under CPLR 3211 (a) (1). Indeed, the emails exchanged between the parties raise more questions than they answer, and do not conclusively establish that plaintiff is

not owed any further compensation from the defendants. Plaintiff's August and October 2011 emails are certainly some proof that LSD never agreed to plaintiff's request for a 15% partnership interest (*see* Tannenbaum Aff., Exs. B and C thereto). However, those emails and subsequent emails also indicate that the parties were still negotiating the exact terms of plaintiff's compensation (*id.*, Ex. D). In addition, plaintiff avers that Tannenbaum initially agreed to the 15% partnership interest, but then, in July 2011, attempted to unilaterally alter the terms of their initial agreement (Kahn Aff., ¶¶ 17, 19, 22). Unlike the email considered by the court in *David v Hack*, 97 AD3d 437, *supra*, which merely established what the defendant law firm was told about a particular date, the email correspondence here sets forth each man's understanding of the agreement, and does not prove a specific and unassailable fact. The complaint pleads legally sufficient claims for breach of contract, an accounting and declaratory relief relating to future profits, and defendants' documentary evidence does not definitely dispose of these causes of action.

Labor Law Claim

Plaintiff's first cause of action seeks statutory damages for sales commissions allegedly not timely paid in violation of New York Labor Law § 191-c. Defendants move to dismiss this claim on the ground that plaintiff is not a covered "sales representative," because the complaint does not allege that plaintiff "solicit[ed] orders in New York state" as required by the statute (*see* NY Labor Law § 191-a [d]). The complaint merely alleges that plaintiff "worked for all of the Defendants out of New York, Israel and Brazil" (Cmplt., ¶ 24), but fails to allege that he "solicited orders" from New York for sale elsewhere or that he solicited orders from New York-based customers (*see Kaye v Artmatic Corp.*, 214 AD2d 473 [1st Dept 1995]).

Indeed, the allegations of the complaint suggest that all of plaintiff's customers were located in Central and South America (*see* Cmplt., ¶¶ 16-18, 25, 31, 36). In his opposing affidavit, plaintiff merely claims that he traveled to New York "to meet with potential customers" (Kahn Aff., ¶ 18). Notably, plaintiff does not allege that he actually solicited any orders on defendants' behalf at these New York meetings, and thus, he fails to sufficiently allege that he was acting as a sales representative in New York. This claim is dismissed.

Fraud

The complaint alleges that Tannenbaum, through his false representation that plaintiff would receive a partnership interest and commissions as a result of his efforts on LSD's behalf, "duped plaintiff into introducing Defendants to Plaintiff's business contacts" (Cmplt., ¶ 63). These allegations do nothing more than restate plaintiff's breach of contract claim (*see Quiroz v Tsoulos*, 303 AD2d 331 [1st Dept 2003]; *Orix Credit Alliance v R.E. Hable Co.*, 256 AD2d 114, 115 [1st Dept 1998]). It is well settled that a cause of action alleging breach of contract cannot be converted to one for fraud merely with an allegation that the contracting party never intended to meet its contractual obligations (*Sound Communications, Inc. v Rack & Roll, Inc.*, 88 AD3d 523, 523-524 [1st Dept 2011]; *Trusthouse Forte (Garden City) Mgt. v Garden City Hotel*, 106 AD2d 271, 272 [1st Dept 1984]). Since none of the other causes of action are viable as against Tannenbaum, the complaint is dismissed as to this defendant.

Unjust Enrichment

Defendants seek dismissal of the fifth cause of action on the ground that the documentary evidence submitted in support of the motion proves that LSD-NY paid plaintiff all fees and commissions owing with respect to the period prior to his May 2012 termination. Defendants

attach two summary charts showing that plaintiff was paid $83,000 in salary between November 28, 2011 and May 7, 2012, and commissions and "other payments" totaling close to $53,000 through August 2, 2012 (*see* Tannenbaum Aff., Ex. F). Regarding the post-termination period, defendants maintain that plaintiff's refusal to execute a formal separation agreement left the Brazilian market open to defendants.

To succeed on a claim for unjust enrichment, "[a] plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal citations omitted]).

It is not clear from the charts and emails attached to defendants' moving papers whether plaintiff was paid all of the commissions he claims are owed, either pre- or post-termination. Nor does plaintiff's failure to execute a formal separation agreement preclude him from seeking monetary damages based on his claim that LSD was unjustly enriched by successfully utilizing plaintiff's knowledge, expertise and contacts in the Brazilian market to avoid paying Brazil import taxes, and then denying any compensation to the individual who facilitated the transaction. At this stage of the litigation, where LSD has denied any agreement to pay post-termination compensation to plaintiff, plaintiff may plead both contract and quasi-contract causes of action in the alternative (*Beach v Touradji Capital Mgt., L.P.*, 85 AD3d 674 [1st Dept 2011]; *Winnick Realty Group LLC v Austin & Assoc.*, 51 AD3d 408 [1st Dept 2008]).

Service of Process on LSD-India and LSD-East

Plaintiff offers no proof that either of these defendants were served with the summons and complaint within 120 days of the commencement of the action on December 27, 2012, and

makes no request for an extension of time to effect service (*see* CPLR 306-b). The complaint is, therefore, dismissed against LSD-India and LSD-East, without prejudice.

Conclusion and Order

For the foregoing reasons, it is

ORDERED that defendants' motion to dismiss the complaint is granted to the extent of dismissing: (i) the first and seventh causes of action; (ii) all causes of action against defendant Elliot Tannenbaum, who is severed from the complaint; and (iii) all causes of action against defendants Leo Schachter Diamonds India Pvt. Ltd. and Leo Schachter Diamonds East Ltd., without prejudice; and the motion is denied in all other respects; and it is further

ORDERED that the remaining defendants shall serve and file an answer to the complaint within twenty (20) days of service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on Nov. 1, 2013 at 10:30 a.m./p.m. at 26 Broadway 10th Floor

Dated: September 19, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER