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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
Justice

EVAN PETKANAS and GEORGE KALERGIOS, individually and as shareholders of KANNALIFE SCIENCES, INC., Plaintiffs, -against- DEAN PETKANAS and KANNALIFE LIFE SCIENCES, INC., Defendants.	Index Number 15292/2013 Motion Date November 13, 2013 Motion Cal. No. 135 Motion Seq. No. 1

The following numbered papers read on this motion by defendants Dean Petkanas and KannaLife Sciences, Inc. (KannaLife) pursuant to CPLR 3211, General Obligations Law § 5-701(a)(10) and Uniform Commercial Code § 8-310 to dismiss the complaint, and for an award of sanctions and reasonable attorneys' fees pursuant to 22 NYCRR 130-1.1.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-6
Answering Affidavits - Exhibits	7-8
Reply Affidavits	9-11

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs commenced this action asserting causes of action for conversion, breach of contract, unjust enrichment, breach of fiduciary duty and a shareholder derivative claim. In the complaint, plaintiffs allege defendant KannaLife is a corporation involved in medical marijuana research and product development, and that it issued 200 shares of

no-par value stock on or about August 11, 2010. Plaintiffs also allege that thereafter, defendant Dean Petkanas solicited his cousin, plaintiff Evan Petkanas, for funds for the continued operation of KannaLife. Defendant Dean Petkanas allegedly was suffering financially due to personal and business reasons. It is alleged that on or about December 1, 2011, plaintiff Evan Petkanas provided defendant Dean Petkanas, with $5000.00 "as a loan towards KannaLife" with the understanding that shares of stock in defendant KannaLife would serve as collateral for the loan. It is also alleged that thereafter, the parties entered into an oral agreement whereby plaintiff Evan Petkanas was to provide defendant Dean Petkanas with part-time employment at his company, Stone Engineering, and a salary for Dean for his work at both Stone Engineering and defendant KannaLife, and office space for KannaLife at the Stone Engineering building, in exchange for a 17% ownership interest in defendant corporation. Plaintiffs further allege the parties also agreed that plaintiff George Kalergios, a friend of plaintiff Evan Petkanas, also would become a 17% shareholder in defendant KannaLife in exchange for George's procuring of introductions for defendants to politicians, and lobbying and raising funds for the passage of legislation favorable to the marketing of KannaLife's products.

It is alleged that between March 2012 and December 2012, plaintiffs "subsidized" defendants in an amount over $150,000.00, and introduced defendants to certain politicians and business persons for the purpose of building good will for defendant KannaLife. In the meantime, defendant Dean Petkanas allegedly ignored plaintiffs' requests to memorialize their interests in defendant KannaLife in writing, and in November 2012, wrongfully removed all assets, equipment and operations of KannaLife from its headquarters and ceased all communications with plaintiffs. Plaintiffs allege that subsequently, defendant Dean Petkanas either sold KannaLife or licensed its patents or methods, to a third party, Medical Marijuana Inc. (MJNS), or received investment funding for KannaLife from MJNS, without their knowledge or consent. Plaintiffs claim defendants have refused to acknowledge their respective ownership of shares in defendant KannaLife or return their funds upon due demand, and as a consequence, they have suffered economic injury. Plaintiffs seek a judgment directing specific performance, restitution and an accounting, enjoining defendants from removing or destroying any property of KannaLife and using any money or assets of KannaLife for personal reasons, declaring that plaintiffs Evan Petkanas and George Kalergios each own 17% of KannaLife's total shares of stock, and awarding compensatory and punitive damages, and attorneys' fees.

In lieu of serving an answer, defendants move to dismiss the complaint asserted against them pursuant to CPLR 3211, General Obligations Law § 5-701(a)(10) and Uniform Commercial Code § 8-310.

It is well settled that "[o]n a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008]; *see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Smith v Meridian Tech., Inc.*, 52 AD3d 685, 686 [2d Dept 2008]). " 'On a motion to dismiss based upon documentary evidence [under CPLR 3211(a)(1)], dismissal is only warranted if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law' (*Klein v Gutman*, 12 AD3d 417, 418 [2d Dept 2004]; *see* CPLR 3211 [a] [1]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Ballas v Virgin Media, Inc.*, 60 AD3d 712, 713 [2d Dept 2009]; *McMorrow v Dime Sav. Bank of Williamsburgh*, 48 AD3d 646, 647 [2d Dept 2008])" (*Moore v Liberty Power Corp., LLC*, 72 AD3d 660 [2d Dept 2010], *lv to appeal denied* 14 NY3d 713 [2010]).

With respect to the second cause of action for breach of contract, the elements of a cause of action to recover damages for breach of contract are: (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages (*see Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806 [2d Dept 2011]). The allegations of the second cause of action asserted in the complaint for breach of contract are sufficient to state the formation of contracts by defendants with plaintiff Evan Petkanas, and by defendants with plaintiff George Kalergios, respectively, and their breach.

Even though the allegations are sufficient to avoid dismissal of plaintiffs' breach of contract claim under CPLR 3211(a)(7), the oral contract as alleged with respect to plaintiff George Kalergios fails to satisfy General Obligations Law § 5-701(a)(10), the applicable statute of frauds provision, and defendants have established a right to dismissal of the breach of contract and unjust enrichment claims asserted by plaintiff George Kalergios under CPLR 3211(a)(5) and General Obligations Law § 5-701(a)(10) .

General Obligations Law § 5-701(a)(10) renders void oral contracts to pay compensation for services rendered in "negotiating a loan, ... or of a business opportunity, ... 'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law...." (General Obligations Law § 5–701[a][10]). "Courts have interpreted the phrase 'negotiating ... a business opportunity' as providing services 'such as: (1) identifying and analyzing the business opportunity; (2) identifying and analyzing potential business partners; (3) and being a 'major contributor' to the

eventual formation of the [business opportunity]' (*Gutkowski v Steinbrenner*, 680 F Supp.2d 602, 613 (SD NY 2010, citing *Snyder v Bronfman*, 13 NY3d 504, 508–509 [2009])" (*Bell Independent Power Corp. v Owens-Illinois, Inc.*, 947 F Supp 2d 341 [WD NY 2013]). The statute has been found to be applicable when a plaintiff's services provide "connections," "ability," "knowledge," " 'know-how' or 'know-who,' in bringing about between principals an enterprise of some complexity or an acquisition of a significant interest in an enterprise" (*Freedman v Chemical Constr. Corp.*, 43 NY2d 260, 267 [1977]). On the other hand, "an oral employment agreement is not subject to the provisions of General Obligations Law § 5–701(a)(10) (*see Caruso v Malang*, 250 AD2d 800 [2d Dept 1998]; *Murphy v CNY Fire Emergency Servs.*, 225 AD2d 1034, 1035 [4th Dept 1996]; *Festa v Gilston*, 183 AD2d 525 [1st Dept 1992]; *Giordano v Thomson*, 438 F Supp 2d 35 [ED NY 2005] ['too broad an interpretation (of General Obligations Law § 5-701) would extend the writing requirement to unintended situations']; *Freedman v Chemical Constr. Corp.*, 43 NY2d 260, 266 [1977]; *cf. Ostrove v Michaels*, 289 AD2d 211, 212 [2d Dept 2001])" (*Kuo v Wall St. Mtge. Bankers, Ltd.*, 65 AD3d 1089 [2d Dept 2009]; *see Ashwood Capital, Inc. v OTG Management, Inc.*, 99 AD3d 1, 11 [1st Dept 2012]).

Defendants assert that the alleged oral agreement violates the provision requiring a writing where the agreement involves the payment of compensation for services rendered in negotiating a business opportunity (*see* General Obligations Law § 5–701[a][10]). The allegations asserted in the complaint with respect to plaintiff Evan Petkanas do not involve an agreement between Evan Petkanas as a finder or other such negotiator or broker of a business opportunity and defendant Dean Petkanas as a principal of defendant KannaLife that is intended to be covered by section 5–701(a)(10). Instead, the allegations concerning plaintiff Evan Petkanas are based upon a claim that Evan was promised a 17% share in defendant KannaLife in exchange for his providing a loan and income to defendant Dean Petkanas for use in furtherance of the business of defendant corporation, and office space for KannaLife, and that such contractual promise has been breached by defendants.

On the other hand, the allegations with respect to the second cause of action asserted by plaintiff George Kalergios for breach of contract fit within the bar of General Obligations Law § 5-701(a)(10) (*see Freedman v Chemical Const. Corp.*, 43 NY2d 260). Defendant George Kalergios's role vis-a-vis defendant corporation is alleged to have been limited and transitory, i.e. he was to introduce defendant KannaLife to his "political contacts" as a "legitimate medical marijuana corporation" through "lobbying and fund raising efforts" and somehow procure legislation favorable to the marketing of KannaLife products. These allegations are of a kind to which the statute is addressed (*see Freedman v Chemical Const. Corp.*, 43 NY2d 260; *see also Bell Independent Power Corp. v*

Owens-Illinois, Inc., 947 F Supp 2d 341). Likewise, the third cause of action for unjust enrichment by plaintiff George Kalergios against defendants is predicated on a quantum meruit theory based on his services in negotiating a business opportunity. Such claim also is also barred by the statute of frauds (*see* General Obligations Law § 5-701[a][10]; *Snyder v Bronfman*, 13 NY3d 504, 508; *Bell Independent Power Corp. v Owens-Illinois, Inc.*, 947 F Supp 2d 341, 349-350).

To the extent defendants seek to dismiss the first cause of action for conversion asserted against them pursuant to CPLR 3211(a)(7), plaintiffs allege that defendants converted their moneys and stock interests in defendant KannaLife. Conversion "is an unauthorized exercise of dominion and control over property by someone other than the owner, where such control interferes with and is in defiance of the superior possessory right of the owner or another person" (*Miller v Marchuska*, 31 AD3d 949, 950 [3d Dept 2006]; *see Galtieri v Kramer*, 232 AD2d 369 [2d Dept 1996]). It is settled, however, that a claim of conversion cannot be predicated on a mere breach of contract (*see Wolf v National Council of Young Israel*, 264 AD2d 416 [2d Dept 1999]; *MBL Life Assur. Corp. v 555 Realty Co.*, 240 AD2d 375, 377 [2d Dept 1997]). Plaintiffs base their conversion claim on the same allegations as they make their breach of contract claims, i.e. defendants breached the agreement to provide plaintiff Evan Petkanas with a 17% ownership interest in defendant KannaLife in consideration for Evan's supplying funds and office space to them, and breached the agreement to provide plaintiff George Kalergios with a 17% ownership interest in defendant KannaLife in consideration for George's procuring introductions to politicians and potential investors. Plaintiffs make no claim that defendants breached a duty distinct from, or in addition to, the respective breaches of contract (*see Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corp.*, 64 AD3d 85 [2d Dept 2009]). Under such circumstances, plaintiffs have no viable cause of action to recover damages for conversion independent of the breach of contract claim (*see* CPLR 3211[a][7]; *Priolo Communications, Inc. v MCI Telecommunications Corp.*, 248 AD2d 453 [2d Dept 1998]). Consequently, they may not recover punitive damages (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]).

The third cause of action for unjust enrichment asserted by plaintiff Evan Petkanas is premised upon his allegation that defendants received a loan, money and office space and did not compensate him for such items and therefore were enriched at his expense. The elements required for a claim based upon unjust enrichment are: (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 (*see Old Republic Natl. Tit. Ins. Co. v Luft*, 52 AD3d 491, 491–492 [2d Dept 2008]). The allegations in the complaint are sufficient to state a cause of action on behalf of plaintiff

Evan Petkanas against defendants for unjust enrichment (CPLR 3211[a][7]).

The fifth cause of action for breach of fiduciary duty and a shareholder derivative claim, is based upon plaintiffs' claim that defendant Dean Petkanas, as a corporate officer, has engaged in waste, self dealing, malfeasance, and misappropriation of corporate assets and opportunities. To the extent plaintiffs seek damages, injunctive relief and an accounting pursuant to Business Corporation Law §§ 626[b] and 720, the complaint fails to set forth with particularity any efforts by plaintiffs to secure the initiation of an action for damages and injunctive relief by the board of directors, an accounting by the board of directors, or the reasons for not making such an effort (*see* Business Corporation Law §§ 626[c]; *Walsh v Wwebnet, Inc.*, ___ AD3d ___ [2d Dept 2014], 2014 WL 1465601, 2014 NY App Div LEXIS 2538). Moreover, because plaintiff George Kalergios makes no allegation that he has any ownership interest in shares of stock in defendant corporation other than by means of the void oral agreement (*see* General Obligations Law § 5-701[a][10]) with defendants, he cannot maintain any claims in a shareholder's derivative capacity (*see* Business Corporation Law §§ 626[b], 720; *see generally Independent Inv. Protective League v Time, Inc.*, 50 NY2d 259, 263 [1980]; *Pursnani v Stylish Move Sportswear, Inc.*, 92 AD3d 663, 664-665 [2d Dept 2012]). Plaintiff Evan Petkanas, furthermore, seeks to recover damages as a means of vindicating his personal rights with respect to the purported breach of the alleged oral agreement between him and defendants, and such claim is not appropriately asserted as a derivative claim. Thus, the fifth cause of action fails to state a cognizable claim (CPLR 3211[a][7]).

Plaintiffs seek declaratory relief by the fourth cause of action. In an action seeking a declaratory judgment, to withstand a motion to dismiss the complaint pursuant to CPLR 3211(a)(7), the allegations of the complaint have to demonstrate the existence of a bona fide justiciable controversy (*see T.V. v. New York State Dept. of Health*, 88 AD3d 290, 306 [2d Dept 2011]; *Halloran v Halloran*, 161 AD2d 562, 565 [2d Dept 1990]; *Sysco Corp. v Town of Hempstead*, 133 AD2d 751, 752 [2d Dept 1987]). In this instance, a bona fide justiciable controversy exists as to whether plaintiff Evan Petkanas owns a 17% interest of the total shares of KannaLife stock. With respect to plaintiff George Kalergios, however, the dismissal of the other causes of action against him requires a declaration that he is not an owner of a 17% interest in the total shares of stock in defendant corporation based upon the alleged oral agreement with defendants (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *appeal dismissed* 371 US 74, *cert. denied* 371 US 901 [1962]; *Deleo v Kaladjian*, 215 AD2d 520 [2d Dept 1995]).

To the extent defendants seek to dismiss the complaint against them based upon a defense founded on documentary evidence, " '[a] party seeking dismissal on the ground that its defense is founded on documentary evidence under CPLR 3211 (a) (1) has the

burden of submitting documentary evidence that "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" ' " (*Sullivan v State of New York*, 34 AD3d 443, 445 [2006], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453, 453 [2d Dept 2000]; *see Leon v Martinez*, 84 NY2d at 88)" (*Uzzle v Nunzie Ct. Homeowners Assn., Inc.*, 70 AD3d 928 [2d Dept 2010]). Defendants have failed to demonstrate that the documentary evidence upon which they rely resolves all factual issues as a matter of law and conclusively disposes of plaintiff Evan Petkanas's breach of contract and unjust enrichment claims (*see Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]; *Leon v Martinez*, 84 NY2d at 88; *Infra-Metals Co. v Metro Structural Steel, Inc.*, ___ AD3d ___ [2d Dept 2014], 2014 WL 1465118, 2014 NY App Div LEXIS 2526; *Paramount Transp. Sys., Inc. v Lasertone Corp.*, 76 AD3d 519, 520 [2d Dept 2010]).

With respect to that branch of the motion by defendants to dismiss the complaint asserted against them pursuant to UCC § 8-310, that statute was repealed effective October 10, 1997 (*see* L 1997, c 566, § 5).

Lastly, to the extent defendant Dean Petkanas indicates he employed plaintiff Evan Petkanas as "executive director/corporate advisor" of defendant corporation, and employed plaintiff George Kalergios as a "corporate advisor," the determination of the motion herein is without prejudice to any further applications which plaintiffs may be so advised to pursue (*see e.g. Ashwood Capital, Inc. v OTG Management, Inc.*, 99 AD3d 1, 11 [1st Dept 2012]; *Moses v Savedoff*, 96 AD3d 466 [1st Dept 2012]).

The motion by defendants is granted only to the extent of dismissing the first and fifth causes of action asserted against them in the complaint by plaintiffs, and the second and third causes of action asserted against them by plaintiff George Kalergios, and with respect to the fourth cause of action, declaring that George Kalergios is not an owner of a 17% interest in the total shares of stock in defendant corporation based upon the alleged oral agreement with defendants.

This constitutes the decision and order of the court.

Dated: April 28, 2014

Howard G. Lane, J.S.C.