Gate Pass Entertainment, LLC v National Cares Mentoring Movement
2018 NY Slip Op 30545(U)
March 29, 2018
Supreme Court, New York County
Docket Number: 656197/2016
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** 58

Justice

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GATE PASS ENTERTAINMENT, LLC,

Plaintiff,

- v -

NATIONAL CARES MENTORING MOVEMENT, SUSAN TAYLOR, DWAYNE ASHLEY

Defendant.

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INDEX NO. 656197/2016

MOTION DATE 3/23/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this application to/for Dismiss.

Upon the foregoing documents, it is

Decided that defendant Ashely's motion to dismiss based upon documentary evidence and failure to state a cause of action upon which relief can be granted is granted in part and denied in part. In the Complaint, Gate Pass Entertainment ("GPE" or "Plaintiff") alleges that, on or about November 19, 2015, GPE, under the direction of Sidra Smith ("Smith"), the owner and CEO of GPE, entered into a written contract (the "Agreement") with defendant National Cares Mentoring Movement ("CARES") for execution of a comprehensive multi-year fundraising campaign in observance of the 10th Anniversary of CARES. CARES hired GPE on October 1, 2015 to produce their January 25th Gala (the "Gala"), assist CARES in the planning and implementation of a Capital Campaign, and an accelerated 2016 Gala Campaign program for CARES' Campaign

launch. GPE hired Dwayne Ashely ("Ashely"), a leading global fundraising consultant, on to the project as lead consultant. The Complaint alleges that Ashely was intimately involved in the development of a campaign plan, strategic advice, identification of new prospects, working with CARES' board, CEO and key staff. The Agreement, which began on November 19, 2015 to November 19, 2016, was solely between GPE and CARES. The Payment structure in the Agreement stated:

> "[i]n full and final consideration of services to be provided by [GPE] to [CARES], [CARES] shall pay the following:
>
> "The payment schedule is as follows: (a) $20,000 per month from November 19, 2015 to February 19, 2016, with the first payment made upon execution of this Agreement, and each subsequent payment made on the 19th day of each month for the duration of the Agreement, (b) $10,000 per month from February 2016 to November 19, 2016, plus travel costs, and all other approved expenses, (c) Expenses are additional and billed back as incurred on a bi-weekly basis. Any amount over $250 must be pre-approved by client, and specifications for when and in what amounts milestone recognition payments would be made were also detailed in the Agreement."

The Agreement does not provide that CARES would be paying any monies directly to Ashley. Further, the Agreement detailed three situations which needed to occur in order for either party to have the ability to terminate the contract including if "[GPE] agrees to assign Dwayne Ashely to [CARES] for the duration of the contract."

According to the Complaint, Susan Taylor ("Taylor," known collectively with CARES and Ashely as, "Defendants"), CEO of CARES, initially paid GPE the required amounts due pursuant to the Agreement. Following receipt of payment by CARES, Smith paid Ashley by check from the GPE account. The Complaint alleges, that CARES failed to pay GPE the agreed upon $10,000.00 per month from February 2016 to November 19, 2016 for services following the Gala. In addition, between February 2016 to November 19, 2016, CARES paid Ashely the $90,000.00 that was owed to GPE, in breach of the parties' Agreement.

The Complaint further alleges that neither Taylor, CARES, or Ashely informed GPE that Ashely was receiving money directly from CARES and that on both April 7, 2016 and October 12, 2016, Ashely sent Smith invoices indicating that GPE owed him money. In October of 2016, CARES, through Taylor, informed GPE/Smith that she "was paying Ashely directly since February or March of 2016." Upon asking why Ashely was sending GPE/Smith invoices demanding payment, Taylor stated that she "did not know as the Agreement was still in place." The Complaint alleges four causes of action; (1) breach of contract against CARES and Taylor, (2) tortious interference with a contract against Ashely, (3) unjust enrichment against Ashley, and (4) tortious interference with contractual relations against CARES and Taylor.

Defendant Ashely moved to dismiss the claims brought against him based upon CPLR § 3211(a)(1) and (7). In support of the motion, Ashely submitted a copy of the New York State Attorney General's Office ("NYSAG"), Executive Law, Article 7-A, Rules for Solicitation and Collection of Funds for Charitable Purposes, a copy of the contract provided by GPE's counsel Derek Etheridge ("Etheridge"), emails sent by Etheridge to defendant, a letter from Ashely's attorney, sent to Smith demanding that Smith cease and desist, copies of invoices sent to CARES by GPE, an affidavit of Ashely's counsel Brian K. Robinson, a copy of the list of services provided by GPE—taken directly from their website, email correspondence between Taylor and Smith, a document describing the scope of GPE's work for the Gala, and emails to Ashely regarding recommended changes to the fundraising contract.

When deciding a motion to dismiss pursuant to CPLR § 3211, the court should give the pleading a "liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Landon v Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *see Faison v Lewis*, 25 NY3d 220 [2015]). A motion to dismiss

pursuant to CPLR § 3211(a)(1), should not be granted unless the documentary evidence submitted is such that it resolves all factual issues as a matter of law and conclusively disposes of the claims set forth in the pleading (*Art & Fashion Grp. Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept. 2014]). Under CPLR § 3211(a)(7), the court "accepts as true the facts as alleged in the complaint and affidavits in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged manifest any cognizable legal theory" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 [1st Dept 2013] quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]).

As this motion to dismiss was brought only by Ashely, the Court will only review the merits of the motion regarding the causes of action for tortious interference with a contract and unjust enrichment against Ashley, and does not affect the claims against defendants CARES or Taylor.

Ashely argues that under NYSAG rules GPE falls under § 7-A's definition of a "professional fund raiser" and "fund raising counsel." Pursuant to § 171-a, the definition of a "professional fund raiser" is:

> "[a]ny person who directly or indirectly, by contract, including but not limited to sub-contract, letter or other agreement or other engagement on any basis, for compensation or other consideration (a) plans, manages, conducts, carries on, or assists in connection with a charitable solicitation or who employs or otherwise engages on any basis another person to solicit from persons in this state for or on behalf of any charitable organization or any other person, or who engages in the business of, or holds himself out to persons in this state as independently engaged in the business of soliciting for such purpose; (b) solicits on behalf of a charitable organization or any other person; or (c) who advertises that the purchase or use of goods, services, entertainment or any other thing of value will benefit a charitable organization but is not a commercial co-venturer. A bona fide director, trustee, officer, volunteer or employee of a charitable organization or fund raising counsel shall not be deemed a professional fund raiser."

Under § 171-a, the definition, in relevant part, of "fund raising counsel" is:

> "Any person who for compensation consults with a charitable organization or who plans, manages, advises, or assists with respect to the solicitation in this state of contributions for or on behalf of a charitable organization, but who does not have access to contributions or other receipts from a solicitation or authority to pay expenses associated with a solicitation and who does not solicit."

Pursuant to Article 7-A, § 172-d, except as exempted pursuant to subdivision one of §172-a no person shall:

> "(5) Enter into any contract or agreement with or otherwise employ or engage any professional fund raiser, fund raising counsel or professional solicitor required to be registered pursuant to this article unless such professional fund raiser, fund raising counsel or professional solicitor has provided to such person a statement, signed under penalties for perjury, that it is registered and in compliance with all filing requirements of this article; or
>
> "(6) Enter into any contract or agreement, employment or engagement to raise funds or conduct any fundraising activities for any charitable organization required to be registered pursuant to this article unless such charitable organization is registered and in compliance with all filing requirements of this article; or
>
> "(10) Solicit for a charitable purpose or engage in any other fund raising activities without being a registered charitable organization in compliance with all filing requirements of this article, if required to be registered, or having a written contract or agreement with a charitable organization or registered charitable organization if required to be registered, authorizing solicitation on its behalf; or
>
> "(12) Act as or enter any contract or other agreement with a charitable organization as a professional fund raiser, fund raising counsel, or professional solicitor without having registered and being in compliance with all filing and disclosure requirements of this article; or. . . ."

Additionally, §173 states that "[n]o person shall act as a professional fund raiser or fund raising counsel on behalf of a charitable organization required to be registered pursuant to this article before registering with the attorney general or after the expiration or cancellation of such registration or any renewal thereof." Moreover, §174 of Article 7-A states that "[n]o charitable organization shall employ any professional fund raiser or commercial co-venturer unless and until

such fund raiser or commercial co-venturer is registered pursuant to this article. Any such contract of employment shall be voidable at the option of the charitable organization."

The Agency Scope of Work section of the Letter of Agreement, which was signed by all parties, detailing GPE's duties included but is not limited to the following:

- develop a campaign plan to secure a minimum of $3.1 million in new funding over the next 12 months: [t]he plan will detail work and campaign structure needed to complete personal solicitations of the Board, current and lapsed donors; and new individual, corporate, and foundation prospects, identify potential donors for the gala and overall campaign;
- manage the donor list for campaign and gala;
- conduct prospect identification and review sessions: identify donor prospects and determine appropriate asking strategies and donation amounts;
- assist with the compilation and review of all viable CARE's donor prospects;
- assist with the compilation and review of all viable CARE's donor prospects;
- coordinate all aspects of the campaign working with the campaign Chair and Founder;
- advise on strategy for other fundraising events; and
- conduct rating program to suggest asking amounts for each donor prospect."

The payment structure of the agreement included an area detailing the breakdown of "milestone recognition payments" plaintiff would receive based on their campaign achievements in obtaining new funds. The "milestone recognition payments," pursuant to the Agreement, include the following breakdown: "$750k in new funds = $10k; 1.5M in new funds = $10k; 2.25M = $15k; 3M in new funds = $15k; 3.150 in new funds = $25k." Based on the plain language of the Agreement it is evident that the contract between the parties was for GPE to serve in a fund-raising capacity.

Defendant Ashely contends that the Agreement is invalid because of GPE's failure to register as a "professional fund raiser" or "fund raising counsel" with the NYSAG. However, while § 174 of Article 7-A does state that a contract is voidable by any person for failure to register as a professional fundraiser, it states that the contract is voidable "at the option of the charitable organization." Nowhere in the moving papers is there evidence that CARES elected to void the contract with GPE. Ashely cannot void the Agreement and his claim that the Agreement is void is not supported by applicable law. As such, with respect to the present motion, the contract at issue is valid and enforceable.

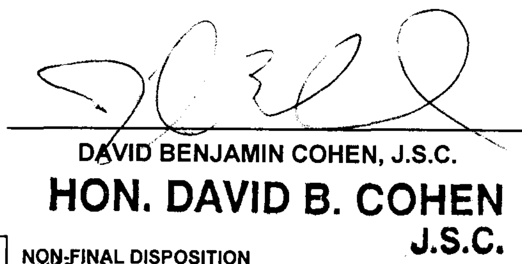
The motion to dismiss the tortious interference with a contract claim against Ashely is granted. A claim of tortious interference requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages (*Foster v Churchill*, 87 NY2d 744, 749–50 [1996]). While plaintiffs allege that defendant Ashely wrongfully obtained payment from CARES, the Complaint fails to satisfy all of the requirements for a tortious interference claim. In the Complaint, plaintiffs fail to articulate any manner in which defendant Ashely is alleged to have intentionally procured the breach. Therefore, the elements necessary for a tortious interference claim are not met. As such, the second cause of action against defendant Ashely for tortious interference is dismissed.

The motion to dismiss for unjust enrichment is denied. A cause of action under a quasi-contract theory "only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment" (*Martin H. Bauman Assoc., Inc. v H & M Intl. Transp., Inc.*, 171 AD2d 479, 484 [1st Dept 1991]). To prevail on a claim for unjust enrichment, "plaintiff must allege 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" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511 [2012]). Further, although privity is not required for an unjust enrichment claim (*Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]), a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part (*Georgia Malone & Co., Inc.*, 86 AD3d at 408). It is uncontroverted that there was a connection or relationship between the parties. Plaintiff alleges that defendant Ashely was unjustly enriched when he received $90,000 from defendants CARES/Taylor. Additionally, defendant Ashely has not denied that he received the $90,000 from defendants CARES/Taylor. Pursuant to the parties' agreement, CARES/Taylor were supposed to pay GPE the $90,000 for the ongoing work it did for CARES following the gala. Following receipt of payment, GPE would then pay Ashely what he was owed. Instead, CARES/Taylor paid the $90,000 directly to Ashely. As such, at this pleading stage, the unjust enrichment claim is cognizable and shall not be dismissed. Accordingly, it is therefore

ORDERED, that the second cause of action for tortious interference is dismissed as against defendant Ashley; and it is further

ORDERED, that defendant Ashley's motion to dismiss the third cause of action for unjust enrichment, as against him, is denied.



3/29/2018
DATE

DAVID BENJAMIN COHEN, J.S.C.
HON. DAVID B. COHEN J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION		
APPLICATION:	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER	
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