SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. ROBERT D. KALISH **PART 29**
Justice

ELJM CONSULTING, LLC,

Plaintiff,

- v -

SANTONI S.P.A.,

Defendant.

INDEX NO. 652431/2017

MOTION DATE 2/26/18

MOTION SEQ. NO. 002

The following papers, numbered 29-34, were read on this motion to dismiss

Notice of Motion—Affirmation—Memorandum—Exhibit 1	**No(s). 29-32**
Memorandum in Opposition	**No(s). 33**
Memorandum in Reply	**No(s). 34**

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

Motion by Defendant Santoni S.P.A. to dismiss the complaint in its entirety, pursuant to CPLR 3211 (a) (5) and (a) (7), is granted in part and denied in part as discussed herein.

Plaintiff alleges the following claims:

- Claim I: Breach of contract regarding the (written) Consulting Agreement;
- Claim II: Breach of contract regarding the (oral) Men's Agreement;
- Claim III: Breach of contract regarding the (oral) Miami Agreement;
- Claim IV: Fraud / fraud in the inducement regarding the (oral) Men's Agreement;
- Claim V: Fraud / fraud in the inducement regarding the (oral) Miami Agreement;
- Claim VI: Promissory estoppel regarding the (oral) Men's Agreement and the (oral) Miami Agreement;
- Claim VII: Quantum meruit-unjust enrichment regarding the (oral) Men's Agreement and the (oral) Miami Agreement;

- Claim VIII: Breach of the implied covenant of good faith and fair dealing regarding the (written) Consulting Agreement; and
- Claim IX: Accounting regarding the (written) Consulting Agreement.

As will be discussed herein, the Court dismisses all claims except for Claim I for breach of the (written) Consulting Agreement.

BACKGROUND

I. The Consulting Agreement (Allegedly Executed on November 15, 2015) re Claims I, VIII & IX.

In the instant complaint, Plaintiff ELJM Consulting, LLC ("ELJM") alleges that, on November 19, 2015, it entered into a written Consulting Agreement with Defendant Santoni S.P.A. ("Santoni") – a luxury shoe manufacturer – whereby ELJM was to provide certain consulting services to Santoni in connection with Santoni's women's collection. The contract had an initial term of twelve months, subject to automatic renewal absent notice of intent not to renew at least 90 days prior to the end of the Term. (Ex. A to Amended Complaint [Consulting Agreement] ¶ 9 [a].) The Consulting Agreement could only be terminated for cause, and only after the breaching party failed to cure after ten days of receiving notice of the breach. (Id. ¶ 9 [b].)

Pursuant to a paragraph entitled "Consideration" in the Consulting Agreement, ELJM was to be compensated, in sum and substance, for its services with:

(a) "an annual guaranteed amount" of $60,000 to be paid in monthly installments of $7,917.00; and
(b) commissions of 8% of net sales with "with a minimum annual commissions guaranteed amount" of $35,000 for the initial twelve-month term.

(Id. ¶ 8.)

The Consulting Agreement contains a paragraph entitled "Services" which states in part:

> "During the Term of this Agreement (as defined below), ELJM has agreed to provide to SANTONI each of the services set forth in Schedule A, attached hereto (the "Services"). ELJM shall designate a representative, who need not be an employee of ELJM, subject to the prior written approval of SANTONI, to devote such time as it is necessary and desirable to effectively provide the Services herein and shall act in a diligent manner and in accordance with all applicable laws. . . ."

(Id. ¶ 2.) ELJM alleges that pursuant to the above provision, it designated Renee Igoe to serve as its designated representative, and that, following "a brief and pro forma Skype interview", Santoni approved of said designation. (Amended Complaint ¶ 14.) ELJM further alleges that "Ms. Igoe was but one member of a team at ELJM who could be assigned to projects like Santoni's" and that, for example, another individual named Dominique Marano was also on this team at ELJM. (Id.)

ELJM alleges that by a letter, dated July 22, 2016, Santoni advised ELJM that it would not be renewing the Consulting Agreement for an additional year, and that, as such, said agreement would expire on November 14, 2016. (Id. ¶ 16; Ex. B [Termination Letter].) ELJM alleges that in August 2016, Ms. Igoe informed ELJM that she "was moving on to other professional endeavors" and would no longer serve as ELJM's designated representative. (Amended Complaint ¶ 20.) ELJM alleges that it then informed Santoni that Dominique Marano would replace Ms. Igoe as the designated representative and provided a copy of Ms. Marano's resume to Santoni. (Id. ¶¶ 20-21; *see also* Ex. C [Marano Resume].)

By letter dated September 12, 2016, Santoni rejected Ms. Marano, stating that "Ms. Marano appears to be experienced in apparel and jewelry but has no specific experience in luxury women's shoes." (Id. ¶ 22; Ex. D [Marano Rejection Letter].) Said letter further claimed that since July of that year ELJM had not provided "any significant services under the Agreement and have been struggling to find a replacement for Ms. Igoe since that time." (Marano Rejection Letter at 1.) The letter further stated: "If you are unable to provide such a replacement within ten (10) days from receipt of this letter, we will have no choice but to terminate the Agreement immediately for cause without further notice." (Id. at 2.)

ELJM alleges that pursuant to a letter dated September 27, 2016, Santoni purported to terminate the Consulting Agreement "for cause, as per Section 9(b) of the Agreement for the reasons described in our letter dated September 12, 2016." (Ex. E [For Cause Letter].)

ELJM alleges that Santoni breached the Consulting Agreement by purporting to terminate the agreement pursuant to its September 27, 2016 letter. In particular, ELJM claims that Santoni's rejection of Ms. Marano's designation was a pretext for terminating the Consulting Agreement in bad faith—as ELJM claims that Ms. Marano was clearly qualified for the designation, having experience in showroom sales for Jimmy Choo shoes for example. As such, ELJM alleges breach of contract as a first cause of action, claiming damages of at least $19,792 for payments pursuant to the Consulting Agreement for September to November 14, 2016.

ELJM also alleges causes of action for breach of good faith (Claim VIII) for Santoni's "unreasonable refusal to provide written approval of an ELJM representative" under the Consulting Agreement. (Amended Complaint ¶¶ 103-06.) And in addition, ELJM alleges a cause of action for an accounting (Claim IX), stating that an accounting "should be performed in order to determine the amount of commissions to which ELJM is entitled." (Id. ¶¶ 107-12.)

II. The Men's Agreement (Allegedly Executed on October 23, 2014) re Claims II, IV, VI and VII.

ELJM alleges that on October 23, 2014, at the opening of Santoni's flagship boutique store in New York, Santoni's President, Giuseppe Santoni, approached the principals of ELJM – Roberto Libani and Enrico Libani – and proposed that ELJM provide Santoni with consulting services "with the eventual goal of placing Santoni's men's collection with high-end retailers, including Bergdorf Goodman, Neiman Marcus, Barneys, and Saks Fifth Avenue (collectively, the 'Preferred Retailers')." (Amended Complaint ¶¶ 36-37.)[1] ELJM further alleges that the

[1] This flagship store was apparently to be managed by ELJM pursuant to a separate August 1, 2014 agreement between ELJM and a non-party entity named 762 Madison, Inc. d/b/a Santoni. (Id. ¶ 34.) This August 1, 2014 agreement is not a subject of the instant action.

parties orally agreed that ELJM would provide such services and would be compensated by "an 8% commission on any Santoni men's collection order placed by any of the Preferred Retailers." (Id. ¶ 37.)[2]

ELJM alleges that, "in addition to making introductions to the Preferred Retailers and negotiating the placement of [orders]", ELJM was to also to:

> "(i) advise Santoni regarding price positioning separate from any introduction to or negotiation with the Preferred Retailers,
>
> (ii) undertake merchandising tasks, including creation of the 'Santoni Luxury' capsule collection (which, on information and belief, Santoni continues to use in its own boutiques to this day) distinct from any specific effort to obtain business with the Preferred Retailers, and
>
> (iii) strategize with Santoni on deliveries and designated sales associate (DSA) positions as a related, but distinct, process to reaching out directly to the Preferred Retailer (collectively, the 'Men's Services')."

(Complaint ¶ 38.)

ELJM alleges that it met with several of the Preferred Retailers over the subsequent months, and eventually, through its work, Bergdoff Goodman placed an order for Santoni men's shoes in May 2016.[3]

ELJM alleges that Santoni subsequently refused to pay any commissions pursuant to the agreement and now disclaims any obligation to make said payments.

Based on said refusal, ELJM alleges:

- a cause of action for breach of oral contract (Claim II);

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[2] ELJM further alleges that this oral agreement was witnessed by Mr. Santoni's associate, Roberto Martinelli. (Id. ¶ 37.)

[3] Among other things, ELJM alleges that several of its team members flew to Milan in May 2016 where they met with Bergdoff Goodman's buying team "to finalize Bergdorf Goodman's order from Santoni's men's collection." (Id. ¶ 44.)

- a cause of action for "fraud / fraud in the inducement" (Claim IV);
- a cause of action for promissory estoppel (Claim VI); and
- a cause of action for quantum meruit / unjust enrichment (Claim VII).

III. The Miami Agreement (Allegedly Executed on January 5, 2016) re Claims III, V, VI and VII.

ELJM alleges that on January 5, 2016, Enrico Libani called Mr. Santoni and proposed that ELJM provide consulting services to Santoni for the purpose of locating a space for a Santoni store in Miami, and that "if the parties were able to locate a space, ELJM would then provide actual consulting work (similar to the work performed under the Consulting Agreement), to begin Santoni's entry into the Miami market[.]" (Id. ¶ 50.) In consideration for said consulting work, ELJM "would be awarded an exclusive management contract for Santoni's Miami store, once opened." (Id.) ELJM claims that the parties agreed to the said proposal over the phone that day. (Id.)

ELJM alleges that, pursuant to the above agreement, among other things, it traveled to Miami on two occasions and introduced Santoni to "the principals of the most prestigious retail locations in the Miami, Bal Harbour Shops and Brickell . . . ." (Id. ¶ 52.) ELJM claims that they communicated with Mr. Santoni regarding the work they were undertaking to locate a retail space and that Mr. Santoni encouraged their efforts. (Id. ¶ 56.)

ELJM alleges that in May 2016, Santoni entered into a lease agreement for a retail space in Miami with one of the principals whom ELJM introduced Santoni to, and subsequently proceeded to open a store on the premises. (Id. ¶ 57.) ELJM alleges that Santoni refused to grant them an exclusive contract to manage the store pursuant to their January 5, 2016 oral agreement. (Id.)

Based on the aforesaid allegations, ELJM alleges:

- a cause of action for breach of oral contract (Claim III);
- a cause of action for "fraud / fraud in the inducement" (Claim V);
- a cause of action for promissory estoppel (Claim VI); and
- a cause of action for quantum meruit / unjust enrichment (Claim VII).

DISCUSSION

Santoni now brings the instant motion to dismiss each of ELJM's nine causes of action.

When considering a CPLR 3211 (a) (7) motion to dismiss 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.'" (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201-02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008].) Thus, "'a motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law.'" (*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 125 [2d Dept 2009], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].)

Claim I: Breach of (Written) Consulting Agreement re the Women's Collection

"To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages." (*VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 58 [1st Dept 2013].)

In the instant case, ELJM alleges: that it entered into the written Consulting Agreement with Santoni on November 15, 2015; that it performed; that Defendant failed to perform by refusing to make payments under the agreement for periods between September 1, 2016 to November 14, 2016; and that it suffered damages in at least $19,792 for payments that it was owed pursuant to the consulting agreement. As such, Plaintiff has sufficiently stated a cause of action for breach of the Consulting Agreement.

Santoni's reliance on *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 (1st Dept 1988) is misplaced. In *Gordon*, the plaintiff and defendant were both exploring the possibility of purchasing a subsidiary of the Coca-Cola Company. The parties, there, then entered into a confidentiality agreement concerning information they would share as they explored the possibility of forming a joint venture to raise funds and purchase the subsidiary. However, the plaintiff was unable to raise the requisite funds, and the joint venture never materialized. Defendant on the other hand was able to negotiate on its own with the Coca-Cola Company, and it entered into a purchase agreement with the latter.

The *Gordon* plaintiff then sued the defendant "in the amount of $35 million, apparently representing the lost opportunity of obtaining [the subsidiary]." (Id. at 436.) The Appellate Division, First Department dismissed the breach of contract claim, finding that "the complaint is fatally deficient because it does not demonstrate how the defendant's alleged breach of the confidentiality agreement caused plaintiffs any injury." (Id.) In contrast, ELJM is explicit about how Santoni's breach caused injury: Santoni allegedly refused to pay ELJM monies it owed for services rendered pursuant to the Consulting Agreement.

Whether ELJM fully performed under the Consulting Agreement or whether the Santoni properly terminated the agreement for cause are issues not before this Court on the instant motion to dismiss. The issue before this Court is whether ELJM has properly pleaded a cause of action for breach of the Consulting Agreement. This Court finds that it has.

Accordingly, the branch of the instant motion seeking to dismiss Claim I, for breach of the Consulting Agreement, is denied.

Claim II: Breach of the (Oral) Men's Agreement

Santoni argues that ELJM's claim for breach of the Men's Agreement is void and unenforceable pursuant to General Obligations Law § 5-701 (a) (10). Said statute states:

> "[e]very agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking . . . [i]s a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. '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 to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman."

The statute of frauds, as codified above, "is designed to protect the parties and preserve the integrity of contractual agreements." (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015] [internal quotation marks omitted].)

In determining whether "consulting services" surrounding business negotiations – like the one herein – fall under section 5-701 (a) (10), the Court of Appeals has stated that "[t]he fundamental question … is whether the services for which plaintiff seeks compensation were tasks performed so as to inform defendants whether *to negotiate* for the properties at issue, or whether those services were performed as part of or *in furtherance of negotiation* for the subject properties." (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 765–66 [2015] [emphasis in original].)

For example, in *Snyder v Bronfman*, 13 NY3d 504 (2009), the plaintiff and defendant allegedly entered into an oral agreement to "to acquire and operate companies in the media business", wherein the plaintiff was to function as defendant's "consigliere." (*Id.* at 506.) After several years of work, plaintiff acted as a "major contributor" in bringing together a $2.6 billion deal for the acquisition of Time Warner Music from Time Warner. Shortly thereafter, however, the defendant told the plaintiff that there was "no room" for him at Time Warner

Music and refused to compensate the plaintiff for his work. The Court of Appeals ruled that the plaintiff's claims for unjust enrichment and quantum meruit were barred by section 5-701 (a) (10):

> "The essence of plaintiff's claim is that he devoted years of work to finding a business to acquire and causing an acquisition to take place—efforts that ultimately led to defendant's acquisition of his interest in Warner Music. In seeking reasonable compensation for his services, plaintiff obviously seeks to be compensated for finding and negotiating the Warner Music transaction. His claim is of precisely the kind the statute of frauds describes.

(*Snyder v Bronfman*, 13 NY3d 504, 509 [2009.)

In contrast, in the *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759 (2015), the Court of Appeals held that the plaintiff alleged some claims for non-payment of services related to advising the defendant on *whether to* enter into certain negotiations, rather than *as part of or in furtherance of negotiation*. As such, the plaintiff's claims were not rendered void by the statute of frauds per General Obligations Law § 5-701 (a) (10). (*Id.*; *see also Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 11 [1st Dept 2012] [dismissing plaintiff's claim for unjust enrichment based on defendant's alleged failure to compensate plaintiff for acting as intermediary, but denying dismissal of plaintiff's claim for unjust enrichment based on defendant's failure to compensate plaintiff for plaintiff's advice "financing, its CFOs, and raising the quality of its concessions"].)

Here, ELJM was clearly acting as an intermediary in furtherance of bringing a deal together between Santoni and Bergdoff Goodman. ELJM was not providing advice to Santoni on whether to negotiate with Bergdoff Goodman—the goal was to get a deal with Bergdoff Goodman, as well as other Preferred Retailers. Without a deal from one of the Preferred Dealers, ELJM was entitled to no money under the alleged contract.

Because this alleged agreement was not reduced to a written instrument, it is void per General Obligations Law § 5-701 (a) (10). (*Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 11 [1st Dept 2012] ["The statute of frauds applies where the intermediary's activity is that of providing 'know-who', in bringing about between

principals an enterprise of some complexity." [internal quotation marks and emendation omitted]].)

Moreover, to the extent that ELJM attempts to disentangle and separately seek compensation for work related to "price positioning," "merchandising," and "stategiz[ing]" with regard to the Men's collection—services which ELJM claims were done in addition to "making introductions to the Preferred Retailers"—these claims for compensation can only be asserted under theories of quasi-contract. (*See Whitman Heffernan Rhein & Co., Inc. v Griffin Co.*, 163 AD2d 86, 87 [1st Dept 1990] ["[T]he general rule is that if part of an entire contract is void under the Statute of Frauds, the whole of such contract is void."]; *see also Castellotti v Free*, 138 AD3d 198, 204 [1st Dept 2016] ["If a contract is barred by the statute of frauds, a promissory estoppel claim is viable in the limited set of circumstances where unconscionable injury results from the reliance placed on the alleged promise."].) As such, the Court addresses this issue with regard to ELJM's claims under theories of quasi-contract (i.e. Claims VI and VII).

Accordingly, Claim II, for breach of the oral Men's Agreement, is dismissed.

Claim III: Breach of the (Oral) Miami Agreement

Like Claim II, Claim III for breach of the Miami Agreement also must be dismissed as void per General Obligations Law § 5-701 (a) (10). According the amended complaint the most liberal construction and giving ELJM the benefit of every possible inference, the services that ELJM performed were clearly for the purpose of negotiating a deal: they introduced Santoni to "the principals of the most prestigious retail locations in the Miami, Bal Harbour Shops and Brickell," surveyed the spaces offered, and made a trip "for the specific purpose of negotiating the lease terms." (Amended Complaint ¶¶ 52-53.)

These were not services rendered for the purpose of advising Santoni as to whether "to negotiate", but rather were rendered "in furtherance of negotiation." (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 765–66 [2015].) In point of fact, ELJM could only receive the contemplated compensation under this alleged contract if it succeeded in securing premises for Santoni.

Accordingly, Claim III, breach of the Miami (Oral) Agreement, is hereby dismissed.

Claim IV: Fraud / Fraud in Inducement re (Oral) Men's Agreement

A claim for fraud in the inducement must be plead with particularity. (*Kavner v Geller*, 49 AD3d 281, 282 [1st Dept 2008].) "To state a legally cognizable claim of fraudulent inducement based on a misrepresentation or omission, the complaint must allege that the defendant intentionally made a material misrepresentation of fact in order to defraud or mislead the plaintiff, and that the plaintiff reasonably relied on the misrepresentation and suffered damages as a result." (*Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 537 [1st Dept 2016], *affd* 29 NY3d 137 [2017].) "A claim for fraudulent inducement of contract can be predicated upon an insincere promise of future performance only where the alleged false promise is collateral to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract." (*Fairway Prime Estate Mgt., LLC v First Am. Int'l Bank*, 99 AD3d 554, 557 [1st Dept 2012]; *see also Castellotti v Free*, 138 AD3d 198, 211 [1st Dept 2016] [holding that "the fraudulent inducement claim was properly dismissed because it alleges only an insincere promise of future performance under the oral contract"].)

The First Department has recently reiterated the longstanding rule in this state that "a fraud claim that arises from the same facts as an accompanying contract claim, seeks identical damages and does not allege a breach of any duty collateral to or independent of the parties' agreements is subject to dismissal as redundant of the contract claim." (*Cronos Group Ltd. v XComIP, LLC*, 156 A.D.3d 54, 62-63 [1st Dept 2017].) As the First Department further explains:

> "To say that a contracting party intends when he enters into an agreement not to be bound by it is not to state 'fraud' in an actionable area, but to state a willingness to risk paying damages for breach of contract. Implicit in the policy sanctioning the formalization of contractual undertakings is precaution against an existing intention not to be bound by the agreement as well as a future change of mind about being bound by it. Actionable relief

> hangs on breach; and relief does not lie for fraud resting on an intention not to perform."

(*Cronos Group Ltd.*, 156 A.D.3d at 68 [internal quotation marks and emendation omitted], quoting *Briefstein v P.J. Rotondo Const. Co.*, 8 AD2d 349, 351 [1st Dept 1959].)

Here, ELJM simply claims that Santoni entered into the Men's Agreement with intention of not performing. This is duplicative and redundant of its breach of contract claim (Claim II) and, as such, fails to state claim for fraud / fraud in the inducement.

Accordingly, Claim IV for fraud / fraud in the inducement regarding the "Men's Agreement" is dismissed.

Claim V: Fraud / Fraud in Inducement re (Oral) Miami Agreement

Similar, to Claim IV, ELJM simply alleges that Santoni entered into the oral Miami Agreement with the intention of not performing. This is duplicative and redundant of its breach of contract claim (Claim III) and, as such, fails to state claim for fraud / fraud in the inducement.

Accordingly, Claim V for fraud / fraud in the inducement regarding the "Miami Agreement" is dismissed.

Claim VI: Promissory Estoppel
re (Oral) Men's Agreement and (Oral) Miami Agreement

"The elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance." (*MatlinPatterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 841–42 [1st Dept 2011].) "If a contract is barred by the statute of frauds, a promissory estoppel claim is viable in the limited set of circumstances where unconscionable injury results from the reliance placed on the alleged promise." (*Castellotti v Free*, 138 AD3d 198, 204 [1st Dept 2016].) On this point, the Court of Appeals has recently stated that there is a very high bar

for promissory estoppel claims, based on oral promises, surviving the statute of frauds:

> "The strongly held public policy reflected in New York's Statute of Frauds would be severely undermined if a party could be estopped from asserting it every time a court found that some unfairness would otherwise result. For this reason, the doctrine of promissory estoppel is properly reserved for that limited class of cases where the circumstances are such as to render it unconscionable to deny the promise upon which the plaintiff has relied."

(*In re Estate of Hennel*, 29 NY3d 487, 495 [2017], quoting *Philo Smith & Co., Inc. v. USLIFE Corp.*, 554 F.2d 34 [2d Cir. 1977].)

For example, in *Castellotti v Free*, the plaintiff's promissory estoppel claims were allowed to proceed – despite failing to comply with the statute of frauds – where in reliance on the defendant's (plaintiff's sister's) promise to return half of the monies under his mother's will after plaintiff's divorce was finalized, the plaintiff paid $2 million in his mother's estate taxes. (138 AD3d 198, 205 [1st Dept 2016].) The First Department held that this rose to the level of unconscionability.

In *Fleet Bank v Pine Knoll Corp.*, the Appellate Division, Third Department held that the defendant counterclaiming on promissory estoppel sustained an unconscionable injury where "she incurred debt in excess of $100,000, depleted her son's college savings account, lost her residence . . . to foreclosure, was required to sell her car to support the debt incurred and, in the end, was left with only a portion of her original business venture . . . ." (290 AD2d 792, 797 [3d Dept 2002]; *compare Steele v Delverde S.R.L.*, 242 AD2d 414, 415 [1st Dept 1997] [finding that alleged violation of promise to make plaintiff exclusive agent did not rise to level of unconscionability]; *In re Estate of Hennel*, 29 NY3d 487 [2017] [finding that unfulfilled promise of grandfather to grandsons to satisfy mortgage on property that they were working on did not raise to level of unconscionability].)

Here, allowing one sophisticated business entity to escape its alleged promises to another sophisticated business entity under "application of the statute of frauds does not render a result so inequitable and egregious as to shock the conscience and confound the judgment of any person of common sense." (*In re*

Estate of Hennel, 29 NY3d 487, 497 [2017].) At worst, this amounts to unfairness, "[b]ut what is unfair is not always unconscionable." (Id.)

Accordingly, Claim VI for promissory estoppel regarding the Men's Agreement and the Miami Agreement is dismissed.

Claim VII: Unjust Enrichment re
(Oral) Men's Agreement and (Oral) Miami Agreement

"The elements of a cause of action to recover for unjust enrichment are (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." (*GFRE, Inc. v U.S. Bank, N.A.*, 130 AD3d 569, 570 [2d Dept 2015].) "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." (*Paramount Film Distrib. Corp. v State*, 30 NY2d 415, 421 [1972].)

This essential inquiry however becomes more complicated when a defendant asserts the statute of frauds as a defense, and the Court must additionally consider the latter's statutory purpose, which, "[s]imply stated, . . . is to prevent perjury and fraud and to preserve the integrity of contracts." (*Dorfman v Reffkin*, 144 AD3d 10, 15 [1st Dept 2016].) As such, Appellate Division, First Department has cautioned that the statute of frauds, under General Obligations Law 5–701(a) (10), should be applied to unjust enrichment claims on a "case-by-case basis" and that courts should avoid "sweeping generalizations" about the scope of the statute of frauds. (*Id.* at 17.)

Taking into account *Snyder*, *JF Capital*, and *Dorfman*, this Court finds that ELJM's claims for unjust enrichment do not fall outside the scope of the statute of frauds. For example, with regard to the Men's Agreement, ELJM alleges that it and Santoni entered into an agreement "whereby ELJM would utilize its industry experience in relation to Santoni's men's collection with the eventual goal of placing Santoni's men's collection [with the Preferred Retailers]." (Complaint ¶ 36.) In exchange, ELJM was to receive an "8% commission on any Santoni men's collection order placed by any of the Preferred Retailers." (Id. ¶ 37.) This is a

classic example of "where the intermediary's activity is that of providing 'know-who'. . . ." (*Ashwood Capital, Inc. v OTG Mgt.*, Inc., 99 AD3d 1, 11 [1st Dept 2012].)

ELJM argues that, under the Men's Agreement, ELJM was to also to:

> "(i) advise Santoni regarding price positioning separate from any introduction to or negotiation with the Preferred Retailers, .
>
> (ii) undertake merchandising tasks, including creation of the 'Santoni Luxury' capsule collection (which, on information and belief, Santoni continues to use in its own boutiques to this day) distinct from any specific effort to obtain business with the Preferred Retailers, and
>
> (iii) strategize with Santoni on deliveries and designated sales associate (DSA) positions as a related, but distinct, process to reaching out directly to the Preferred Retailer (collectively, the 'Men's Services')."

(Complaint ¶ 38.) In sum and substance, ELJM argues and alleges, that it provided certain services with the ultimate goal of placing an order with one of the preferred retailers, but that Santoni reaped certain collateral benefits from ELJM's work that were separate and apart from any order that was placed with one of the Preferred Retailers.

These collateral benefits pale in comparison to the work that the plaintiff in *Dorfman v Reffkin* did that "clearly extend[ed] beyond the negotiation of a business opportunity, including developing materials to secure investor backing, recruiting engineers and others to join Urban Compass, and developing the details of how Urban Compass's software product, web, and mobile applications would be 'architected.'" (144 AD3d 10, 15 [1st Dept 2016].) Moreover, as ELJM admits, this above work was done "with the eventual goal of placing Santoni's men's collection [with the Preferred Retailers]" and ELJM's compensation for such work was contingent on the successful placement of orders for the Santoni men's collection with the Preferred Retailers.

As such, the work performed by ELJM was inapposite to the work the plaintiffs performed in *JF Capital* "to inform defendants whether *to negotiate*." (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 765–66 [2015] [emphasis in original].) Here, ELJM and Santoni had already decided to negotiate with the Preferred Retailers, and ELJM's compensation was contingent on the occurrence of successful negotiations with the Preferred Retailers.

Moreover, analyzing the instant allegations, on a case-by-case basis, this Court cannot say that the application of the statute of frauds produces a result that is against good conscience. (*Compare Snyder v Bronfman*, 13 NY3d 504, 506 [2009] [holding that the plaintiff's claims for unjust enrichment and quantum meruit were barred by the statute of frauds where the plaintiff spent several years acting as a "major contributor" in bringing together a $2.6 billion deal for the acquisition of Time Warner Music from Time Warner].)

For the same reasons and with greater force, ELJM's claims for unjust enrichment for its alleged work of "introducing Mr. Santoni to the principals of the most prestigious retail locations in the Miami, Bal Harbour Shops and Brickell," surveying the spaces offered, and negotiating lease terms is clearly the type of work done in furtherance of negotiation that is barred by the statute of frauds as per *JF Capital*. In addition, notwithstanding ELJM's assertions to the contrary, while it may be unfair for ELJM not to be compensated for its work, it is not unconscionable. (*See In re Estate of Hennel*, 29 NY3d 487, 497 [2017].)

Accordingly, Claim VII for unjust enrichment regarding the Men's Agreement and the Miami Agreement is dismissed.

Claim VIII: Breach of Covenant of Good Faith re Consulting Agreement

In this state, every contract implies a covenant of good faith and fair dealing in the course of performance. (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002].) "This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (*Id.* [internal quotation marks omitted].) "While the duties of good faith and fair dealing do not imply

obligations inconsistent with other terms of the contractual relationship, they do encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included." (*Id.* [internal quotation marks omitted]; *see also Tr. Funding Assoc., LLC v Capital One Equip. Fin. Corp.*, 149 AD3d 23, 29 [1st Dept 2017] ["The covenant of good faith and fair dealing cannot negate express provisions of the agreement, nor is it violated where the contract terms unambiguously afford [one party] the right to exercise its absolute discretion to withhold the necessary approval."].)

Santoni argues that ELJM's claim for a breach of the covenant of good faith and fair dealing, with regard to the Consulting Agreement, should be dismissed because: (1) it is duplicative of ELJM's breach of contract claim regarding the Consulting Agreement; and (2) it seeks "to negate a right expressly granted to Santoni in the Consulting Agreement to veto any replacement representatives ELJM proposed." (Memo in Supp. at 14-15.) In opposition, ELJM argues that the instant claim for breach of good faith is distinct from its claim for breach of contract claim because the latter "centers" on Santoni's "wrongful termination of the Consulting Agreement following Santoni's 10-day demand for another designee" whereas the former is based Santoni's rejection of Ms. Marano as the designee. (Memo. in Opp. 14-15.)

The Court finds that Plaintiff's claim for the breach of a covenant of good faith regarding the consulting agreement is duplicative of the breach of contract claim, which notably seeks the same damages and centers on the same facts. (*Mill Fin., LLC v Gillett*, 122 AD3d 98, 104 [1st Dept 2014] ["Where a good faith claim arises from the same facts and seeks the same damages as a breach of contract claim, it should be dismissed."]; *compare Rosania v. Gluck*, 2016 N.Y. Slip Op. 30910(U), *7-8 [Sup Ct, NY County May 18, 2016] [Scarpulla, J.] ["The [fair dealing] claim rests on Rosania's actions with respect to a rental unit, whereas the [contract] claim rests upon allegations that Rosania breached express provisions in the Parkmerced."].)

In so ruling, the Court, however, notes that it makes no ruling with regard to Santoni's second argument. Whether the duty of good faith and fair dealing can be reasonably implied into the exercise of Santoni's right to reject a designated representative cannot be appropriately resolved at this early stage of the litigation.

Accordingly, Claim VIII for breach of the covenant of good faith regarding the Consulting Agreement is dismissed.

Claim IX: Accounting re Consulting Agreement

In order to allege a cause of action for an accounting, a plaintiff must allege that the defendant owed it a fiduciary duty. (*Zyskind v Facecake Mktg. Tech., Inc.*, 110 AD3d 444, 446 [1st Dept 2013]; *AMP Services Ltd. v Walanpatrias Found.*, 34 AD3d 231, 233 [1st Dept 2006]; *Vitale v Steinberg*, 307 AD2d 107, 110 [1st Dept 2003]; *Michnick v Parkell Products, Inc.*, 215 AD2d 462, 463 [2d Dept 1995].)

ELJM does not claim that it was owed a fiduciary duty by Santoni, and its reliance on the fifty-plus-year-old case of *Kaminsky v. Kahn*, 23 A.D.2d 231, 238 (1st Dep't 1965) is misplaced. Indeed, a judge in this county's Commercial Division has warned against relying on *Kaminsky* for Plaintiff's proposition:

> "The *Kaminsky* defendant was the majority shareholder as well as chairman of the board of directors, and had a duty to exercise good faith toward minority shareholders, including the plaintiff. Thus, the above quoted language is dicta, as the appellate court directed an accounting under the 'special circumstances' in that case. In any event, *Kaminsky* was decided in 1965 and the current law requires a fiduciary relationship as an element of an accounting claim."

(*See Chambers v Weinstein*, 44 Misc 3d 1224(A) [Sup Ct, NY County 2014] [Sherwood, J.], *affd*, 135 AD3d 450 [1st Dept 2016].)

Accordingly, Claim IX of the complaint for an accounting is dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the instant motion to dismiss the complaint in its entirety, pursuant to CPLR 3211, is granted in part to the extent that Claims II through IX are hereby dismissed; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that Defendant Santoni S.P.A. is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 104, 71 Thomas Street, on June 26, 2018, at 9:30 AM.

Dated: March 26, 2018
New York, New York

, J.S.C.
HON. ROBERT D. KALISH
J.S.C.

1. Check one:.....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....

☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE