SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 54EFM

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BRIAN RIPKA,

Plaintiff,

- v -

ANDREW STENZLER, EUGENE REMM, ANTHONY DIMARCO, RUMBLE FITNESS LLC

Defendant.

INDEX NO. 154593/2019

MOTION DATE 07/08/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JENNIFER G. SCHECTER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7-24, 26-30, 32-35, 37, 40- 44

were read on this motion to/for DISMISS.

Defendants Andrew Stenzler, Eugene Remm, Anthony DiMarco, and Rumble Fitness LLC (Rumble) move to dismiss the complaint and, in the alternative, to strike certain allegedly irrelevant and prejudicial portions of it. Plaintiff Brian Ripka opposes the motion and cross-moves for leave to file a proposed first amended complaint (Dkt. 37 [the PFAC]). Defendants oppose the cross-motion. The cross-motions are granted in part.

Background

The following facts are drawn from the PFAC and are assumed to be true for the purposes of this motion to dismiss.[1]

[1] The PFAC adds an immaterial amount of detail and the parties have briefed its merits; thus, the sufficiency of the PFAC is addressed.

Plaintiff is the founder and CEO of a fitness company called Ripped Fitness (Ripped). He alleges that on February 15, 2016, at their sons' basketball game, Stenzler solicited plaintiff's involvement in Rumble, a boxing-based fitness studio. Plaintiff alleges Stenzler orally agreed to provide him with a 10% stake in Rumble in exchange for plaintiff's services in assisting the company's early development. Plaintiff alleges that Stenzler orally reaffirmed this agreement on multiple occasions. In consideration for the 10% equity grant, plaintiff claims he performed his end of the bargain by providing Stenzler with proprietary information about Ripped's operations and the names of its vendors and that he performed various services to benefit Rumble, such as analyzing traffic at competing businesses to scout for optimal locations.

Plaintiff claims that Stenzler reneged on their agreement after bringing in two additional partners, Remm and DiMarco, who allegedly told Stenzler that plaintiff should not be given such a large equity stake. After plaintiff insisted that their alleged oral agreement be reduced to writing, Stenzler refused. Instead, Stenzler offered to provide plaintiff with a 3% stake in Rumble in exchange for a 3% stake in Ripped.

Rumble, a New York LLC, opened its first location in January 2017. To date, plaintiff has not been issued a membership interest. Rumble has since opened additional locations and plans to expand nationally.

Plaintiff filed his original complaint on June 18, 2019, asserting claims for (1) a declaratory judgment that he owns a 10% stake in Rumble; (2) breach of the alleged oral agreement; and (3) unjust enrichment (Dkt. 5). On July 8, 2019, defendants made this motion to dismiss, principally arguing that the parties' emails only reflect the 3% offer and

do not reflect the alleged oral agreement to provide 10% equity. Defendants also seek to strike unrelated allegations of wrongdoing. On September 4, 2019, plaintiff cross-moved for leave to file the PSAC, which includes additional causes of action seeking recovery for breach of fiduciary duty, "common law tort" (which presumably is a claim for prima facie tort) and fraud.

Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint and all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp.*, 60 AD3d 491 [1st Dept 2009]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). If the defendant seeks dismissal of the complaint based upon documentary evidence, the motion will succeed only if "the documentary 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]).

Defendants seek dismissal of the declaratory judgment and breach of contract causes of action, which are based on the allegation that Stenzler orally agreed to prove plaintiff with a 10% stake in Rumble, based on certain emails and text messages that they chose to submit that refer only to the 3% equity swap and not to any promise of a 10% equity stake (*see* Dkts. 12-16). Such communications, however, do not definitively prove that Stenzler

never made the 10% equity promise. Thus, even if the court were to consider them as admissible documentary evidence (*see Amsterdam Hospitality Group, LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 433 [1st Dept 2014]), they "do not utterly refute plaintiff's allegations" (*Kolchins v Evolution Markets, Inc.*, 128 AD3d 47, 59 [1st Dept 2015], *affd* 31 NY3d 100, 108 [2018]).

The argument that any oral agreement would have been reflected in the universe of emails that defendants chose to submit on this motion is not a valid basis to dismiss a complaint under CPLR 3211(a)(1). Defendants have not cited a single case where a complaint was dismissed with such a showing. Of course, had one of the emails contained an admission by plaintiff that he never reached an agreement for a 10% stake, that would be another matter. Here, however, defendants simply ask this court to infer that plaintiff's claims are not plausible based on their cherry-picked submissions. While they protest that plaintiff could have refuted their evidentiary showing with other emails in his possession, plaintiff has no obligation to do so. This is not summary judgment; there is no burden shifting on a motion to dismiss (*cf. Stonehill Capital Mgmt., LLC v Bank of the West*, 28 NY3d 439, 448 [2016]). On the contrary, defendants bear the entire burden of proving that "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen*, 98 NY2d at 326).

Of course, there may not be any dispositive documentary evidence. That is inherently a feature of many alleged oral agreements. Whether documentary evidence ultimately suggests the existence of an oral agreement is a question of fact. While the statute of frauds is meant to guard against dubious oral agreement claims, defendants do

not claim the statute of frauds applies (*see* Dkt. 40 at 14). Simply put, defendants cannot procure dismissal of a claim based on an alleged oral agreement by proving that such agreement is not reflected in writing.

That said, only Stenzler is alleged to have entered into an alleged oral agreement with plaintiff. Plaintiff alleges that Remm and DiMarco only became involved with Rumble after the alleged oral agreement was entered into. They are not parties to the agreement and thus cannot be held liable for its breach (*see Leonard v Gateway II, LLC*, 68 AD3d 408 [1st Dept 2009]).[2]

The unjust enrichment claim also is not yet amenable to dismissal. Where, as here, there is a question as to the existence of an agreement and the plaintiff alleges that he performed work without being compensated, he is entitled to proceed with an unjust enrichment claim in the alternative (*Livathinos v Vaughan*, 121 AD3d 485, 486 [1st Dept 2014], citing *Zuccarini v Ziff-Davis Media, Inc.*, 306 AD2d 404, 405 [1st Dept 2003]). Plaintiff may also maintain this claim against Rumble since it is the company that principally benefitted from plaintiff's alleged contributions. The claim, however, cannot be asserted against Remm and DiMarco because they merely benefitted by virtue of their status as members of Rumble (*see Lau v Lazar*, 130 AD3d 413, 414 [1st Dept 2015]).

[2] Remm, DiMarco, and Rumble are nonetheless necessary parties to the declaratory judgment claim since their rights might be adversely affected if plaintiff is held to be a member of the Rumble (*see* CPLR 1001). They should be privy to any determination that could result in dilution or changes to corporate governance. Remm and DiMarco, however, do not face any financial liability.

Plaintiffs' proposed additional claims, however, are clearly devoid of merit (*see MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 500 [1st Dept 2010]). The fraud claim is duplicative. The claim seeks to recover for Stenzler's insincere promise of future performance (*see RKA Film Fin., LLC v Kavanaugh*, 171 AD3d 678, 679 [1st Dept 2019]) that, in any event, can still give rise to a quasi-contract recovery. If both the contract and quasi contract claims cannot be proven, the fraud claim necessarily fails; but if plaintiff recovers on either claim, recovery on the fraud claim would be duplicative (*see Carling v Peters*, 170 AD3d 482, 483 [1st Dept 2019]). The breach of fiduciary duty claim is likewise duplicative. Even if plaintiff was owed a fiduciary duty as a minority member (*see Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]) or based on his friendship with Stenzler (*see Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 57 [1st Dept 1988]), damages on this claim would be duplicative (*see Chowaiki & Co. Fine Art v Lacher*, 115 AD3d 600 [1st Dept 2014]).[3] Finally, the prima facie tort claim fails because plaintiff's allegations make clear that defendants had an economic motive--a bigger equity stake--for their actions and malice is not alleged to be the only reason for their actions (*see AREP Fifty-Seventh, LLC v PMGP Assocs., L.P.*, 115 AD3d 402, 403 [1st Dept 2014]).

Finally, defendants move to strike plaintiff's allegations concerning Stenzler's prior employer and those made in other lawsuits, which have no bearing on plaintiff or the claims

[3] The court is skeptical that a fiduciary duty claim is viable here since no actual duty of care or loyalty was allegedly breached. Instead, plaintiff was simply not given the equity he was allegedly promised, which is merely a claim for breach of contract. There is no authority for the proposition that all contract breaches are also fiduciary violations when the parties have a fiduciary relationship.

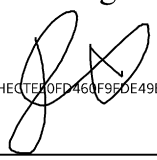
in this action other than to suggest Stenzler is generally a bad actor (*see Soumayah v Minnelli*, 41 AD3d 390, 392-93 [1st Dept 2007]). Those claims are inflammatory and irrelevant, so they are stricken (*see Chowaiki*, 115 AD3d at 601). That said, plaintiff's claims that defendants sought to defraud him, while not originally the subject of a fraud claim (and now the subject of a dismissed fraud claim), are not stricken. Defendants' motive, while not an element of the surviving claims, is relevant context and may inform the finder of fact as to whether to believe there was an oral agreement (*see Forty Cent. Park S., Inc. v Anza*, 130 AD3d 491, 492 [1st Dept 2015]). Accordingly, it is

ORDERED that defendants' motion to dismiss the three claims in the original complaint is granted to the extent of dismissing the breach of contract and unjust enrichment claims asserted against Remm and DiMarco and the breach of contract claim asserted against Rumble; and it is further

ORDERED that defendants' motion to strike is granted only to the extent of striking allegations of misconduct not involving plaintiff, including those related to Stenzler's bad character traits, his prior employer, and other lawsuits; and it further

ORDERED that plaintiff's motion for leave to file the PSAC is granted only to the extent that, by January 16, 2020, plaintiff shall file an amended complaint that may include his new factual allegations but which must omit (1) the claims dismissed herein; (2) the proposed claims for breach of fiduciary duty, prima facie tort, and fraud; and (3) facts concerning Stenzler's bad character traits, his prior employer, and other lawsuits; and it is further

ORDERED that by January 9, 2020, the parties shall either (1) jointly stipulate to consolidate the related action *Rumble Fitness LLC v Ripka* (Index. No. 154803/2019) with this one under this Index Number or else (2) e-file a joint letter, not to exceed two pages, laying out each party's objection to such consolidation, and an e-filing confirmation of the parties' stipulation or joint letter shall be emailed to ekimmel@nycourts.gov.



December 19, 2019
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:	☐	CASE DISPOSED			X	NON-FINAL DISPOSITION	
	☐	GRANTED	☐	DENIED	X	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE