Schaffer v Coral Reef Capital, LLC
2020 NY Slip Op 34139(U)
December 10, 2020
Supreme Court, New York County
Docket Number: 653921/2018
Judge: Louis L. Nock

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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DEAN SCHAFFER,

Plaintiff,

- v -

CORAL REEF CAPITAL LLC,

Defendant.

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INDEX NO. 653921/2018

MOTION DATE 10/30/2018

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion of defendant Coral Reef Capital LLC ("Defendant") to dismiss the complaint of plaintiff Dean Schaffer is denied and the cross-motion to amend is granted, in accord with the following memorandum decision.

Background

Defendant is a private investment firm located in New York, New York (complaint ¶ 7).[1] Plaintiff is a former employee of Defendant who commenced this action to recover amounts allegedly owed in connection with his prior employment with Defendant. Plaintiff began his employment with defendant in the spring of 2014. Plaintiff alleges that the terms of his employment are governed by an offer letter dated March 20, 2014 (the "Offer Letter") (complaint, exhibit A; NYSCEF Doc No 1). Plaintiff disputes that the Offer Letter is a binding contract of employment and further asserts that the March 20, 2014 Offer Letter was not the final version of the letter. Defendant submits a similar letter dated March 27, 2014, which it asserts is

[1] Except where otherwise indicated, the facts are set forth here as alleged in the complaint and are accepted as true for the purposes of the motion to dismiss.

the final version (Traub affirmation in support, exhibit A; NYSCEF Doc No 9). Because the two letters are substantially similar, this court will refer primarily to the version attached to the complaint[2] and take note of differences where they are relevant.

The Offer Letter in dispute bears the title "Employment Terms" at the top and sets forth in detail terms of Plaintiff's proposed employment with Defendant. The letter designates Plaintiff's title as Managing Director and lists several responsibilities of the position, including, among others, "deal execution, deal analysis, transaction due diligence, financial modeling, investor presentations, internal investment committee memoranda," management and oversight of "VPs, Associates, Analysts, and Interns," and portfolio management (complaint, exhibit A; NYSCEF Doc No 1). The letter also sets forth the details of various forms of compensation, including a base salary of $170,000, a discretionary bonus, and the payment of carried interest (*id.*).[3]

With respect to "Carry Allocation," the Offer Letter provides for "7% of the total GP [General Partner] carry earned and attributable to [Defendant] in each special purpose investment vehicle created from the date of signing of this agreement for each discrete investment. Employee will also receive 7% ownership of any new tranche of investment in any existing [Defendant] investment occurring from the date of signing this agreement" (*id.*). Provisions for vesting of these interests are also provided (*id.*). The March 27, 2014 version of the letter provides for a 7% carry allocation, described as "7% of [Defendant's] Net Carried Interest in each special purpose investment vehicle created starting March 31, 2014 for each discrete investment or new investment made by [Defendant]" (Traub affirmation in support, exhibit A;

[2] Exhibits to the complaint are appropriate for consideration on a motion to dismiss (*e.g., Wernham v Moore*, 77 AD2d 262 [1st Dept 1980]).
[3] "Carried Interest" is the share of profits generated by a private equity fund that is paid to the fund's general partner.

NYSCEF Doc No 9). The March 27, 2014 letter also contains provisions regarding vesting of carry interest entitlement; but does not contain the provision for "7% ownership in any new tranche of investment" (*id.*).

Plaintiff accepted the offer of employment and thereafter began his employment with Defendant as a Managing Director. He was paid an annual base salary of $170,000 as set forth in the Offer Letter, and this amount was later increased to $175,000 annually. Plaintiff alleges that, during the course of his employment, he was also awarded 18% and 19%, respectively, of the carried interest in two private equity funds, the Coral Reef Capital Energy Fund LP (the "Energy Fund") and the Coral Reef Capital Resources Fund II LP (the "Resources Fund") (together, the "Funds"), as provided for in the Offer Letter and pursuant to the terms of the operating agreement of each Fund and to "the supporting carried interest model and business record of Defendant, created by the Resource Fund's Fund Administrator" (proposed amended complaint ¶ 87). Plaintiff's employment with Defendant ended in the Spring of 2018, though the parties dispute the actual date of his termination. Plaintiff alleges, in short, that he was advised on March 22, 2018 that he and Defendant needed to "part ways," but was not advised of a termination date at that time and believed himself to be employed by Defendant until May 4, 2018 when Defendant notified him that his termination was effective on April 30, 2018. Plaintiff also alleges that he continued to provide services on Defendant's behalf through April 2018. Defendant maintains that Plaintiff was terminated on April 30, 2018 and is not entitled to any salary after this date.

Plaintiff commenced this action to recover carried interest from the Funds and $29,167 in unpaid salary for April 2018. The original complaint asserts causes of action for breach of contract, breach of the covenant of good faith and fair dealing, and violation of Labor Law § 193.

Defendant moves to dismiss the complaint in its entirety. In opposition, Plaintiff withdraws his second and third causes of action for breach of the covenant of good faith and fair dealing and for violation of Labor Law § 193 and cross-moves to amend the complaint. The proposed amended complaint includes causes of action for a declaratory judgment that Plaintiff is entitled to 18% and 19%, respectively, of the carried interest distributions of the Energy Fund and the Resource Fund, breach of contract for Defendant's failure to pay Plaintiff's salary through the end of April 2018, and unjust enrichment (proposed amended complaint, NYSCEF Doc No 18). Defendant opposes the cross-motion.

Standard of Review

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002][internal citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]) and "the court is not required to accept factual allegations that are

plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

Dismissal under CPLR 3211 (a) (1) is warranted "only where 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]). "To be considered 'documentary' under CPLR 3211 (a) (1), evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010] [internal citation omitted]). In effect, "the paper's content must be 'essentially undeniable and . . . assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [internal citation omitted]). Affidavits and deposition testimony do not qualify as documentary evidence for the purposes of CPLR 3211 (a) (1) (*Lowenstern v Sherman Sq. Realty Corp*., 143 AD3d 562, 562 [1st Dept 2016]; *Correa v Orient-Express Hotels, Inc*., 84 AD3d 651, 651 [1st Dept 2011]), but judicial records, mortgages, deeds and contracts (*Fontanetta*, 73 AD3d at 84), and email and letter correspondence (*Kolchins v Evolution Mkts., Inc*., 31 NY3d 100, 106 [2008]) may be considered. "[W]here a written agreement . . . unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211(a)(1)" (*Madison Equities, LLC v. Serbian Orthodox Cathedral of St. Sava*, 144 A.D.3d 431, 431 [1st Dept 2016], *citing 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 A.D.3d 1, 5, 784 N.Y.S.2d 63 [1st Dept 2004]).

Discussion

A. Existence of a Contract

As an initial matter, Defendant argues that the Offer Letter constitutes sufficient documentary evidence warranting dismissal of the complaint because it is not an enforceable contract of employment. Defendant alleges that the version of the Offer Letter attached to the complaint was not the final version, but does not otherwise dispute the authenticity of the letter or contend that the parties did not reach a meeting of the minds regarding Plaintiff's employment. Rather, Defendant argues that the letter is not an enforceable contract of employment because it defines the employment as "at will" and does not have a definite durational term of employment.

Under New York law, to establish the existence of an enforceable contract, a plaintiff must demonstrate the existence of an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (*Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]). A written offer letter may constitute a contract of employment where the terms of employment are clearly defined in the agreement (*Mohammed v Start Treatment & Recovery Centers, Inc.*, 64 Misc 3d 1, 5 [App Term, 1st Dept 2019; *Sipkin v Major League Baseball Advance Media, L.P.*, 9 Misc 3d 133 [A] [App Term, 1st Dept 2005]). Here, the basic elements of a contract are not in dispute—an offer was made, accepted, and the parties reached a meeting of the minds regarding Plaintiff's employment. Furthermore, the written offer of employment clearly defines the essential terms of Plaintiff's employment, including the parties involved, Plaintiff's title and responsibilities, start date, compensation, including salary, bonuses and carry allocation, and other benefits. Thus, for the purposes of withstanding a motion to dismiss, the Offer Letter constitutes a contract of employment. Contrary to Defendant's assertions, the "Length of Employment" disclaimer that

defines Plaintiff's employment as "at will" does not render the contract unenforceable (*see, Feeney v Marine Midland Banks, Inc.*, 180 AD2d 477 [1st Dept] [lack of fixed duration in a contract does not render it unenforceable; rather, it is rendered an enforceable at-will contract], *lv denied* 80 NY2d 753 [1992]; *see also, supra, Mohammed v Start Treatment*, 64 Misc 3d at 5). Moreover, for the purposes of this action, the "at will" provision is largely irrelevant because Plaintiff does not assert a cause of action for wrongful termination or dispute his termination. Plaintiff's claims arise from a dispute regarding compensation allegedly earned during the course of his employment; not whether his termination was proper under the agreement. Therefore, Defendant's motion to dismiss the complaint on this basis is denied.

B. Carried Interest

Plaintiff also seeks to amend the complaint to interpose a cause of action for a declaratory judgment that Plaintiff is entitled to 18% and 19%, respectively, of the carried interest distributions from the general partner of the Energy Fund and the Resource Fund, pursuant to the terms of the operating agreement of each Fund and to "the supporting carried interest model and business record of Defendant, created by the Resource Fund's Fund Administrator" (proposed amended complaint ¶ 87; NYSCEF Doc No 18).[4] Defendant argues that the proposed cause of action for declaratory judgment is palpably insufficient as a matter of law because the relief sought is speculative and no actual, live controversary exists because carried interest has not yet

[4] The breach of contract cause of action interposed in the original complaint sought payment of 18% and 19%, respectively, of the carried interest distributions of the Energy Fund and the Resource Fund (complaint ¶¶ 72-78; NYSCEF Doc No 1). Plaintiff moved to dismiss this portion of the breach of contract claim on the ground that it not ripe for adjudication because carried interest has not yet been paid, and therefore, Plaintiff is not owed any payment at this time. Plaintiff did not oppose this argument, and instead cross-moves to amend the cause of action to add the cause of action for declaratory judgment (proposed amended complaint ¶¶ 86-89; NYSCEF Doc No 18). By failing to oppose Defendant's arguments in favor of dismissal and moving to amend the cause of action, the original claim is effectively abandoned or moot, and the issue currently before the court is whether to permit the proposed amendment.

been paid and is not due to be paid.[5] Defendant also contends that the claim is barred with respect to the Energy Fund by a provision of the agreement that requires the parties to resolve disputes pursuant to a dispute resolution procedure set forth in the agreement.

Pursuant to CPLR 3001, the court "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." "A declaratory judgment action thus requires an actual controversy between genuine disputants with a stake in the outcome and may not be used as a vehicle for an advisory opinion" (*Long Island Lighting Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006] [internal citations and quotations omitted]). Hence, the general purpose of a "declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations" (*Touro Coll. v Novus Univ. Corp.*, 146 AD3d 679, 679 [1st Dept 2017] [internal quotation marks and citations omitted]). "The fact that the court may be required to determine the rights of the parties upon the happening of a future event does not mean that the declaratory judgment will be merely advisory . . . [b]ut a request for a declaratory judgment is premature if the future event is beyond the control of the parties and may never occur" (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 530-531 [1977]).

On its face, the operating agreement for the Energy Fund purports to grant 18% carried interest to Plaintiff in his capacity as a limited partner of CRC Energy GP LP, the general partner of the Energy Fund (operating agreement, exhibit A [titled "CRC Energy GP LP Summary of

[5] As Defendant explains, carried interest is a percentage of profits paid to a private equity firm "based on how their portfolio of investments perform" (mem in support at 6; NYSCEF Doc No 12). "When profits are generated, they are first paid out to the investors. After those payments are made, and certain other deductions taken, any remaining profits are distributed to the owners of the fund's general partner as 'carried interest'" (*id.*). The crux of Defendant's argument is that the funds are not yet profitable, and therefore, carried interest payments are not yet due.

Key 'Carried Interest Terms"] and appendix A [titled "Initial Carried Interest Sharing Percentages"]; NYSCEF Doc No 22) and 18 "Units," defined as "company interests held by such Member corresponding to such Member's capital contributions to the Company" (operating agreement at 1; NYSCEF Doc No 22). The operating agreement for the Resource Fund does not speak directly to carried interest; but does indicate that Plaintiff holds one "Unit" as a Member (operating agreement at 1, schedule 1; NYSCEF Doc No 20).

The proposed amended complaint alleges that the carried interest percentage allocation for the Resource Fund was specified in the model created by Defendant's Fund Administrator (proposed amended complaint ¶ 29; NYSCEF Doc No 18). A spreadsheet attached to the proposed amended complaint that purports to contain this information indicates Plaintiff's allocation is 19% (*id.*, exhibit E). Defendant has not come forward with any documentary evidence that utterly refutes Plaintiff's allegations that he was granted carried interest rights in the two Funds. On the contrary, Plaintiff's termination letter, filed by Defendant in support of its motion, also indicates that Defendant "calculated [Plaintiff's] current ownership interest" in the Energy Fund at 6 Units and in the Resource Fund at 1 Unit (Schlumberger reply aff, exhibit B; NYSCEF Doc No 36). Also, the March 20, 2018 email from Defendant's Managing Member Marceau Schlumberger indicates that Defendant had advised Plaintiff that "his vested carry is fine with the Energy Fund and Fund II but that he would not keep his unvested carry" (*id.*, exhibit D; NYSCEF Doc No 38). Thus, the documentary evidence appears to support Plaintiff's allegations, at least at this preliminary stage of the litigation.

The court is unpersuaded by Defendant's assertion that no "live controversy" exists because carried interest payments are not yet due. The *entitlement* to carried interest and the ownership of investments that Plaintiff alleges he earned during his employment are assets that

have present value, even if the right to payment has yet to be realized. This is evidenced by the provision in the Offer Letter which provides that, in the event that Plaintiff's employment ends, Defendant "will have the right to repurchase in full the [Plaintiff's] carried interested participations based on the book equity value amounts shown in each company's latest available K-1 partnership year end statements" (Offer Letter [NYSCEF Doc No 2]). Although intangible, a right or asset that can be repurchased has present value. To the extent that Defendant disputes Plaintiff's entitlement to carried interest or ownership in the Funds, there is an actual, live controversy. A declaratory judgment regarding this matter would undoubtedly serve the general purpose of quieting or stabilizing a disputed obligation (*see Touro Coll., supra*, 146 AD3d at 679). Accordingly, Plaintiff's proposed amended cause of action for a declaratory judgment is not speculative and the proposed amendment does not lack merit.

Relying on *Kalisch-Jarcho, Inc. v City of New York* (72 NY2d 727, 732 [1988]), Defendant also contends that Plaintiff's claim for carried interest in the Energy Fund is barred by a dispute resolution process prescribed by the operating agreement of that fund. The section in question (titled "Fund GP Agreement") states as follows:

> . . . Each of the Initial Members has reviewed and considered in detail a binding term sheet relating to the Company and the Fund GP (the "Term Sheet"), a copy of which is annexed to this Agreement for the purposes of identification, and agrees to negotiate in good faith to amend and restate the Agreement of Limited Partnership of the Fund GP, dated as of November 28, 2016 (the "Fund GP Agreement") in due course to reflect the terms set out in the Term Sheet. For the avoidance of doubt, the Initial Members agree that any dispute around the implementation of the Term Sheet shall be resolved pursuant to the Approval Process.

(Operating agreement [NYSCEF Doc No 22] § 18). The term "Initial Members" is defined as Mr. Schlumberger, Plaintiff, and non-party L. Jared Powell (*id.* at 1 ¶ 2), and the "Term Sheet"

appears to be a document annexed to the operating agreement titled "Summary of Key 'Carried Interest' Terms" (*id*., exhibit A).

The "Approval Process" is set forth in section 2 of the operating agreement as follows:

> "Approval Process" means, in connection with any Company consents, decisions and determinations that explicitly require an Approval Process pursuant to the terms of this Agreement, seeking a majority consent of the Initial Members (in each case for so long as such person is a Member) (such consent, the "Majority Consent"), with the Managing Member having a veto right over any such consent, decision, or determination. In the event that a Majority Consent is obtained, the Managing Member shall be permitted to implement such consent, decision or determination on behalf of the Company. In the event that the Managing Member fails to obtain a Majority Consent for his proposed course of action in respect of any Company consent, decision or determination as a result of the other Initial Members voting against such proposal, each such consent, decision or determination shall then become subject to the Conflict Resolution Process.

(*id*. at 2 ¶ 2.) The operating agreement designates Schlumberger as the Managing Member (*id*. at 1 ¶ 1). Under *Kalisch-Jarcho*, "parties to an agreement may not seek a declaration of their contract rights when their agreement specifies a different, reasonable means for resolving such disputes. A declaratory judgment in such circumstances may be unnecessary, and could also enable parties to circumvent their contractual undertakings" (72 NY2d at 731-732 [internal citations omitted]).

The court is not persuaded that these provisions bar Plaintiff's claim for declaratory action. At the outset, the term "implementation" is not defined in the operating agreement, but is defined by Merriam-Webster's Dictionary as "an act or instance of implementing something: the process of making something active or effective" (Merriam-Webster Online Dictionary).[6] Taking this definition into account, "implementation of the Term sheet" appears to refer to the provision of section 18 which requires the Initial Members to review and consider the Term Sheet and "negotiate in good faith to amend and restate the Agreement of Limited Partnership of

[6] Available at: http://www.merriam-webster.com/dictionary/implementation

the Fund GP . . . in due course to reflect the terms set out in the Term Sheet" (operating agreement § 18; NYSCEF Doc No 22). Since Plaintiff's claims do not relate to this obligation, they do not fall under the Approval Process provision. Furthermore, it is unclear whether the referenced "Agreement of Limited Partnership of the Fund GP" refers to the operating agreement before the court, which is titled "Operating Agreement of CRC Energy GP LLC" or whether "Agreement of Limited Partnership of the Fund GP" refers to some other, separate, agreement that is not before the court on this motion. This presents a question of fact not suitable for resolution on a motion to dismiss.

Additionally, the Approval Process (operating agreement § 2) requires the seeking of majority consent of the "Initial Members" and bestows veto power to the Managing Member over any such majority determination. Because Schlumberger is designated as both an Initial Member and the Managing Member, pursuit of the Approval Process would require Plaintiff to present his claim twice to Defendant's Managing Partner, who is adverse to him in this action and who is also a witness in this action. This would prejudice Plaintiff and would not afford fair consideration of his claims (*see Cross & Brown Co. v Nelson*, 4 AD2d 501, 575 [1st Dept 1957] ["Irrespective of any proof of actual bias or prejudice, the law presumes that a party to a dispute cannot have that disinterestedness and impartiality necessary to act in a judicial or quasi-judicial capacity regarding that controversy"]). As such, the Approval Procedure is not a "reasonable means for resolving such disputes" under *Kalisch-Jarcho*. For these reasons, Plaintiff's motion to amended is granted and the motion to dismiss is denied regarding this cause of action.

C. Unpaid Wages

Plaintiff's claim for unpaid wages is, effectively, a dispute regarding the date of Plaintiff's termination. Plaintiff alleges that on March 22, 2018, Defendant's Managing

Member, Marceau Schlumberger, informed Plaintiff that Plaintiff and Defendant needed "to part ways," but "did not explicitly state to Plaintiff that [Defendant] intended to terminate his employment" (proposed amended complaint ¶¶ 68-69; NYSCEF Doc No 18). Plaintiff further alleges that, in this and subsequent conversations over the following two weeks, Schlumberger "told Plaintiff that he would continue paying Plaintiff his base salary at the current run-rate of $175,000 through the end of May 2018" (*id.* ¶¶ 70). Based on these conversations, Plaintiff believed that he was still employed by Defendant (*id.*). Plaintiff alleges that he "continued to provide services for [Defendant] throughout this time" and throughout the month of April 2018 (*id.* ¶¶ 71-74).[7] When he was not paid at the end of April 2018, Plaintiff sent a demand to Schlumberger for unpaid salary in the amount of $29,167 (*id.* ¶ 76). In reply, Schlumberger stated that he was withholding payment until Plaintiff signed a separation agreement (*id.*). On May 4, 2018, Plaintiff received a draft separation agreement from Defendant that indicated his employment was terminated on March 31, 2018, and he received a termination notice on May 24, 2018 (*id.* ¶¶ 77-78). Plaintiff alleges that the May 4, 2018 letter was his first notification of the March 31, 2018 termination date (*id.*). Based on these allegations, Plaintiff asserts that questions of fact exist regarding the effective date of termination.

Defendant maintains that Plaintiff was terminated in March 2018 and presents a variety of documents to sustain its position. First, Defendant presents a March 20, 2018 email from Schlumberger to other employees of Defendant, in which he states, in relevant part, the following:

[7] Specifically, Plaintiff alleges that on April 10, 2018, he "came into the office for a discussion about an add-on acquisition" for Shawnee Oil Company ("SOC"), one of the companies associated with the Resource Fund, on April 18, 2018, and that he "received and answered questions regarding SOC from one of Defendant's employees, and that throughout the month of April 2018, Plaintiff was still receiving calls from SOC's CEO, for advice and counsel to run the business (NYSCEF Doc No 18 ¶¶ 72-74).

> We gave notice to Dean Schaffer yesterday of termination of his employment at Coral Reef Capital LLC. We proposed to pay him severance until the end of May 2018 and that his vested carry is fine with the Energy Fund and Fund II but that he would not keep his unvested carry. I think we probably need to give him an official letter. Also if there are other terms we need to think of. Also we will need to notify the Advisory Committees of the Funds.

(NYSCEF Doc No 38). Next, Defendant submits a March 22, 2018 draft resignation and acknowledgment of termination that Schlumberger attests he "sent to Plaintiff to be signed following our conversation on March 20, 2018" (Schlumberger Aff. [NYSCEF Doc No 34] ¶ 4; NYSCEF Doc No 37). Third, Defendant submits a March 22, 2018 email from Defendant's CFO directing Defendant's bank to remove Plaintiff's signing authority and his access to Defendant's account (NYSCEF Doc No 33). Finally, Defendant submits a May 24, 2018 letter from Schlumberger on behalf of Defendant to Plaintiff. The letter states, in relevant part, "[y]ou were provided notice of the termination of your employment with the Company on March 22, 2018. The effective date of the termination was March 31, 2019" (NYSCEF Doc No 36).

Although the documents submitted by Defendant may suggest that it intended to terminate Plaintiff at the end of March 2018, they do not conclusively contradict Plaintiff's allegation that he was not notified of the effective date of termination until May 4, 2018 or the allegations that he performed work for Defendant throughout April 2018. The March 20, 2018 email demonstrates only that Plaintiff was notified of the termination and does not indicate the effective date of termination or any document that Plaintiff was notified of same. The draft resignation letter dated March 22, 2018 is unsigned, and nothing within the text of the letter or Schlumberger's affidavit indicates the date on which it was given to Plaintiff. Similarly, neither the March 22, 2018 email or the May 24, 2018 letter provides irrefutable proof that Plaintiff was advised of the March 31, 2019 effective date of termination prior to May 25, 2019. In short, issues of fact exist regarding the effective date of Plaintiff's termination; when he was advised of

such date; and whether Plaintiff continued to provide services to Defendant after he was terminated. The proposed amended cause of action for breach of contract I, therefore, not palpably insufficient. As such, Defendant's motion is denied as to this cause of action, and the motion to amend is granted.

D. Quantum Meruit and Unjust Enrichment

The proposed amended complaint includes a cause of action titled "Quantum Meruit – Unjust Enrichment" (NYSCEF Doc No. 18 at 16). Plaintiff's argument in support of such amendment cites cases which recognize a plaintiff's ability to engage in alternative pleading of equitable claims within a complaint that also includes a claim at law for breach of contract (*see*, NYSCEF Doc No 15 at 11-9-12).

Defendant argues that Plaintiff's motion to amend the complaint to add a claim for unjust enrichment should be denied because Plaintiff does not allege that the services he provided in April 2018, after the contested date of his termination, were at the request or behest of Defendant. Plaintiff contends that he should be permitted to plead unjust enrichment as an alternative theory of relief. To state a cause of action for unjust enrichment a plaintiff must demonstrate "that (1) defendant was enriched, (2) at plaintiff's expense, and (3) that it is against equity and good conscience to permit defendant to retain what is sought to be recovered" (*Farina v Bastianich*, 116 AD3d 546, 548 [1st Dept 2014]). "A person may be unjustly enriched not only where she receives money or property, but also where she otherwise receives a benefit" (*id.*). Where the existence or scope of a contract is contested, as they are here, Plaintiffs are permitted to plead unjust enrichment as an alternative theory of liability (*Loheac v Children's Corner Learning Center*, 51 AD3d 476, 476 [1st Dept 2008] [Plaintiff permitted to plead alternative theory of unjust enrichment where "[t]here is a dispute as to the scope of work intended by the

original oral contract and whether plaintiff is owed money outside the scope of that agreement"]).

Here, Plaintiff alleges that he provided services to the benefit of Defendant pursuant to an agreement of employment and under the understanding that his employment continued into the contested period of time. At least one of the specific allegations from this period of time alleges that Plaintiff received and answered questions from an agent of Plaintiff regarding a business matter, and Plaintiff continued to receive inquiries from a client of Defendant during the period in question. At this early, pre-discovery stage of the litigation, and where Defendant disputes the existence of any contract between the parties, these allegations are sufficient to resist the motion to dismiss. Therefore, Plaintiff's motion to amend the complaint and add a cause of action for unjust enrichment is granted.

Accordingly, it is

ORDERED that the motion to dismiss is denied, and the cross-motion to amend the complaint is granted; and it is further

ORDERED that an amended summons and complaint, in the form annexed to the motion papers filed as NYSCEF Doc No 18, shall be deemed served by virtue of such filing, on defendant Coral Reef Capital LLC, and shall be served on proposed additional defendants CRC GP LLC and CRC Energy GP LLC in accordance with the Civil Practice Law and Rules; and it is further

ORDERED that defendant Coral Reef Capital LLC will have 30 days from the date of filing hereof to respond to the amended complaint, and that the additional defendants will have such time as is afforded them by the Civil Practice Law and Rules to respond to the amended complaint subsequent to service of process upon them; and it is further

ORDERED that counsel for the parties shall contact the chambers of this court at lfurdyna@nycourts.gov within ten days of filing this decision and order to schedule a preliminary conference to be held thereafter.

12/10/2020
DATE

LOUIS L. NOCK, J.S.C.

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