SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS _____ **PART** 53
Justice

Index Number : 653301/2013
WILLIAM MORRIS ENDEAVOR
vs
RIVERA, GERALDO
Sequence Number : 002
— DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read ... **for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

_____ **is decided in accordance with accompanying memorandum decision and order.**

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

Dated: 3/26/2014

_____, J.S.C.
CHARLES E. RAMOS

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

WILLIAM MORRIS ENDEAVOR ENTERTAINMENT, LLC,

Plaintiff,

-against-

INDEX NUMBER 653301/2013

GERALDO RIVERA and MARAVILLA PRODUCTIONS CO., INC.,

Defendants.

Hon. Charles E. Ramos, J.S.C.:

In this contract dispute, defendants Geraldo Rivera (Rivera) and Maravilla Productions Co., Inc. (Maravilla) move, pursuant to CPLR 3211 (a) (1), (3), (5) and (7), to dismiss the complaint.

Factual Background

According to the complaint, plaintiff William Morris Endeavor Entertainment, LLC (WME) is a talent agency representing performing artists, authors, and entertainers. Rivera is a television personality, who currently hosts a program on the Fox News Network (Fox). Maravilla is Rivera's personal services corporation, organized and operating under New York law. WME's predecessor, William Morris Agency, Inc. (WM), first contracted with Rivera in 1985.[1]

Their letter agreement, dated October 14, 1985, gave WM a 10% commission "of the gross compensation and/or other

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[1] A merger created WME in 2009.

consideration paid" to Rivera "whenever made and whether procured by you [WM], me [Rivera and Maravilla] or any third party." Braun opposition aff, exhibit 1, ¶ 4 (a). This agreement reached beyond its three-year coverage period to "any and all extensions, renewals, modifications, substitutions for and additions to such contracts whenever made, and whether procured by you, me or any third party." *Id.* On July 6, 1988, the parties agreed to a three-year extension of their agreement. *Id.*, exhibit 2. Further three-year extensions were agreed to on August 12, 1991 and September 29, 1994. *Id.*, exhibits 3 and 4. Each of the four letter agreements was paralleled by an executed "Standard AFTRA Exclusive Agency Contract" (AFTRA Contract). *Id.*, exhibits 6, 7 and 8; Rivera aff, exhibit A. It is undisputed that no written contract succeeded the September 29, 1994 letter agreement and the corresponding AFTRA Contract.

WME continued to represent Rivera after the expiration of the last agreement in 1997, being paid commissions through January 2010. During this later period, defendants negotiated a four-year agreement with Fox, in June 2005, and renegotiated the agreement with Fox, on January 26, 2009, extending it through December 31, 2011. When WME demanded commission payments from February 2010 until December 31, 2011, defendants allegedly refused to pay, denying responsibility for such commissions.

The instant action commenced on September 24, 2013, with the complaint asserting causes of action for breach of contract, quantum meruit and unjust enrichment.

Discussion

In support of his motion to dismiss, Rivera represents that, when executing the September 1994 AFTRA Contract, he "made clear that only Jim Griffin was to be responsible for handling my representation in film, television and radio, and that the Agreement would terminate if Griffin did not remain at WM." Rivera aff, ¶ 3. Rivera claims that he struck the names of other WM employees proposed to represent him listed on the September 29, 1994 AFTRA Contract, leaving only Griffin's name. *Id.* The copy of this AFTRA Contract confirms these changes. Rivera aff, exhibit A.

In addition, Defendants maintain that "[s]ince the early 1980s, the only person who has represented Rivera in his television, radio, film and book deals is his agent, Jim Griffin. While Griffin was with WM for thirty-two years, through December 31, 2009, no one else at WM was ever authorized to represent Rivera." Defendants' memorandum of law at 1. This may, in fact, be the case, but preprinted as paragraph 8 of each AFTRA Contract is the following:

> "The Agent agrees that the following persons, and the following persons only, namely
>
> (HERE INSERT NOT MORE THAN FOUR NAMES)

shall personally supervise the Artist's business during the term of this contract."

The October 14, 1985 AFTRA Contract, the companion to the October 14, 1985 letter agreement, lists Lou Weiss, Walter Zifkin, Lee Stevens and Jim Griffin in the space provided. Braun opposition aff, exhibit 6.

The July 6, 1988 AFTRA Contract, the companion to the July 6, 1988 letter agreement, repeats these four names, but Walter Zifkin is crossed out and replaced, by hand, with Robert Crestani. *Id.*, exhibit 7.

The August 12, 1991 AFTRA Contract, the companion to the August 12, 1991 letter agreement, lists Jim Griffin, Lou Weiss and Norman Brokaw. *Id.*, exhibit 8. Walter Zifkin's typed name has been overwritten with Bob Crestani, and the change initialed "GR".

However, Griffin's name does stand alone on the September 29, 1994 AFTRA Contract, after redactions initialed GR. This is the last written contract.

Rivera contends that Griffin "was forced out by WME, [after the merger]." Rivera aff, ¶ 6. After Griffin moved to Paradigm Talent Agency (Paradigm), another talent agency, on January 1, 2010, Rivera claims that he "went with him, and paid commissions to Griffin." Defendants' memorandum of law at 1-2.

Regardless of Griffin's position, Rivera maintains that he

has never had an agency agreement with WME. The last representation agreement, he argues, was with WM, dating back to September 1994, running to October 1997. Further, Rivera states that WME "did not seek my consent to their representation of me. I have never been given any advice by an agent for WME, written or oral. I have never been to an office of WME, nor have I ever met an agent for WME in a professional capacity." Rivera aff, ¶ 5. He objects to being asked to pay "for work never performed, by agents I never met." *Id.*, ¶ 6.

Even if there was an agreement between WME and defendants, they argue that WME is not entitled to commissions for Rivera's work for Fox for two reasons. First, New York's statute of frauds, General Obligation Law § 5-701 (a) (1), requires an agreement, that "[b]y its terms is not to be performed within one year from the making thereof," be in writing. *Sheehy v Clifford Chance Rogers & Wells LLP*, 3 NY3d 554, 560 (2004) ("Because memories fail over time, the statute requires a written contract for an agreement that is not to be performed within one year of its making"); *D & N Boening v Kirsch Beverages*, 63 NY2d 449, 455 (1984) ("Wherever an agreement has been found to be susceptible of fulfillment within that time, in whatever manner and however impractical, this court has held the one-year provision of the Statute to be inapplicable, a writing unnecessary, and the agreement not barred").

Contracts for commissions have been specifically examined by New York courts in light of the statute of frauds. *Zupan v Blumberg*, 2 NY2d 547, 550 (1957) ("A service contract of indefinite duration, in which one party agrees to procure customers or accounts or orders on behalf of the second party [in return for a percentage commission], is not by its terms performable within a year -- and hence must be in writing ... since performance is dependent, not upon the will of the parties to the contract, but upon that of a third party"); *Guterman v RGA Accessories*, 196 AD2d 785, 785 (1st Dept 1993) ("The indefinite promise to pay commissions on all future sales is clearly within the Statute [of Frauds] and voidable for want of a writing satisfying the Statute").

Assuming that the parties executed a letter agreement and/or an AFTRA Contract on or about September 29, 1994, no one claims that they executed any form of written commission agreement after 1997, after the end of the typical three-year period of the earlier agreements and AFTRA Contracts. Therefore, pursuant to the statute of frauds, WME seemingly has no enforceable claim against defendants for commissions allegedly earned after September 29, 1997.

WME argues that the parties "continued the[ir] relationship on the same terms after the last written agency agreement expired" on October 14, 1997. Plaintiff's memorandum of law at

1. There is no dispute that defendants continued to pay commissions to WM and WME, in the absence of any written agreement, up to January 2010, when Griffin left WME for Paradigm. WME posits an unwritten "Agency Agreement" that defined the parties relationship "after the last written agency agreement expired." *Id.* at n 1. This Agency Agreement allegedly arose after October 14, 1997, when "the parties - by their agreement and conduct - further extended their agency relationship under the same terms as the 1985 Letter Agreement, 1988 Extension, 1991 Extension and 1994 Extension." *Id.* at 4.

WME claims that the "Agency Agreement is memorialized and reflected in multiple writings," the agreements and extensions cited, invoices, payments, letters and communications between the parties. *Id.* at 4-5. WME views the alleged Agency Agreement as effectively operating in perpetuity "[u]nder the express terms of the 1985 Letter Agreement (and, consequently, all written, oral and implied extensions thereof) ..." *Id.* at 6. According to WME, defendants owed WME commissions for any employment-related payments received, regardless of the parties' relationship. *Id.*

WME tries to avoid application of the statute of frauds to the purported Agency Agreement by focusing upon Rivera's contract with Fox, the basis of the disputed commissions. WME maintains that defendants might have declined to enter into a contract with Fox, the Fox contract might have been limited to one year or

less, or the Fox contract might have allowed termination at any time.[2] Any of those circumstances, according to WME, excused the Fox contract, and any associated commissions, from the reach of the statute of frauds.

However, the terms and conditions of the Fox contract are irrelevant to WME's case. The Fox contract may not satisfy the statute of frauds, but no one is seeking to enforce the Fox contract here. It is the alleged Agency Agreement that is under review, and it is not merely another name for the Fox contract. WME even points out that "the Agency Agreement predates the Fox News Agreement." Plaintiff's memorandum of law at 11. WME never suggests that a short-lived Fox contract would have terminated the Agency Agreement.

The alleged Agency Agreement is an oral agreement, a logical construct on behalf of WME's position. The writings executed by the parties in 1985, 1988, 1991 and 1994 all specified a three-year term. After 1997, they followed a consistent course of conduct in their dealings, but no written agreement controlled their behavior. Undoubtedly, the alleged Agency Agreement is unenforceable by application of the statute of frauds, as well-illustrated by a case on point, *McCollester v Chisholm* (104 AD2d 361, 362 [2d Dept 1984], *affd* 65 NY2d 891 [1985]) ("it is

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[2] Neither party annexed a copy of the Fox contract to the motion papers.

undisputed that there was no formal, signed contract between the parties. Since plaintiff has neither pleaded nor proved the dates upon which the alleged agreement between him and defendant . . . was to commence and terminate, the agreement was indefinite in duration and therefore falls squarely within the Statute of Frauds"). Therefore, the Court concludes that the parties had no enforceable commission agreement after October 1997, because the statute of frauds requires a written agreement.

Defendants' second objection to WME's claim, also interposed as an affirmative defense, is premised upon the argument that the alleged Agency Agreement violated General Business law (GBL) § 181, which requires

> "every employment agency to give to each applicant for employment: 1. A true copy of every contract executed between such agency and such applicant, which shall have printed on it or attached to it a statement setting forth in a clear and concise manner the provisions of sections one hundred eighty-five, and one hundred eighty-six of this article."

The alleged Agency Agreement does not comply with this requirement. GBL § 171 (2) (d) defines an employment agency to include "any theatrical employment agency," and until amended in 2012 after this dispute arose, GBL § 171 (8) defined a "theatrical employment agency" as anyone who procures or attempts to procure employment for an artist in the "circus, vaudeville, the variety field, the legitimate theater, motion pictures, radio, television, phonograph recordings, transcriptions, opera,

concert, ballet, modeling or other entertainments or exhibitions or performances ..."

Defendants argue that WM and then WME had to provide them a "true copy," that is, a written copy of their contract. This Court agrees, that failing this, there was no enforceable agreement between the parties. *Sabia v Mattituck Inlet Mar. & Shipyard, Inc.*, 24 AD3d 178, 179 (1st Dept 2005) ("Since no right of action can arise from an illegal contract, plaintiffs are barred, as a matter of law, from suing on the alleged agreement for the purchase of the boat"); *Scotto v Mei*, 219 AD2d 181, 183 (1st Dept 1996) ("it is black-letter law that a contract entered into in violation of a statute is an unlawful undertaking and such an illegal contract cannot give rise to a viable cause of action").

Defendants move to dismiss the complaint on several grounds, that is, CPLR 3211 (a) (1), (3), (5) and (7). "In order to prevail on a CPLR 3211 (a) (1) motion, the moving party must show that the documentary evidence conclusively refutes plaintiff's ... allegations." *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 (2005). Here, the documentary evidence produced establishes that the parties had written agreements from 1985 through 1997 and oral agreements thereafter. This Court need not draw conclusions from the absence of succeeding documents but may rely on the failure to

allege an enforceable agreement. The complaint does fail to allege the existence of a written agreement that would satisfy the requirements of GBL § 171 (2) (d) or GBL § 171 (8).

On a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction. "Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations - claims consisting of bare legal conclusions with no factual specificity - are insufficient to survive a motion to dismiss." *Godfrey v Spano*, 13 NY3d 358, 373 (2009); *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). The instant complaint is founded on a cause of action for breach of contract, WME's claim that defendants failed to honor the unwritten Agency Agreement by ceasing commission payments after January 2010. As discussed above, the Agency Agreement is not an enforceable contract under New York law, failing to meet the requirements of the statute of frauds and GBL § 181, as it applied to theatrical talent agencies at the relevant time. Without a valid contract between the parties, no breach could lie.

The complaint offers causes of action for quantum meruit and unjust enrichment as equitable alternatives to its breach of contract claim. "Unjust enrichment and quantum meruit are, in this context, essentially identical claims, and both are claims

under a contract implied ... in law to pay reasonable compensation." *Snyder v Bronfman*, 13 NY3d 504, 508 (2009) (internal quotation marks omitted). To state a cause of action to recover in quantum meruit, a plaintiff must allege "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services allegedly rendered." *AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 19 (2d Dept 2008).

WME concedes that it was paid by defendants until January 2010, when Griffin left WME. The disputed unpaid commissions arose thereafter, when WME did nothing but wait for its regular commission payments from defendants. However, WME cannot rely upon a contract implied-in-law for compensation. *Wings Assoc. v Warnaco, Inc.*, 269 AD2d 183, 184 (1st Dept 2000) ("Since the alleged agreement is void by reason of the Statute of frauds, plaintiff cannot use the same alleged promise as a basis for a cause of action sounding in quantum meruit").

In addition, were this Court to enforce an oral agreement as WME urges, this Court would impose the terms of the last written contract, which as set forth above, provides (as Rivera insists) that Griffin would be his exclusive contact at WME. Thus, WME's discharge of Griffin would have ended any relationship between WME and Rivera.

For these reasons, the complaint must be dismissed, pursuant to CPLR 3211 (a) (7), because its causes of action for breach of contract, quantum meruit and unjust enrichment all fail to state a cause of action. The unwritten Agency Agreement is neither an enforceable contract, nor a promise obliging payment.

The Court has considered the plaintiff's remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that defendants Geraldo Rivera and Maravilla Productions Co., Inc.'s motion, pursuant to CPLR 3211 (a) (7), to dismiss the complaint is granted, with costs and disbursements to the defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

DATED: March 26, 2014

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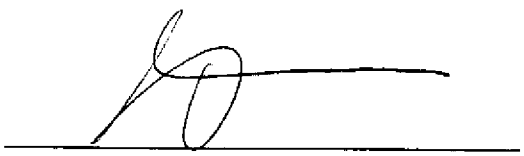

J.S.C.

CHARLES E. RAMOS