

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 18 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 12-7-04
Submission Date: 1-12-05
**Motion Sequence No.: 001,002,003,004/
MOT D**

**INTERNATIONAL OIL FIELD SERVICES
CORP.**

Plaintiff,

COUNSEL FOR PLAINTIFF
T. Kevin Murtha & Associates, P.C.
45 Post Road
Westbury, New York 11590

- against -

**FESTUS ALANI FADEYI a/k/a FESTUS
A. FADEYI a/k/a FESTUS FADEYI,
JASON OLUWATOYIN FADEYI a/k/a
JASON TOYIN FADEYI a/k/a JASON
FADEYI, PAN OCEAN OIL
CORPORATION, NIGERIA, CSS
PETROLEUM SERVICES, LLC,
JOHN/JANE DOE #1, JOHN/JANE DOE
#2, JOHN/JANE DOE #3, NIGERIAN
NATIONAL PETROLEUM
CORPORATION,**

Defendants.

COUNSEL FOR DEFENDANTS
**(for Festus Alani Fadeyi, Jason
Oluwatoyin Fadeyi and CSS Petroleum
Services, LLC)**
Borstein & Sheinbaum, Esqs.
420 Lexington Avenue - Suite 2920
New York, New York 10170-0002

x

ORDER

The following papers were read on the various motions listed below:

Motion Sequence # 1

CSS Petroleum Services, LLC Motion to Dismiss the Complaint:
Notice of Motion dated October 22, 2004;

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Affirmation of James B. Sheinbaum, Esq. dated October 22, 2004;
Defendant CSS Memorandum of Law;

Motion Sequence # 2

Festus Alani Fadeyi Motion to Dismiss the Complaint;
Notice of Motion dated October 22, 2004;
Affirmation of James B. Sheinbaum, Esq. dated October 22, 2004;
Defendant Festus Alani Fadeyi's Memorandum of Law;

Motion Sequence # 3

Jason Fadeyi Motion to Dismiss the Complaint;
Notice of Motion dated October 22, 2004;
Affirmation of James B. Sheinbaum, Esq. dated October 22, 2004
Defendant Jason Fadeyi's Memorandum of Law.

Motion Sequence # 4

Plaintiffs' Cross-motion to Amend the Complaint;
Notice of Cross-motion dated December 3, 2004;
Affidavit of Albert Langoria sworn to on December 3, 2004;
Affirmation of Joseph E. Madsen, Esq. dated December 3, 2004;

Additional Papers:

Reply Affirmation of James B. Sheinbaum, Esq. dated December 20, 2004 (Motion Seq. #1);
Reply Affirmation of James B. Sheinbaum, Esq. dated December 20, 2004 (Motion Seq. #2);
Reply Affirmation of James B. Sheinbaum, Esq. dated December 20, 2004 (Motion Seq. #3);
Defendant Festus Alani Fadeyi's Reply Memorandum of Law;
Defendant Jason Fadeyi's Reply Memorandum of Law.
Affirmation of William Bird III, Esq. dated January 11, 2005.

Defendant CSS Petroleum Services, LLC moves, pursuant to CPLR 3211 (a)(1) and (7), for an order dismissing the complaint on the grounds that there are no separate causes of action asserted against it and no request for relief or damages as against it.

Defendant Festus Fedeyi moves for an order, pursuant to CPLR 3211(a)(1), (5) and (7) and 3016(b), dismissing the complaint on the grounds that the claims for breach of contract, breach of fiduciary duty and fraud are not pleaded with the requisite particularity; that the claims are time barred; that certain contract claims are barred by the Statute of Frauds; and that the complaint fails to state a cause of action.

Defendant Jason Fadeyi moves for an order dismissing the complaint on the same grounds as those proffered by co-defendant Festus Fadeyi.

Plaintiff International Oil Field Services Corp. cross-moves, pursuant to CPLR 3025, 2004 and 2005, for an order permitting Plaintiff to correct/amend the complaint to assert a cause of action against Defendant CSS Petroleum Services, LLC; for an order declaring Defendants to be in default in answering; and for an order consolidating the Defendants motions. The remaining Defendants, Nigerian National Petroleum Corp., and Pan Ocean Oil Corp have not been served and have not appeared.

INTRODUCTION

Plaintiff brings this action against CSS Petroleum Services, LLC, Festus Fadeyi and his son, Jason Fadeyi, claiming breach of contract, breach of fiduciary duty, unjust enrichment and fraud. These Defendants now move to dismiss the complaint against them. Defendants are in default based upon their delay in moving to dismiss. The delay in bringing these motions is extremely brief, and *de minimis*; five days. Under the

circumstances, Defendants' informal request for an extension of the time to move should be granted. Pursuant to CPLR 2004, the motions are deemed timely. See, Junior v. City of New York, 85 A.D. 2d 683, 684 (2nd Dept 1981) (by serving an answer after a brief delay and before the Plaintiff moved for a default judgment, Defendant demonstrated unequivocally its intention to diligently defend the action). Certainly, New York's strong public policy favoring the resolution of matters on their merits (see, e.g., Robles v. Grace Episcopal Church, 192 A.D. 2d 515 [2nd Dept. 1992]; I.J. Handa, P.C. v. Imperato, 159 A.D. 2d 484 [2nd Dept. 1990]), militates in favor of addressing the merits of these motions.

BACKGROUND

In a disjointed and chronologically meandering 232 paragraph complaint, Plaintiff, International Oil Field Services Corp. ("IOFS"), avers that it was associated with Defendant Festus Fadeyi ("Festus") since 1989. It also addresses an alleged business relation between Festus and his son, Defendant Jason Fadeyi ("Jason"), covering a period of fifteen years.

Plaintiff alleges that it provided goods and services to Festus' Nigerian oil exploration company, Defendant Pan Ocean Oil Corporation ("Pan Ocean"), between 1993 and 2003 and that Festus promised to provide services to Plaintiff, the nature of which, inexplicably, are not identified. Examination of the complaint reveals only

allegations that Plaintiff paid Festus \$1,337,259.00 and that Festus represented to IOFS “that [he] was tendering valuable consideration to IOFS in exchange for such payments” (Complaint ¶ 76), that “IOFS will expand and grow in Nigeria and the United States . . . provided that Festus Fadeyi continues to receive payments for his services to IOFS” (Complaint ¶ 54) , that “IOFS would expand through his assistance” (Complaint ¶ 81) and that Festus would “engage in activities” which would “expand” IOFS’ business operations “within the Republic of Nigeria and within the United States” (Complaint ¶ 156).

Precisely how Festus was to effect the expansion of IOFS is not revealed. There is no allegation otherwise shedding light on the “activities” or services he was to provide in consideration for the approximately \$1 million dollars in payments over a ten year period. Only the intended result is given; to wit: participation in oil drilling contracts in Nigeria.

There are other written agreements attached to the complaint, the relevance of which is not made clear. One is a letter agreement dated April 30, 1994 between Pan Ocean and “International Oil Field Supply, Inc.” which provides for petroleum engineering consulting services by Norman De Mauriac Hammond to Pan Ocean for a period of one year (Complaint Ex. A). No breach of this agreement is alleged.

The second agreement is for the "Sale of Business Interest by Stock Purchase" dated December 1, 1995. It provides for the sale of 80 treasury shares of International Oil Field Supply, Corp. stock, constituting an 80% ownership interest, to Jason for a purchase price of \$1 million. (Complaint Ex. C)

With regard to the stock sale, the complaint reveals that in 1995 Festus "requested" that IOFS sell Jason 80% of its stock for a price of \$1 million, and requested IOFS to participate in an "Immigrant Petition by Alien Entrepreneur" for Jason to achieve permanent residency status in the United States based upon an investment made in an American company. IOFS redeemed Jason's stock after he received his "green card". This also was allegedly at the instance of Festus.

Documentation concerning a special meeting of the Board of Directors indicates that Jason was elected Assistant Vice President of the corporation, and was to serve without compensation until he was "approved to obtain gainful employment" in the United States. The document shows Albert Longoria was the President and T. Kevin Murtha (Plaintiff's counsel of record in this action) was the Treasurer/Secretary. Documentation for several agreements providing for the redemption of Jason's shares by "International Oil Field Supply" are annexed to the complaint. No breach of these agreements is alleged.

An additional agreement dated August 20, 1998 ("1998 Contract") provides for "International Oil Field Supply Corporation d/b/a Intercon" to "make Advances" to Pan Ocean Oil Corp. (Complaint Ex. F). Under their agreement, Pan Oil is obligated to reimburse Intercon for such "Advances", plus a 10% service fee and costs within "45 days" of the date Intercon sends an invoice. No breach of this agreement is alleged.

Finally, an agreement dated January 1, 2003 between International Oil Field Services, Corp. d/b/a "Intercon" and Pan Ocean Oil Corp. provides for IOFS to "cover technical expertise for oil and gas exploration, drilling and production operations through IOFS Consultants". This agreement provides that IOFS consultants "shall supervise other engineering contractors and vendors" on behalf of Pan Ocean's venture and "provide guidance on behalf of" Pan Ocean in Nigeria (the "Nigeria Agreement").

Pan Ocean's oil drilling venture in Nigeria was made possible by its association with the Defendant, Nigerian National Petroleum Corporation ("NNPC"), an "entity operating under laws of the Federal Republic of Nigeria, pursuant to the Nigerian National Petroleum Corporation Act".

Under the terms of the Nigeria Agreement between Pan Ocean and IOFS, IOFS agreed to treat as "proprietary" information belonging to Pan Ocean. The Agreement provided for a monthly \$30,000.00 fee for each consultant IOFS provided to Pan Ocean, together with certain other payments for expenses. The Nigeria Agreement's one

year term commenced on January 1, 2003, with automatic annual renewals thereafter, “unless terminated in writing by either party on or before 60 days prior to the renewal date . . .” There are no allegations that this agreement was breached, or that Plaintiff did not receive the required notice. However, Plaintiff makes a bald allegation that it was always the intention of Pan Ocean to take over the services provided by IOFS and not to allow any automatic renewal of the Nigeria Agreement. The alleged takeover vehicle was the newly formed Defendant CSS Petroleum Services, LLC (“CSS”).

The only allegations against Jason are that he purchased and resold IOFS stock, and that he is a partner of CSS, a limited liability company which filed Articles of Organization in New York State in May 2003.

In a proposed amendment to the complaint to assert causes of action against CSS (none were alleged in the complaint), Plaintiff obliquely alleges that funds earned before and after the cancellation of the Nigeria Agreement belong to IOFS but were paid to CSS and were wrongfully withheld from Plaintiff. The only supporting documents are CSS’ 2003 Articles of Organization and a 2004 Panoco (Pan Ocean) inter-office letter which advises that, effective February 4, 2004, CSS would replace International Oil Field Services Corporation, stating “all business with Intercon will cease and be replaced with CSS”.

Plaintiff claims that it is entitled to earnings of \$189,000 per month for a period of eighteen months from May 2003 (the CSS filing date) to November 2004, stating that CSS "billed and received specific funds" from Pan Ocean that should have been paid to IOFS, and that CSS "converted" such funds. No invoices or other factual detail is provided. The amendment to the complaint does not allege that Plaintiff was not paid for all services performed under the Nigeria Agreement. Rather, the allegations appear to claim that any earnings of CSS should have been those of IOFS. Revealing in this regard is paragraph "53" of the affidavit of IOFS president Albert Longoria who states that Festus and Jason "secretly created CSS Petroleum, a competing organization to seize control of IOFS employees, contracts, and business, and exploited the work already done by IOFS on the developing projects in Nigeria . . ." The inference is that IOFS was entitled to continue in Pan Ocean's oil exploration activities with NNPC, and thus CSS was reaping profits which should have gone to IOFS.

The proposed amendment also asserts claims that CSS tortiously induced Pan Ocean to breach the Nigeria contract and the 1998 contract to advance funds. Significantly, there is no allegation of a breach regarding either agreement. Offered in support to establish merit is the 2004 inter-office letter, which, however, is dated subsequent to the non-renewal and cancellation of the Nigeria Agreement.

Two additional causes of action seek an accounting and allege interference with proposed business opportunities.

DISCUSSION

A. Motion to Dismiss - Standard

A liberal construction is given to a pleading attacked for insufficiency, and if it states “any cause of action known to our law” it will not be dismissed. Rinaldi v. Casale, 13 A.D. 3d 603, 604 (2nd Dept. 2004); and Well v. Yeshiva Rambam, 300 A.D. 2d 580 (2nd Dept. 2002). See also, Guggenheimer v. Ginzburg, 43 N.Y. 2d 268 (1977); and Rovello v. Orofino Realty Co., 40 N.Y. 2d 633 (1976). The facts stated in the complaint “must be taken as true”, and Plaintiff must be accorded “the benefit of every possible favorable inference”. *Supra* at 605. See also, 511 West 232nd Street Owners Corp. v. Jennifer Realty Co., 98 N.Y. 2d 144 (2002). However, “bare legal conclusions and factual claims which are flatly contradicted by the evidence” merit no such deference. See, Palazzolo v. Herrick, Feinstein, 298 A.D. 2d 372 (2nd Dept. 2002). That is, an allegation that a Defendant owes a fiduciary duty without a factual basis to support it constitutes a bare legal conclusion which carries no weight.

B. Breach of Fiduciary Duty

Plaintiff offers no factual support for the bare allegations that any of the Defendants owe it a fiduciary duty, with the sole exception of Jason Fadeyi, who will be discussed *infra*. In this case, there is nothing in the complaint which indicates the existence of a fiduciary relationship between IOFS and Festus, Pan Ocean or CSS. The complaint indicates that the relationship between Plaintiff, Festus Fadeyi and Pan Ocean was an arms-length business relationship, which “does not give rise to a fiduciary duty”. Atkins Nutritionals Inc. v. Ernst & Young, LLP., 301 A.D. 2d 547, 549 (2nd Dept. 2003). See also, Clark - Fitzpatrick, Inc. v. Long Island Railroad Co., 70 N.Y. 2d 382 (1987); and WIT Holding Corp. v. Klein, 282 A.D. 2d 527 (2nd Dept. 2001).

Plaintiff appears to allege that because it was the sole source of Festus’ income – – he was not paid by Pan Ocean, that fact alone created a “special relationship” and a consequent fiduciary duty. However, Plaintiff was on notice that Festus was a shareholder and officer of Pan Ocean. As such, Festus owed a fiduciary duty to Pan Ocean. See, Barbour v. Knecht, 296 A.D. 2d 218, 227 (1st Dept. 2002). Plaintiff offers no authority that a duty of loyalty did not exist because Festus received no compensation. Thus, Festus owed a primary loyalty to Pan Ocean; not IOFS.

Insofar as the vague and ambiguous pleading may be read to allege that a fiduciary duty arose out of an agency relation, there are no factual allegations to support the existence of an agency relationship. The basic tenet of the principal–agent

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relationship is control. There is no allegation that Festus or Pan Ocean acted "in accordance with the direction and control" of IOFS. William Steven, Ltd. v. Kings Village Corp., 234 A.D. 2d 287, 288 (2nd Dept. 1996). Control of the agent by the principal is the "*sine qua non*" of the agency relationship. Park Ave. Imports v. U.S., 299 F.Supp. 528, 533 (Customs Ct.1969). Such relationship prohibits the agent from acting on his own account or for his own profit in the same matter. Matter of Grotzinger, 81 A.D. 2d 268, 273 (1st Dept. 1981); and Dutton v. Willner, 52 N.Y. 312, 319 (1873). Here, not only is there is no allegation of IOFS control over Pan Ocean or Festus, the affidavit of IOFS' president avers the opposite (Longoria aff. ¶ ¶ 48-53). Moreover, the complaint indicates that Pan Ocean was pursuing its own business interests and not acting solely on behalf of IOFS.

Plaintiff also relies upon case law which holds that a fiduciary relationship exists under New York law when a person "is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation". See, Flickinger v. Harold C. Brown & Co., 947 F.2d 595 (2nd Cir. 1991)(relating to a securities broker). To find a fiduciary duty under such circumstances a court will look to whether a party "reposed confidence in another and reasonably relied on the other's superior expertise or knowledge". Wiener v. Lazard Freres & Co., 241 A.D. 2d 114, 115 (1st Dept. 1998). Plaintiff's memorandum of law addresses only the vague promises of business expansion over a ten year period and, in 2000, a specific promise of "participation" in

four mineral lease concessions in Nigeria. IOFS was to participate in such mineral leases by providing consulting and supervisory services for production. Festus' superior knowledge and skill was not relied upon. Thus, the authority relied upon is inapposite.

With respect to Jason, while he was a majority shareholder of Plaintiff, he clearly owed a fiduciary duty to the corporation. Barbour v. Knecht, *supra* at 227. An officer or director of a corporation "may not deprive the corporation of a business opportunity". However, when such officer is no longer an officer or director of the corporation, he owes no fiduciary duty to the corporation absent a covenant not to compete. Pangia & Co., CPAs, P.C. v. Diker, 291 A.D. 2d 539 (2nd Dept. 2002). No act or omission is alleged during the period in which Jason owed such duty to IOFS. His eventual association with CSS, when he was no longer a shareholder or officer of IOFS, does not constitute a breach of any duty to Plaintiff.

As there are only bare legal conclusions of a fiduciary duty alleged in the complaint, and the facts which are alleged negate the claim of agency, the causes of action alleging breach of fiduciary duty must be dismissed.

C. Accounting

The accounting cause of action must also be dismissed, as a fiduciary relationship between the parties is a prerequisite for such equitable relief. Hydro Investors, Inc. v. Trafalgar Power, 6 A.D. 3d 882 (3rd Dept. 2004).

D. Unjust Enrichment

Recovery based upon unjust enrichment is also not available to Plaintiff.

Plaintiff's admitted and willing participation in selling and redeeming its treasury stock, in what amounts to a fraud upon the United States Immigration and Naturalization Service, precludes Plaintiff from establishing that it has the requisite "clean hands" necessary to seek the court's aid. Kleeger v. Kleeger, 261 A.D. 2d 587 (2nd Dept. 1999) ("doctrine of unclean hands bars equitable remedy of recovering money obtained through unjust enrichment").

E. Breach of Contract

Turning to Plaintiff's causes of action for breach of contract, Plaintiff posits an agreement which does not identify the terms. Giving the complaint the benefit of every inference, there are only vague allegations that Festus was supposed to engage in "activities" with a resulting expansion of IOFS business in Nigeria and the United States.

With regard to the Nigeria contract, Plaintiff has failed to identify any breach, as the terms of that agreement permit a non-renewal notice and there is no allegation of noncompliance. The basis for Plaintiff's claim with regard to the Nigeria contract is suggested in the Longoria affidavit at paragraph 53. He states that Festus and Jason secretly created CSS Petroleum "and exploited the work already done by IOFS on the developing projects in Nigeria."

Addressing the cause of action for breach of contract, Defendants assert the affirmative defenses of the Statute of Frauds, as well as failure to state a cause of action. Dismissal for failure to state a cause of action for breach of contract is warranted “for failure to identify” contract terms breached. Chatlos v. MONY Life. Ins. Co., 298 A.D. 2d 316 (1st Dept. 2002), *lv. app. den.*, 99 N.Y. 2d 504 (2003). On this ground alone, the breach of contract cause of action alleging that Festus failed to “expand” IOFS’ business is subject to dismissal.

The Longoria affidavit states that Festus and Jason made promises “during the course of the relationship from approximately 1993 to 2003” that “IOFS would act as the New York office for Pan Ocean” upon Pan Ocean’s renewal of its mining leases with the NNPC “to be completed in or about 2003.” NNPC is the quasi-governmental Nigerian oil exploration company with which Pan Ocean was an exploration participant. If it is Plaintiff’s claim that its payments for services to Festus were in consideration for the above promise, the agreement is one which could not have been performed within a year and was barred under the Statute of Frauds (General Obligations Law § 5-701[a][1]).

The Court rejects Plaintiff’s contentions of contract liability resting upon Festus’ failure to provide “services, value, opportunities, or expansion” for the payment of over \$1 million dollars over a ten year period. Contrary to Plaintiff’s contention, the

complaint does not sufficiently plead the “terms” of the alleged contract, the consideration owed by Festus or a breach of the contract. See, Furia v. Furia, 116 A.D. 2d 694 (2nd Dept 1986). The bare contention that Festus failed to engage in “activities” resulting in expansion of Plaintiff’s business in Nigeria is ‘too vague to support a breach of contract claim’. See, Levine v. Lacher & Lovell-Taylor, 256 A.D. 2d 147 (1st Dept 1998).

E. Tortious Interference with Contract

The failure to identify a breach of a specific contract term also precludes any cause of action for tortious interference with the Nigeria Agreement, as a breach is a fundamental requisite for such tort. Tortious interference with contract requires “the existence of a valid contract between the Plaintiff and a third party, Defendant’s knowledge of that contract, Defendant’s intentional procurement of the third-party’s breach of the contract without justification, actual breach of the contract and damages resulting therefrom”. Lama Holding Co. v. Smith Barney, 88 N.Y. 2d 413, 424 (1996). As there was only a non-renewal pursuant to the terms of the contract, no breach of the Nigeria Agreement has been identified. Moreover, as Plaintiff alleges that Festus induced Pan Ocean to breach the Nigeria Agreement, such claim fails in that he was a principal and officer of Pan Ocean. Thus, Pan Ocean is not a third party who could be induced to breach. Accordingly, all claims for tortious interference must be dismissed.

F. Tortious Interference with Business Relationship

Plaintiff also fails to state a cause of action for tortious interference with contractual relations, where a breach is not required. “To make out a claim for tortious interference with business relationships, a Plaintiff must show that the Defendant interfered with the Plaintiff’s business relationships either with the sole purpose of harming the Plaintiff, or by means that were unlawful or improper”. 71 Pierrepont Assocs. v. 71 Pierrepont Corp., 243 A.D. 2d 625, 625-6 (2nd Dept. 1997). Wrongful means are defined as representing “physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degree of economic pressure . . .” NBT Bancorp v. Fleet/Norstar Fin. Group, 87 N.Y. 2d 614, 624 (1996).

Plaintiff does not allege wrongful means in the Defendants’ pursuit of Plaintiff’s alleged business opportunities. Such pursuits clearly have a profit motive rather than a sole purpose to harm Plaintiff, as “the interference is intended at least in part to advance the competing interest of the interferer”. Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y. 2d 183, 190-1 (1980). Accordingly, the application to assert a cause of action for tortious interference with business relations against CSS cannot be granted.

G. Fraud

The remaining causes of action sound in fraud. Paragraph 208 of the complaint states in its entirety:

Festus Fadeyi misrepresented the purpose and relationship of IOFS and Pan Ocean in causing IOFS to accept Jason Fadeyi as a shareholder, as set forth on Exhibit "B" (Stock Purchase Agreement), and in causing IOFS to pay Festus Fadeyi the sum of \$1,337,295.00 and further to pay Jason Fadeyi the sum of \$1,471,402.00 under agreements as previously set forth herein, when in (sic) it was his intention to wrongfully convert the property and business of IOFS for his own use and benefit; and he continued to receive payments from IOFS and during such time Festus Fadeyi was taking the necessary steps to convert the business and property of IOFS for his own personal use.

Reading the foregoing in a most liberal manner, the basis of Plaintiff's claim rests upon allegations that Festus made false promises to Plaintiff regarding participation in future lucrative oil contracts, all the while intending to form his own company to capitalize on the initial services provided by Plaintiff under the Nigeria Agreement. The allegations of misrepresentation concerning Jason's stock purchase agreement is belied by IOFS' knowledge and willing participation in securing permanent residency status on Jason's behalf. Plaintiff has identified no other purpose for this transfer of stock which could have been the subject of misrepresentation.

To make out a *prima facie* case of fraud, Plaintiff must allege "representation of a material existing fact, falsity, scienter, deception and injury * * * In addition, each of these essential elements must be supported by factual allegations sufficient to satisfy

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the requirement of CPLR 3016 (subd [b]) that ‘the circumstances constituting the wrong shall be stated in detail . . . ’ Lanzi v. Brooks, 54 A.D. 2d 1057, 1058 (3rd Dept. 1976), *affd.*, 43 N.Y. 2d 778 (1977). See generally, Channel Master Corp. v. Aluminum Ltd. Sales, Inc., 4 N.Y. 2d 403 (1958); and Brown v. Lockwood, 76 A.D. 2d 721 (2nd Dept. 1989).

Essential to satisfaction of Plaintiff’s burden is an allegation of misrepresentation of a present fact. Stuart Lipsky, P.C. v. Price, 215 A.D. 2d 102, 103 (1st Dept. 1995); and Garelick v. Carmel, 141 A.D. 2d 501, 502 (2nd Dept 1988). A failure in this regard requires dismissal. Cohen v. Houseconnect Realty Corp., 289 A.D. 2d 277, 278 (2nd Dept. 2001). That is, a statement of future intentions, promises or expectations is not actionable as a fraud. Non-Linear Trading Co. v. Braddis Assocs. Inc., 243 A.D. 2d 107 (1st Dept. 1998); and Harris v. Camilleri, 77 A.D. 2d 861 (2nd Dept. 1980).

As to the allegations of fraud against Festus, they amount to no more than a present intention not to fulfill future promises to allow participation in lucrative Nigerian oil drilling contracts. The “unfulfilled promises” were not actionable as fraud (Jacobs v. Lewis, 261 A.D. 2d 127, 128 (1st Dept. 1999), as such representations do not constitute “actionable representations of fact”. Non-Linear Trading Co. v. Braddis Assocs. Inc., *supra*; and Harris v. Camilleri, *supra*. See also, Greenberg v. Chrust, 282 F. Supp.2d 112 (SDNY 2003). Festus’ claim that he would increase Plaintiff’s business in Nigeria constituted a declaration of intention; not a present or existing fact. Thus, his statements

are not actionable as fraud. This is particularly true in the present case since there could be no continued reasonable reliance upon such declarations continuing after many years had elapsed with no results. IOFS, a sophisticated petroleum service company, continued making monthly payments for a full decade, without results and apparently without question or objection. Reliance, under such circumstances, cannot be deemed justifiable under any reasonable view. See e.g., Cohen v. Cerier, 243 A.D. 2d 670 (2nd Dept. 1997). It is noted that the Statute of Limitations becomes an additional obstacle to a successful claim of fraud.

Plaintiff's additional claim that it was defrauded into the stock purchase agreement with Jason, based upon such representations, is belied by the documents in the record, including Plaintiff's willing assistance to secure permanent resident alien status on his behalf.

Accordingly, it is,

ORDERED, that the motion of Defendant CSS Petroleum Services, LLC to dismiss the complaint as to it is **granted**; and it is further,

ORDERED, that the motion of Defendant Festus Alani Fadeyi to dismiss the complaint as to him is **granted**; and it is further,

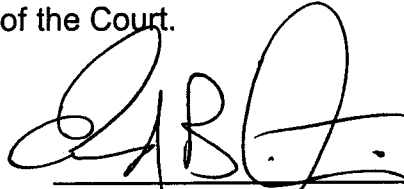
ORDERED, that the motion of Defendant Jason Oluwatoyin Fadeyito dismiss the complaint as to him is **granted**; and it is further,

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ORDERED, that Plaintiff's cross-motion is **denied** in its entirety.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
April 25, 2005



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED XXX

APR 28 2005

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**