

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

**TRIAL/IAS PART 3
NASSAU COUNTY**

COMPLUS DATA INNOVATIONS, INC.,

Plaintiff(s),

-against-

VINCENT PADULA and MVP ENTERPRISES, LLC,

Defendant(s).

ORIGINAL RETURN DATE: 10/16/09

SUBMISSION DATE: 11/06/09

INDEX No.: 10980/09

MOTION SEQUENCE #2

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2
Plaintiff's Memorandum of Law in Support of Motion.....	3
Defendants' Memorandum of Law in Opposition to Plaintiff's Motion	4
Plaintiff's Reply Memorandum of Law.....	5

Plaintiff moves for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the counterclaims of defendants. Although the memorandum of law submitted in support of plaintiff's motion also seeks sanctions, sanctions were not sought in the motion and will not be addressed by the court.

This action was commenced to recover damages for breach of contract, breach of covenant of good faith and fair dealing and breach of fiduciary duty against defendant Vincent Padula ("Padula") and for tortious interference with contract and unjust enrichment against defendant MVP Enterprises, LLC ("MVP"). Defendants interposed an answer which asserted affirmative defenses and counterclaims.

On or about May 3, 2006, plaintiff and defendant Padula entered into an agreement (the "Consulting Agreement" (Movant's Ex. 1). The term of the Consulting Agreement was twenty-four (24) months. The Consulting Agreement contained a restrictive covenant during Padula's engagement with plaintiff that he shall not:

"directly or indirectly, for his own account or as an employee, consultant, officer,

director, partner, joint venturer, shareholder, investor or otherwise in connection with a third party, within the states of New York, New Jersey, Maryland, Ohio, Illinois, Michigan, Connecticut, Massachusetts or Rhode Island, either engage in any phase of any business or enterprise similar to that of Corporation or in competition with Corporation or compete with the Corporation in any Business-related business . . .” (Id. ¶5(a)).

The Consulting Agreement also provided, in pertinent part, as follows:

“Consulting Services. The Corporation hereby retains the Consultant to render consulting and advisory services to the Corporation during the Term hereof in connection with the conduct of the Business [business of parking ticket management and related services] . . . Notwithstanding the foregoing, the Consultant shall perform the following: (a) inform his and MVP’s clients and potential clients that he and MVP are no longer providing any services related to the Business; (a) attempt to transition such clients to the Corporation; and (c) arrange for the Consultant and a representative of the Corporation . . . to have meetings with the Administrator of Parking of each of Quincy MA and New Bedford MA . . .” (Id. ¶2).

Plaintiff submits that the documentary evidence, the Consulting Agreement, conclusively establishes that defendants’ counterclaims fail as a matter of law. Moreover, it is submitted that there is no privity of contract between plaintiff and defendant MVP. In addition, plaintiff argues that the counterclaims fail to set forth a cause of action.

In reply MVP withdraws its counterclaims for breach of contract, breach of covenant of good faith and fair dealing and for unjust enrichment/quantum meruit. MVP’s counterclaim for tortious interference with prospective economic advantage remains, as well as Padula’s counterclaims for breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment/quantum meruit and tortious interference with prospective economic advantage.

It is alleged in plaintiff’s complaint that “[i]n or about November 2008, Complus learned that Padula violated the Agreement by providing parking ticket management services to the Milford Connecticut Police Department through MVP (Ex. 3 ¶12). Counsel for defendants submits that defendants reentered the marketplace after the Consulting Agreement lapsed in May 2008.

Although plaintiff in its moving affidavit claims that it paid all of the monies owed to Padula, Padula avers that he was only paid “\$34,000 despite the agreement to pay me \$36,000 and 10% commissions” (Padula Aff. ¶15). Counsel for plaintiff argues that Padula’s material breach of the Consulting Agreement relieves plaintiff from its contractual obligations. It is not clear, however, whether Padula’s alleged material breach occurred prior to plaintiff’s obligations for payment. Padula’s counterclaim for breach of contract alleges that plaintiff breached the contract by its failure to pay Padula.

Plaintiff's arguments that the counterclaims for breach of covenant of good faith and fair dealing and unjust enrichment/quantum meruit are governed by the Consulting Agreement are unavailing. Plaintiff submits that these claims are duplicative of the breach of contract claim.

"A breach of the covenant of good faith and fair dealing may include conduct, however, that does not violate an express term of the parties' [agreement], but constitutes arbitrary, irrational, or manipulative action in exercising discretion otherwise permitted under the contract" (*Ring v. Arts Intern., Inc.*, 7 Misc.3d 869 [Civ.Ct., City of NY 2004]). Although counsel for plaintiff asserts that Padula was to perform only those services plaintiff wanted or needed at its sole discretion, counsel for defendants submits that plaintiff failed to act in good faith and placed Padula on the sideline to "collect dust" (Def's Memo of Law).

Plaintiff may not argue that Padula's material breach of the Consulting Agreement relieves plaintiff from its contractual obligations "and then invoke that very contract as a means to avoid quasi-contractual liability (citation omitted). As there is a bona fide dispute as to the . . . scope of a contract, the defendant may proceed on theories of breach of contract and quantum meruit" (*Parkash v Utilisave Corp.*, 295 A.D.2d 330 [2d Dept. 2002]).

Plaintiff contends that defendants' claim for tortious interference must fail as a matter of law submitting that there must be an allegation that "but for" plaintiff's conduct, a contract would have been entered into. Plaintiff relies on *Algomod Tech. Corp. v. Price*, No. 602492/07, 1009 N.Y. App. LEXIS 6591 [1st Dept. 2009] which cited *Vigoda v. DCA Productions Plus, Inc.*, 293 AD2d 265 [1st dept. 2002]. In *Vigoda* plaintiffs could not name the parties to any specific contract. Here, Padula avers that Standard Corporation was contacted regarding a potential subcontractor opportunity for the City of Norwalk RFP.

In assessing a motion under CPLR § 3211(a)(7), a court may freely consider affidavits submitted by defendant to remedy any defects in the counterclaim (*Lazzarino v. Warner Bros. Entertainment, Inc.*, 13 Misc.3d 1230(A) [Sup. Ct. NY Co., 2006]).

Padula's affidavit also remedied the absence of an allegation of wrongful conduct. Padula avers that "plaintiff told Standard Corporation that (a) 'MVP is out of the ticket processing business and should not be bidding' (b) '[MVP] were bought out by Complus;' and (c) 'MVP has a non compete with Complus'" (Padula Aff. ¶28). Wrongful conduct includes misrepresentation (*see, Apex Equity Partners Inc. v. Murray*, 18 Misc.3d 1137(A) [Sup. Ct, NY Co. 2008].)

CPLR 3013 provides, as follows: "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be provided and the material elements of each cause of action or defense." "[T]he essential facts required to give 'notice' must be stated" (*Foley v. D'Agostino*, 21 AD2d 60, 63 [1st Dept. 1964]). "In considering the legal sufficiency of these allegations, [defendant] must be given the benefit of every possible favorable inference (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634) and the [counterclaim] should not be dismissed if 'upon examination of the four corners of the

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examination of the four corners of the pleading . . . the factual allegations contained therein indicate the existence of a cause of action' (citations omitted) " (*Reifenstein v. Allstate Ins. Co.*, 92 A.D.2d 715 [4th Dept. 1983]).

"Where, as here, evidentiary material has been considered in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (citations omitted). 'If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action' (*Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 46 A.D.3d 530, 846 N.Y.S.2d 368)" (*Zurich Depository Corp. V. Iron Mountain Info. Mgmt., Inc.*, 61 AD3d 750, 751 [2d Dept. 2009]).

"'[D]ismissal is warranted [pursuant to CPLR 3211(a)(1)] only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law [citation omitted]' (*Chaudhry v. Vital Holding Co. of NY, Inc.*, 51 A.D.3d 844, 845 [2d Dept. 2008]).

Taking the above factors into consideration, the court finds that defendant's remaining counterclaims state causes of action. Accordingly, plaintiff's motion to dismiss is denied.

This decision constitutes the order of the court.

Dated: 1-6-10

HON THOMAS P. PHELAN

J.S.C.

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ENTERED

JAN 15 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**