SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 39
NASSAU COUNTY

LYSAGHT, LYSAGHT & KRAMER, P.C.

Plaintiff.

Index No.: 002118/00
Sequence No.: 1 & 2

- against -

TRAGER, CRONIN & BYCZEK, LLP,
MARSHALL TRAGER, individually,
LINDA CRONIN, individually, and
CHRISTOPHER BYCZEK, individually.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Motion by defendants, Linda Cronin, Marshall Trager and Christopher Byczek, for an order pursuant to CPLR 3211(a)(7) dismissing the complaint as to the individually named defendants as not being personally liable for the debts, obligations or liabilities chargeable to the registered limited partnership, Trager, Cronin & Byczek, LLP (TCB), is granted to the extent of dismissing the entire complaint and causes of action therein against the individual defendants only, and also dismissing the second and third causes of action against defendant TCB for failure to state a cause of action.

Cross-motion by plaintiff, Lysaght, Lysaght & Kramer, P. C. (LLK):

(1) for summary judgment pursuant to CPLR 3212 on the issue of liability against defendants, Trager, Cronin & Byczek, LLP, Marshall Trager, individually, Linda Cronin, individually and Christopher Byczek, individually, for breach of the February 8, 1998 agreement and to set the matter down for an immediate inquest on the issue of damages;

(2) permitting plaintiffs to serve an amended complaint adding causes of action sounding

in unjust enrichment and quantum meruit; and

(3) pending resolution of the within matter, issue an order:

(a) directing defendants to provide an accurate list of the estimated one thousand (1,000) legal matters subject to the February 8, 1998 agreement, whether resolved or active;
(b) directing that defendants recognize a lien on all matters subject to the February 8, 1998 agreement;
(c) directing that defendants place and hold the attorney fee portion of the proceeds from any settlement or judgment on all legal matters subject to the February 8, 1998 agreement, whether resolved or active, in an interest bearing escrow account to be held until resolution of this matter,

is denied.

The first cause of action for breach of contract is dismissed as against the individual defendants only. The individual defendants are not parties to the contract dated February 8, 1998 (effective February 3, 1998) between LLK (as seller) and TCB (as purchaser). Said contract, which is annexed to the verified complaint shows that the individual defendants, Marshall D. Trager, Linda M. Cronin and Christopher Byczek, signed the contract on behalf of TCB solely in the official capacity as partners of TCB and not in their individual personal capacities. There is no allegation in the complaint that they were negligent or committed any act of misconduct while rendering services on behalf of the partnership or in rendering professional services in their capacity as a partner. Nor is there any allegation that the majority of the partners agreed that these individual defendants would be personally liable for the debts and obligations of the partnership and the partnership agreement does not so provide. Moreover, in paragraph 2 of the verified complaint, plaintiff LLK acknowledges that TCB is a Registered Limited Liability Partnership duly organized and existing under the laws of the State of New York; and defendant TCB admits this is so.

Therefore, Partnership Law section 26(b)(c) and (d) is applicable to the non-liability and liability for a partnership acts in a "registered limited liability partnership". Except in the case of negligence or misconduct or where there has been an agreement thereto [see Partnership Law, section 26(c) and (d)], no partner of a limited liability partnership is individually or personally liable for the debts, obligations or liabilities of a registered limited liability partnership. [Partnership Law, section 26(b).] Here, the alleged liability under the contract at issue was incurred by TCB while it was a registered limited liability partnership; and any conceivable liability that may arise from the allegations in the first cause of action in the verified complaint cannot, under any circumstances, give rise to individual partner personal liability, where as here, the individuals are partners of a duly registered limited liability partnership. Accordingly, there is no basis for continuing the individual defendants to the first cause of action. The case law cited by plaintiff is inapplicable here. Not only is the first cause of action dismissed as against

the individual defendants but the improper conclusion of law in paragraph "6" of the verified complaint is also stricken.

With respect to the second cause of action seeking damages for anticipatory breach of contract, it has no application to an action for the payment of money only and is therefore dismissed as against all defendants. (See: Rachmani v. 9 E 96th St Corp., 211 AD2d 262; Franklin Society Federal Savings and Loan Association v. Far-Pap Corp., 57 AD2d 607; Sholom & Zuckerbrot Queens Leasing Corp. v. Forate Realty Corp., 29 AD2d 571.) Moreover, this Court will not grant leave to replead same since the doctrine of anticipatory breach as stated previously, has no application to a contract for the payment of money only, in installments or otherwise.

The third cause of action for breach of implied covenant of good faith, is dismissed against all defendants for failure to set forth facts stating a cause of action (CPLR 3013). For the further reason that the individual defendants were not parties to the contract, it is dismissed against them as implied good faith obligation is only applicable to the "parties" to the contract. (Kalisch-Jarcho v. City of NY, 58 NY2d 377; Madison Pictures v. Pictorial Films, 6 Misc2d 302.) The conclusory and vague statement that TCB has wasted, mismanaged and wrongfully manipulated the funds to avoid payment to LLK as called for by the contract, thereby breaching its implied covenant of good faith, fails to set forth sufficiently particular facts to give the Court and defendants notice of the occurrences intended to be proved and the material elements of the cause of action. While every contract implies good faith and fair dealing between the parties to it, the complaint here fails to state the particular facts as to the waste, mismanagement and the wrongful manipulation of funds in order to show that the defendant TCB was allegedly doing things which would have the effect of destroying or injuring the right of the plaintiff to receive the fruits of the contract. As such, it is insufficient in law to state a cause of action.

That part of plaintiff's cross-motion seeking to serve an amended complaint in order to add causes of action sounding in unjust enrichment and quantum meruit, is denied. It is well settled where, has here, a valid and enforceable contract exists governing a particular subject matter, it precludes recovery in quasi contract or unjust enrichment arising out of the same subject matter. (See: Mariacher Contracting Company, Inc. v. Kirst Construction, Inc., 187 AD2d 986; The Limited, Inc. v. McCrory Corporation, 169 AD2d 605; Smith v. Pagano, 154 AD2d 586, app den 76 NY2d 703, later prac. 201 AD2d 632.) Similarly, it is impermissible to seek damages under a quantum meruit theory where, as here, there is an express written contract between the parties covering the same subject matter. (See: Tierney v. Capricorn Investors, L. P., 189 AD2d 629, 632, app den 81 NY2d 710; Zolotar v. NY Life Ins. Co., 172 AD2d 27, 33; Recon Car Corp. of New York v. Chrysler Corporation, 130 AD2d 725, 730, app den 70 NY2d 612.)

The plaintiff has made a prima facie showing that defendant TCB has failed to make payments of the amounts due under the terms of the contract.

The interpretation of a contract is a matter of law and as such is within the province of

the court and is properly determined by motion for summary judgment. W.A. Olson Enterprises, Inc. v. Agway, Inc., 55 N.Y.2d 659 (1981); Automotive Management Group, Ltd. v. SRB Management Co., Inc., 239 A.D.2d 450, 658 N.Y.S.2d 54 (2nd Dep't 1997).

The contract is "...to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed." Automotive Management Group, Ltd., supra at 55.; Morlee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16, 210 N.Y.S.2d 516 (1960). "[C]lear, complete writings should generally be enforced according to their terms." Automotive Mangagement Group, Ltd., supra at 55; Wallace v. 600 Partners Co., 86 N.Y.2d 543, 634 N.Y.S.2d 669 (1995).

When the contract is ambiguous and "...determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact." Amusement Business Underwriters v. American International Group, Inc., 66 N.Y.2d 878, 498 N.Y.S.2d 760, 489 N.E.2d 729 (1985). See, also, Icon Motors, Inc. v. Empire State Datsun, Inc., 178 A.D.2d 463, 577 N.Y.S.2d 309 (2nd Dep't 1991).

While defendant makes conclusory allegations of compliance with the contract, interferences with defendant's business relationship and practices, fraudulent inducement and estoppel, there is no evidence in support thereof. The contract is a clear and concise one entered into by competent and experienced attorneys on behalf of their respective entities. It was entered into with knowledge and appreciation for everyone's respective positions.

Thus, the only issue of fact to be resolved by the trier of fact is whether the "Purchasers earn[ed] yearly income, as defined in paragraph 8, in the total amount of $3,000,000.00 in the relevent yearly period for which each payment is due." The affidavits of the parties' experts are not sufficiently factual to allow the court to so determine. Although the court views this as a mathematical exercise much like the computation of damages, the court sees no authority to do anything other to move this matter along to trial as expeditiously as possible on this issue.

The matter is accordingly set down for a preliminary conference on August 16, 2000.

So Ordered.

A.J.S.C.

Dated: August 2, 2000