

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
MARK J. PODLIN *et ano*,
:
Plaintiffs,
:
-against-
:
NADER GHERMEZIAN *et al.*,
:
Defendants.
-----X

13 Civ. 4117 (WHP)
MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiffs Mark Podlin and Podlin International Realty, Ltd. bring this diversity action for breach of contract, quantum meruit, unjust enrichment, and fraud against Nader Ghermezian, Donald Ghermezian, Raphael Ghermezian, Triple Five Worldwide, Triple Five Group Ltd., Triple Five Worldwide Development Co. LLC, Meadowlands Development Limited Partnership, Ameream LLC, Ameream Development LLC, Meadow A-B Office LLC, Meadow C-D Office LLC, Meadow ERC Developer LLC, Meadowlands One LLC, Meadow Baseball, LLC, and Meadow Hotel LLC. Defendants move to dismiss the Amended Complaint (“Complaint”) for failure to state a claim. For the reasons that follow, Defendants’ motion is granted in part and denied in part.

BACKGROUND

The following facts are gleaned from the Complaint and accepted as true for this motion. In December 2009, Podlin applied to join Triple Five as Chief Executive Officer of its International Shopping Center Development operations. (Compl. ¶ 45.) The Ghermezian family

owns Triple Five.¹ On February 23, 2010, Nader Ghermezian contacted Podlin and asked if Podlin could “assist in getting control of the Xanadu project at the Meadowlands.” (Compl. ¶¶ 46, 50.)² Nader also asked Podlin if he was still interested in the CEO position. (Compl. ¶ 51.) Podlin responded affirmatively to both questions, and Nader invited him to a meeting in New York the very next day. (Compl. ¶ 52.)

At that initial meeting, Nader focused on Podlin’s ability to help Triple Five get control of Xanadu at the Meadowlands. (Compl. ¶ 55.) Podlin described his experience redeveloping properties in New Jersey, boasted about his contacts in New Jersey, and assured Nader that he could get control of Xanadu for Triple Five if he was Triple Five’s CEO of International Shopping Center Development operations. (Compl. ¶¶ 56, 59.)

Nader said Triple Five would hire Podlin as CEO of the International Mall Development Group at a salary of \$12,000 per month, plus commissions equal to 10% of the appraised value of all deals he brought in, including Xanadu, and 10% of the increased value of projects he developed or redeveloped, including Xanadu. (Compl. ¶ 62.) However, Nader cautioned that before any employment agreement could be finalized, Podlin would need to meet with other members of the Ghermezian family. (Compl. ¶ 63.)

The next day, Podlin met with Nader, Raphael, and several other Ghermezian relatives. (Compl. ¶ 67.) They “discussed in detail the approach Podlin would take to attempt to deliver the [Xanadu] deal to Triple Five.” (Compl. ¶ 68.) Nader was particularly anxious on this point. (Compl. ¶ 69.) Podlin observed that his experience in New Jersey coupled with Triple

¹ Triple Five is a multinational conglomerate best known for its ownership of two of North America’s largest shopping malls. Although Plaintiffs name several Defendants bearing the name “Triple Five,” this Memorandum and Order treats them as a single enterprise.

² “Meadowlands Xanadu” was the original name for a recreation facility located in the Meadowlands Sports Complex in East Rutherford, New Jersey. The Meadowlands Sports Complex is owned by the New Jersey Sports and Exposition Authority.

Five's reputation as owner of the Mall of America might persuade the New Jersey Sports and Exposition Authority ("NJSEA") to give control of Xanadu to Triple Five. (Compl. ¶¶ 70–71.)

At the meeting, Podlin and the Ghermezians negotiated Podlin's compensation. Nader asked Podlin to accept less guaranteed money in return for a larger portion of fees brought in by the projects, but he was unable to clarify the nature or amount of the fees, and Podlin insisted on a \$12,000 per month base salary, 10% of the appraised value and 10% of the increased value of any projects he brought in or developed, plus control of the Xanadu redevelopment, assuming he brought the project to Triple Five. (Compl. ¶¶ 72, 74.) Nader and Raphael agreed to Podlin's terms, with Nader adding, "Okay, but you have to get it for us first." (Compl. ¶ 75.)

The next day, Nader called Podlin and asked him to accept a 2% equity stake in real estate deals rather than the 10% commission. (Compl. ¶ 76.) When Podlin rejected that proposal, Nader relented and "said that Mark Podlin was hired as CEO of the Triple Five World Wide Mall International Development Group to do the Xanadu deal" (Compl. ¶ 77.)

On March 2, 2010, Podlin flew to Alberta, Canada to begin work at Triple Five Headquarters. (Compl. ¶ 82.) When he arrived, he was issued an ID badge labeled "Consultant." (Compl. ¶ 86.) He pointed out the error, but Triple Five security told him to ignore it. (Compl. ¶ 86.)

Podlin set to work on a variety of projects for Triple Five but focused on the Xanadu acquisition. (Compl. ¶¶ 89–90.) According to Podlin, he devised a repositioning plan, called numerous New Jersey politicians and administrators, identified the key players in the Xanadu deal, and arranged a conference call between Triple Five and the New Jersey government's "lead guy" on Xanadu. (Compl. ¶¶ 92–105.)

Podlin asked Nader repeatedly for a written employment agreement. (Compl. ¶ 111.) After making a number of excuses, Nader told Podlin his arrangement with Triple Five would have to be restructured as a consulting relationship. (Compl. ¶ 112.) Podlin continued his work.

On April 2, 2010, Podlin met with Nader and complained that he had not received a written contract or his \$12,000 monthly salary. Nader responded that Triple Five would not pay Podlin anything “until [Triple Five] started making money on the projects.” (Compl. ¶ 119.) Podlin ceased working, flew back to the United States, and had no further contact with Triple Five or the Xanadu project for the balance of the calendar year.

On December 23, 2010, Triple Five acquired an ownership interest in the entertainment and retail component of Xanadu. (Compl. ¶¶ 127–28.) Four months later, Podlin called Nader and Donald and offered to lead redevelopment. (Compl. ¶ 130.) Donald rejected Podlin’s offer out of hand.

In May 2013, over three years after the abrupt termination of Podlin’s one-month relationship with Triple Five, NJSEA approved the transfer and assignment of development rights and ground leases to Triple Five and its subsidiaries. Triple Five took complete control of Xanadu, now called The American Dream@Meadowlands, with authority to pursue its redevelopment plan. (Compl. ¶¶ 133–35.) In June 2013, Podlin sued.

DISCUSSION

I. Legal Standard

To survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

To determine plausibility, courts follow a “two-pronged approach.” Iqbal, 556 U.S. at 679. “First, although a court must accept as true all of the allegations contained in a complaint, that tenet is inapplicable to legal conclusions, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009). Second, a court determines “whether the ‘well-pleaded factual allegations,’ assumed to be true, ‘plausibly give rise to an entitlement to relief.’” Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010) (quoting Iqbal, 556 U.S. at 679). On a motion to dismiss, courts may consider “facts stated on the face of the complaint, in the documents appended to the complaint or incorporated in the complaint by reference, and . . . matters of which judicial notice may be taken.” Allen v. WestPoint–Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991).

II. Breach of Contract

Podlin claims that he is responsible for Triple Five securing the Xanadu project and that Defendants owe him \$200 million. (Compl. ¶ 153.)³ Defendants maintain that Podlin cannot state a claim for breach of contract for three reasons: first, the alleged contract involved a New Jersey real estate transaction, and Podlin is not a licensed realtor in New Jersey; second, the alleged contract was perpetual in duration, and the statute of frauds voids all oral contracts that cannot be completed within one year of agreement; and third, the parties abandoned the contract.

A. *Choice of Law*

“A federal trial court sitting in diversity jurisdiction must apply the law of the forum state to determine the choice-of-law.” Fieger v. Pitney Bowes Credit Corp., 251 F.3d 386, 393 (2d Cir. 2001) (citing Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 497 (1941)).

“In New York, the forum state in this case, the first question to resolve in determining whether to

³ Podlin styles the claim alternatively as one for breach of an oral employment contract or breach of a consulting agreement, (Compl. ¶¶ 154–67), but the analysis is the same in either case.

undertake a choice of law analysis is whether there is an actual conflict of laws.” Fieger, 251 F.3d at 393. Both New York and New Jersey require that persons acting in-state as real estate brokers be licensed in-state in order to bring actions for commissions. See N.J.S.A. 45:15-3 (2011); N.Y. Real Prop. L. § 442-d (2000). Podlin is a licensed real estate broker in New York but not New Jersey. (See Compl. ¶ 15.) Consequently, Podlin’s claim for a commission stands on a different footing depending on which state’s law applies.

“New York courts seek to apply the law of the jurisdiction with the most significant interest in, or relationship to, the dispute.” Brink’s Ltd. v. S. African Airways, 93 F.3d 1022, 1030 (2d Cir. 1996) (citing Babcock, 191 N.E.2d at 283–84). In contract cases, this means identifying the “center of gravity” of a contract. Brink’s, 93 F.3d at 1030; see also Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 317 (1994). “Under this approach, courts may consider a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties.” Brink’s, 93 F.3d at 1030–31. “New York courts may also consider public policy where the policies underlying conflicting laws in a contract dispute are readily identifiable and reflect strong governmental interests.” Brink’s, 93 F.3d at 1031. However, “the places of contracting and performance[] are given the heaviest weight in this analysis.” Brink’s, 93 F.3d at 1031.

In Fieger, the Second Circuit addressed a New York financial advisor’s breach of contract claim relating to a Connecticut real estate transaction. 251 F.3d at 386. The Second Circuit determined that although the contract concerned property in Connecticut, New York law applied because the plaintiff’s claim involved his labor and negotiations in New York, not the

validity of the transaction in Connecticut. Fieger, 251 F.3d at 397;⁴ see also Charles H. Greenthal Commercial Corp. v. Equity Residential Props. Trust, 300 A.D.2d 47, 47 (N.Y. App. Div. 1st Dep't 2002) (affirming application of New York law to brokerage dispute concerning Connecticut property, in part because of New York's interest in seeing its licensed real estate brokers compensated); Rosenberg & Rosenberg, P.C. v. Hoffman, 600 N.Y.S.2d 228, 229 (App. Div. 1st Dep't 1993) (“[T]he interest of New York in seeing that its licensed brokers are compensated on contracts arising from initial contacts in New York and . . . the fact that a New York source was found and the loan commitment issued and the loan agreement closed in New York would indicate the propriety of the application of New York law.”). By contrast, the Second Department applied Florida law to a New York broker's suit for a commission on the sale of property in Florida, emphasizing the location of the property and Florida's interest in “regulating the activities of real estate brokers who perform services in connection with the sale of Florida property.” Madison Realty, Inc. v. Neiss, 676 N.Y.S.2d 672, 673–74 (App. Div. 2d Dep't 1998) (citations omitted).

Here, the oral contract was allegedly formed at a meeting in New York. The bulk of Podlin's services were rendered at Triple Five's headquarters in Alberta, Canada. The central object of Podlin's employment—acquisition of Xanadu—is real estate in New Jersey. This geographic dispersion of the places of negotiation and performance, the location of the subject matter, and the domicile and places of business of the contracting parties obscures the alleged

⁴ Similarly, in Advance Realty Associates v. First Bank National Association, a district court found that a breach of contract claim involving Georgia property should be governed by New York law because the plaintiff's principal place of business was New York, the plaintiff performed brokerage services in New York, found a New York buyer for the property, and never negotiated the transaction within Georgia or solicited Georgia purchasers; moreover, neither the seller or the buyer had any connection with Georgia. No. 89 Civ. 4843 (SWK), 1991 WL 64153, at *2 (S.D.N.Y. Apr. 15, 1991).

contract's center of gravity.

On balance, however, New Jersey has the largest interest in the contract. Xanadu is located in New Jersey, and Nader Ghermezian's words, (see Compl. ¶ 75 (hiring Podlin with the warning that "you have to get [Xanadu] for us first" (emphasis in original))),⁵ Podlin's actions, (Compl. ¶ 90 ("Podlin was especially focused on the acquisition of Xanadu.")), and the damages sought in this action (\$200 million—a 10% commission on Xanadu's value) all put Xanadu—and New Jersey—at the center of the contract.

Situs is not dispositive because, as in Fieger, the dispute here is less about real estate located in another jurisdiction and more about the contract allegedly formed in New York. However, unlike the plaintiff in Fieger, Podlin performed almost no work in New York.⁶ (See Compl. ¶¶ 89–90.) Podlin also presents a different case from the plaintiff in Advance Realty Associates: Podlin's principal place of business is Georgia, not New York, and he purposefully sought out and contacted many New Jersey residents, including the government authority responsible for Xanadu, (see, e.g., Compl. ¶¶ 95, 97, 108). The Complaint places particular emphasis on a conference call he set up with a representative to the NJSEA. (See Compl. ¶¶ 96–105.) At oral argument, Podlin's counsel conceded that it was "substantially [that] conference call" that entitles Podlin to a commission. (Tr. of Oral Arg., dated Jan. 30, 2014, ECF No. 36, at 27.)⁷ Weighing the public policies at issue, New York has an interest in seeing that its brokers

⁵ Moreover, Podlin says Nader Ghermezian hired him "as CEO of the Triple Five World Wide Mall International Development Group to do the Xanadu deal . . ." (Compl. ¶ 77 (emphasis added).)

⁶ Podlin alleges that on the same day Nader Ghermezian confirmed their agreement, one day before flying to Canada, he "began calling his business and political contacts within New Jersey to determine the most effective route for gaining control of [Xanadu]." (Compl. ¶ 84.) No other work is alleged to have been performed in New York.

⁷ In Fieger, it was the Plaintiff's communications in New York that were "the heart" of his services. 251 F.3d at 397.

are compensated, but New Jersey has an equal if not greater interest in asserting “a significant substantive policy of the state,” which is to ensure that those who broker New Jersey real estate transactions are qualified under New Jersey law. Weston Funding Corp. v. Lafayette Towers, Inc., 550 F.2d 710, 714 (2d Cir. 1977) (citing Stahl v. Twp. of Teaneck, 162 F. Supp. 661, 667–69 (D.N.J. 1958)). The spectrum of contacts points toward applying New Jersey law.

B. *Licensure*

As noted, New Jersey’s licensing statute forbids recovery of New Jersey real estate commissions by brokers not licensed in New Jersey.

No person, firm, partnership, association or corporation shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in R.S.45:15-1 et seq. without alleging and proving that he was a duly licensed real estate broker at the time the alleged cause of action arose.

N.J.S.A. 45:15-3. The prohibition applies to suits filed outside of New Jersey. Interglobal Realty Corp. v. Am. Std., 571 N.Y.S.2d 20, 20 (App. Div. 1st Dep’t 1991) (holding that N.J.S.A. 45:15-3 does not merely “close the doors of the [New] Jersey courts” but rather “operates to extinguish the commission claim of the unlicensed plaintiff so that he cannot pursue his action anywhere” (internal quotation marks and citation omitted)). Podlin is not licensed in New Jersey, so he cannot collect compensation for brokering a New Jersey real estate transaction. Nor can he evade the licensure requirement by styling his claim as one for breach of an oral employment contract. New Jersey’s definition of brokering activity is quite broad. It classifies as a “broker” anyone who “solicits for prospective purchasers or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is contemplated to result in the sale, exchange, leading, renting, or auctioning of any real estate.”

N.J.S.A. 45:15–3. It clearly encompasses Podlin’s attempt to negotiate Triple Five’s acquisition of Xanadu. Cf. Fieger, 251 F.3d at 399–401 (analyzing Connecticut’s real estate licensure

requirement and determining that it applied even where the Plaintiff claimed to have acted as a financial advisor rather than a broker).

Podlin argues his conduct did not implicate New Jersey's licensure requirement because that requirement does not apply to services performed outside of New Jersey.⁸ But Podlin did in fact perform services in New Jersey. Podlin projected himself into the state via multiple telephone calls. For purposes of New Jersey's policy interest, it makes no difference that Podlin himself never entered the state. Cf. Agency Rent A Car Sys. v. Grand Rent-A-Car Corp., 98 F.3d 25, 30 (2d Cir. 1996) (in the context of personal jurisdiction analysis: "we question whether, in an age of e-mail and teleconferencing, the absence of actual personal visits to the forum is any longer of critical consequence"). His phone calls and teleconferences directed into New Jersey triggered the license requirement. Cf. Interglobal Realty, 571 N.Y.S.2d at 21 ("New Jersey's licensing provisions are triggered when a real estate broker performs a single act within New Jersey in connection with the rendering of brokerage services.") (citing Tanenbaum v. Sylvan Builders, Inc., 142 A.2d 247, 255 (N.J. Super. Ct. App. Div. 1958)). Podlin's claim for a commission under the alleged oral contract is therefore dismissed.

C. *Statute of Frauds*

New Jersey's statute of frauds no longer renders an oral agreement unenforceable if it cannot be performed within one year. N.J.S.A. 25:1-5e, repealed by L.1995, c. 360, § 8 effective Jan. 5, 1996; see also Graziano v. Grant, 741 A.2d 156, 162-63 (N.J. Super. Ct. App.

⁸ Many states' licensure statutes apply only to activities performed within state. See, e.g., Consul Ltd. v. Solide Enters., Inc., 802 F.2d 1143, 1151 (9th Cir. 1986) (finding California's ban on unlicensed realtors earning commissions applied only to services performed within the state); Lucas v. Gulf & W. Indust., Inc., 666 F.2d 800, 804 (3d Cir. 1981) (interpreting Florida's licensure statute not to reach persons who render brokerage services outside of Florida); Paulson v. Shapiro, 490 F.2d 1, 6 (7th Cir. 1973) (Wisconsin's licensure statute not applicable where defendant "did not act in capacity of a broker" in Wisconsin).

Div. 1999). Therefore, the statute of frauds is no obstacle to enforcement of Podlin's alleged contract. However, for the reasons given above, Podlin still cannot state a claim for a commission arising from a New Jersey real estate transaction.

D. *Abandonment*

Under New Jersey law, “[a]bandonment of a contract can only take place by the consent of both parties.” Cnty. of Morris v. Fauver, 707 A.2d 958, 965–66 (N.J. 1998). “[A] contract will be treated as abandoned where one party acts in a manner inconsistent with the existence of the contract and the other party acquiesces in that behavior.” Cnty. of Morris, 707 A.2d at 965–66. The intent to abandon an agreement may be inferred from the parties’ acts and the circumstances. See Cnty. of Morris, 707 A.2d at 966 (citation omitted).

Here, Podlin pleads facts suggestive of abandonment. For example, while he alleges an agreement to serve as CEO beginning in March 2010, he also pleads that he packed up and left the company’s office on April 2, 2010 and never returned. Disappearing from the office for more than a year before seeking to return to work is inconsistent with Podlin’s notion that he was the CEO. But the question of the parties’ subjective intent is a fact-intensive one that, in this case, cannot be decided on the pleadings.

III. Unjust Enrichment

Alternatively, Podlin asserts a claim for unjust enrichment. The parties agree that New York law applies to this claim.⁹ Under New York law, unjust enrichment and quantum meruit claims “are analyzed together as a single quasi-contract claim.” Gutkowski v.

⁹ Even if the parties disagreed, choice-of-law analysis would reveal that there is no actual conflict between New York and New Jersey’s unjust enrichment laws. Compare Zeising v. Kelly, 152 F. Supp. 2d 335, 345 (S.D.N.Y. 2001), with Snyder v. Farnam Cos., 792 F. Supp. 2d 712, 724 (D.N.J. 2011); see also In re Mercedes-Benz Tele Aid Contract Litig., 257 F.R.D. 46, 58 (D.N.J. 2009) (finding no material difference among the unjust enrichment laws of different states);

Steinbrenner, 680 F. Supp. 2d 602, 613 (S.D.N.Y. 2010). To state a claim for quantum meruit or unjust enrichment, a plaintiff must plead that (1) the defendant was enriched; (2) the enrichment was at the plaintiff's expense; and (3) the circumstances were such that equity and good conscience requires defendants to make restitution. Zeising v. Kelly, 152 F. Supp. 2d 335, 345 (S.D.N.Y. 2001).

Here, Podlin alleges that he worked on Defendants' behalf for roughly one month. During that time, he advanced Defendants' interests toward securing Xanadu. He alleges that he expected to be compensated. In sum, Podlin alleges that the Defendants received the benefit of his labor on Xanadu and other projects but have yet to compensate him: this is a textbook claim for unjust enrichment.

Of course, unjust enrichment is an alternative to the contract claim and requires the absence of an enforceable agreement. See Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp., 18 F.3d 168, 175 (2d Cir. 2005). Moreover, Podlin can only recover the value of the work performed, not the contract price. Grappo v. Alitalia Linee Aeree Italiane, S.p.A., 56 F.3d 427, 433 (2d Cir. 1995). Thus, if Podlin were to succeed in his contract claim, he could not also recover on a quasi-contract theory. And if Podlin's alleged contract were unenforceable,¹⁰ he could not claim the full benefit of the alleged bargain in unjust enrichment: he would be left with the reasonable value of a month's work as CEO of the Triple Five World Wide Mall International Development Group.¹¹

¹⁰ Because the alleged contract does not fall within the statute of frauds, the line of cases holding that "a plaintiff may not escape the Statute of Frauds by . . . affixing the label 'quantum meruit' to the very contract claim that is barred[,]" Grappo, 56 F.3d at 433, is inapplicable.

¹¹ Further, Podlin would remain ineligible to recover compensation for the Xanadu deal for the reasons given in Part IIA supra.

IV. Fraud

Podlin claims that the Defendants fraudulently induced him into the oral agreement and never intended to pay him. (Compl. ¶ 183.) He seeks \$200 million in damages plus an additional \$500 million in punitive damages.

Because Podlin's fraud allegations focus exclusively on negotiations in New York, New York law applies to the claim. Under New York law, to state a claim for fraud a plaintiff must demonstrate: (1) a misrepresentation or omission of material fact; (2) which the defendant knew to be false; (3) which the defendant made with the intention of inducing reliance; (4) upon which the plaintiff reasonably relied; and (5) which caused injury to the plaintiff. Wynn v. AC Rochester, 273 F.3d 153, 156 (2d Cir. 2001). In addition, Rule 9(b) requires plaintiffs to plead fraud claims with particularity and "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." Rombach v. Chang, 355 F.3d 164, 170 (2d Cir. 2004).

Critically, "[a] cause of action for fraud does not generally lie where the plaintiff alleges only that the defendant entered into a contract with no intention of performing." Grappo, 56 F.3d at 434 (citation omitted). "[W]here a fraud claim arises out of the same facts as plaintiff's breach of contract claim, with the addition only of an allegation that defendant never intended to perform the precise promises spelled out in the contract between the parties, the fraud claim is redundant and plaintiff's sole remedy is for breach of contract." Telecom Int'l. Am., Ltd. v. AT&T Corp., 280 F.3d 175, 196 (2d Cir. 2001) (quoting Sudul v. Computer Outsourcing Servs., 868 F.Supp. 59, 62 (S.D.N.Y. 1994)); see also Stillman v. InService Am., Inc., No. 05 Civ. 6612 (WHP), 2008 WL 2156724, at *3 (S.D.N.Y. May 20, 2008). "Rather, to state a fraud

claim co-existent with an alleged breach of contract, Plaintiff must: ‘(i) demonstrate a legal duty separate from the duty to perform under the contract; (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages.’” Stillman, 2008 WL 2156724, at *3 (quoting Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc., 98 F.3d 13, 20 (2d Cir. 1996)).

“Only a misrepresentation regarding a present fact may give rise to a claim for fraudulent inducement separate and apart from a breach of contract claim.” C3 Media & Mktg. Grp., LLC v. Firstgate Internet, Inc., 419 F. Supp. 2d 419, 432 (S.D.N.Y. 2005) (citations omitted). “By contrast, a misrepresentation concerning a party’s intention not to perform its obligations under a contract is no different from the commonly presumed intention either to perform or to pay damages for breach of contract, and should be penalized no more extensively.” C3 Media, 419 F. Supp. 2d at 432 (citations omitted). Representations that merely underscore a party’s purported intention and ability to perform a contract “are simply part and parcel of the intention to perform.” C3 Media, 419 F. Supp. 2d at 432 (dismissing a fraud claim where the alleged fraudulent representations “merely buttress[ed]” the defendant’s contractual promise). But see Solutia Inc. v. FMC Corp., 385 F. Supp. 2d 324, 342 (S.D.N.Y. 2005) (“[A] misrepresentation concerning present facts states an independent claim of fraud, even when the contract expressly warrants the accuracy of the defendant’s representations.”)

Here, the first alleged fraud is that “[a]t the time each of the [Defendants] entered into the oral Employment Agreement and/or the Consulting Agreement with Podlin, they did so with the intent not to pay Podlin or to perform any of the obligations they undertook as a result of the Employment Agreement and/or the Consulting Agreement.” (Compl. ¶ 183.) This is

precisely the sort of fraud claim that New York law forbids.

The Complaint also alleges that Nader's repeated excuses for not producing a written contract are tantamount to fraud because they allowed Triple Five to benefit from Podlin's continued services. But Nader's alleged misrepresentations merely buttressed the Ghermezians' intention to honor the alleged contract with Podlin and therefore cannot sustain a fraud claim. C3 Media, 419 F. Supp. 2d at 432.

With no underlying fraud claim, the conspiracy to commit fraud claim must fail as well. See Abacus Fed. Sav. Bank v. Lim, 905 N.Y.S.2d 585, 585 (App. Div. 1st Dep't 2010) (“[U]nder New York law, to establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort” (internal quotation marks and citation omitted)).

V. “Procuring Cause” Liability and Piercing the Corporate Veil

The Complaint also includes claims for “Procuring Cause Liability,” (Compl. ¶¶ 168–80), and “Piercing the Corporate Veil,” (Compl. ¶¶ 200–05). That the plaintiff was the “procuring cause” of a transaction is merely one element in a claim for a brokerage commission, see, e.g., Site Search of N.J., Inc. v. Camco Mgmt., LLC, 2012 WL 2345386, at *7 (N.J. Super. Ct. App. Div. June 21, 2012); Ormond Park Realty, Inc. v. Round Hill Dev. Corp., 266 A.D.2d 523, 523 (N.Y. App. Div. 2d Dep't 1999), a claim Podlin cannot pursue for the reasons set forth in Part II. Piercing the corporate veil is not a separate cause of action in New York or New Jersey. See RTC Mortg. Trust 1995-S/N1 v. Sopher, 171 F. Supp. 2d 192, 202 (S.D.N.Y. 2001); Tulli Makowski v. Cmty. Educ. Ctrs., Inc., No. 12 Civ. 06091 (WJM), 2013 WL 6623885, at *8 (D.N.J. Dec. 16, 2013). And the Complaint alleges no facts to support piecing the veil in this case. Therefore, these “claims” are dismissed.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss Mark Podlin and Podlin International Realty's Amended Complaint is granted in part and denied in part. Plaintiffs' claims for fraud, "procuring cause liability," "piercing the corporate veil," and breach of contract as to any commission relating to the Xanadu transaction are dismissed in their entirety. Because Podlin agreed in open court that any dismissal would be final, (Transcript of Hr'g, dated June 24, 2013, ECF No. 26, 37-38), leave to replead is denied. Plaintiffs' claims for unjust enrichment, quantum meruit, and breach of contract for a monthly salary may proceed to discovery. The Clerk of Court is directed to terminate the motion pending at ECF No. 23.

Dated: May 28, 2014
New York, New York

SO ORDERED:


WILLIAM H. PAULEY III
U.S.D.J.

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