

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

RAY VUONO, x

Plaintiff,

-against-

INTERPHARM HOLDINGS, INC. f/k/a ATEC GROUP,
INC.,

Defendant.

x

MOTION DATE: 8-17-06
SUBMITTED: 10-25-06
MOTION NO.: 003-MOT D
004-RRH

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Upon the following papers numbered 1 to 27 read on these motions to dismiss and cross-motion disqualify counsel; Notice of Motion and supporting papers 1-7; Notice of Cross Motion and supporting papers 8-22; Answering Affidavits and supporting papers 23-24; Replying Affidavits and supporting papers 25-27; it is,

ORDERED that the motion by the defendant for an order dismissing the complaint is determined as follows; and it is further

ORDERED that the cross motion by the plaintiff for an order disqualifying the defendant's counsel is referred to a hearing, which date shall be decided on at the next conference.

On July 1, 2002, the plaintiff and Atec Group, Inc., entered into an advisory agreement in which the plaintiff agreed to introduce Atec to potential investors, mergers, acquisitions, and other similar transactions and to act as Atec's advisor in matters related to mergers and acquisitions, corporate finance activities, and disposition of assets, among other things. The term of the advisory agreement was for an initial period of 12 months. In addition, the agreement provided that it was to be automatically renewed for two periods of three years each unless one of the parties gave notice to the other within 90 days prior to the end of any period. The agreement also provided that the plaintiff was to receive a fee of 8% for any transactions he introduced to Atec with a value of \$5 million or less and 5% for any transactions with a value of more than \$5 million. All payments were to be in cash unless the parties mutually agreed to

payment in Atec stock or other form. Moreover, if the plaintiff performed due diligence with respect to a potential transaction, he was to be compensated at a rate of \$200 per hour or such other amount as agreed upon with Atec. Finally, the agreement gave the plaintiff a right of first refusal to act as a finder for any merger, acquisition or similar transaction, or financing activity Atec pursued during the period of his engagement.

Pursuant to the terms of their agreement, the plaintiff introduced Atec to Interpharm, Inc., a subsidiary of the defendant Interpharm Holdings, Inc. Atec and Interpharm, Inc. negotiated a plan for a reverse merger in which Atec would nominally become Interpharm Holdings, and non-party Baar Group, Inc., an entity formed solely for the purpose of acquiring Atec's assets, would purchase Atec's computer operations and assume certain of Atec's liabilities. By a letter agreement dated October 16, 2002, which was signed by the plaintiff and the President of Atec, the plaintiff agreed as follows:

This letter shall confirm that pursuant to our July 1, 2002, agreement, I will perform due diligence on behalf of Atec Group, Inc. ("Atec") with respect to a potential acquisition of Interpharm, Inc. ("Interpharm") for a flat fee of \$75,000 (the "fee"). The fee shall be payable by Atec 30 days after the closing of an acquisition of Interpharm or within 30 days of the termination of a negotiations [sic] with Interpharm. I shall not be entitled to any other fees with respect to the acquisition of Interpharm, if consummated.

The plaintiff subsequently agreed to accept 335,000 shares of Atec stock in lieu of the aforementioned \$75,000. On May 30, 2003, the transaction closed and stock was issued pursuant to the reverse merger.

The plaintiff commenced this action, inter alia, to recover damages for breach of contract. The plaintiff alleges that, in addition to the \$75,000 already paid him for his due diligence work, the defendant Interpharm Holdings owes him finder's fees in connection with the Atec reverse merger. The plaintiff further alleges that the defendant Interpharm Holdings owes him finder's fees for two additional transactions that it entered into with non-parties Well Fargo Business Credit and Tullis-Dickerson Capital Focus III, L.P. The plaintiff alleges that the defendant did not honor his right of first refusal to act as a finder for the additional transactions.

The defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(1),(5), and (7). The defendant argues that the plaintiff agreed to accept \$75,000 (which was paid to him in shares of Atec stock) in full satisfaction of all fees due and owing to him in connection with the Atec reverse merger. The defendant also argues that, under the terms of the parties' advisory agreement, the plaintiff's purported duties and responsibilities were not limited to those of a finder and that the agreement contemplated that he act as a securities broker. Securities brokers must be registered with the Securities and Exchange Commission (SEC) in order to receive compensation. Since the plaintiff is not registered, he is not entitled to any additional compensation.

It is well settled that, on a motion to dismiss pursuant to CPLR 3211(a)(7), the court

is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory. The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*see, Leon v Martinez*, 84 NY2d 83; **Guggenheimer v Ginzburg**, 43 NY2d 268; **Rovello v Orofino Realty Co.**, 40 NY2d 633). Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted utterly refutes the plaintiff's factual allegations, conclusively establishing a defense to the asserted claims as a matter of law (*see, Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326; **Leon v Martinez**, *supra* at 88).

The court finds that the parties' October 16, 2002, letter agreement is dispositive of the additional fees purportedly due the plaintiff in connection with the Interpharm transaction. It is not reasonably susceptible to more than one interpretation and is, therefore, unambiguous (*see, Chimart Assoc. v Paul*, 66 NY2d 570). When, as here, the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms (*see, W.W.W. Assocs. v Gianconieri*, 77 NY2d 157, 162; **Automotive Mgmt. Group v SRB Mgmt. Co.**, 239 AD2d 450; **Matter of Ajar**, 237 AD2d 597). In the absence of any ambiguity, there are only documents to interpret, and the issue is one of law to be determined by the court (*see, Automotive Mgmt. Group v SRB Mgmt. Co.*, *supra*).

Contrary to the plaintiff's contentions, the October 16, 2002, letter agreement limited the plaintiff's fees for his work on the Interpharm transaction to \$75,000. In the final sentence thereof, the plaintiff agreed that he was not "entitled to any other fees with respect to the acquisition of Interpharm, if consummated." The plaintiff drafted the letter agreement. Had he intended that the last sentence only apply to fees for due diligence work, he easily could have written that language in the last sentence. A court may not write into a contract conditions the parties did not include by adding or excising terms under the guise of construction (*see, Reiss v Financial Performance Corp.*, 97 NY2d 195, 199). Moreover, a court should be extremely reluctant to interpret an agreement as impliedly stating something that the parties have neglected to specifically include (*see, Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475). Accordingly, the defendant's motion to dismiss is granted to the extent that the plaintiff's complaint seeks damages for the plaintiff's work on the Interpharm transaction.

The court finds that the defendant has failed to establish conclusively that the plaintiff acted as a broker within the meaning of the Securities and Exchange Act of 1934. The defendant contends that, under the terms of the advisory agreement, the plaintiff was to act as an advisor and receive transaction-based compensation, which would require him to be registered as a broker. However, with regard to the Interpharm transaction, the defendant contends that the plaintiff's role was "virtually non-existent," and the plaintiff received a flat fee for his work. He did not receive the transaction-based compensation that the defendant claims is the hallmark of a broker. Moreover, the defendant has produced no evidence that, had the plaintiff been involved in the additional transactions, he would have acted as a broker and received compensation as a broker. At this point, the record is insufficient to allow the court to conclude that the factors articulated by the SEC in the no-action letters and/or other authorities cited by the defendant that would cause the plaintiff to be deemed a broker are present in this case. Accordingly, the court declines to dismiss the remainder of the complaint.