

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COMMERCIAL DIVISION, WESTCHESTER COUNTY**

Present: **HON. KENNETH W. RUDOLPH**
Justice.

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PETER F. GAITO ARCHITECTURE, LLC, d/b/a
PETER F. GAITO AND ASSOCIATES,

Plaintiff, :

22157/05 Index No
Motion Date: 5/19/06
-against-

DECISION

SIMONE DEVELOPMENT CORP.,
Defendant, :

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The following papers numbered 1 to 10 read on this motion.

<u>NUMBERED</u>	<u>PAPERS</u>
Notice of Motion/Affidavits/Exhibits A-C	1-6
Answering Affidavit/Memorandum of Law, Plaintiff	7-8
Memoranda of Law, Defendant	9-10

Upon the foregoing papers, it is ORDERED that this motion by defendants for an order, pursuant to CPLR 3211, dismissing the first, second, third and fifth causes of action of plaintiff's complaint, is decided as follows.

As set forth initially in its complaint, plaintiff brings this action seeking to redress defendant, Simone Development Corp.'s ("SDC") unprincipled breach of

its contractual obligations to plaintiff. Plaintiff alleges it took a calculated risk and performed over \$400,000 in architectural and design services for defendant on speculation that, if plaintiff and defendant's joint proposal for development of a mixed-use project in place of a municipal parking garage in the City of New Rochelle ("project") was accepted, plaintiff would profit from its investment in the form of architectural fees and a percentage of the profits generated from the ensuing project. Plaintiff's risk was that if its design was not selected, then it would receive no compensation for all of its hard work and effort. However, despite agreeing to the terms that plaintiff proposed and allowing plaintiff to generate a spectacular design package that overwhelmed the competition, defendant completely ignored its obligations and, despite plaintiff's full and complete performance, defendant, SDC has wrongfully refused to live up to its end of the bargain.

Plaintiff's first cause of action alleges that defendant breached its contract with plaintiff, the terms of which were agreed during a phone call between the parties' presidents, Peter F. Gaito ("Gaito") and Joseph Simone ("Simone") and memorialized by an email. Plaintiff alleges it performed all its duties under the agreement but defendant failed to hire plaintiff to provide all final plans plus construction phase services for a lump sum equal to eight percent of construction costs. Plaintiff is entitled to \$18,000,000.

Plaintiff's second cause of action alleges anticipatory breach of contract in that defendant wrongfully repudiated the agreement by indicating that it would not pay plaintiff 25% of the profits generated by the project; plaintiff duly requested adequate assurances from defendant that it would honor the agreement; defendant failed to provide such assurances. Plaintiff is entitled to \$23,000,000.

Plaintiff's third cause of action alleges that a justiciable controversy exists between the parties as a result of defendant's failure to hire plaintiff and seeks a declaratory judgment that plaintiff is entitled to 25% of the profits generated by the project.

Plaintiff's fourth cause of action, which defendant has not moved against, alleges quantum meruit in that defendant received design services valued at over \$400,000 from plaintiff based on defendant's agreement that, should plaintiff and defendant be awarded the project, defendant would hire plaintiff at a lump sum fee of eight percent of the construction cost for the project and would pay plaintiff 25% of the profits generated by the project. Defendant benefited from plaintiff's services in that, among other things, plaintiff and defendant were awarded the project based solely on plaintiff's design. Under principles of equity and good conscience, defendant should be required to pay for the services rendered by plaintiff. Plaintiff is entitled to \$400,000.

Plaintiff's fifth cause of action alleges copyright infringement in that plaintiff duly registered the project Design with the United States Copyright Office, which issued the Design a Certificate of Registration bearing registration numbers VA 1-330-925, VA 1-330-926 and VA 1-330-927. The Certificate of Registration constitutes prima facie evidence of the validity of plaintiff's copyright in the Design and the information contained on the Certificate of Registration. Plaintiff allowed defendant to use the Design in connection with the submission to the City of New Rochelle solely in reliance on the terms of the agreement.

After defendant repudiated the agreement, plaintiff informed defendant that defendant was no longer entitled to use plaintiff's copyrighted work in any manner, including in connection with the project. Upon information and belief, defendant is wrongfully infringing on plaintiff's copyright in the Design by continuing to use the Design in connection with the project without the approval of plaintiff. As a result, plaintiff is entitled to judgment against defendant, pursuant to 17 U.S.C. §504(b) for its actual damages suffered as a result of defendant's infringement plus any profits derived from defendant's infringement of plaintiff's copyright in an amount to be determined at trial, but believed to be in excess of \$1,000,000.

Herein, defendant moves to dismiss the first, second and third causes of action, pursuant to CPLR §§3211(a) 1, 5, and 7, and General Obligations Law ("GOL") 701, upon the grounds that there exists documentary evidence which serves to defeat the plaintiff's causes of action, that such causes of action fail to state any cause of action upon which relief may be granted, and that the statute of frauds precludes such causes of action as the alleged contract cannot be performed within one year. Defendant moves, pursuant to CPLR §3211(a) 2, to dismiss the fifth cause of action upon the grounds that this court lacks subject matter jurisdiction to hear the copyright infringement cause of action.

Defendant's attorney avers that plaintiff's action is essentially one for breach of an oral contract, and relies upon a vague, ambiguous and indefinite email which does not contain the requisite terms to form a binding agreement. The email also specifically contemplated the execution of future documents and more definitive agreements. Plaintiff and defendant were never able to execute an operating agreement, or any other writing, as they could not agree upon terms. Defendant cites documentary evidence: plaintiff's email concludes as follows: "Note: More definitive agreements to be developed if our team is selected as a developer". Defendant contends the foregoing clearly reflects the fact that the parties had no agreement or understanding whatsoever, there was no meeting of the minds, and the email was not a binding contact as it is devoid of material terms. Inter alia, the email failed to identify and describe the project, set forth any dates, define or describe profits as being net, gross, pre-tax, after-tax or with or without defendant's overhead, identify the reasonable parameters for the financing that defendant was allegedly obligated to obtain (i.e., borrow money at 6% or 20%), describe what

architectural services plaintiff would perform, (i.e. did they include engineering and structural steel drawings, and if not, who would do them and pay for them), and describe the respective obligations of defendant or plaintiff or identify what, if anything, it would construct or develop and/or who would be responsible for the actual construction.

Additionally, a combination of the statute of frauds and State Environmental Quality Review Act ("SEQRA") preclude performance of the purported contract within one year, thereby requiring a written contract.

As to plaintiff's fifth cause of action, statutory copyright infringement is within the purview of the Federal courts; this State Court lacks subject matter jurisdiction of such a claim.

In an evidentially proper affidavit, Gaito president of plaintiff avers that the affidavit of defendant's president, Simone incorrectly claims that the email memorandum of understanding Gaito sent to Simone on August 25, 2004 annexed to the complaint as Exhibit B and summarized at paragraph 15 of the complaint was not intended to be a valid and binding agreement between Gaito and Simone. In fact, although the agreement does contemplate the development of a more definitive agreement, the agreement was intended to be a valid and binding agreement between the partes and, for that reason, the agreement does not provide that it would not be enforceable until such definitive agreements were developed.

Plaintiff contends that the complaint sufficiently alleges breach of contract. Too, that the agreement contemplated a more definitive agreement, does not negate the allegation of a binding contract; the agreement itself is sufficiently definite to constitute to be an enforceable agreement. Nor does the statute of frauds provide a basis for dismissal of plaintiff's contractual claims. The agreement, by its terms could possibly be performed within one year. Because the City could have awarded the project to another team, the agreement is not bared by the statute of frauds, which additionally does not apply to joint ventures. Finally, the statute of frauds is inapplicable because Gaito's past performance is unequivocally referable to the agreement.

Defendant replies initially reiterating its contention that the documentary evidence evinces the parties intent to be bound only by a signed writing and that the email is indefinite and lacks the material terms of a contract. Too, defendant reiterates its argument that due to the complexity of the project, the alleged agreement cannot be performed within a year. Additionally, the Court must consider

the entire agreement when determining if the agreement is capable of being performed within one year. Too, the email does not create a joint venture and part performance does not save contracts governed by GOL 5-701.

On a motion to dismiss pursuant to CPLR 3211, a court must accept as true the facts as alleged within the four corners of the complaint and accord the plaintiff the benefit of every possible favorable inference to determine whether the allegations fit within any cognizable legal theory, see, Leon v. Martinez, 84 NY2d 83, 87-88, Guggenheimer v. Ginzburg, 43 NY2d 268, 275; Rovello v. Orofino Realty Co., 40 NY2d 633, 634. However, bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion. Palazzolo v. Herrick, 298 A.D.2d 372. "When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleadings has a cause of action, not whether she has stated one." Meyer v. Guinta, 262 AD2d 436 (2d Dept., 1999).

The essential elements of a cause of action for breach of contract are formation of a contract, performance by plaintiff, a breach by defendant and damage, see, Ascoli v. Lynch, 2 AD 3d 553. Herein, plaintiff's email expressly stated that more definitive agreements had to be developed evincing an intent by plaintiff not to be bound in the absence of more definitive agreements. No definitive agreement was ever signed by the parties; there was no meeting of the minds on all of the essential material terms of the agreement. The Court rejects plaintiff's contention that there was an enforceable agreement because the email did not specifically state that it was not binding until reduced to a formal writing and executed. See, Wilson, Elser, Moskowitz, Edelman and Dicker, LLP v. Hiro Real Estate Co., 269 AD 2d 295.

The Court cannot find that the email or any evidence advanced by plaintiff herein establishes that plaintiff has a cause of action for breach of contract. Plaintiff's first cause of action for breach of contract is dismissed.

Plaintiff's second cause of action for anticipatory breach of contract: a wrongful repudiation of the contract by one party before the time for performance has occurred see, Computer Possibilities Unlimited, Inc. v. Mobil Oil Corp., 301 AD 2d 70, is predicated upon the dismissed breach of contract cause of action, supra, and as such is similarly dismissed.

With respect to plaintiff's third cause of action for a declaratory judgment, the Court initially finds that said cause of action effectively seeks the same relief as the breach of contract cause of action and is inappropriate when plaintiff alternatively alleges the breach of contract cause of action. See, Apple Records v. Capitol Records, Inc., 137 AD 2d 50. Plaintiff claims that plaintiff is entitled to 25% of the profits generated by the project in accord with the terms of the agreement. The Court's finding that there is no contract

between the parties deprives this cause of action of its necessary predicate: the existence of a judicial controversy. See, Watson v. Aetna Casualty Surety Company, 246 AD 2d 57. Dismissal of the contract cause of action requires dismissal of the declaratory judgment cause of action. Plaintiff's third: declaratory judgment cause of action is dismissed.

The Court finds that plaintiff's fifth cause of action arises under the Copyright Act 28. U.S.C. 1338 in that said cause of action alleges that defendant is wrongfully infringing on plaintiff's copyright to plaintiff's damage. 28 U.S.C. 1338(a) provides in pertinent part:

"The district court shall have original jurisdiction of any civil action arising under any Act of Congress relating to, copyrights..... Such jurisdiction shall be exclusive of the courts of the states in copyright cases."

Plaintiff's fifth cause of action is dismissed.

In lieu of a preliminary conference, the Court has signed a disclosure order herein.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
November 3, 2006

E N T E R,

HON. KENNETH W. RUDOLPH
Justice of the Supreme Court

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