SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREA MASLEY** **PART** **IAS MOTION 48EFM**

Justice

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AVI DORFMAN and RENTJOLT, INC.

Plaintiff,

- v -

ROBERT REFFKIN and URBAN COMPASS, INC.,

Defendant.

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INDEX NO. 652269/2014

MOTION DATE

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 355, 356, 357, 363, 364, 365, 366, 376, 378

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

In motion sequence number 008, defendants Robert Reffkin and Urban Compass, Inc. (Compass) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Avi Dorfman's claims for unjust enrichment and quantum meruit as well as plaintiff RentJolt Inc.'s (RentJolt) claim for breach of contract.

In 2010, Dorfman and a friend co-founded iRent, a start-up company with the business goal of creating a web-based application to streamline the rental process in New York City and decrease costs for renters (Rabin aff, exhibit 4, Dorfman depo. tr. at 48:2-48:12; 43:9-24[1]). Specifically, the plan for iRent was to offer online rental applications to eliminate or reduce broker commissions (*id.* at 46:10-16). iRent never

[1] Pursuant to the parties' Stipulation and Order for the Production and Exchange of Confidential Information, certain documents "filed under seal" to NYSCEF were not uploaded to NYSCEF, but rather a placeholder was filed in lieu of the actual document. Thus, the court cannot accurately refer to a NYSCEF Doc. No. when citing these documents. The parties are directed to either bring an Order to Show Cause within 20 days of entry of this order to seal or e-file the documents in their entirety. The parties are referred to Part 48 Rule 13.

"went live" and Dorfman has all rights to iRent's assets (*id.* at 82:7-11). Dorfman raised $20,000 from friends and family to financially support his company and formed RentJolt in November 2011 (*id.* at 82:12-23). He then merged iRent into RentJolt (*id.*). RentJolt had the same mission as iRent (*id.* at 83:16-17). However, RentJolt was also a broker with a real estate broker's license (*id.* at 85:3-4).

On July 14, 2012, Dorfman and Reffkin both attended the same event, and during this encounter, discussed the residential real estate market (Strang aff, exhibit 8, Dorfman depo. tr. at 157:8-16; 158:9-159:7). During the conversation, Reffkin acknowledged that Dorfman had a competing company (*id.*). Later that evening, Reffkin sent Dorfman an email wishing Dorfman luck with his company but proposed that, if things did not work out with that company, Dorfman get involved in what Reffkin was planning (Strang aff, exhibit 10). Dorfman expressed interest in being involved and the two conversed about setting up a meeting (*id.*).

On July 23, 2012, Dorfman, on behalf of RentJolt, and Reffkin, on behalf of NewCo Real Estate Venture, entered into a non-disclosure agreement (NDA) (Strang aff, exhibit 11). The NDA provides, in relevant part, that

> "[e]ach party understands and agrees that no contract or agreement providing for any transaction involving the parties shall be deemed to exist unless and until a definitive agreement has been executed and delivered... . Each party also agrees that unless and until a definitive agreement regarding a transaction between the parties has been executed and delivered, neither party will be under any legal obligation of any kind whatsoever with respect to such a transaction by virtue of this Agreement or any other written or oral communication with respect to such transaction, except for matters agreed to herein"

(*id.* at Section 8[b]). The NDA further provides, in relevant part, that "[e]ach party further understands that nothing herein shall be construed to prohibit it or its designees from

challenging: (a) the other party's failure to comply with its promises and provide benefits under this Agreement" (*id.* at Section 10[a]).

In August 2012, Reffkin orally made Dorfman a job offer to Dorfman as evidenced by Dorfman's August 13, 2012 email, requesting that Reffkin's offer be made in writing and specify the title of job role and description of job, salary (base and bonuses), equity including a vesting schedule, as well as Reffkin's intention to purchase RentJolt and the purchase price (Rabin aff, exhibit 28). That same day, Reffkin responded, via email, with an offer to join the new venture as a "founding team member but not co-founder" at a salary of $80,000 and a 2.5% equity grant in the company upon formation to vest over period of four years subject to a one-year cliff (Strang aff, exhibit 30). The offer also stated that "any grant to RentJolt will be deducted from offer" (*id.*).

Dorfman informed Reffkin, via email, that he could not work for less than $100,000 and 2.5% equity with a one-year cliff was not acceptable (*id.*, exhibit 31). He further wrote that, until Reffkin purchased RentJolt, Dorfman was an employee of RentJolt and owed it a fiduciary duty (*id.*). On August 27, 2012, Dorfman forwarded Reffkin a job offer he received from another company, Bridgewater Associates, LP, and asked Reffkin to meet him "in the middle" (*id.*, exhibit 32). On August 28, 2012, Reffkin informed Dorfman that Reffkin would no longer go back and forth with him and if Dorfman wanted to continue to negotiate he should do so with Reffkin's partner in the venture, Ori Allon (*id.*, exhibit 33). Dorfman did reach out to Allon and they explored the possibility of Dorfman taking the job offer with Bridgewater and working in an advisory position with the real estate venture (id., exhibit 34). No agreement was ever reached between Dorfman and Reffkin or Dorfman and Allon.

On September 17, 2012, Dorfman sent Reffkin a cease and desist letter, demanding that Reffkin cease soliciting investors using RentJolt's materials (*id.*, exhibit 3). On October 4, 2012, Reffkin and Allon incorporated Compass (*id.*, exhibit 2, Reffkin depo. tr. at 33:7-9). Compass launched its website in May 2013 (*id.*, exhibit 42).

On July 23, 2014, Dorfman brought this action by filing a summons and complaint asserting claims for fraudulent inducement, unjust enrichment, quantum meruit, misappropriation of trade secrets, negligent misrepresentation, and breach of implied contract (NYSCEF Doc. No. 1). On December 10, 2014, plaintiffs amended the complaint adding a claim for breach of contract (NYSCEF Doc. No. 47). Defendants moved to dismiss the complaint, and on September 10, 2015, this court (Oing, J.) dismissed all claims except Dorfman's claims for unjust enrichment and quantum meruit; RentJolt's breach of contract claim remained as it was not at issue on the motion (NYSCEF Doc. No. 188). The Appellate Division, First Department, affirmed Justice Oing's decision to sustain the unjust enrichment and quantum meruit claims, but only with respect to the "services that went beyond the negotiation or consummation of a business opportunity" (*Dorfman v Reffkin*, 144 AD3d 10, 19 [1st Dept 2016]) (Appellate Decision).

Defendants now move for summary judgment dismissing these remaining three claims.

A. Unjust Enrichment and Quantum Meruit Claims (Dorfman)

Defendants assert that Dorfman's claims are barred by the Statute of Frauds as Dorfman's claims are precisely what the statute safeguards against: "a fraudulent, false or exaggerated claim for compensation in the absence of a written agreement."

Defendants and Dorfman did not execute a written agreement setting forth the terms of the services Dorfman rendered or was to render. The record is clear that they exchanged, among other things, emails that only set forth offers and counteroffers as to how Dorfman would be compensated as a "founding team member" of the new venture. Further, as stated above, it is undisputed that Dorfman provided services and made contributions during the nascent stage of the new venture's development. Indeed, in their memorandum of law, defendants admit that Dorfman performed services in the summer of 2012, but argue that those services were to secure the purchase of RentJolt or secure future employment with the new venture.

Thus, the issue is whether Dorfman is owed compensation for these services under the quasi-contractual theories of quantum meruit and unjust enrichment in the context of the Statute of Frauds, which "interdicts oral agreements to pay compensation for services rendered with respect to the negotiation of . . . a business opportunity." (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 766 [2015]; *see also* General Obligations Law [GOL] § 5-701 [a] [10] [requiring a written agreement pertaining to the negotiation of services for the purchase of real estate or of a business opportunity]).

Dorfman asserts that he provided the following contributions and services:

(a) developed a "120 Day Plan" which laid out the steps that the new venture would need to go through to successfully launch and grow (Rabin aff, exhibit 12, 120 Day Plan);

(b) created a specific list of New York City landlords and information regarding brokerage commission fees charged in New York City acquired and

aggregated by Dorfman (*id.,* exhibit 13, Landlord List; *id.*, exhibit 14, Brokerage Commissions Fees List);

(c) recruited Allon and Compass Founding Engineer Paul Groudas (*id.,* exhibit 15, Emails introducing Groudas and Reffkin);

(d) provided a "slide deck" containing an analysis of the various types of New York City rental inventory and the steps the new venture could follow to acquire that inventory (*id.,* exhibit 16, Slide);

(e) provided competitive information about other real estate technology companies to guide the new venture's launch and attract investors (*id.,* exhibit 17, Email with slides);

(f) Provided other slides containing valuable information to Reffkin (*id.,* exhibit 18, Presentation; *id.,* exhibit 19, Snider depo tr. at 23:9-24:14; *id.,* exhibit 20, Reffkin depo tr. at 69:11-72:12);

(g) Provided Reffkin with information to present to investors regarding the development of the real estate technology industry (*id.,* exhibits 21-24, Emails), an analysis of the amounts of capital required (*id.,* exhibit 25, Spreadsheet), and an investor desk (*id.,* exhibit 6, Dorfman depo tr. at 186:12-203:12).

In the Appellate Decision, the First Department held that "[w]hen alleged services go beyond the negotiation of a business opportunity, claims for unjust enrichment and quantum meruit should be sustained." (*Dorfman*, 144 AD3d at 16). The First Department found that Dorfman "alleges that he provided services clearly extending beyond the negotiation of a business opportunity, including developing materials to

secure investor backing, recruiting engineers and others to join Urban Compass, and developing the details of how Urban Compass's software product, web, and mobile applications would be 'architected'" (*id.*). The First Department was clear that these services would fall outside of the scope of GOL § 5-701 (a) (10). Thus, this court is bound by the First Department's decision, and on this motion for summary judgment, Dorfman has submitted enough proof to show that he provided these types of services that went beyond the negotiation of a business opportunity, i.e. the 120 Day Plan, creating lists of landlords and information regarding brokerage commission fees, recruiting, and developing materials such as the slides and competitive information to attract investors. However, recovery of payment for any services Dorfman rendered in negotiating defendants' potential purchase of RentJolt are barred by GOL § 5-701 (a) (10).

The First Department also held that, to fall outside the scope of GOL § 5-701 (a) (10), these services must have occurred after the "fruition" of the new venture (*Dorfman*, 144 AD3d at 16). Specifically, GOL § 5-701 (a) (10) "covers conduct at the outset, during the course of, and at the conclusion of the services rendered for the purpose of 'assisting in the negotiation or consummation' of a business opportunity" (*Dorfman*, 144 AD3d at 16-17). Here, the question of when NewCo/Compass came into fruition is an issue of fact that cannot be resolved at this juncture. Thus, Dorfman's claims for unjust enrichment and quantum meruit are not barred by GOL § 5-701 (a) (10).

Defendants argue that Dorfman could not have had a reasonable expectation of compensation for his services, which is an essential element for his quasi-contract claims, because he never invoiced Reffkin or otherwise expressly requested

compensation. However, "the question of whether a party had a reasonable expectation of compensation for services rendered is a matter for the trier of fact to determine based on the evidence before it" (*Caribbean Direct, Inc. v Dubset, LLC*, 100 AD3d 510, 511 [1st Dept 2012] [internal quotation marks and citation omitted]). The argument is rejected. Even though Dorfman did not send an invoice expressly asking to be paid, on September 12, 2012, he emailed Reffkin a document describing the nature and scope of the 80 hours of services he rendered for NewCo (Strang aff, exhibit 13). This document, although not expressly designated an "invoice," arguably reflects his expectation of getting paid. This is an issue of material fact.

Finally, defendants argue that Dorfman's claims are barred by section 10 (a) of the NDA, which states that each party "waives any and all rights to recover monetary damages" in any lawsuit filed for "liability or obligation arising out of this Agreement" (Strang aff, exhibit 11). Defendants argue that Dorfman performed services on behalf of RentJolt and not individually. This also presents an issue of fact, because there is conflicting evidence as to whether materials produced and information shared as part of the services provided were property of RentJolt's or Dorfman (*compare* Strang aff, exhibit 31 [Dorfman writes "any materials I have produced or ideas I have offer (business, product or otherwise) remain the property RentJolt, Inc."; Rabin aff, ex 6, Dorfman depo. tr. at 194:2-195:6 [quoting in part, **Q.** "[w]as that information that belonged to you or RentJolt? **A.** That was mine.").

B. Breach of Contract Claim (RentJolt)

In regard to RentJolt's breach of contract claim, which seeks both equitable relief and monetary damages based upon defendants' alleged breach of the NDA, defendants

again argue that section 10 (a) of the NDA precludes money damages. In opposition, plaintiffs contend that the foregoing section is a "general provision," and is "carved out" by the more specific language in section 11 (b) of the Agreement which states, in part, the "[e]ach party further understands that money damages may not be a sufficient remedy for any breach of this Agreement ... and the non-breaching party may be entitled to equitable relief ... as a remedy for such breach. Such remedies shall not be deemed to be for a breach ... of this Agreement, but shall be in addition to all other remedies available at law or equity" (Strang aff, exhibit 11).

It is apparent that the parties hold divergent views of the NDA with respect to the two separate provisions therein. Whether one provision is "general" or "boilerplate" or the other is a "carve-out" cannot be readily determined from the face of the NDA. These competing provisions create factual issues regarding the intent of the parties in drafting the NDA that cannot be resolved by simply reading the contractual language. Defendants are not entitled to summary judgment dismissing RentJolt's breach of contract claim for monetary damages (*see e.g.*, *Shadlich v Rongrant Assocs., LLC*, 66 AD3d 759, 760 [2d Dept 2009] ["[w]hen the language of a contract is ambiguous, its construction presents a question of fact that may not be resolved by the court on a motion for summary judgment"]).

Defendants also argue that RentJolt's claim for equitable relief is time-barred under the doctrine of laches because elements of laches are readily established by Dorfman's nearly two-year delay in filing this action, which result in prejudice to Compass as it changed its business model, raised money from new investors, changed its cap table, and grew into a successful business.

Plaintiffs contend that the defense of laches was not pleaded in defendants' answer and is raised for the first time four years after this action was commenced. Plaintiffs also contend that they are prejudiced by defendants' failure to timely assert this defense. Nevertheless, plaintiffs further contend that the laches defense is unavailable where a complaint also seeks equitable relief in an action at law, and because the breach of contract claim in this action is timely filed within the six-year limitation period, the equitable relief is also timely.

The above contentions are rejected Admittedly, this defense is predicated on Dorfman's email with a non-party (Alex Stern) on September 18, 2012 which revealed that he strategically delayed the bringing of this action against defendants in order to enhance his potential recovery when Newco became successful (*see* Strang aff., ex. 4), even though Dorfman also sent a letter to Reffkin the day before (on September 17, 2012) demanding Reffkin/Newco cease and desist in using RentJolt's trade secrets (Strang Aff., exh. 3). Defendants also point out that this defense was not known to them at the time of their answer, and before they completed discovery, and that their failure to plead this defense is immaterial. The court agrees.

"Laches applies to equitable claims, not legal ones" (*Juleah Co. v Roslyn,* 56 AD2d 483, 489 [2d 1977] [citation omitted]). Thus, this defense only applies to the portion of RentJolt's claim seeking equitable relief.

"The four basic elements of laches are, (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief,

and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant (*Dwyer v Mazzola*, 171 AD2d 726, 727 [2d 1991] [citation omitted]). Defendants have failed to establish all four elements for invocation of the laches defense. While there was certainly a strategic delay by RentJolt in bringing its claim, defendants had notice of RentJolt's claim when it sent defendants the cease and desist letter. Further, defendants have not adequately shown prejudice in the delay.

Defendants' motion for summary judgment is denied.

Accordingly, it is

ORDERED that the motion for summary judgment of defendants (sequence number 008) seeking dismissal of the first (breach of contract), third (unjust enrichment), abd fourth (quantum meruit) causes of action of the amended complaint is denied; and it is further

ORDERED, that the parties shall file motions in limine within 30 days of the date of this decision. Otherwise, they are waived. The court shall set an argument date for motions *in limine* if filed. Otherwise, the parties shall contact the Part Clerk within 35 days to select trial dates. The parties shall read the court's trial rules and comply therewith.

9/28/19
DATE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE