ORIGINAL

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.
TRIAL/IAS PART 7

ALLAN T. BOMBARD

Plaintiff,

INDEX NO.: 600442/2010
MOTION DATE: 5/11/11
MOTION SEQUENCE: 001 & 002

-against-

XITENEL, INC., LEONARD KELLNER, and
BIO-REFERENCE LABORATORIES, INC.

Defendants.

The following papers read on this motion:

Notice of Defendants' Motion for Summary Judgment, Leonard Kellner Affidavit and Exhibits Annexed 1
Defendants' Rule 19A Statement 2
Defendants' Memorandum of Law 3
Plaintiff's Notice of Cross-Motion for Declaratory Judgment, Allan Bombard Affidavit, and Exhibits Annexed 4
Plaintiffs' Memorandum of Law 5
Leonard Kellner Reply Affidavit 6
Defendants' Reply Memorandum of Law 7

PRELIMINARY STATEMENT

Defendants Xitenel, Inc. and Leonard Kellner move for partial summary judgment dismissing plaintiff's Second through Sixth Causes of Action. Following oral argument, this court dismissed plaintiff's Sixth Cause of Action on the record. The plaintiff has cross-moved for a declaratory judgment that Allan T. Bombard is a 10% shareholder of Xitenel.

BACKGROUND

Allan T. Bombard instituted this action, alleging that he is a 10% shareholder of Xitenel, Inc. f/k/a Lenetix Medical Screening Laboratory, Inc., and that he served Xitenel in the capacity of CEO during three months, for which service he is owed certain compensation. Leonard Kellner is the founder of Xitenel, incorporated in 2001 as a laboratory which conducts various genetics-related tests. Kellner and Bombard had been good friends for some time, and Bombard lent Kellner some assistance in establishing Xitenel, since Kellner is not a board certified physician or similarly credentialed scientist, which New York requires for management of a laboratory company, while Bombard is a credentialed physician and MBA.

Some time in 2008, Kellner believed he had secured substantial funds from a private equity investor. Kellner then recruited Bombard for CEO of Xitenel, while Bombard was also being recruited by a competing genetics-testing laboratory, Sequenom, Inc. Certain communications reveal that a 10% stake in Xitenel was discussed during these exchanges, on top of annual compensation of $450,000 for Bombard's services as CEO of Xitenel. Kellner and Bombard held a face-to-face meeting in September 2008, at which time Bombard alleges that he accepted to join Xitenel as CEO. On September 17, 2008 Bombard provided notice of resignation to his employer at the time, and sent an email to Kellner informing him of this fact.

Bombard alleges that as soon as he began his services as CEO to Xitenel he discovered that Xitenel operated very informally, with no written employment agreements with any officers or any staff. In this regard, Bombard produced an employment offer letter for himself that anticipated a three-year term of employment and a 10% stake in Xitenel. He produced a similar employment offer letter for Kellner, to assume a 90% stake in Xitenel. These offer letters were never signed.

Soon thereafter it was learned that the private investor had lost vast sums of money in the Madoff scandal and would not be able to finalize the private equity investment agreement. Xitenel's cash flow could not sustain Bombard's salary while meeting Xitenel's other commitments. Bombard offered to defer his compensation and ultimately resigned from his position in January 2009, when he took a position with Xitenel's competitor Sequenom. (Bombard Aff., Ex. G). Kellner then continued to manage and promote Xitenel's operations

without any help from Bombard, and now Xitenel has been successfully sold for several million dollars. Bombard claims that as a 10% shareholder of Xitenel, he was entitled to notice of the sale transaction and that he is now entitled to a portion of those proceeds.

DISCUSSION

Because contract interpretation is a matter of law, this court can generally determine whether Bombard's and Kellner's exchanges have created a contract as a matter of law. (*See, e.g., Surrey Strathmore Corp. v. Dollar Sav. Bank of New York*, 36 N.Y.2d 173 [1975], *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385 [1974]). On the other hand, if contrary inferences can reasonably be drawn from evidence that must be determined by trial, then genuine issues of material fact will preclude summary judgment; provided, however, that an immaterial or feigned issue of fact will not defeat summary judgment. (*See, e.g.,Bank of New York v. 125-127 Allen Street Assoc.*, 59 AD3d 220 [1st Dep't 2009]).

Bombard asserts that he gained a 10% interest in Xitenel merely by beginning to perform services as CEO for Xitenel under an at-will employment agreement. Bombard bases his claim on an alleged promise by Kellner which, it is asserted, created a legally binding and enforceable contract. The court finds that Kellner's promise, if any, to grant Bombard a 10% interest in Xitenel did not create a legally binding and enforceable contract because the alleged exchange or agreement lacks two essential elements of any contract, mutual assent to be bound and definiteness.[1] (*See* R2d Contracts §§ 17[1] & 33[2]).

A contract is created by an offer and an acceptance which manifest a mutual assent to be bound to an exchange of promises or an exchange of a promise and performance. As has been expounded by E. Allan Farnsworth, reporter for the Restatement Second of Contracts, this requirement "follows from the premise that contractual liability is consensual." (Farnsworth,

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[1] While Bombard affirms in his Affidavit that before becoming CEO of Xitenel he gratuitously offered his services to help Kellner in setting up Xitenel, he does not contend that Kellner's alleged promise to award him a 10% interest in Xitenel should be enforced under the material benefit rule or as "past consideration." The record does not at all suggest that Kellner intended to offer the 10% interest as repayment for Kellner's past services in founding Xitenel. Further, Bombard does not contend that any other basis for enforcing a promise, such as promissory estoppel, requires this court to enforce Kellner's intention to give Bombard a 10% interest in Xitenel. Therefore, the court notes that its analysis is focused only on the common law doctrines surrounding contract law, and as such, equitable concerns such as reliance, past services, or moral obligation, do not enter into the analysis, as much as they may weigh in favor of enforcing an indefinite intention to give Bombard a 10% interest in Xitenel.

Contracts 4th ed. § 3.1; *cf. Joseph Martin, Jr. Delicatessen, Inc. v. Schumacher*, 52 NY2d, 105, 109 [1981] ["a contract is a 'private' ordering in which a party binds himself to do, or not to do, a particular thing"). Or, as Farnsworth also instructed, "[n]o legal system has ever bee reckless enough to make all promises enforceable." (Farnsworth, *Contracts* 4th ed. § 1.5).

Contract law will therefore enforce a promise only if it is an "offer" which is a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." (R2d Contracts § 24). Often, however, parties to a negotiation will make statements that manifest a willingness to bargain, but such statements are "not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent." (R2d Contracts § 26). Such statements are short of an offer that can create a binding and enforceable agreement. (*See, e.g., Concilla v. May*, 214 AD2d 848, 849 [3rd Dept. 1995]). Similarly, a mere "agreement to agree" which leaves open terms to further negotiation does not create a binding and enforceable agreement. (*Teutul v. Teutul*, 79 AD3d 851 [2d Dept. 2010]).

Bombard seeks to present Kellner's statements in an email dated August 30, 2008 as an offer sufficient to conclude a contract. (Bombard Aff., Ex. C). However, Kellner's statements are statements made during the course of preliminary negotiations, as reflected by the language at the bottom of the email: "Before you do something #%&*@!, maybe we both should fly down to Houston when you get back before you give them an answer." (*Id.*) Indeed, Bombard's reply email was not an acceptance, and this is evidence that Kellner's statements with regard to a 10% interest in Xitenel did not invite an immediate acceptance such as to conclude a bargain. This email, alone, does not constitute a binding and enforceable promise.

Subsequent to this email conversation, Bombard and Kellner met in person, and Bombard alleges that at that time he accepted a definite offer by Kellner for a 10% interest in Xitenel, along with the promised salary, in exchange only for joining Xitenel as CEO in an at-will agreement. Other evidence, however, strongly contradicts Bombard's allegation that this oral exchange concluded Bombard's and Kellner's negotiations with regard to any interest that

Bombard was to acquire in Xitenel, and Bombard's own conduct contradicts his position that he became a 10% owner of Xitenel following only this oral exchange.

First, where a written memorial of a contract is expressly contemplated, this may be evidence that there was no mutual assent to be bound until such a written memorial is created. (*See Willmott v. Giarraputo*, 5 NY2d 250, 253 [1959]). While the Restatement Second of Contracts indicates that the lack of a memorial, even if one was contemplated, does not prevent the creation of a contract where there is otherwise consideration and mutual assent to be bound, it does acknowledge that where "parties manifest an intention to prepare and adopt a written memorial... the circumstances may show that the agreements are preliminary negotiations." (R2d Contracts § 27). Among the relevant circumstances that a court should consider to determine whether the parties intended that only a written memorial would conclude a contract, are:

> the extent to which express agreement has been reached on all the terms to be included, whether the contract is of a type usually put in writing, whether it needs a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether a standard form of contract is widely used in similar transactions, and whether either party takes any action in preparation for performance during the negotiations

(R2d Contracts § 27 Comment *c*).

In this regard, Kellner's email contemplated that any 10% interest in Xitenel would be given "in writing." (Bombard Aff., Ex. C). Thus the court may infer that Kellner "did not intend to be bound until a formal contract was executed." (*Kniffen v. Kniffen*, 223 AD2d 686 [2d Dept. 1996]). Indeed, an agreement to sale or grant an interest in a corporation is a type of agreement almost exclusively put into writing. Until recently, UCC § 8-319 [repealed eff. Oct. 10, 1997] required that any such agreements for exchange of securities had to be in writing. Acquiring shares in a close corporation is also a type of agreement that requires various details, such as voting rights, effect from any dilution of shares, shareholder's right to sale the shares, any calculation of the value of shares in event of liquidation, and such other details as might be found in a shareholder agreement, certificate of incorporation, or corporate by-laws. Bombard himself attempted to iron out such details for his acquisition of a 10% interest in Xitenel by the formal employment agreements that he drafted. (Bombard Aff., Ex. E). Tellingly, however, Bombard's

employment agreement was never signed. And, the fact that Bombard left Xitenel after only three months, despite having contemplated agreeing to a three-year term of employment, according to his draft employment letter, bolsters the conclusion that Bombard and Kellner never settled on the final details and terms of their agreement by which Bombard was to be CEO for some period of time and in exchange acquire a 10% stake in Xitenel. Bombard's unsigned employment letter is therefore prima facie evidence that Bombard's and Kellner's alleged bargain was never sealed, and that any oral discussions regarding Bombard's 10% stake in Xitenel constitute non-binding statements in the course of preliminary negotiations which also fail for indefiniteness or lack of material terms.

A requirement of definiteness in the offer and acceptance is part of the requirement of mutual assent to be bound, since the parties must know what it is to which they are agreeing to be bound. (*See* R2d Contracts § 33). Indeed, a promise must be sufficiently definite to create some justifiable and concrete expectation of a benefit in the recipient of the promise (or promisee), and thus the requirement of definiteness "is implicit in the premise that contract law protects the promisee's expectation interest." (Farnsworth, *Contracts* 4th ed. § 3.1). In this case, it is not at all clear that Bombard ever received such a sufficiently definite promise as to create a justifiable and concrete expectation that he was a 10% owner of Xitenel. On the contrary, as is discussed later in this opinion, Bombard's conduct (as such his failure to request any stock certificates or report his stock ownership to the IRS)[2] reveals that he never had any settled expectation that he was a 10% shareholder of Xitenel.

In some contexts, particularly in the sale of goods governed by Article 2 of the UCC, courts will enforce contracts despite some gaps in the terms, if the parties otherwise believed they were bound and had a contract. In the context of sale of goods between merchants, a course of dealings, trade usage, market value, and certain UCC default terms (or "gap-fillers") may be used

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[2] While defendants contend that judicial estoppel should apply to prevent Bombard from asserting any ownership of Xitenel, because he failed to disclose any such ownership in his income tax returns, defendants did not present any evidence that Bombard was affirmatively required to disclose to the IRS any income loss from his alleged ownership of Xitenel, as would have been reflected in any K1 statement. (Bombard Aff., Ex. J). If Bombard was not required to report an income loss, then failing to report it is not perjury and not inherently inconsistent with his position. However, because it would have been in Bombard's financial interest to disclose the income loss, it is further evidence that Bombard did not have a settled expectation that he was a 10% shareholder of Xitenel and that he did not believe that Kellner's intention to grant him the 10% interest had become a binding promise.

to ascertain the reasonable expectations of the parties in the contract, as merchants who regularly deal with sales of goods. (*May Metro. Corp. v. May Oil Burner Corp.*, 290 NY 260 [1943]). However, in other contexts, such as in sale of real estate, "[s]tability is the hallmark of the law controlling such transactions" and therefore indefiniteness will not do. (*Joseph Martin, Jr. Delicatessen Inc. v. Schumacher*, 52 NY2d 105, 111 [1981]). A sale or exchange of shares is certainly more analogous to the real estate context than the sale of goods between merchants. Indeed, until recently, UCC § 8-319 applied a written memorial requirement to any transactions involving a transfer of shares and other securities. Further, New York's Business Corporation Law, like the Real Property Law, seeks to protect parties' settled expectations regarding their legal rights of ownership by promoting bright-line rules and creation of written records. In fact, BCL § 624 requires a corporation to maintain an accurate shareholder ledger, much like acquisitions in real estate must be recorded in title registries. Therefore, the requirement of definiteness surely still carries significant force in the context of an agreement to transfer shares in a corporation, and it is not clear that the repeal of UCC § 8-319 changes well-settled case law that has refused to enforce indefinite oral agreements to transfer shares in a corporation, even when the promisee had begun performance (generally an exception to the statute of frauds). (*See, e.g., Anostario v. Vicinanzo*, 59 N.Y.2d 662 [1983]).

The instant matter can be analogized to the First Department's discussion in *Hart v. Windjammer Barefoot Cruises Ltd.* (220 A.D.2d 252, 252-53 [1st Dept. 1995]) regarding an alleged oral agreement to make the plaintiff a shareholder: "even assuming the Statute of Frauds did not apply, the alleged agreement to make plaintiff a 'part of the Windjammer family' is too vague to be capable of enforcement making plaintiff at best an employee at will subject to termination for any reason or no reason" (citations omitted). Similarly, Kellner's stated intention to have Bombard join as a "partner" rather than a mere "employee," is too vague an intention to constitute the basis of Bombard's and Kellner's alleged bargain to make Bombard a 10% shareholder of Xitenel only upon Bombard's beginning to work as CEO of Xinetel.

It is not at all clear what would be the sum and substance of Bombard's and Kellner's alleged bargain according to Bombard, or that this sum and substance could be ascertained. What is clear, however, is that courts would be left to fill various gaps and indefinite terms in

this alleged agreement. For example, there is no evidence that any terms were agreed to regarding Bombard's voting rights, ability to transfer his shares, or any methods for valuing Bombard's shares in the event of liquidation. And, again, Bombard cannot escape the fact that a definite term of employment for his services as CEO was discussed as part of his bargain with Kellner.

The fact that no agreement was reached as to any definite term of employment as CEO is fatal to his claim to a 10% stake in Xitenel. Farnsworth expounds on a critical distinction in this regard, as it relates to incomplete terms:

> It is essential to distinguish one other cause of incompleteness of agreement—failure to agree. If the seller and the buyer of apples do discuss the matter of the seller's responsibility for their quality and are unable to agree on how that matter is to be resolved, the incompleteness of their agreement in that respect will be fatal to the enforceability of their agreement... because of lack of assent. There is a critical distinction between remaining silent on such a matter and discussing it but failing to agree.

(Farnsworth, *Contracts* 4th ed. § 3.27). Thus, while Bombard cites case law for the proposition that an employment agreement is not indefinite or lacking mutual assent when it lacks any terms regarding the term of employment, the fact that a term of employment was discussed as part of Bombard's and Kellner's bargain is certainly prima facie evidence that Bombard and Kellner did not conclude their negotiations and assent to be mutually bound. Rather, as is often the case in the employment context, "an employment agreement that is indefinite as to duration may give rise to a series of contracts to pay at the specified rate as each unit of work is performed," (Farnsworth, *Contracts* 4th ed. § 3.30, *cf. Varney v. Ditmars*, 217 N.Y. 223 [1916]). Thus, Bombard began to perform his services as CEO of Xitenel with the understanding that he would receive the continuing monthly salary of $37,500, even as the details of his term of employment and acquisition of an ownership stake in Xitenel were still be worked out.

Bombard's rendering of performance as CEO of Xitenel was not an acceptance of any definite offer by Bombard, and it did not seal Bombard's and Kellner's alleged bargain, given the evidence that a definite term of employment had been considered and no agreement reached. While courts are now more willing to see beginning of performance as evidence of a manifested

acceptance, such performance is not conclusively an acceptance that seals a binding agreement. (*See, e.g., Venture Manuf. LTD v. Matco Gr., Inc.*, 6 AD3d 850 [3rd Dept. 2004] [deposit for a lease was not performance that concluded an agreement or avoid the statute of frauds]). Under the Restatement Second of Contracts § 45, performance at most creates an option contract. However, the "*offerror's* duty of performance under any option contract so created is conditional on completion or tender of the invited performance" (emphasis added). (R2d Contracts § 45[2]). Thus, if Bombard had in fact stayed on as CEO of Xitenel for three years, he would have a much stronger, if not conclusive case, that he had acquired a 10% ownership in Xitenel. Because he left after only three months, however, his leaving is conclusive proof that he did not complete or render the performance that Kellner had requested, and thus Bombard cannot benefit from Kellner's promise.

The record reveals no genuine issues of fact with regard to Bombard's alleged 10% interest in Xitenel. The evidence is conclusive that no agreement was ever "sealed" between Bombard and Kellner. This evidence includes: an email by Kellner which reveals only statements made in the course of negotiations; the indefiniteness of the alleged oral agreement; Bombard's drafted employment letter proving a lack of agreement as to any definite term of employment; and Bombard's failure to perform fully as invited by Kellner, that is, by working during a three year term. The evidence suggests, rather, that Bombard began to perform services as CEO of Xitenel even as the details of any bargain between Bombard and Kellner were still being worked out. These conclusions are confirmed by evidence that Bombard never believed that he was a 10% owner of Xitenel. For example, he never requested that his name be included in the stock ledger, he did not receive any stock certificates, and he never reported his alleged 10% ownership in Xitenel to the IRS, even though it would have been in his financial interest to do so. The only suggestion of "ownership" before this lawsuit is in his resignation letter to Kellner, and that is too fleeting and vague a statement, open to interpretation, to reveal a settled expectation that he indeed held 10% of the stock in Xitenel. The court finds, as a matter of law, that Bombard's and Kellner's exchanges, even as alleged by Bombard, did not create an enforceable agreement to make Bombard a 10% shareholder of Xitenel. Therefore, Bombard was not a shareholder of Xitenel.

Because Bombard is not and has not been a shareholder of Xitenel (or Lenetix Medical Screening Laboratory), the Second through Sixth Causes of Action, which are based on Bombard's alleged 10% ownership of Xitenel, fail as a matter of law. Bombard was not a shareholder of record. (*See Cross Properties, Inc. v. Brook Realty Co., Inc.*, 37 AD2d 193 [2d Dept. 1977]).

Defendants' motion for summary judgment is granted and the Second through Sixth Causes of Action are hereby dismissed. Plaintiff's cross-motion for a judgment declaring that Bombard is a 10% shareholder of Xitenel is denied. In fact, this cross-motion was previously withdrawn in open Court.

This constitutes the Decision and Order of the Court.

DATED: May 24, 2011

J.S.C.

HON. ERB WARSHAWSKY

ENTERED

MAY 25 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE