

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

Sonenshine Partners, LLC v Duravant LLC

2021 NY Slip Op 01135 (Appellate Division First Department 2021) · No. Appeal No. 13157; Case No. 2020-02313; Index No. 657208/19 · Decided February 18, 2021

SUMMARY

The Appellate Division, First Department reversed an order that had dismissed Sonenshine Partners’ quantum meruit/unjust enrichment claim while allowing its breach of contract claim to proceed. The court held that the nondisclosure agreement’s provision concerning a future financial-advisory engagement was an unenforceable agreement to agree because it omitted essential terms. The court concluded that the complaint adequately pleaded quantum meruit/unjust enrichment and that the claim was not barred by General Obligations Law § 5-701(a)(10).

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Renwick, J.P.; Kern, J.; Singh, J.; Shulman, J.
JURISDICTION	New York
DECIDED	February 18, 2021
DOCKET	Appeal No. 13157; Case No. 2020-02313; Index No. 657208/19
DISPOSITION	reversed
PROCEDURAL POSTURE	Appeal from an order of Supreme Court, New York County, resolving defendant's motion to dismiss claims for breach of contract and quantum meruit/unjust enrichment.
STANDARD OF REVIEW	De novo review of an order deciding a motion to dismiss.
PRECEDENTIAL VALUE	Published appellate decision
PARTIES	Duravant LLC, Sonenshine Partners, LLC v. Sonenshine Partners, LLC, Duravant LLC

TOPICS

- contract formation
- quantum meruit
- unjust enrichment
- commercial litigation
- appellate procedure

PRACTICE AREAS

contract law

commercial litigation

appellate procedure

QUESTIONS PRESENTED

1. Whether the nondisclosure agreement created an enforceable contract requiring Duravant to engage or compensate Sonenshine Partners as a financial advisor.
2. Whether Sonenshine Partners adequately stated a quantum meruit or unjust enrichment claim notwithstanding New York General Obligations Law § 5-701(a)(10).

HOLDINGS

1. The relevant provision was an unenforceable agreement to agree because it left essential terms, including the scope of Sonenshine Partners' role, the investment-banking services to be provided, and the fees, for future negotiation.
2. Sonenshine Partners stated a claim for quantum meruit and unjust enrichment, and the claim was not barred by General Obligations Law § 5-701(a)(10) because the alleged services involved informing Duravant whether to acquire Maillis or one of its subsidiaries rather than merely acting as an intermediary in negotiating or consummating a business opportunity.

KEY QUOTATIONS

“Regarding SP's breach of contract claim, the relevant provision in the NDA is an agreement to agree that is unenforceable” ([*1])

“SP has, however, stated a claim for quantum meruit/unjust enrichment.” ([*1]-[*2])

FACTUAL BACKGROUND

Sonenshine Partners alleged that a nondisclosure agreement offered it the opportunity to serve as Duravant's financial advisor regarding a potential transaction involving Maillis Group. It further alleged that it performed financial advisory work aimed at informing Duravant whether to purchase Maillis or one of its subsidiaries, but Duravant failed to compensate it after purchasing part of the Maillis Group.

PROCEDURAL HISTORY

Sonenshine Partners, LLC sued Duravant LLC for breach of contract and quantum meruit/unjust enrichment based on a provision in a nondisclosure agreement concerning the opportunity to serve as Duravant's financial advisor. Supreme Court dismissed the quantum meruit/unjust enrichment claim but declined to dismiss the breach of contract claim. The Appellate Division reversed, dismissing the contract claim and denying dismissal of the quantum meruit/unjust enrichment claim.

DISPOSITION

reversed

CASES CITED

- Carmon v Soleh Boneh Ltd., 206 AD2d 450 (2d Dept 1994), lv denied 85 NY2d 804 (1995)
- Cobble Hill Nursing Home v Henry & Warren Corp., 74 NY2d 475, 482 (1989), cert denied 498 US 816 (1990)
- Foros Advisors v Digital Globe Inc., 333 F Supp 3d 354, 361 (SD NY 2018)
- Schneider v Jarman, 85 AD3d 581, 582 (1st Dept 2011)
- Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp., 78 NY2d 88 (1991)
- Cowen & Co, LLC v Fiserv, Inc., 141 AD3d 18 (1st Dept 2016)
- JF Capital Advisors, LLC v Lightstone Group, LLC, 25 NY3d 759, 766 (2015)
- Dorfman v Reffkin, 144 AD3d 10, 19 (1st Dept 2016)
- Chapman, Spira & Carson, LLC v Helix BioPharma Corp., 115 AD3d 526, 528 (1st Dept 2014)

OPINION

PER CURIAM.

Sonenshine Partners, LLC v Duravant LLC (2021 NY Slip Op 01135) Sonenshine Partners, LLC v Duravant LLC 2021 NY Slip Op 01135 Decided on February 18, 2021 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided and Entered: February 18, 2021 Before: Renwick, J.P., Kern, Singh, Shulman, JJ. Index No. 657208/19 Appeal No. 13157 Case No. 2020-02313 [*1]Sonenshine Partners, LLC, Plaintiff-Respondent-Appellant, vDuravant LLC, Defendant-Appellant-Respondent. Binder & Schwartz LLP, New York (Lauren K. Handelsman of counsel), for appellant-respondent. Cohen Milstein Sellers & Toll PLLC, New York (Michael B. Eisenkraft of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Joel M. Cohen, J.), entered April 21, 2020, which granted defendant's motion to dismiss to the extent of dismissing plaintiff's second cause of action for quantum meruit/unjust enrichment, and denied dismissal of the breach of contract claim, unanimously reversed, on the law, with costs, to grant dismissal of plaintiff's breach of contract claim, and to deny the motion to dismiss the claim for quantum meruit/unjust enrichment.

Plaintiff Sonenshine Partners LLC (SP) commenced this action against defendant Duravant LLC, alleging causes of action for breach of contract and quantum meruit/unjust enrichment, based on a provision in a nondisclosure agreement (NDA) that "offered [SP] the opportunity to be engaged as Duravant's financial advisor with respect to a potential transaction involving [nonparty Maillis Group]."

SP alleged that Duravant failed to compensate it for financial advisory services it rendered in connection with its purchase of a portion of the Maillis Group. Regarding SP's breach of contract claim, the relevant provision in the NDA is an agreement to agree that is unenforceable (see

Carmon v Soleh Boneh Ltd., 206 AD2d 450 [2nd Dept 1994], lv denied 85 NY2d 804 [1995], citing Cobble Hill Nursing Home v Henry & Warren Corp., 74 NY2d 475, 482 [1989], cert denied 498 US 816 [1990]).

The agreement merely provides SP with the opportunity to act as a financial advisor based on terms to be negotiated later (see *Foros Advisors v Digital Globe Inc.*, 333 F Supp 3d 354, 361 [SD NY 2018]; see also *Schneider v Jarmain*, 85 AD3d 581, 582 [1st Dept 2011]).

The relevant provision failed to delineate the scope of SP's role, the types of investment banking services it would provide to Duravant, or the fees associated with any transaction. Although the agreement stated that Duravant would use "commercially reasonable best efforts" to ensure that SP had the opportunity to serve as its financial advisor, this fails to provide an industry standard that could clarify the missing terms and render the agreement enforceable (see *Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd.*

Corp., 78 NY2d 88 [1991]; cf. *Cowen & Co, LLC v Fiserv, Inc.*, 141 AD3d 18 [1st Dept 2016]). SP has, however, stated a claim for quantum meruit/unjust enrichment. Contrary to Duravant's contentions, SP's claim is not barred by New York General Obligations Law (GOL) § 5-701(a)(10) because the complaint alleges that SP was not simply an intermediary, providing services in the negotiation or consummation of a business opportunity.

Rather, it allegedly performed work aimed at informing Duravant whether to purchase Maillis or one of its subsidiaries (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 766 [2015]; see also *Dorfman v Reffkin*, 144 AD3d 10, 19 [1st Dept 2016]).

In any event, the agreement in conjunction with the emails between the parties could satisfy the requirements of GOL 5-701(a)(10) for purposes of SP's quantum meruit[*2]/unjust enrichment claim, as "the rule for a writing establishing quantum meruit claims is less exacting" (*Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 528 [1st Dept 2014]).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: February 18, 2021