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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn PART 49

Index Number : 600397/2006

TORSIELLO CAPITAL PARTNERS

VS

SUNSHINE STATE HOLDING

Sequence Number : 003

SUMMARY JUDGMENT

EX NO.

ION DATE

ION SEQ. NO.

ION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . . .

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/1/08

Hon. Cahn

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

----------X

TORSIELLO CAPITAL PARTNERS LLC, TORSIELLO SECURITIES, INC. AND FIRST INTERNATIONAL CAPITAL LLC,

Plaintiffs,

-against- Index No. 600397/06

SUNSHINE STATE HOLDING CORPORATION,

Defendant.

----------X

Herman Cahn, J.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

In motion sequence number 003, plaintiffs Torsiello Capital Partners LLC, Torsiello Securities, Inc., and First International Capital LLC move for summary judgment in their favor on the complaint and dismissing the counterclaims with prejudice, CPLR 3212.

In motion sequence number 004, defendant Sunshine State Holding Corporation moves for summary judgment in its favor dismissing the complaint and granting it judgment as sought in the counterclaims.

In the complaint, plaintiffs assert a single cause of action for breach of an April 3, 2002 contract. Pursuant to said contract, Sunshine retained First International to render financial advisory and investment banking services and to act as sole agent for the private placement of Sunshine's securities. Although not signatories to the contract, Plaintiffs Torsiello Capital and Torsiello Securities (collectively, the Torsiello companies) seek to enforce the agreement as First International's affiliates and successors-in-interest.

In relevant part, the contract provides that, in exchange for its services, First International would be paid a fee equal to 3.5% of the total purchase price on the sale of Sunshine, if a definitive agreement for the private sale of Sunshine was arrived at during the contract term or within eighteen months after its termination, unless the contract was terminated by Sunshine for cause. The contract also provides that a $50,000 retainer fee to be immediately paid by Sunshine to First International which would be deducted from the fees subsequently earned by First International. Sunshine paid the retainer fee upon the contract's execution.

During the contract term, First International and Torsiello Capital prepared various documents to aid in the sale of Sunshine's securities, made numerous telephone calls to potential purchasers, and held meetings with some of the potential purchasers. Despite these efforts, no purchaser for Sunshine was located.

Sunshine alleges that, by the end of 2002, First International had virtually ceased its efforts to locate a buyer. By letter dated January 14, 2003, Sunshine formally terminated "the services of First International . . . and/or Torsiello Capital . . . , pursuant to paragraph 11 of the [contract]." In the termination letter, Sunshine thanked nonparties Frank D. Lackner, Torsiello Capital's managing director, and Mario Torsiello, president and chief executive officer of each of the three plaintiffs, for their efforts. Approximately eleven months later, in November 2003, First International was formally dissolved and a certificate of cancellation was filed with the Delaware Secretary of State.

Within eighteen months after the contract's termination, nonparty QualSure Insurance Corp., an indirect owner of 16% of Sunshine's stock, announced that it had reached a firm agreement to acquire Sunshine's outstanding stock in exchange for approximately $10.7 million.

The transaction closed in May 2004.

After learning of the purchase, in September 2005, First International demanded payment of a fee based on 3.5% of the purchase price. Sunshine rejected the demand.

Plaintiffs then commenced this action to recover $326,250 in fees, together with interest, costs of collection, and attorneys' fees, on a claim of breach of contract.

Sunshine served an answer in which it denies the allegations of breach. It also asserts affirmative defenses for breach of contract, illegality, unclean hands, waiver, equitable estoppel and lack of standing, based on allegations that, among other things, First International could not legally perform the services that it agreed to perform because it was not a registered securities broker during the contract term and that therefore the contract is void and unenforceable pursuant to Section 29 of the Securities Exchange Act of 1934 (SEA), 15 USCS § 78cc.

In addition, Sunshine asserts counterclaims for fraud, fraudulent concealment and omission, negligent misrepresentation, breach of fiduciary duty and unjust enrichment, and seeks to recover the $50,000 retainer fee. The counterclaims are based on allegations that Mario Torsiello and Frank Lackner repeatedly represented to Sunshine that First International was fully and legally capable of performing its contractual obligations and failed to disclose that it was not a registered broker.

Each side now moves for summary judgment in its respective favor on the complaint and counterclaims.

As a threshold issue, the parties dispute whether Torsiello Capital, Torsiello Securities and First International each have the legal capacity to commence and prosecute this action to enforce the contract.

First International's Standing:

With regard to First International, the parties dispute whether it has legal capacity under Delaware law, inasmuch as it was dissolved prior to commencement of this action and whether Sunshine has waived its right to raise this affirmative defense at this juncture.

A defendant's failure to affirmatively raise lack of standing or legal capacity as a defense in a pre-answer motion to dismiss or in an answer is deemed a waiver of the defendant's right to assert such defense (Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo, 42 AD3d 239, 241-242 [2d Dept 2007]; Security Pacific Natl. Bank v Evans, 31 AD3d 278, 279 [1st Dept 2006], appeal dismissed 8 NY3d 837 [2007]; CPLR 3211 [a] [3], 3211 [e]). Sunshine did not raise the issue of First International's lack of capacity in a pre-answer motion to dismiss, nor did it raise the issue as an affirmative defense in its answer dated March 31, 2006. Thus, Sunshine has waived the right to raise it at this time.

Therefore, that branch of Sunshine's motion for summary judgment against First International based on lack of legal capacity and standing grounds is denied.

Torsiello Companies' Standing:

With regard to the Torsiello companies' standing, plaintiffs contend that, although admittedly not signatories to the contract, they acquired the right to recover fees under the contract as First International affiliates and successors-in-interest to that corporation.

Specifically, plaintiffs contend that the Torsiello companies were retained by First International as its agents to perform its contractual obligations and, thereby, acquired the right to sue for fees earned under the contract, pursuant to the express terms of the contract.

The well-established law of contract interpretation provides that:

> In interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all of its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement. Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied

(American Express Bank Ltd. v Uniroyal, Inc., 164 AD2d 275, 277 [1st Dept 1990], appeal denied 77 NY2d 807 [1991] [internal citations omitted]). Further, "[w]hether or not a writing is ambiguous is a question of law to be resolved by the courts" (W.W.W. Associates, Inc. v Giancontieri, 77 NY2d 157, 162 [1990]).

The first contract provision upon which plaintiffs rely, provides, in relevant part, that "[i]f appropriate in connection with performing the services of this engagement, First International may from time to time use the services of an affiliate in which case references to 'First International' shall include references to such entity" (Contract, at 1 [emphasis added]). The second provision provides that Sunshine shall pay "First International" a fee in certain circumstances (Contract, ¶ 4[b]).

These two provisions, when read together, provide that a First International affiliate whose services were used by First International in performing its contractual obligations acquires the same contractual rights accorded to First International in the contract, including the right to payment of a fee.

Contrary to Sunshine's contention, nothing in the contract limits the obligations and rights acquired by the affiliate whose services are used. Further, nothing in the contract may be

construed as prohibiting the subsequent assignment of the contract to a successor. Rather, the contract provides, in relevant part, that it "will be binding upon and inure to the benefit of [Sunshine] and First International and their respective successors and assignees" (Contract, ¶ 12). The contract terms also do not prohibit subsequent oral modifications to the contract terms.

The evidentiary record demonstrates that Torsiello Capital was a First International affiliate. An affiliate is defined as "[a] corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation" (Black's Law Dictionary [8th ed. 2004]). There is no dispute that: First International and Torsiello Capital were both owned by Mario Torsiello; they were in the same industry and performed the same services for many of the same clients, including Sunshine; and, at some point, First International ceased operations and Torsiello Capital either began or continued performing under the subject contract (see Torsiello 12/11/06 Depo Tr at 92:5-23). Torsiello Capital was formed in June 2002 (see id. at 91:8-12), approximately two months after execution of the contract.

However, there is little evidence that Torsiello Capital was a successor-in-interest to First International. A successor-in-interest is a party which obtains the rights of the original contracting party, without a substantive change in ownership (City of New York v Turnpike Dev. Corp., 36 Misc 2d 704, 706 [Sup Ct, Kings County 1962]). "In the case of corporations, the term 'successor in interest' ordinarily indicates statutory succession as, for instance, when the corporation changes its name but retains the same property" (id.; Spielman v Acme Natl. Sales Co., Inc., 169 AD2d 218, 222 [3d Dept 1991]). In contrast, a mere transfer of property from one business organization to another does not necessarily make the transferee a successor-in-interest (id.). Here, the record at most demonstrates that Torsiello Capital replaced First International

and acquired the right to sue by virtue of its affiliation with First International, but not that it is that corporation's successor-in-interest.

For these reasons, that branch of Sunshine's motion for summary judgment against Torsiello Capital on lack of legal capacity and standing grounds is denied.

Sunshine's Motion on the Contract Claim:

That branch of Sunshine's motion for summary judgment on the contract claim asserted by Torsiello Securities is granted. While Torsiello Securities is wholly owned by Torsiello Capital, it was not created until sometime in 2004 (see Torsiello Aff, ¶¶ 2, 3), after Sunshine's termination of the contract on January 14, 2003 and First International's dissolution on November 23, 2003. Therefore, Torsiello Securities could not have performed any services on behalf of either First International or Torsiello Capital under the contract and, pursuant to the express contract terms, could not have acquired any right to enforce the contract fee provision.

The parties dispute whether the contract is enforceable or void ab initio pursuant to sections 15 (a) and 29 (b) of the SEA. Section 15 (a) (1) of the SEA prohibits a securities broker from using interstate commerce as the means to effect a transaction in securities or to induce or attempt to induce the purchase or sale of any security unless the broker is registered with the SEC (see 15 USCS § 78o [a] [1]). Section 29 (b) provides that "[e]very contract" made in violation of the SEA or the performance of which involves such violation "shall be void" (15 USC § 78cc [b]; Regional Props., Inc. v Financial & Real Estate Consulting Co., 678 F2d 552, 557 [5th Cir 1982] [holding that the section includes a private, equitable cause of action for rescission or similar relief]; Banque Indosuez v Pandeff, 193 AD2d 265, 270 [1st Dept 1993], lv dismissed 83 NY2d 907 [1994] [holding that state courts have subject matter jurisdiction over SEA defenses]).

The parties primarily dispute whether First International was required by the SEA and the contract terms to be a registered securities broker. Plaintiffs contend that First International did not need to be registered to enter into the contract and that, in any event, it had the right to use an affiliate which was registered. Sunshine contends that, because First International was not registered, it could not legally perform its contractual obligations and, therefore, cannot now recover under the contract or retain the $50,000 retainer fee.

Section 3 of the SEA defines the term "broker" to include "any person engaged in the business of effecting transactions in securities for the account of others" (15 USCS § 78c [4]). The statute has been construed to require SEC registration where there is a "regularity of participation at key points in the chain of distribution" of securities (Securities & Exch. Commn. v Martino, 255 F Supp 2d 268, 283 [SDNY 2003], remanded on other grounds 94 Fed Appx 871 [2d Cir 2004]). In addition, the SEC has opined in a no-action letter[1] that "a professional who brings together potential buyers and sellers and advises the parties on questions of value, plays an integral role in negotiating the transaction, or provides other services designed to facilitate the transaction, may be deemed to be a broker" for purposes of the SEA § 15 (a) registration requirements (International Bus. Exch. Corp., SEC No-Action Letter, 1986 WL 67535, at *2 [Dec 12, 1986]).

In determining whether SEC registration is required, the courts look to a variety of factors, including: the receipt of transaction-based compensation as opposed to a flat fee; the

[1] Securities & Exchange Commission no-action letters are prepared by SEC staff counsel; they are purely advisory and do not constitute binding precedent (International Bus. Exch. Corp., SEC No-Action Letter, 1986 WL 67535, *3 [Dec 12, 1986]). However, they may be found "persuasive" in the interpretation of the federal securities laws and regulations (see e.g. Allaire Corp. v Okumus, 433 F3d 248, 254 [2d Cir 2006]).

rendering of advice about the structure, price or desirability of a securities transaction; the finding of investors actively rather than passively; advertisement or solicitation on behalf of the issuer of the securities; becoming involved in negotiations between an issuer and investors; engaging in the foregoing with regularity; being an employee of the issuer; and possessing client funds and securities (Securities & Exch. Commn. v Margolin, 1992 WL 279735, at *5, [SDNY Sept. 30, 1992]).

The record demonstrates that First International was retained to act, and did act, as a securities broker with regard to the marketing and proposed private sale of Sunshine's securities. The contract expressly provides that First International "is engaged by Sunshine . . . to render financial advisory and investment banking services to [Sunshine], on an exclusive basis, in connection with reviewing [Sunshine's] capital structure, as sole agent for a private placement of equity or equity-linked securities or debt of [Sunshine], which may or may not result in a sale of [Sunshine]" (Contract, at 1). The contract also expressly provides that First International would be paid a fee based on a percentage of the gross value of any securities transaction occurring within a certain time frame (see id., ¶ 4[b]). Mario Torsiello admitted at his deposition that First International was typically compensated for its services in this manner (see Torsiello Depo Tr at 67:5-21; 76:20-77:9). One of the hallmarks of a securities broker is the receipt of transaction-based compensation (John R. Wirthlin, SEC No-Action Letter, 1999 WL 34898 [Jan 19, 1999]). The contract also requires First International to act as exclusive agent in arranging for any private placement of Sunshine's securities (see Contract, ¶ 1[iii]).

Torsiello admitted that First International could not serve as Sunshine's sole agent in a private placement or act as a public offering co-manager because it was not a registered securities

broker (see Torsiello Depo Tr at 33:7-34:5; 70:4-14; 171:22-172:2). Further, the contract requires First International to assist Sunshine by preparing an offering memorandum describing Sunshine and the terms of a private placement, by formulating and executing a marketing strategy for the securities, identifying prospective purchasers, contacting such purchasers, and assisting in the negotiations with such purchasers (see Contract, ¶ 1[iv]). Torsiello testified that First International performed these services for its clients generally and that its business was selling whole businesses, including their securities (see Torsiello Depo Tr at 65:8-66:16, 71:2-24). Torsiello also admitted that actively finding purchasers for a company was a part of First International's business (see id. at 66:2-5). These activities are of the type that are performed by a securities broker and require a broker to be registered (see Hallmark Capital Corp., SEC No-Action letter, 2007 WL 1879799 [June 11, 2007]; John R. Wirthlin, SEC No-Action Letter, 1999 WL 34898, supra; Richard S. Appel, SEC No-Action Letter, 1983 WL 30911 [Feb 14, 1983]; SEA § 15 [a]).

In addition, Torsiello admitted that Torsiello Capital was engaged in the same activities as was First International (see Torsiello Depo Tr II at 94:7-96:9, 100:24-103:20) and was compensated in the same way, by a small retainer and a success fee consisting of a percentage of the gross proceeds realized from the transaction (see id. at 100:12-23).

With regard to the work actually performed under the contract at issue, the parties agree that First International and Torsiello Capital: prepared "teasers" and business plans for potential investors in Sunshine securities; disseminated these materials to such investors; placed telephone calls to more than 240 potential investors; identified fifty seven equity investor candidates; and met in person with eleven such investors.

Lastly, and contrary to plaintiffs' contention, Torsiello Securities' registration as a securities broker prior to expiration of the eighteen month period following termination of the contract is not relevant. Torsiello attests that Torsiello Securities was formed in 2004 (see Torsiello 9/11/07 Aff, ¶¶ 2, 3). This testimony confirms that Torsiello Securities did not exist during the term of the contract and, therefore, could not have been used by First International to perform any of the contract services requiring registration.

Inasmuch as the contract required First International and its affiliates to provide the types of services that require licensing by the SEC as a securities broker, and they did perform such services while not so licensed, the contract is void ab initio and rescindable.

The parties next dispute whether Sunshine's affirmative defense based on plaintiffs' failure to register as securities brokers in violation of SEA §§ 15 (a) and 29 (b) is time-barred.

Section 29 (b) of the SEA permits a party to a contract with a non-registered securities broker to seek rescission if performance of the contract "involves the violation of or the continuance of any relationship or practice in violation of" the SEA (15 USCS § 78cc [b]). The provision at subsection 29 [b] [2] [B] sets forth a limitations period as follows:

> no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) or (2) of subsection (c) of section 78o of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation

(15 USC § 78cc [b] [2] [B] [emphasis added]).

The Appellate Division, First Department has held that the defense that the broker was

not registered, was time-barred by the section 29 limitations period where it "was not raised within three years after the violation or one year after its discovery" (Carter Fin. Corp. v Atlantic Med. Mgt., LLC, 262 AD2d 178, 178 [1st Dept 1999]; cf Lawrence v Richman Group of Conn., LLC, 407 F Supp 2d 385, 389 n 7 [D Conn 2005] [holding that SEA § 29 (b) (2) (B) applies only to allegations of illegality based on fraud violations under SEA §§ 15 (c) (1) and 15 (c) (2) and not to allegations of a violation based on a failure to register under SEA § 15 (a)]). The First Department has also held that the limitations period applies to affirmative defenses based on a lack of broker registration in violation of SEA § 15 (a) as well (see id.).

Pursuant to this holding, Sunshine's SEA § 15 (a) affirmative defense is timely asserted. Richard L. Ervin, Jr., Sunshine's chief financial officer (CFO) and vice president, testified at deposition that he believed First International to be a registered securities broker based on representations in the literature that it provided to Sunshine during contract negotiations and on the types of services it agreed to provide. He did not discover that it was not registered until after receipt of plaintiffs' demand for payment dated September 2005 (see Ervin Depo Tr at 93:18-94:17, 98:9-24, 104:17-22; Ervin 8/10/07 Aff, ¶ 7). Nonparty Tal Piccione, the chairman, president, and chief executive officer of nonparty US RE Corporation, a 16% common shareholder of Sunshine in 2001 through 2004, similarly attested that these facts were true (see Piccione 8/15/07 Aff, ¶ 5). Sunshine asserted the defense in its answer filed on March 31, 2006, less than one year after discovery. Plaintiffs have not submitted evidence to contradict Sunshine's defense.

First International's failure to register as a securities broker also renders the contract unenforceable under the common law doctrine of illegality. Pursuant to the doctrine, a party to

an illegal bargain may not ask a court to enforce it (Bonilla v Rotter, 36 AD3d 534, 535 [1st Dept 2007]). Further, "it is unnecessary for the words of the contract to disclose the illegality, as long as the contract is closely connected with an unlawful action" (Anabas Export Ltd. v Alper Indus. Inc., 603 F Supp 1275, 1278 [SDNY 1985] [internal citation omitted]). "[C]ontracts, although legal in their inducement and capable of being performed in a legal manner, which have nonetheless been performed in an illegal manner, will not be enforced" (Prote Contr. Co. v Board of Educ. of the City of New York, 230 AD2d 32, 40 [1st Dept 1997]). Thus, where performance under a contract by a non-registered broker would constitute a violation of the SEA's registration provisions, the contract is unenforceable and may be rescinded (see Regional Props., Inc. v Finance & Real Estate Consulting Co., 678 F2d at 560).

Here, the stated purpose of the contract was to retain First International to market Sunshine's securities and, as discussed above, requires First International to perform activities that may only be performed by a registered securities broker. Inasmuch as plaintiffs' performance necessarily involved violations of SEA § 15 (a), the contract is not enforceable (see Couldock & Bohan, Inc. v Societe Generale Sec. Corp., 93 F Supp 2d 220, 227-28, 233 [D Conn 2000]).

Having determined that the contract is not enforceable because plaintiffs were not registered securities brokers, the court need not reach Sunshine's remaining affirmative defenses, including the defense based on the doctrine of equitable estoppel.

For these reasons, the branch of plaintiffs' motion for summary judgment in its favor on the complaint is denied and the branch of Sunshine's motion for summary judgment in its favor seeking dismissal of the complaint, is granted and the complaint is dismissed.

The Counter Claims:

Each side also seeks summary judgment, in its own favor, on the counterclaims.

Sunshine has asserted counterclaims for fraud, fraudulent concealment, negligent misrepresentation, breach of fiduciary duty and unjust enrichment based on allegations that First International intentionally misrepresented and failed to disclose to Sunshine the fact that it was not a registered securities broker and, therefore, was not legally capable of providing the services for which it was hired. Sunshine also seeks to recover the $50,000 retainer fee it paid to First International at the contract's execution.

The elements of claims of affirmative fraud, fraudulent concealment and negligent misrepresentation are similar. To prove a claim of fraud, a plaintiff must demonstrate by clear and convincing evidence the representation of a material fact, falsity, scienter, justifiable reliance and injury (Small v Lorillard Tobacco Co., 94 NY2d 43, 57 [1999]). A claim of fraudulent concealment is predicated on an act of concealment of a material fact not readily available to the plaintiff, justifiable reliance, an intent to deceive and injury (Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley, 146 AD2d 190, 199 [3d Dept], appeal denied 75 NY2d 702 [1989]). "To recover on a theory of negligent misrepresentation, a plaintiff must establish that the defendant had a duty to use reasonable care to impart correct information because of some special relationship between the parties, that the information was incorrect or false, and that the plaintiff reasonably relied upon the information provided" (Grammar v Turits, 271 AD2d 644, 645 [2d Dept 2000]).

Sunshine bases the first, second and third counterclaims on allegations that: First International intentionally misrepresented that it was legally capable of soliciting and effecting

transactions in Sunshine's outstanding securities and failed to disclose that it was not legally capable of performing these services; Sunshine justifiably relied on the misrepresentation and omission in retaining First International as an investment banker and financial advisor; it never would have retained First International had it known the true circumstances; and it sustained monetary damage in the amount of $50,000, as a result of the fraud.

Plaintiffs contend that the record is devoid of evidence that First International affirmatively misrepresented, or failed to disclose, its status and includes evidence that it advised Sunshine that it was not registered with the SEC as a securities broker.

Summary judgment in favor of Sunshine is granted.

The undisputed record, consisting primarily of written material generated by First International, conclusively demonstrates that First International intentionally misrepresented its registration status. A First International "pitchbook," or handout, provided to Sunshine on February 5, 2002 during contract negotiations, contains the statement that First International could provide a "full range of investment banking products and services," including private placements, public offerings, private equity transactions and merger and acquisition services (Pitchbook at 26). Significantly, the pitchbook describes "FI Capital" as a Bermuda-based broker-dealer, a National Association of Securities Dealers, Inc. (NASD) member, and an NASD registered broker-dealer (see id.).

Torsiello admitted that "FI Capital" stands for First International Capital, although he further testified that the description was of a Bermudan company separate from First International (see Torsiello Depo Tr at 162:2-5). The record is devoid of any evidence that plaintiffs advised Sunshine or its agents that the "FI Capital" described in the pitchbook was not

First International.

Torsiello testified that he and Piccione, US RE's CEO and the individual who recommended Torsiello and his companies to Sunshine, "actually didn't speak about the lack of registration. Basically, we said we don't do public offerings, we do[n't] have the infrastructure for it" (Torsiello Depo Tr at 38:3-10). Torsiello admitted that he did not discuss any other limitations on First International's ability to perform the services required under the contract (see id. at 39:21-40:11). Although Torsiello testified that he contacted and advised Piccione that First International had "parted company" with the Bermudan entities, he also testified that he advised Piccione that the separation "would not effect [First International's] ability to provide services" to Sunshine (id. at 172:10-173:8).

Ervin testified that he believed First International was licensed, based on the pitchbook description (see Ervin Depo Tr at 93:18-94:6). Ervin also attests that, had First International disclosed its lack of SEC registration to him, he would have recommended that Sunshine look for another investment banker and that it was important to him, as Sunshine's CFO, that any investment banker hired be fully capable of performing all the services for which Sunshine contracted (see Ervin 8/10/07 Aff, ¶ 8).

Plaintiffs' contention that the fraud claims are not actionable because they relate to a breach of contract claim is without merit. To be legally viable, a fraud claim must arise out of a duty to the plaintiff separate and apart from any contractual duty (Rockefeller Univ. v Tishman Constr. Corp. of New York, 240 AD2d 341 [1st Dept], lv denied 91 NY2d 803 [1997]; Bernstein v Polo Fashions, Inc., 55 AD2d 530, 531 [1st Dept 1976]). Here, Sunshine does not contend that First International misrepresented its intention to perform the contract, but instead alleges that

First International misrepresented its ability to perform its contractual obligations, to market and sell securities, legally.

Summary judgment in favor of Sunshine on the first, second and third counterclaims is granted.

Each side seeks summary judgment on the fourth counterclaim for breach of fiduciary duty by failure to disclose that First International was not registered with the SEC as a securities broker. Sunshine contends that the record includes evidence of a fiduciary relationship between First International and Sunshine prior to execution of the contract sufficient to raise a triable issue.

Summary judgment in favor of either side is denied.

> A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.' Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions

(EBC I, Inc. v Goldman Sachs & Co., 5 NY3d 11, 19-20 [2005] [internal quotations and citations omitted]). It "is fundamental that fiduciary 'liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation [citation omitted]' " (id.).

Here, based on First International's admission that it provided financial advice and investment banking services to Sunshine beginning in December 2001 (see Torsiello Depo Tr at 12:12-22), several months before the contract was finalized and executed in April 2002, the trier of fact may find that a pre-contractual fiduciary duty existed. Fiduciary relationships creating a

duty of disclosure have been found to exist where an investment banker or financial advisor advises clients in business transactions (see e.g. EBC I, Inc. v Goldman Sachs & Co., 5 NY3d at 33; Pergament v Roach, 41 AD3d 569, 571 [2d Dept 2007]; Fyrdman & Co. v Credit Suisse First Boston Corp., 272 AD2d 236, 237 [1st Dept 2000]). Evidence of First International's interest in creating such a relationship may also be found in its pitchbook representations that it "develops relationships with its clients by gaining an in depth knowledge of their long-term strengths and challenges" and seeks to become "partners with [its] clients" (Pitchbook at 11-14).

Plaintiffs' contention that the fiduciary duty counterclaim is time-barred under the three-year statute of limitations is without merit. Where a claim for breach of fiduciary duty is founded on allegations of actual fraud, a six-year statute applies (see Kaufman v Cohen, 307 AD2d 113, 119 [1st Dept 2003]). Inasmuch as intentional misrepresentation and concealment of First International's registration status are the gravamen of Sunshine's fiduciary duty counterclaim, the counterclaim is timely asserted.

Next, each side seeks summary judgment on the fifth counterclaim for unjust enrichment. In this counterclaim, Sunshine alleges that First International was unjustly enriched by its receipt and retention of the $50,000 retainer fee under the contract, although it was not a registered securities broker and, therefore, not legally capable of performing its contractual duties.

Summary judgment in favor of Sunshine is granted. "To prevail upon a claim of unjust enrichment, plaintiff must show that (1) defendant was enriched (2) at plaintiff's expense, and (3) that 'it is against equity and good conscience to permit . . . defendant to retain what is sought to be recovered' " (Lake Minnewaska Mountain Houses Inc. v Rekis, 259 AD2d 797, 798 [3d Dept 1999] [quoting Paramount Film Distrib. Corp. v State of New York, 30 NY2d 415, 421 [1972],

cert denied 414 US 829 [1973]). As discussed at length above, the contract is void ab initio by virtue of plaintiffs' lack of registration as a securities broker with the SEC and, therefore, the contract has been rescinded. Therefore, Sunshine is entitled to the return of the $50,000 retainer fee it paid upon execution of the contract.

Accordingly, it is

ORDERED that motion sequence number 003 is denied in its entirety; and it is further

ORDERED that motion sequence number 004 is granted to the extent that summary judgment in favor of Sunshine State Holding Corporation is granted dismissing the complaint asserted by Torsiello Securities, Inc., with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that summary judgment in favor of Sunshine State Holding Corporation is granted on the first, second, third and fifth counterclaims, and the Clerk is directed to enter judgment in favor of Sunshine in the amount of $50,000, together with interest at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the fourth counterclaim, for breach of fiduciary duty prior to execution of the contract, is severed and shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 1, 2008

ENTER:

J.S.C.