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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 MINTZ LEVIN COHN FERRIS
4 GLOVSKY AND POPEO, P.C.,

5 Plaintiff,

11 CV 08728

6 v.

7 JORGE PINHOL, et al,

8 Defendant.

9
10 New York, N.Y.
11 April 5, 2012
12 1:02 p.m.

13 Before:

14 HON. KATHERINE B. FORREST,

15 District Judge

16 APPEARANCES

17 MINTZ LEVIN COHN FERRIS GLOVSKY & POPEO, P.C.

18 Attorney for Plaintiff

19 BY: OMAR AZIZ KHONDKER

20 TROUTMAN SANDERS, LLP

21 Attorney for Defendant

22 BY: ADAM SETH LIBOVE
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1 (In open court)

2 THE COURT: Good afternoon. Be seated. Thank you.

3 THE CLERK: Mintz Levin Cohn Ferris Glovsky and Popeo,
4 P.C. versus Jorge Pinhol, et al, 11 CV 08728.

5 MR. KHONDKER: Omar Khondker, appearing for pro se
6 plaintiff.

7 THE COURT: Good afternoon, Mr. Khondker.

8 MR. LIBOWE: Good afternoon, Judge. Adam S. Libowe,
9 appearing on behalf of defendant John Risley.

10 THE COURT: And how about the other defendants?

11 MR. KHONDKER: Your Honor, we're making efforts to
12 serve them. As you know, the formal way to do it, through the
13 Hague Convention, it's an expensive, time-consuming process.
14 We are trying to see if we can waive service of summons. And I
15 have people in London right now taking the amended complaint
16 over to the registered addresses and, hopefully, we'll know
17 very soon if they will waive summons of service at least for
18 defendants Jorge Pinhol and Beverly Securities, Limited.

19 THE COURT: Mr. Libowe, do you have any reason to
20 believe that you are going to be representing the other
21 defendants if they are served?

22 MR. LIBOWE: No, we do not, Judge.

23 THE COURT: I was going to ask you whether or not you
24 thought you could facilitate acceptance of service.

25 MR. LIBOWE: Unfortunately, I'm not in a position to

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1 do that, your Honor.

2 THE COURT: We'll get there eventually through
3 appropriate conventions, or you will get there, Mr. Khondker,
4 eventually through the appropriate conventions.

5 Okay, I have reviewed, now, the amended complaint, and
6 have a couple of questions, and then want to talk about where
7 we go next. The complaint, in my view -- and I would like to
8 hear from you, Mr. Libowe, in terms of whether or not you have
9 a different view, appears on its face to state a claim. The
10 merits of that claim, I think, are to be determined, that is
11 why we're here. But it does seem as if it alleges a contract,
12 sets forth a contract, says that there was performance and that
13 there was a breach, and there were damages as a result of that
14 breach. And there may be some other -- trying to think if you
15 have got the breach of contract claim -- that, and quantum
16 meruit, are two claims. So I think both of those have been
17 fairly stated.

18 At this point in time, do you have a view as to
19 whether or not you disagree with that?

20 MR. LIBOWE: Respectfully, Judge, we do disagree with
21 that. We think it fails to state a claim as to either of those
22 causes of action. Based on the allegations in the amended
23 complaint itself, my client did not sign the engagement letter.
24 There is no indication my client was ever a client of Mintz
25 Levin. And we think that under a plausible pleading standard,

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1 it does not state a claim at all.

2 THE COURT: The complaint does allege, just to sort of
3 make sure we're all on the same page if you're going to spend
4 your time briefing, that Mr. Risley was a recipient of multiple
5 e-mails that were sent to the working group and that he, in
6 fact said, I believe in one of the e-mails, something along the
7 lines of -- and I'm not quoting: We've got a great deal of
8 fire power together, now let's see if we can get something
9 done.

10 Am I correct, Mr. Khondker?

11 MR. KHONDKER: Yes, your Honor, you are.

12 THE COURT: Okay. And that Mr. Risley, therefore,
13 seemed to be acting on behalf of Mr. Lawson. Mr. Lawson did
14 sign the engagement letter with a notation underneath the
15 signature with authority, or by authority, something to that
16 nature. So there seems to be enough indicia in the four
17 corners of the complaint to provide a plausible view to this
18 Court, or the basis for a plausible view, that Mr. Lawson was
19 acting under the apparent authority, or actual authority, to be
20 determined, of Mr. Risley.

21 So when you undertake that he didn't sign, you should
22 take it in the light of the fact that before the Court are the
23 allegations in the complaint about Mr. Risley's direct
24 communications and inclusion on the direct communications.

25 MR. LIBOWE: With all due respect, your Honor, being

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1 copied on e-mails is not dispositive of being a client of a law
2 firm. And it makes a whole lot of sense that he would get
3 copied on e-mails and would send a kind of congratulatory
4 e-mail because he was the representative of an affiliate that
5 was funding the litigation. And due to that position, he had
6 every expectation that he would be kept abreast of the status
7 of the litigation, and would attend meetings from time to time
8 with counsel. That does not make him a client. He is not a
9 signator to the engagement letter, and you mentioned, Judge,
10 that Mr. Lawson signed the engagement letter or annotates under
11 it on behalf of, or pursuant to, a power of attorney --

12 THE COURT: I think by authority.

13 MR. LIBOWE: By authority of. For three indicated
14 defendants; for Jorge Pinhol, for BSI, and for BSL.

15 Mr. Risley's name does not appear anywhere on the
16 engagement letter. And, further, in the allegations in
17 complaint, there is mention of a meeting in Geneva. He was
18 there with his personal solicitor, William Humphries. And to
19 allege that he is somehow a client or partially disclosed or
20 undisclosed principal when he is sitting right there, is
21 completely inconsistent and, we think, implausible.

22 So with all due respect, we don't think that this
23 states a claim.

24 THE COURT: Okay, I understand your argument. And I,
25 you know, do find important to the Court's consideration of Mr.

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1 Risley's position the fact that when he was writing his
2 congratulatory e-mail, it was worded in the phrasing of we. So
3 it did seem to suggest that he was part of a group, which is
4 what the allegations in the complaint assert. And, remember,
5 that what I am tasked with doing in construing a motion to
6 dismiss under Rule 12(b)(6) is to accept the allegations as
7 true for the purposes of reviewing that motion. Not that the
8 merits might show differently in that there is an allegation
9 that there was a working group that was put together that had
10 multiple people involved, including Mr. Humphries. So the fact
11 that Mr. Humphries showed up to a Geneva meeting is, for me,
12 given the allegations in the four corners of the complaint,
13 certainly not dispositive as to whether or not Mr. Risley was
14 represented by only one of a number of individuals. I tell you
15 all this, Mr. Libowe, just to have you think hard about whether
16 or not you want to make a motion. It's not the kind of motion
17 which preserves particular objections for the future, or
18 something of that nature. It's just a motion that you would
19 make, and have made, and you're entitled to make it. If you
20 want to make it, make it. But I will tell you, right now, I
21 think this complaint states a claim. You can try to talk me
22 out of it.

23 MR. LIBOWE: We appreciate the Court's guidance in
24 that respect, Judge.

25 THE COURT: All right. Now, I am curious, to switch

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1 focus now to Mr. Khondker.

2 Why didn't you sue -- what's that fellow's name,
3 Lawson? Along with the others. Not that you had to, but why
4 didn't you?

5 MR. KHONDKER: Well, I mean I think it's pretty fair
6 to say that both he and Mr. Humphries were not clients of our
7 firm. I think that, together with Mintz Levin, the idea was
8 that this group of lawyers was going to represent Mr. Pinhol,
9 Mr. Risley, BSL, BSI, and Mr. Humphries, and Mr. Lawson's
10 involvement was that of co-counsel, rather than that of client.
11 So we didn't believe that we are providing legal services, per
12 se, to Mr. Lawson or to Mr. Humphries.

13 THE COURT: But he was the agent of --

14 MR. KHONDKER: Right.

15 THE COURT: -- the principals.

16 MR. KHONDKER: Yes, your Honor.

17 THE COURT: All right. I mean it's -- certainly, he
18 is an important third-party witness, if not a -- if not
19 somebody who you should have joined in the chain.

20 MR. KHONDKER: I see what you're saying, your Honor.

21 THE COURT: Okay. All right, well, you have made your
22 choices.

23 Have you folks talked at all about settlement? Have
24 your clients had any, conferred at all about settling this?

25 MR. LIBOWE: I believe the client may have exchanged

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1 some e-mails before litigation commenced, but I'm not hundred
2 per sure.

3 THE COURT: Okay. All right.

4 In addition, Mr. Libowe, to your argument that Mr.
5 Risley shouldn't be joined, and understanding that the other
6 defendants are not here yet before this Court, have you yet
7 formed a view as to what your clients, apart from the one that
8 is mentioned, what his major defense is gonna be; is he going
9 to claim he didn't receive the services, or --

10 MR. LIBOWE: He is going to claim that he was never a
11 client of Mintz Levin.

12 THE COURT: That's his entire defense?

13 MR. LIBOWE: Not his entire defense, but that will be
14 one of his defenses.

15 THE COURT: Okay. Now, I want you to make your
16 motion.

17 What happens if I decide, as a matter of law, he was.
18 Then does he have a defense?

19 Well, you think about that, because if you get a
20 ruling, if that is his entire defense and you get a ruling on
21 the motion to dismiss from me that, in fact, this guy can be
22 considered a client based upon, you know, not only the
23 allegations, but the papers that are before me --

24 MR. LIBOWE: But frankly, Judge --

25 THE COURT: -- it would be tough for him.

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1 MR. LIBOWE: -- in denying the motion to dismiss, you
2 wouldn't necessarily be making a conclusion of law that he was
3 a client. We would ask at that point for discovery, because
4 that's an issue that, you know, we could certainly disprove
5 with evidence.

6 THE COURT: Understood. Unless there is enough, with
7 all of these attachments, for me to make that decision as a
8 matter of the attachment, you know.

9 MR. LIBOWE: Okay --

10 THE COURT: -- you can make your --

11 MR. LIBOWE: I would have to take it under advisement.

12 THE COURT: You take it under advisement, you figure
13 out what you want to do, but that's going to be his defense.

14 MR. LIBOWE: That's gonna be at least one of his
15 defenses; yes, your Honor.

16 THE COURT: Do you know of any others right now?

17 MR. LIBOWE: Certainly part of our motion is lack of
18 personal jurisdiction over Mr. Risley, an individual citizen of
19 Canada, conducting no business individually with the State of
20 New York.

21 THE COURT: Okay, but you're here.

22 MR. LIBOWE: I am. But we haven't answered yet.

23 THE COURT: You have appeared.

24 MR. LIBOWE: I have appeared. But we have not -- we
25 have not answered.

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1 THE COURT: Okay. All right, if that becomes an
2 issue, then you'll need to take some -- if it's something that
3 is found not to, maybe take some discovery on that and get it
4 resolved one way or the other. And it may be that what you
5 will want to do is take Mr. Lawson's deposition very quickly,
6 Mr. Khondker. Because if you take Mr. Lawson's deposition very
7 quickly, and he says -- personal jurisdiction deposition. And
8 he says Mr. Risley, in fact, did directly authorize me to hire
9 you, I have a number of conversations, he was the guy among
10 others, along with Pinhol and everything else, that helps with
11 personal jurisdiction. But it also may help you with having
12 discussions with the group of defendants that you have got.

13 MR. KHONDKER: We would like to receive our fees as
14 quick as possible, so it's our intention to take these
15 depositions as quickly as we can.

16 THE COURT: Yeah, and there may be other defenses that
17 the defendants have that I'm not aware of. So I'm not
18 suggesting necessarily that you are going to prevail on all
19 counts. I am trying to provide some direction as to ways in
20 which you folks could speed this along. Because if it turns
21 out that the facts are along the lines of what they appear to
22 be, which is a signed engagement letter, services provided.
23 The bill was done very quickly, it was done within eight days
24 of the close of the month -- several bills -- not objected to
25 until much later. Payments made in the interim, the \$45,000

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1 payment I believe was made in November. Then it's gonna be
2 tough to make an argument that either the services were not
3 rendered or that they were so poorly provided that they didn't
4 meet the minimum standards that would have been necessary to
5 have paid the fees agreed to under the engagement letter.
6 That's gonna be tough.

7 MR. KHONDKER: Thank you, your Honor.

8 THE COURT: So I say that because maybe you guys have
9 another chat after you have taken Mr. Lawson's deposition.

10 MR. LIBOWE: I would point out, Judge, with respect to
11 Mr. Lawson, we submitted a letter from Mr. Lawson that was
12 appended to our motion to dismiss. And he says that Risley had
13 nothing to do with the retention of Mintz Levin, so there is
14 really no reason to believe he would testify otherwise at
15 deposition. Obviously, if they take that deposition, they
16 would have that opportunity.

17 THE COURT: Saying they didn't have anything to do
18 with the selection --

19 MR. LIBOWE: With the selection or retention.

20 THE COURT: Well, then, it may well be that he was not
21 the guy -- he wasn't the guy who -- I mean Risley was not guy
22 who signed. Risley may have been the guy who directed Lawson.
23 Lawson was the guy who met with Mintz Levin.

24 This is all to be determined. I'm just saying there
25 are facts to be determined, and good reason for you folks to

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1 keep the line of communications open.

2 I will entertain whatever motions you want to bring,
3 Mr. Libowe. And I will, you know, review them, personal
4 jurisdiction or otherwise. And you get your people, the other
5 folks served, so we've got an entire group of defendants here
6 all at once.

7 MR. KHONDKER: Yes, your Honor.

8 THE COURT: How long do you think that's gonna take?

9 MR. KHONDKER: I am hoping that they will waive
10 service of summons, at least two of those defendants, within a
11 matter of days. And, obviously, they have up to 60 days, I
12 think, to make that decision.

13 Is that just a hope you have, or do you have any
14 reason to believe that?

15 MR. KHONDKER: I don't have any reason to believe that
16 they will do so.

17 THE COURT: You know, I can't bet, but I would bet you
18 a nickel, if I could bet, that there is no way they would
19 waive, if you don't have any reason they would waive, not with
20 Mr. Risley taking the position he has taken.

21 MR. KHONDKER: I don't believe they will. Like I
22 said, I'm hopeful. The one very difficult thing is that all of
23 the rest of his defendants are located elsewhere. In the
24 instance of BSL, BSI, CFFI, and EEF, these are companies that
25 are organized and operate in places like Lichtenstein and

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1 Luxembourg. And, frankly, difficult to track down. So you
2 know we want to do our best to attempt to locate them and serve
3 them and get them in the case as quickly as we can.

4 THE COURT: Okay. And if it turns out that Mr. Lawson
5 is the one you should be going after, you should consider
6 whatever you need to consider there.

7 MR. KHONDKER: Sure.

8 THE COURT: Now, let's keep your close of fact
9 discovery, but let's -- what kind of expert -- I know you guys
10 don't think -- you haven't decided yet.

11 MR. LIBOWE: Before we get to that, I would like to
12 make one additional point, if the Court doesn't mind.

13 THE COURT: Certainly. Go ahead.

14 MR. LIBOWE: With all of these other defendants out
15 there, and with this kind of loose timetable of when they are
16 going to be served, entering a discovery schedule at this point
17 is immensely premature.

18 THE COURT: Not as to Mr. Risley.

19 MR. LIBOWE: Then we're going to have two tracks of
20 discovery.

21 THE COURT: No, we'll get them on track. Because I'm
22 not convinced that these people are ever gonna be served. You
23 may be the only one. So what I'll do is I'll make my decision
24 on personal jurisdiction and on other grounds. But we have
25 you. And these other folks are in Lichtenstein and Timbuktu.

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1 So, sufficient under the day. That can take us 6 months. And
2 we don't want to wait.

3 So we'll proceed to pace, we'll catch them up. It's
4 gonna be a limited record, consists of some bills, engagement
5 letters, and deposition testimony as to whether or not who
6 hired whom, and whether the services were in fact provided. It
7 will take you about two and a half weeks to do discovery once
8 you put your mind to it.

9 So let's do -- you have got your close of fact
10 discovery August 3. We'll keep that because of these other
11 defendants, otherwise we would have moved it up. We'll knock
12 out your expert discovery, because I can't believe you're gonna
13 need any. If you decide you need some, let me know and we'll
14 build in something.

15 The JPTO, it would be due, then, August 17. And the
16 trial would be September 17, Joe?

17 THE CLERK: My calendar just crashed.

18 THE COURT: Your calendar crashed.

19 We'll put it out in an order. And we'll give you the
20 day of the week. But it would be in September.

21 Now, this may well be something which, for one reason
22 or the other, either gets resolved and you're out, Mr. Risley,
23 and there are no other defendants before the Court, and so they
24 have -- they no longer have a case, because they can't serve
25 anybody. Or, it may be the kind of case where we have got

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1 multiple defendants, but we're dealing with a relatively
2 discrete record. And we can resolve it in summary judgment.

3 So what I'm going to do is set down a conference right
4 after the close of fact discovery, where we're gonna talk about
5 whether or not you folks are going to be giving me summary
6 judgment motions on August 17, or going to be giving me a JPTO
7 on August 17.

8 MR. LIBOWE: Your Honor, with respect to fact
9 discovery, just another thing I would like to advise the Court
10 of, if I may?

11 THE COURT: Yes.

12 MR. LIBOWE: As Mr. Risley is a resident of Canada, we
13 would hope that some sort of provision could be made so that he
14 wouldn't have to travel to New York to be deposed. We would
15 ask that plaintiff be flexible in considering potentially a
16 visual conference or telephone conference to the extent that
17 discovery does go forward.

18 THE COURT: Yeah, I would ask that plaintiff consider
19 it very seriously, and in good faith. I just earlier today was
20 describing to some parties how there is now technology which
21 allows a camera to see the entire room. You can have two
22 cameras; one where the lawyers can watch the entire room,
23 another camera that is actually trained on the face of the
24 deponent. That way you can see there aren't hand signals going
25 on, because people are always worried about people holding up

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1 signs saying say yes, no, I don't know. And you can prevent
2 that. And, also, the technology does allow for there to be no
3 delay. So with the appropriate facilities, it is doable. I
4 leave the logistic and ultimate decision up to the negotiation
5 between the parties. But I would like you to consider it in
6 good faith, have the plaintiffs consider it in good faith.

7 MR. KHONDKER: Plaintiff will do so, your Honor.

8 MR. LIBOWE: Thank you.

9 THE CLERK: Okay. So we'll put out an order that will
10 set forth the dates, as I have just discussed them. Because my
11 deputy's calendar is down, we won't tell you right now what the
12 date for the next conference is. But it will be right after
13 August 3rd, or just before August 3rd. Because we'll know
14 exactly sort of whether we're looking at summary judgment at
15 that point or not.

16 And, again, if it turns out that you don't serve, we
17 don't see notices of appearance show up on the docket, we'll
18 probably pull this schedule in and make it tighter. If it
19 turns out that by, I don't know, June, you haven't or -- how
20 much time do they have?

21 THE CLERK: They still have 120 days from the
22 amendment, which was this week. That gets us basically to
23 August, I think.

24 THE COURT: Serve lickety split.

25 MR. KHONDKER: I understand, your Honor. We'll try to

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1 do so. But do we have the 120 days to serve them or?

2 THE COURT: I mean you do your own analysis of what
3 the rules give you on the amended complaint.

4 MR. KHONDKER: Yeah.

5 THE COURT: I would have to look it up.

6 MR. KHONDKER: That's our position, is that we have
7 that much time, but I didn't want to walk away --

8 THE COURT: Yeah.

9 MR. KHONDKER: -- being unclear about that.

10 THE COURT: Well, no, just -- I don't -- without
11 looking it up, I don't know what the rules provide. And if the
12 rules provide for less, then I would take it as an application
13 for more. And I don't know what I would do with that. So I
14 want you to do it as quickly as possible. In fact, why don't
15 you do this, by June 1 write me a letter that tells me what the
16 status is of service.

17 Okay, so if we don't have notices of appearance
18 popping up on our ECF, we'll know where you stand.

19 MR. KHONDKER: Yes, your Honor.

20 THE COURT: Okay. All right.

21 Okay. And Mr. Libowe, you will make whatever motions
22 you deem appropriate. I will then deal with them also very
23 quickly.

24 Mr. Khondker, don't think of expanding, too far, your
25 schedule. So just try to respond as quickly as you can. If

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1 you need some discovery on personal jurisdiction, you folks
2 negotiate it. I will allow a short period for that to occur if
3 that is an appropriate defense at this point. And but, you
4 know, don't try to get like 60 days extension, because we'll
5 either have Mr. Risley as defendant in or out pretty soon.

6 MR. KHONDKER: Understood, your Honor.

7 THE COURT: Okay. All right, anything else?

8 MR. KHONDKER: No, your Honor.

9 THE COURT: Okay. We're adjourned on this. Thank you
10 very much.

11 MR. LIBOWE: Thank you, your Honor.

12 MR. KHONDKER: Thank you, your Honor.

13 THE COURT: Oh, let me just say, there is a
14 transcript, because I knew that we would be dealing with some
15 issues relating to your client, Mr. Libowe. So you folks know
16 how to order the transcript.

17 We're adjourned.

18 MR. KHONDKER: Yes, your Honor.

19 MR. LIBOWE: Yes, your Honor.

20 THE CLERK: All rise.

21 (Adjourned)
22
23
24
25