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JF Capital Advisors, LLC v Lightstone Group, LLC

Court of Appeals of New York

June 3, 2015, Argued; July 1, 2015, Decided

No. 112

Reporter

25 N.Y.3d 759 *; 37 N.E.3d 725 **; 16 N.Y.S.3d 222 ***; 2015 N.Y. LEXIS 1524 ****; 2015 NY Slip Op 05622

[1] JF Capital Advisors, LLC, Appellant, v The **Lightstone** Group, LLC, et al., Respondents.

Prior History: Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered March 25, 2014. The Appellate Division modified, on the law, an order of the Supreme Court, New York County (Melvin L. Schweitzer, J.; op [2012 NY Slip Op 33262\[U\]](#) [\[2012\]](#)), which had (1) denied defendants' motion to dismiss plaintiff's quantum meruit and unjust enrichment causes of action related to the Innkeepers Project, Fitchburg and Omaha Projects, Towneplace Suites Metairie Project, Hotel Victor Project, and Crowne Plaza Somerset Project; and (2) granted defendants' motion to dismiss those causes of action related to the Waterpark Portfolio Project, CBRE 7 Loan Portfolio Project, Allegria Hotel Loan Purchase and Miscellaneous Projects. The modification consisted of granting defendants' motion to dismiss as to the remainder of the complaint. The Appellate Division affirmed the order as modified. The following question was certified by the Appellate Division: "Was the order of the Supreme Court, as modified and otherwise affirmed by this Court, properly made?"

[JF Capital Advisors, LLC v. Lightstone Group, LLC, 115 A.D.3d 591, 982 N.Y.S.2d 472, 2014 N.Y. App. Div. LEXIS 1946 \(N.Y. App. Div. 1st Dep't, 2014\)](#)

Disposition: Order modified, without costs, by denying defendants' motion to dismiss the amended complaint in part in accordance with the opinion herein, and, as so modified, affirmed and certified question not answered as unnecessary.

Core Terms

amended complaint, services, Hotel, statute of frauds, cause of action, allegations, negotiation, modified, business opportunity, motion to dismiss, defendants', pertaining, properties, Projects

Case Summary

Overview

HOLDINGS: [1]-The statute of frauds, as embodied in [General Obligations Law § 5-701\(a\)\(10\)](#), did not bar causes of action for quantum meruit and unjust enrichment by an investment advisor against customers, arising from the customers' failure to pay for services rendered, as the work was performed for the purpose of informing the customers whether to negotiate in certain business opportunities; [2]-However, dismissal was proper as to similar claims regarding investment projects that were bound by the common thread of allegations pertaining to the customers' negotiation of a business opportunity.

Outcome

Order modified; motion to dismiss denied in part. As modified, order affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

25 N.Y.3d 759, *759; 37 N.E.3d 725, **725; 16 N.Y.S.3d 222, ***222; 2015 N.Y. LEXIS 1524, ****1524; 2015 NY Slip Op 05622, *****05622

[HN1](#) **Motions to Dismiss, Failure to State Claim**

In a motion to dismiss pursuant to [CPLR 3211\(a\)\(7\)](#), courts are bound to, inter alia, accept the facts as alleged in the amended complaint as true.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

[HN2](#) **Motions to Dismiss, Failure to State Claim**

In addition to accepting the facts as alleged as true for purposes of a motion to dismiss under [CPLR 3211\(a\)\(7\)](#), a court must give the pleading a liberal construction and afford plaintiff the benefit of every possible favorable inference. In other words, where the allegations are ambiguous, courts resolve the ambiguities in plaintiff's favor and, dissimilar to a motion for summary judgment, where courts review the record to determine whether a cause of action or a defense has been established as a matter of law, in the dismissal motion courts limit their inquiry to the legal sufficiency of plaintiff's claims.

Contracts Law > Statute of Frauds > General Overview

[HN3](#) **Procedural Matters, Statute of Frauds**

The statute of frauds is codified in [General Obligations Law § 5-701](#). As a general matter, it is designed to protect the parties and preserve the integrity of contractual agreements. More precisely, the statute is meant to guard against the peril of perjury; to prevent the enforcement of unfounded fraudulent claims. The statute decreases uncertainties, litigation, and opportunities for fraud and perjury, and primarily discourages false claims. In short, the purpose of the Statute of Frauds is simply to prevent a party from being held responsible, by oral, and perhaps false, testimony, for a contract that the party claims never to have made.

Contracts Law > Statute of Frauds > Requirements > General Overview

[HN4](#) **Statute of Frauds, Requirements**

[General Obligations Law § 5-701\(a\)\(10\)](#) applies to a contract implied in fact or in law to pay reasonable compensation and provides that every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking is a contract to pay compensation for services rendered in negotiating the purchase of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein. The same subdivision further states that "negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

Contracts Law > Statute of Frauds > Requirements > General Overview

[HN5](#) **Types of Contracts, Oral Agreements**

[General Obligations Law § 5-701\(a\)\(10\)](#) interdicts oral agreements to pay compensation for services rendered with respect to the negotiation of the purchase of real estate or of a business opportunity or business.

Contracts Law > Statute of Frauds > General Overview

[HN6](#) **Procedural Matters, Statute of Frauds**

Where an intermediary's activity is so evidently that of providing know-how or know-who, in bringing about between principals an enterprise of some complexity or an acquisition of a significant interest in an enterprise, the statute of frauds, [General Obligations Law § 5-701](#), is entitled to be read both in accordance with its plain meaning, its evident purpose, and to accomplish the prevention of the mischief for which it was designed.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

[HN7](#) **Reviewability of Lower Court Decisions,**

25 N.Y.3d 759, *759; 37 N.E.3d 725, **725; 16 N.Y.S.3d 222, ***222; 2015 N.Y. LEXIS 1524, ****1524; 2015 NY Slip Op 05622, *****05622

Preservation for Review

The New York Court of Appeals best serves the litigants and the law by limiting its review to issues that have first been presented to and carefully considered by the trial and intermediate appellate courts.

Headnotes/Syllabus

Headnotes

Frauds, Statute of — Conveyances and Contracts Concerning Real Property — Financial Advisory Services for Real Estate Investors

On a motion to dismiss, the statute of frauds did not bar plaintiff hospitality industry consultant's quantum meruit and unjust enrichment causes of action based on financial advisory services it had allegedly provided to defendants with respect to five of nine groups of investment opportunities for hotel/water park properties (project groups). [General Obligations Law § 5-701 \(a\) \(10\)](#) applies to a contract implied in fact or in law to pay reasonable compensation, and provides that an agreement which is "a contract to pay compensation for services rendered in . . . negotiating the purchase . . . of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein" is void unless in writing and signed by the party to be charged. Negotiating includes "procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction" ([General Obligations Law § 5-701 \[a\] \[10\]](#)). The fundamental question was whether the services for which plaintiff sought compensation were tasks performed so as to inform defendants whether to negotiate for the properties at issue, or whether those services were performed as part of or in furtherance of negotiation for the properties. Plaintiff generally alleged that its work with respect to each of the project groups consisted of the review, analysis, and modeling of the finances and operation of the assets in which defendants had the opportunity to invest. However, with respect to three of the nine project groups, the allegations included either a claim for compensation for work performed in furtherance of defendants' negotiation of a business opportunity or compensation for services rendered in anticipation of a possible bid by defendants, and a fourth project group was not at issue on appeal. The allegations with respect to the remaining five project groups could be construed as seeking recovery for work performed so as to inform defendants

whether to partake in certain business opportunities, that is, whether to negotiate.

Counsel: [****1] *Weber Law Group LLP*, Melville (Jason A. Stern of counsel), for appellant. I. The appellate decision should be reversed because it applied [General Obligations Law § 5-701 \(a\) \(10\)](#) too broadly. (*Freedman v Chemical Constr. Corp.*, 43 NY2d 260, 372 NE2d 12, 401 NYS2d 176; *Sporn v Suffolk Mktg.*, 56 NY2d 864, 438 NE2d 1108, 453 NYS2d 393; *Tower Intl., Inc. v Caledonian Airways, Ltd.*, 133 F3d 908; *Intercontinental Planning v Daystrom, Inc.*, 24 NY2d 372, 248 NE2d 576, 300 NYS2d 817; *Snyder v Bronfman*, 13 NY3d 504, 921 NE2d 567, 893 NYS2d 800; *Gutkowski v Steinbrenner*, 680 F Supp 2d 602; *Enfeld v Hemmerdinger Estate Corp.*, 34 AD2d 980, 312 NYS2d 735; *Whitman Heffernan Rhein & Co. v Griffin Co.*, 163 AD2d 86, 557 NYS2d 342; *GEM Advisors, Inc. v Corporacion Sidenor, S.A.*, 667 F Supp 2d 308; *Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 948 NYS2d 292.) II. The First Department's application of the breach of contract standard to plaintiff's quantum meruit and unjust enrichment claims is in violation of this Court's holding in *Morris Cohon & Co. v Russell* (23 NY2d 569, 245 NE2d 712, 297 NYS2d 947 [1969]). (*Gottesman Co. v Keystone Enters., Inc.*, 43 AD3d 696, 841 NYS2d 540; *Davis & Mamber v Adrienne Vittadini, Inc.*, 212 AD2d 424, 622 NYS2d 706; *Kalfin v United States Olympic Commn.*, 209 AD2d 279, 618 NYS2d 724; *Springwell Corp. v Falcon Drilling Co., Inc.*, 16 F Supp 2d 300; *Shapiro v Dictaphone Corp.*, 66 AD2d 882, 411 NYS2d 669; *Newmark & Co. Real Estate Inc. v 2615 E. 17 Realty LLC*, 80 AD3d 476, 914 NYS2d 162; *Stevens v Publicis S.A.*, 50 AD3d 253, 854 NYS2d 690, 10 NY3d 930, 892 NE2d 399, 862 NYS2d 333.) III. Dismissal of **JF Capital** Advisors, LLC's claims was premature without discovery of critical facts. (*Gottesman Co. v Keystone Enters., Inc.*, 43 AD3d 696, 841 NYS2d 540; *Ladenburg Thalmann & Co. v Tim's Amusements*, 275 AD2d 243, 712 NYS2d 526; *Tenesaca Delgado v Bretz & Coven, LLP*, 109 AD3d 38, 967 NYS2d 371; *Marcus v Hemphill Harris Travel Corp.*, 193 AD2d 543, 598 NYS2d 195.)

Emery Celli Brinckerhoff & Abady LLP, New York City (Elizabeth S. Saylor, Andrew G. Celli, Jr. and Hayley Horowitz of counsel), for respondents. I. The Appellate Division's ruling dismissing the complaint was required by both the policy and the plain language of [General Obligations Law § 5-701 \(a\) \(10\)](#). (*Intercontinental Planning v Daystrom, Inc.*, 24 NY2d 372, 248 NE2d 576, 300 NYS2d 817; *Freedman v Chemical Constr.*

25 N.Y.3d 759, *759; 37 N.E.3d 725, **725; 16 N.Y.S.3d 222, ***222; 2015 N.Y. LEXIS 1524, ****1; 2015 NY Slip Op 05622, *****05622

[Corp.](#), 43 NY2d 260, 372 NE2d 12, 401 NYS2d 176; [Minichiello v Royal Bus. Funds Corp.](#), 18 NY2d 521, 223 NE2d 793, 277 NYS2d 268; [Snyder v Bronfman](#), 57 AD3d 393, 869 NYS2d 493, 13 NY3d 504, 921 NE2d 567, 893 NYS2d 800; [Gutkowski v Steinbrenner](#), 680 F Supp 2d 602; [Orderline Wholesale Distribs., Inc. v Gibbons, Green, van Amerongen, Ltd.](#), 675 F Supp 122; [Enfeld v Hemmerdinger Estate Corp.](#), 34 AD2d 980, 312 NYS2d 735, 28 NY2d 606, 268 NE2d 649, 319 NYS2d 854; [Whitman Heffernan Rhein & Co. v Griffin Co.](#), 163 AD2d 86, 557 NYS2d 342; [Zeising v Kelly](#), 152 F Supp 2d 335; [United Resource Recovery Corp. v Ramko Venture Mgt., Inc.](#), 584 F Supp 2d 645.) II. **JF Capital** Advisors, LLC's argument that a writing exists to satisfy [General Obligations Law § 5-701 \(a\) \(10\)](#) is not properly before the Court and is meritless. ([Morris Cohon & Co. v Russell](#), 23 NY2d 569, 245 NE2d 712, 297 NYS2d 947; [Bingham v New York City Tr. Auth.](#), 99 NY2d 355, 786 NE2d 28, 756 NYS2d 129; [Wild v Catholic Health Sys.](#), 21 NY3d 951, 991 NE2d 704, 969 NYS2d 846; [Roohan v First Guar. Mtge., LLC](#), 97 AD3d 891, 948 NYS2d 200; [Mehmet v Add2Net, Inc.](#), 66 AD3d 437 886 NYS2d 397; [Duane Morris LLP v Astor Holdings Inc.](#), 61 AD3d 418, 877 NYS2d 250; [Elezaj v Carlin Constr. Co.](#), 89 NY2d 992, 679 NE2d 638, 657 NYS2d 399; [Matter of Meister](#), 39 AD2d 857, 333 NYS2d 41; [Metropolitan Steel Indus. v Citnalta Constr. Corp.](#), 302 AD2d 233, 754 NYS2d 278; [Ladenburg Thalmann & Co. v Tim's Amusements](#), 275 AD2d 243, 712 NYS2d 526.) III. Dismissal of the complaint for failure to state a claim is required. ([Snyder v Bronfman](#), 13 NY3d 504, 921 NE2d 567, 893 NYS2d 800; [Herzog v Town of Thompson](#), 216 AD2d 801, 628 NYS2d 869.)

Judges: Opinion by Judge Fahey. Chief Judge Lippman and Judges Read, Pigott, Rivera, Abdus-Salaam and Stein concur.

Opinion by: FAHEY

Opinion

[**726] [*762] [***223] Fahey, J.:

The primary issue on this appeal is whether the statute of frauds, as embodied in [General Obligations Law § 5-701 \(a\) \(10\)](#), bars the causes of action set forth in the amended [2] complaint. In that pleading, plaintiff claims to have rendered to defendants financial advisory services for what plaintiff characterizes as nine groups

of investment opportunities,¹ and plaintiff [***224] seeks recovery for those services rendered based on theories of quantum meruit and unjust enrichment. We conclude that the statute of frauds does not bar the causes of action with respect to five of the nine [**727] project groups, to wit, with respect to what the amended complaint characterizes as the "Innkeepers Project," the "Fitchburg and Omaha Projects," the "Towneplace Suites Metairie Project," the "Hotel Victor Project," and the "Crowne Plaza Somerset Project." We therefore modify the Appellate Division's order by denying those parts of defendants' motion seeking to dismiss the amended complaint with respect to those project groups.

I.

Inasmuch as this appeal had its genesis [HN1](#)^(↑) in a motion to dismiss pursuant to [CPLR 3211 \(a\) \(7\)](#), we

¹ The amended complaint denominates those project [****2] groups as follows:

 [Go to table 1](#)

Project Group

Project Name

- 1
the Waterpark Portfolio Project
- 2
the Innkeepers Project
- 3
the Fitchburg and Omaha Projects
- 4
the Towneplace Suites Metairie Project
- 5
the Hotel Victor Project
- 6
the CBRE 7 Loan Portfolio Project
- 7
the Allegria Hotel Loan Purchase
- 8
the Crowne Plaza Somerset Project
- 9
the Miscellaneous Projects

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are bound to, inter alia, "accept the facts as alleged in the [amended] complaint as true" (*Leon v Martinez*, 84 NY2d 83, 87, 638 NE2d 511, 614 NYS2d 972 [1994]). Plaintiff alleges that it and its principals are hospitality industry consultants engaged in the business of providing investment and advisory services. In November 2010, defendants solicited plaintiff's assistance in analyzing an investment opportunity involving certain hotel/water park properties. The parties entered into a [3] written agreement whereby plaintiff provided [*763] financial and analytical services to defendants regarding that project, and defendants paid plaintiff for its work with respect to that opportunity.

Defendants did not purchase the hotel/water park properties, and those holdings eventually became the subject of an online auction. Based on the seller's willingness to dispose of the [****3] hotel/water park properties separately, defendants again sought plaintiff's services with the goal of acquiring only 2 of the 10 holdings that comprised the hotel/water park properties. Plaintiff provided continuing "advisory services" to defendants consisting of financial and market analyses with respect to the hotel/water park endeavor, as well as to other projects, and defendants accepted those services.

According to plaintiff, however, defendants did not compensate plaintiff for such work. Consequently, plaintiff commenced this action through the filing of a complaint in which it asserted six causes of action, including claims for quantum meruit and unjust enrichment. Defendants moved to dismiss the complaint, and Supreme Court granted the motion but afforded plaintiff "leave to serve and file an amended complaint alleging causes of action for quantum meruit and unjust enrichment" (2012 NY Slip Op 33788[U], *12 [Sup Ct, NY County 2012]).

Plaintiff availed itself of that leave, and the amended complaint lies at the core of this appeal. There, as noted, plaintiff asserts causes of action for quantum meruit and unjust enrichment, through which it seeks compensation for approximately \$480,000 in services it rendered to defendants in connection [****4] with the nine project groups. Plaintiff generally alleges that its work with respect to each of the project groups consisted of the review, analysis, and modeling of the finances and operations of the assets in which defendants had the opportunity to invest. However, with respect to the "Waterpark Portfolio Project," the "CBRE 7 Loan Portfolio Project," and the "Allegria Hotel Loan Purchase," i.e., what are respectively denominated as

project groups Nos. 1, 6, and 7, plaintiff alleges that it performed work that was used to assist in defendants' negotiation of a business opportunity and [***225] that was conducted in anticipation of a possible purchase bid.

In lieu of answering, defendants moved to dismiss the amended complaint pursuant to CPLR 3211 (a) (7), contending that the claims for compensation for the "advisory services" plaintiff allegedly performed [***728] are subject to the statute of frauds [*764] (see *General Obligations Law § 5-701 [a] [10]*). Supreme Court granted the motion in part by dismissing the amended complaint to the extent it seeks recovery for work performed with respect to the "Waterpark Portfolio Project," the "CBRE 7 Loan Portfolio Project," the "Allegria Hotel Loan Purchase," and the "Miscellaneous Projects," i.e., what are denominated as [****5] project groups Nos. 1, 6, 7, and 9 (2012 NY Slip Op 33262[U] [Sup Ct, NY County 2012]). The court denied the remaining parts of the motion.

On appeal, the Appellate Division modified by granting the motion in its entirety and dismissing the amended complaint based upon its conclusion that "investment analyses and financial advice regarding the possible acquisition of investment opportunities clearly fall within [4] *General Obligations Law § 5-701 (a) (10)*" (115 AD3d 591, 592-593, 982 NYS2d 472 [1st Dept 2014] [internal quotation marks omitted]). The Appellate Division subsequently granted plaintiff leave to appeal and certified the question whether the order of Supreme Court, as modified, was properly made (2014 NY Slip Op 78658[U] [1st Dept 2014]).

II.

Having marshaled the relevant facts, our review turns to the pertinent principles of law. HN2[↑] In addition to accepting the facts as alleged as true (see *Leon*, 84 NY2d at 87), we "must give the pleading a liberal construction . . . and afford . . . plaintiff the benefit of every possible favorable inference" (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 5, 999 NE2d 1121, 977 NYS2d 676 [2013], rearg denied 22 NY3d 1084, 981 NYS2d 667, 4 NE3d 968 [2014] [internal quotation marks omitted]). In other words, "[w]here the allegations are ambiguous, we resolve the ambiguities in plaintiff's favor" (*Snyder v Bronfman*, 13 NY3d 504, 506, 921 NE2d 567, 893 NYS2d 800 [2009]) and, dissimilar to a motion for summary judgment, where we review the record to determine whether a cause of action or a defense has been established as a matter of law, here

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we " 'limit our inquiry [****6] to the legal sufficiency of plaintiff's claim[s]' " (*Davis v Boeheim*, 24 NY3d 262, 268, 998 NYS2d 131, 22 NE3d 999 [2014], quoting *Silsdorf v Levine*, 59 NY2d 8, 12, 449 NE2d 716, 462 NYS2d 822 [1983]; see *Leon*, 84 NY2d at 87-88).

HN3 [↑] The statute of frauds is codified in *General Obligations Law § 5-701*. As a general matter, it "is designed to protect the parties and preserve the integrity of contractual agreements" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 476, 982 NYS2d 813, 5 NE3d 976 [2013]). More precisely, the statute

"is meant 'to guard against the peril of perjury; to prevent the enforcement of unfounded fraudulent [*765] claims' (*Morris Cohon & Co. v Russell*, 23 NY2d 569, 574, 245 NE2d 712, 297 NYS2d 947 [1969]). The statute 'decrease[s] uncertainties, litigation, and opportunities for fraud and perjury,' and primarily 'discourage[s] false claims' (73 Am Jur 2d, *Statute of Frauds* § 403). 'In short, the purpose of the Statute of Frauds is simply to prevent a party from being held responsible, by oral, and perhaps false, testimony, for a contract that the party [***226] claims never to have made' (*id.*)" (*William J. Jenack Estate Appraisers & Auctioneers, Inc.*, 22 NY3d at 476).

Here we are specifically concerned with **HN4** [↑] *General Obligations Law § 5-701 (a) (10)*, which "appl[ies] to a contract implied in [**729] fact or in law to pay reasonable compensation" and which provides that

"[e]very agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking . . .

" . . . [i]s a contract to pay compensation for services rendered in . . . *negotiating the purchase* . . . of any *real estate or interest therein*, or of a [****7] *business opportunity, business*, its good will, inventory, fixtures or an interest therein" (Emphases added).

The same subdivision further states that " '[n]egotiating' includes procuring an introduction to a [5] party to the transaction or assisting in the negotiation or consummation of the transaction" (*id.*).

III.

Applying these principles, we conclude that the statute of frauds does not bar the causes of action to the extent they pertain to what the amended complaint characterizes as the "Innkeepers Project," the "Fitchburg and Omaha Projects," the "Towneplace Suites Metairie Project," the "Hotel Victor Project," and the "Crowne Plaza Somerset Project," i.e., what are denominated as project groups Nos. 2 through 5 and 8. The fundamental question on this appeal is whether the services for which plaintiff seeks compensation were tasks performed so as to inform defendants *whether to negotiate* for the properties [*766] at issue, or whether those services were performed as *part of or in furtherance of negotiation* for the subject properties. As noted, **HN5** [↑] *General Obligations Law § 5-701 (a) (10)* interdicts oral agreements to pay compensation for services rendered with respect to the *negotiation* of the purchase of real estate or of a business opportunity or business. [****8] Supreme Court recognized this in dismissing the causes of action pertaining to project groups Nos. 1, 6, and 7. The allegations pertaining to project group No. 1 include what Supreme Court correctly saw as a claim for compensation for work plaintiff performed in furtherance of defendants' negotiation of a business opportunity, while the allegations pertaining to project groups Nos. 6 and 7 seek compensation for services rendered in anticipation of a possible bid by defendants, including preparation of documents for bidding.

Said another way, Supreme Court properly dismissed the parts of the amended complaint bound by the common thread of allegations pertaining to defendants' negotiation of a business opportunity and declined to dismiss the parts of the amended complaint pertaining to project groups Nos. 2 through 5 and 8, which are not braided by such claims. Indeed, the allegations with respect to project groups Nos. 2 through 5 and 8 could be construed as seeking recovery for work performed so as to inform defendants whether to partake in certain business opportunities, that is, *whether to negotiate*. To the extent the causes of action are based on such allegations, they are not barred by the statute of frauds.²

² [****9] To this point absent from our analysis is reference to project group No. 9. The omission is intentional inasmuch as plaintiff abandoned its appeal with respect to that project group by failing to raise any contention with respect to that group (see generally *Webb-Weber v Community Action for Human Servs., Inc.*, 23 NY3d 448, 451 n 2, 992 NYS2d 163, 15 NE3d 1172 [2014]; *New York Mut. Underwriters v Baumgartner*, 19 AD3d 1137, 1140-1141, 797 NYS2d 210 [4th

25 N.Y.3d 759, *766; 37 N.E.3d 725, **729; 16 N.Y.S.3d 222, ***226; 2015 N.Y. LEXIS 1524, ****9; 2015 NY Slip Op 05622, *****05622

[***227] Our decision in [Snyder \(13 NY3d 504, 921 NE2d 567, 893 NYS2d 800\)](#), which is [**730] among the authorities on which [6] defendants rely in seeking affirmance of the Appellate Division order, does not compel a different result. In that case the parties allegedly engaged in what the plaintiff characterized as a joint venture wherein the plaintiff essentially was to have functioned as the defendant's "consigliere" (*id. at 506*) in exchange for a share in the proceeds of any business transaction the defendant was able to consummate. In concluding that such "intermediary" work was covered [*767] by the statute of frauds, we invoked [Freedman v Chemical Constr. Corp. \(43 NY2d 260, 372 NE2d 12, 401 NYS2d 176 \[1977\]\)](#), which provides that

[HN6](#)[↑] "where [an] intermediary's activity is so evidently that of providing 'know-how' or 'know-who', in bringing about between principals an enterprise of some complexity or an acquisition of a significant interest in an enterprise, the statute [of frauds] is entitled to be read [****10] both in accordance with its plain meaning, its evident purpose, and to accomplish the prevention of the mischief for which it was designed" (*id. at 267*; see [Snyder, 13 NY3d at 509-510](#)).

The work contemplated by the project groups that we have concluded survive the motion to dismiss arguably is not of an "intermediary" nature, so [Snyder](#) does not require that we affirm. Indeed, with respect to those project groups, plaintiff does not seek recovery for its "know-how" or "know-who," i.e., the "use [of] 'connections', . . . 'ability', and . . . 'knowledge' to arrange for [defendants] to meet appropriate persons' " in their business pursuits ([Freedman, 43 NY2d at 267](#)).

Plaintiff also contends that the Appellate Division order violates [Morris Cohon & Co. v Russell \(23 NY2d 569, 245 NE2d 712, 297 NYS2d 947 \[1969\]\)](#), in that a memorandum writing may satisfy the statute of frauds (*id. at 575-576*). This contention is not properly before us inasmuch as the issue was raised for the first time on reply at the Appellate Division (see [Bingham v New York City Tr. Auth., 99 NY2d 355, 359, 786 NE2d 28, 756 NYS2d 129 \[2003\]](#) [[HN7](#)[↑]] "this Court best serves the litigants and the law by limiting its review to issues that have first been presented to and carefully considered by the trial and intermediate appellate courts"]; see also [Elezaj v Carlin Constr. Co., 89 NY2d](#)

[992, 994, 679 NE2d 638, 657 NYS2d 399 \[1997\]](#) ["(t)his Court has no power to review . . . unpreserved error" (internal quotation marks omitted)]). Finally, plaintiff's [****11] remaining contention is unpreserved.

Accordingly, the order of the Appellate Division should be modified, without costs, by denying defendants' motion to dismiss the amended complaint in part in accordance with this opinion, and, as so modified, affirmed and the certified question not answered as unnecessary.

Chief Judge Lippman and Judges Read, Pigott, Rivera, Abdus-Salaam and Stein concur.

Order modified, without costs, by denying defendants' motion to dismiss the amended complaint in part in accordance with [*768] the opinion herein, and, as so modified, [***228] affirmed and certified question not answered as unnecessary. [7]

[Dept 2005\]](#). We neither examine that project group nor grant relief with respect to that group herein.

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