

JUN 22 2005

For The Northern Mariana Islands
By _____
(Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

YU SUK CHUNG,

Plaintiff,

v.

WORLD CORPORATION, a CNMI
corporation,

Defendant.

Case No. CV-04-0001-ARM

**ORDER ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT**

THIS MATTER is before the Court on defendant World Corporation's Motion for Partial Summary Judgment (Doc. #50) filed on April 8, 2005, Plaintiff's Opposition to Defendant's Motion for Summary Judgment; Cross-Motion (Doc. #62) filed on April 26, 2005 and defendant World Corporation's Reply and Opposition to Cross-Motion for Summary Judgment (Doc. #72) filed on May 6, 2005. The motions came on for hearing on May 12, 2005. Upon review of the memoranda of the parties, the evidence submitted, the argument of counsel and the applicable law, the Court makes the following disposition.

BACKGROUND

Plaintiff advances eight claims for relief: (1) Breach of written contract; (2) breach of oral contract; (3) fraudulent misrepresentation; (4) wrongful discharge; (5) intentional infliction of emotional distress; (6) negligent infliction of emotional

1 distress; (7) quantum meruit; and (8) promissory estoppel. World Corporation
2 (“World”) moves for summary judgment as to claims 1, 2, 3, 5, 6, 7 and 8. World
3 contends that, as to the 1 and 2 claims for relief, they are unenforceable as in violation
4 of Commonwealth of Northern Mariana Islands (“CNMI”) law. World further
5 contends that claims 5, 6, 7 and 8 are barred by the doctrine of unclean hands. Finally,
6 World argues that plaintiff’s third claim for relief is barred because the applicable law
7 bars recovery for fraudulent misrepresentation claims predicated on unfulfilled
8 promises of future performance. On plaintiff’s part, he agrees that his claims for
9 intentional and negligent infliction of emotional distress are untenable and should be
10 dismissed. However, plaintiff opposes World’s motion in all other respects and moves
11 for summary judgment on his claim of wrongful discharge. World opposes summary
12 judgment on that claim.

13 **STANDARD OF REVIEW**

14 Summary judgment is appropriate if there is no genuine issue as to any material
15 fact and the moving party is therefore entitled to judgment as a matter of law. *See* Fed.
16 R. Civ. Proc. 56(c). The moving party bears the initial burden of establishing that there
17 is no genuine issue of material fact. *See id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317,
18 322 (1986). On those issues for which it bears the burden of proof, the moving party
19 must make a showing that is “sufficient for the court to hold that no reasonable trier
20 of fact could find other than for the moving party.” *Calderone v. United States*, 799
21 F.2d 254, 259 (6th Cir.1986). *See Idema v. Dreamworks, Inc.*, 162 F.Supp.2d 1162,
22 1141 (C.D.Cal. 2001). If the moving party does not bear the burden of proof at trial,
23 the initial burden of showing that no genuine issue of material fact remains may be
24 discharged by demonstrating that “there is an absence of evidence to support the non-
25 moving party’s case.” *Id.* at 325.

1 After the moving party makes a properly supported motion, the responding party
2 must present specific facts showing that contradiction of the moving party's
3 presentation of evidence is possible. See *British Airways Bd. v. Boeing Co.*, 585 F.2d
4 946, 951 (9th Cir.1978). It is not enough for the responding party to point to the mere
5 allegations or denials contained in the pleadings. Instead, it must set forth, by affidavit
6 or other admissible evidence, specific facts demonstrating the existence of an actual
7 issue for trial. The evidence must be more than a mere "scintilla"; the responding party
8 must show that the trier of fact could reasonably find in its favor. *Anderson v. Liberty*
9 *Lobby, Inc.*, 477 U.S. 242, 252 (1986). Accordingly, summary judgment should be
10 granted "[i]f the [respnding party's] evidence is merely colorable ... or is not
11 significantly probative." *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285,
12 1288 (9th Cir.1987). In reviewing a motion for summary judgment, the court must
13 take the responding party's evidence as true and all inferences are to be drawn in its
14 favor. See *id.* at 1289. Summary judgment is therefore not appropriate "where
15 contradictory inferences may reasonably be drawn from undisputed evidentiary facts
16" *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 (9th
17 Cir.1980).

18 DISCUSSION

19 World Corporation's Motion for Summary Judgment

20 **Breach of Contract.** World moves for summary judgment on plaintiff's claim
21 of breach of written contract and claim of breach of oral contract. World asserts that
22 any purported contract is invalid and unenforceable since no contract was approved by
23 the Department of Labor as required by 3 N.Mar.I. Code § 4434. Plaintiff concedes
24 that the CNMI Department of Labor did not approve the employment contract.
25 Plaintiff nevertheless argues that any contract that existed is enforceable because an
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1 unapproved contract is merely voidable at the discretion of the Department of Labor,
2 not automatically void.

3 3 N.Mar.I. Code § 4434 states in relevant part that:

4 After entering into a nonresident employment agreement pursuant to [3
5 N.Mar.I. Code § 4433], an employer may use a nonresident worker to fill
6 the job vacancy covered by this agreement, subject to the following
7 procedures and conditions:

8 (a) Prior to entry of the nonresident worker into the
9 Commonwealth for employment under this chapter or, if the
10 worker is already within the Commonwealth, before commencing
11 employment, the employer shall present to the chief the affidavit
12 described in subsection (c) of this section and shall be contingent
13 on: (1) approval by the chief, (2) the payment of the required fee,
14 and (3) the disclosure of any other information or document
15 required pursuant to the employment agreement or departmental
16 regulations. Approval by the chief, as required by this section, is
17 a review of the contract for compliance with the provisions of this
18 chapter.

12 However, 3 N.Mar.I. Code § 4437(d) states in relevant part that “[a]ny nonresident
13 employment contract or change thereto which has been approved by the chief or which
14 violates any provisions of this chapter shall, in the discretion of the chief: (1) Be
15 voidable...” Interpreting former section 4437(e), the precursor to section 4437(d), the
16 court in *Loren v. E’Saipan Motors, Inc.*, No. 87-9019, 3 C.R. 564, 571 (D.N.Mar.I.
17 App.Div. 1988)¹ found that contracts between parties that are not approved by the
18 Department of Labor are not void but only voidable in the discretion of the Department
19 of Labor.

20 In this case, the Department of Labor has the discretion to ratify the employment
21 contract between plaintiff and World. There is no evidence that the contract was
22 voided by the Department of Labor. Since the contract is not void, World’s attempt
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24 ¹ At the time that this decision was rendered, the Appellate Division of the District Court
25 for the Northern Mariana Islands was the Commonwealth’s court of last resort on issues relating to
26 CNMI law.

1 to dismiss the claims fail as a matter of law.

2 **Quantum Meruit, Promissory Estoppel.** World moves for summary judgment
3 on plaintiff's claims for quantum meruit and promissory estoppel. World contends that
4 these claims are equitable claims that are barred by the affirmative defense of unclean
5 hands. The Court finds no merit in this argument for the following reason.

6 Quantum meruit is a doctrine of quasi-contract. *Midcoast Aviation, Inc. v.*
7 *General Elec. Credit Corp.*, 907 F.2d 732, 737 (7th Cir. 1990). "Quasi contracts are
8 not contracts at all, although they give rise to obligations more akin to those stemming
9 from contract than from tort. The contract is a mere fiction, a form imposed in order
10 to adapt the case to a given remedy... The law creates it, regardless of the intention of
11 the parties, to assure a just and equitable result." *Clark-Fitzpatrick, Inc. v. Long Island*
12 *R. Co.*, 516 N.E.2d 190, 193 (N.Y. 1987)(citation omitted). Although quantum meruit
13 has been referred to as "equitable" in nature and is grounded in principles of equity and
14 fairness, the correct characterization of a quasi contract quantum meruit claim is that
15 of an action at law. See *Midcoast Aviation*, 907 F.2d at 737 (stating that the claim is
16 one at law); *Hudson View II Assoc. v. Gooden*, 644 N.Y.S.2d 512, 516 (N.Y.App.Div.
17 1996) (quantum meruit counterclaim would be categorized as a "legal" claim for
18 purposes of determining whether defendants retained right to a jury trial; "these causes
19 of action [of quantum meruit], which still seek only money damages, are quasi-
20 contractual in nature and would, therefore, also have been actions at law. This is so
21 notwithstanding that the rationale underlying such causes of action is fairness and
22 equitable principles in a general, rather than legal, sense"); 1 Dan B. Dobbs, *Law of*
23 *Remedies* § 4.2(1) (2d ed. 1993)(explaining that quantum meruit has its roots in a
24 common law count of assumpsit); Candace S. Kovacic, *A Proposal to Simplify*
25 *Quantum Meruit Litigation*, 35 Am.U.L.Rev. 547, 554 n.15 (1986). Like quantum
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meruit, a claim of promissory estoppel is also an action at law. See *Merex A.G. v. Fairchild Weston Systems, Inc.*, 29 F.3d 821, 824-825 (2d Cir. 1994)(stating that where promissory estoppel is used as a substitute for consideration the claim is legal in nature because its roots are in the common law action of assumpsit).

Quantum Meruit and promissory estoppel are legal claims and the plaintiff is only seeking legal relief, that is, money damages. Unclean hands is an equitable defense only assertable against claims seeking equitable relief. See *Aetna Cas. & Sur. v. Aniero Concrete Co.*, 404 F.3d 566, 607 (2d Cir. 2005); *General Dev. Corp. v. Binstein*, 743 F.Supp. 1115, 1133-1134 (D.N.J. 1990). The equitable defense of unclean hands cannot be asserted against plaintiff's claims for quantum meruit and promissory estoppel.

Fraudulent Misrepresentation. World moves for summary judgment on plaintiff's claim for fraudulent misrepresentation. World argues that plaintiff can provide no evidence that World did not intend to employ plaintiff for as long as plaintiff proved competent. World also argues that plaintiff's claim fails as a matter of law because the claim is based on a future promise of action.

A prima facie case of fraudulent misrepresentation requires plaintiff to produce evidence demonstrating (1) a misrepresentation of a material fact, (2) knowledge of falsity, (3) intent to defraud, i.e., to induce reliance, and (4) resulting damage. See *Agosta v. Astor*, 15 Cal.Rptr.3d 565, 569 (Cal.Ct.App. 2004); Restatement (Second) of Torts § 525 (1977).

"Promissory fraud" is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract. In such cases, the plaintiff's claim does not depend upon whether the defendant's promise is ultimately

1 enforceable as a contract. If it is enforceable, the plaintiff has a cause of
2 action in tort as an alternative at least, and perhaps in some instances in
3 addition to his cause of action on the contract. Recovery, however, may
be limited by the rule against double recovery of tort and contract
compensatory damages.

4 *Agosta*, 15 CalRptr.3d at 569-570(citations and quotations omitted). *See also*
5 Restatement (Second) of Torts § 530 (1977)(stating that “[a] representation of a
6 maker’s own intention to do or not to do a particular thing is fraudulent if he does not
7 have that intention”).

8 World’s argument that plaintiff’s claim fails as a matter of law because the claim
9 is based on a future promise of action lacks merit. Plaintiff’s fraud claim is premised
10 on World’s alleged promise, allegedly made with no intention to perform as promised,
11 to employ plaintiff for at least three years with a vital role in the development of and
12 operation of the World Resort as a first tier hotel. As for World’s argument that
13 plaintiff cannot provide any evidence on the fraud claim, the Court notes that the
14 parties have agreed to depose Mr. Kyu Sang Cho, a person that could provide
15 important evidence on this claim. The Court thus believes that summary judgment on
16 this claim is inappropriate at this time.

17 **Plaintiff’s Cross-Motion for Summary Judgment**

18 Plaintiff moves for summary judgment on his claim for wrongful termination in
19 violation of public policy. To state a claim for wrongful discharge in violation of
20 public policy, an employee must show: (1) The existence of a relevant public policy;
21 (2) that he was engaged in conduct favored by public policy; (3) that the employer
22 knew or believed that the employee was engaged in a protected activity; (4) that
23 retaliation was a motivating factor in the dismissal decision; (5) that the discharge
24 would undermine an important public policy. 82 Am.Jur.2d *Wrongful Discharge* § 55
25 (2003).

1 World opposes plaintiff's motion on the ground that plaintiff did not engage in
2 conduct favored by public policy. Plaintiff's claim is based on the allegation that he
3 communicated to his supervisor the need to obtain government approved contracts for
4 himself and other non-resident employees of World. World argues that plaintiff's
5 conduct did not serve the public, it only served his interest.

6 When an employee's disclosure of information to his employer only serves the
7 employer's private interest, the employee has not stated a claim for wrongful
8 termination. *Rivera v. National R.R. Passenger Co.*, 331 F.3d 1074, 1079 (9th Cir.
9 2003)(citing *Gould v. Maryland Sound Indus., Inc.*, 37 Cal.Rptr.2d 718, 725
10 (Cal.Ct.App. 1995)). However, in this case, reporting the need to obtain government
11 approved contracts for World's non-resident employees was directly connected to the
12 CNMI's policy of not allowing non-residents to work in the CNMI unless approved
13 by the government. *See* 3 N.Mar.I. Code § 4361(e)(making illegal the employment of
14 aliens "while knowing that alien does not have lawful documentation and authority to
15 be so employed"). Such conduct serves the CNMI's public interest. *See, e.g., Green*
16 *v. Ralee Eng. Co.*, 960 P.2d 1046 (Cal. 1998).

17 World also argues that summary judgment is precluded since there is a genuine
18 issue of material fact as to why plaintiff was terminated. The Court agrees. World
19 presents sufficient evidence demonstrating a genuine issue of material fact as to
20 whether plaintiff's conduct toward other employees or some other reason was the
21 motivating reason for terminating plaintiff. Accordingly, the Court will not grant
22 summary judgment in favor of plaintiff on his claim for wrongful termination.

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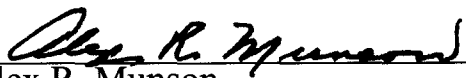
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1 **CONCLUSION**

2 Based on the foregoing, it is **ORDERED** that Defendant's Motion for Partial
3 Summary Judgment (Doc. #50) is **DENIED**. It is further **ORDERED** that Plaintiff's
4 Cross-Motion for Summary Judgment (Doc. #62) is **DENIED**. Finally, it is
5 **ORDERED** that Plaintiff's claims for intentional and negligent infliction of emotional
6 distress are **DISMISSED WITH PREJUDICE**.

7 **DATED** this 22ND day of June, 2005

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10 Alex R. Munson
11 Chief Judge, United States District Court
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