Noryb Ventures v Mankovsky
2014 NY Slip Op 30087(U)
January 16, 2014
Sup Ct, New York County
Docket Number: 650378/2009
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN

PRESENT: _____ **J.S.C.** _____ **PART** 3

Justice

Index Number : 650378/2009
NORYB VENTURES
vs.
MANKOVSKY, STAN
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. 650378/2009
MOTION DATE 7/25/13
MOTION SEQ. NO. 006

The following papers, numbered 1 to 3 **, were read on this motion to/for** summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1

Answering Affidavits — Exhibits _____ **No(s).** 2

Replying Affidavits _____ **No(s).** 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1-16-14

Eileen Branston J.S.C.

HON. EILEEN BRANSTEN
J.S.C.

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☑ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☑ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

----------X

NORYB VENTURES, INC. d/b/a BYRON VENTURES, and DAVID BYRON,

Plaintiffs,

-against-

STANLEY MANKOVSKY, and STANLEY CAPITAL MORTGAGE COMPANY, INC. MARGARET CONSULTING, LLC, MARGARET MANKOVSKY, and HOME SAVINGS OF AMERICA,

Defendants.

----------X

Index No. 650378/2009
Motion Date: 7/25/2013
Motion Seq. No. 006

Eileen Bransten, J.:

This matter arises from a series of transactions, including the execution of a convertible note, which culminated with the investment of $750,000 by Plaintiffs Noryb Ventures, Inc. d/b/a Byron Ventures ("Noryb") and David Byron, its principal, in Defendant Stanley Capital Mortgage Company, Inc. ("Stanley Capital"). Noryb's investment was made in exchange for 46% ownership in Stanley Capital.

Plaintiffs assert that Defendant Stanley Mankovsky, the principal of Stanley Capital, and the other Defendants carried out a fraudulent scheme to extract the investment from Plaintiffs, and transfer the funds to, among other destinations, Defendants Margaret Consulting, LLC ("Consulting"), which was owned by Stanley and Defendant Margaret Mankovsky ("Margaret"). Herein, Defendants bring a motion for summary judgment, seeking dismissal of the action in its entirety. Plaintiffs oppose. For the reasons that follow, Defendants motion is granted in part and denied in part.

I. Background

Noryb's primary business is financial and business consulting, and Byron is Noryb's sole shareholder, officer, and director. Stanley Capital was a mortgage banker and broker, of which Defendant Mankovsky was, at all relevant times, the CEO, director and sole shareholder. Defendant Consulting is a limited liability company owned 50% by Mankovsky, and 50% by his wife Margaret. Consulting had ongoing business interactions with Stanley Capital largely comprising, according to invoices, "lead generation" and "consulting" services.

Plaintiffs contend that Defendants carried out a fraudulent scheme to induce Noryb to transfer $750,000 to Stanley Capital by engaging in a series of sham negotiations to sell it a 46% ownership interest in the company. According to Byron, during the course of the negotiations, Mankovsky repeatedly represented that Stanley was experiencing an acute, short-term cash shortage and that, without an immediate influx of cash, the company would fail to satisfy certain minimum net worth requirements relating to its business licenses.

Throughout 2008, Mankovsky and Byron discussed the possibility of Byron purchasing an ownership interest in Stanley Capital. By August 2008, when Stanley Capital was experiencing the critical effects of the cash shortage, Byron and Mankovsky apparently came to an understanding whereby Byron would lend money to Stanley

Capital, and begin work with the company as a consultant. As of September 2008, Byron made arrangement for two investments in Stanley Capital, the first of which was $250,000 (the "Note"), followed by an additional $150,000. Byron was to begin work as a consultant at the rate of $10,000 per month as of September 15, 2008. Although the first investment of $250,000 was delivered to Stanley Capital, the remaining $150,000 investment was never arranged. Moreover, although Byron began to work as a consultant, a consulting agreement was never actually executed.

The negotiations and consulting arrangements culminated in a December 30, 2008 letter agreement (the "Letter") submitted by Noryb, and countersigned by Mankovsky, providing for Byron to transfer a total of "$750,000 of invested capital for 46% of the issued and outstanding common stock of [Stanley Capital]." The Letter purported to prospectively subsume the Note representing the prior investment by Byron of $250,000, provide an additional cash investment of $470,000, and to consolidate $30,000 in outstanding invoices due to Byron for his consulting services. This arrangement was to be coalesced in a Stock Purchase Agreement ("SPA") to be executed as of January 5, 2009. In addition, the Letter proposed that a Stock Incentive Plan would be executed by February 23, 2009, and that Stanley Capital would pay $10,000 in legal fees for the preparation of the transaction.

With regard to the use of the invested funds, the Letter provided that the funds invested be:

> used for working capital and merger and acquisition activity only and [Stanley Capital] cannot use the invested capital to pay / repay personal or executive loans, personal expenses, dividends, bonuses or other non-capital or non-investment uses without the prior, written consent of David Byron, CEO of [Noryb].

(Affirmation of David Byron ("Byron Aff."), Ex. E at 6.)

As of December 31, 2008, Noryb evidently wired the agreed $470,000 in additional funds to Stanley Capital. *See* Affirmation of Steven Kaplan ("Kaplan Affirm."), Ex. J (Wachovia Bank statement for 11/29/08 through 12/31/08). Over the next few weeks, Byron began to work with Stanley Capital as an officer and shareholder. However, as of March 25, 2009, no SPA was in place, and no shares of Stanley Capital had been transferred to Byron. On April 13, 2009, counsel for Byron demanded that Mankovsky "deliver stock certificates representing 46% of the outstanding Class A and Class B shares of Stanley Capital." (Affirmation of David Lagasse, Ex. 1). Save an affirmation that Byron received 46% of Stanley Capital, *see* Reply Affidavit of Stan Mankovsky ¶ 13, no evidence that a transfer of shares ever occurred has been submitted to the Court.

Within the next year, while the negotiations of the SPA were still not concluded, Mankovsky paid out almost roughly $460,000 to Consulting for "lead generation" and

"consulting" services, some $180,000 of which was paid out *after Stanley Capital discontinued operations*. *See* Kaplan Affirm. Ex. L (invoices to Stanley Capital from Consulting). Meanwhile, within six days of receiving the funds, Mankovsky paid himself $250,000. *See* Kaplan Affirm. Ex. J at 284, 289, check No. 14544. Byron also maintains that Mankovsky used the invested funds to payoff personal loans and various personal expenses, including rent for an apartment in Miami, cars, insurance, cellphone, vacations, and bar mitzvahs. Byron also asserts that Consulting is a sham business entity, and that the payments to Mankovsky himself, and to Consulting were all in direct contravention of the provisions of Letter.

Stanley Capital discontinued its operations in September 2009, at which time Defendant Home Savings of America ("HSA") allegedly took over Stanley Capital and continued the business under its own auspices. According to Plaintiffs, HSA continued Stanley Capital's identical business, and began to pay: (i) rent for Stanley Capital's same New York and New Jersey offices (at 1200 Sixth Avenue, New York, NY, and 120 Sylvan Avenue, Englewood Cliffs, NJ, respectively) without those leases ever being assigned to HSA; and, (ii) all of the salaries and other overhead of the two offices, which comprise only Stanley Capital former employees and Stanley Capital's equipment. In addition, Plaintiffs contend that HSA paid for Stanley Capital to use the same telephone numbers and website. Byron alleges that the discontinuation of Stanley Capital's

business, and subsequent continuation of the identical business by HSA was done in order to defraud Stanley Capital's creditors, including Noryb. *See* Second Am. Compl. ¶¶ 49-54.

Noryb now brings claims against all defendants for fraud (first cause of action), breach of contract (second), breach of implied covenant of good faith and fair dealing (third), unjust enrichment (fifth), money lent (sixth), money had and received (seventh), constructive trust (eighth), accounting (tenth), and conversion (eleventh). Noryb also brings claims for tortious interference with contract (fourth cause of action, as against Mankovsky, Margaret, and Consulting), breach of fiduciary duty (ninth, as against Mankovsky), and aiding and abetting a breach of fiduciary duty (twelfth, as against Margaret and Consulting). Noryb seeks $760,000 in damages, which represents the $750,000 investment that Byron made in Stanley Capital, and $10,000 in legal fees due for the preparation of the Letter.

II. Discussion

Defendants now seek summary judgment dismissing the complaint in its entirety. Summary judgment is governed by CPLR 3212, which provides that the movant must show that "there is no defense to the cause of action or that the cause of action or defense has no merit." CPLR 3212(b). Here, Defendants must make a prima facie showing of

entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957).

Only once Defendants make this prima facie showing does the burden shift to Noryb to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman*, 49 N.Y.2d at 562. As this is Defendant's motion for summary judgment, Noryb is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties. *See Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007). Finally, "[i]t is axiomatic that summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue of fact or where such issue is even arguable." *Trolone v. Lac d'Amiante Du Quebec, Ltee*, 297 A.D.2d 528, 528-29 (1st Dep't 2002). The summary process "classically and necessarily requires that the issues be first exposed and delineated" since "[i]ssue-finding, rather than issue-determination, is the key." *Id.*

A. *The Letter*

A central focus of this litigation is the December 30, 2008 Letter submitted by Noryb and countersigned by Mankovsky. This Letter described Plaintiffs' investment of $750,000 in Stanley Capital in exchange for 46% of Stanley Capital's issued and outstanding common stock. The Letter appears, in some respects (e.g. with regard to the intention to execute an SPA), to be "a mere agreement to agree, in which a material term is left for future negotiations, [which would be] unenforceable." *Matter of 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 91 (1991) (internal quotation marks and citation omitted). Despite this, a purported contract that leaves items to be agreed in the future may still be given effect. *See Four Seasons Hotels v. Vinnik*, 127 A.D.2d 310, 317 (1st Dep't 1987). Thus, where the parties have completed negotiations on sufficient essential elements of a contract, the court may enforce it. *Id.* at 317; *compare Conopco v. Wathne Ltd.*, 190 A.D.2d 587, 588 (1st Dep't 1993); *see generally Aiello v. Burns Int'l Sec. Serv. Corp.*, 110 A.D.3d 234, 243 (1st Dep't 2013).

The Letter provides for a price, a quantity of shares, a schedule for the timing of the transactions, conditions for the use of funds, and other obligations of the signatories. The Letter also states that it is binding. In this latter regard, the court notes that although the intention to be bound is crucial to the formation of a contract, *see Amcan Holdings v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dep't 2010), "[a]

contract is [nonetheless] incomplete and unenforceable when, as to some essential term, there has been no agreement but only an agreement to agree in the future." *May Metro. Corp. v. May Oil Burner Corp.*, 290 N.Y. 260, 264 (1943).

Here, not only did the parties intend to be bound, but there were no essential or significant elements missing from the Letter that render it incapable of being enforced. At the very least, the Letter issues a succinct offer, and if the countersignature of the offer did not constitute an acceptance of that offer, certainly, Stanley Capital's acceptance and retention of Noryb's funds, an obvious and objective manifestation of assent, did. *Zheng v City of New York*, 93 A.D.3d 510, 511 (1st Dep't 2012), *aff'd* 19 N.Y.3d 556 (2012). While the court is reluctant to refer to the Letter directly as a contract, the court accepts the content of the Letter as primary indicators of the terms of a binding and enforceable agreement between the parties (hereinafter, the "Agreement"), the breach of which would provide for recovery.

B. *Breach of Contract (Second Cause of Action)*

Stanley Capital seeks summary judgment dismissing the second cause of action for breach of the Agreement. The elements of a claim of breach of contract include "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof [or non-performance], and resulting damages." *See Harris v. Seward Park Hous.*

Corp., 79 A.D.3d 425, 426 (1st Dep't 2010); *Morris v. 702 E. Fifth St. HDFC*, 46 A.D.3d 478, 479 (1st Dep't 2007).

Here, as noted above, the parties entered into a binding Agreement, evidenced by the Letter, and Noryb performed thereunder by paying out $750,000 to Stanley Capital. Stanley Capital, on its own motion for summary judgment, has not submitted any evidence whatsoever of its performance under the Agreement. Indeed, a troubling aspect of this whole litigation is the amount of supposition and surmise surrounding the simple and crucial question of whether 46% of the shares of Stanley Capital was issued to Byron. Such a transaction, which was clearly called for in the Agreement, is not to be proven by opinion or conjecture, but by documentation. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325-326 (1986) (bare assertions insufficient to support summary judgment). Apart from the conclusory allegations of Mankovsky, the sole evidence provided in support of summary judgment is a loan application of February 23, 2009 in which both Byron and Mankovsky asserted that Byron was the 46% owner of Stanley Capital (the "Loan Application"). *See* Kaplan Affirm., Ex. N at 1.

The Loan Application is wholly inadequate to establish performance by Mankovsky under the Agreement. What is needed to show that 46% of common stock issued and outstanding has been transferred to Byron, is a record of the transaction, or the certificates. Despite this court's direction to produce such records or certificates, no such

evidence has been adduced. Moreover, as of March 25, 2009, *two days after the Loan Application*, the parties exchanged communications indicating that the 46% of common stock had not been transferred. *See* Byron Aff. Ex. L. As of April 12, 2009, the shares had apparently still not been issued, as counsel for Byron wrote to Stanley Capital demanding "stock certificates representing 46% of the outstanding Class A and Class B shares of Stanley Capital." *See* Lagasse Affirm. Ex. 1. This communication could hardly have been necessary if the shares had been provided to Byron already.

Stanley Capital points to the deposition of Aurel Villari, counsel that worked on the SPA, as an indication that the subject transaction took place. Mr. Villari's testimony only offers his *impression* that the 46% due to Byron was "written in stone." *See* Affirmation of Andrew Borsen Ex. E at 32:13-17, 37:9-16 (Transcript of Aurel Villari Deposition). Mr. Villari's testimony concerning *his* view of the proposed transaction is not only insufficient as a matter of law to sustain a motion for summary judgment, *see Alvarez*, 68 N.Y.2d at 325-326, his testimony is also insufficient as a matter of logic: a transaction cannot be deemed completed if the document executing the transfer is still being drafted.

Finally, to the extent that Mankovsky asserts that Byron *did* become the owner of 46% of the outstanding shares of Stanley Capital, the court notes that no K-1 for 2009, or any other documentation whatsoever making such an indication, has been submitted.

In short, Stanley Capital has utterly failed to provide any prima facie evidence of performance of its obligations under the Agreement and entitlement to judgment as a matter of law. The motion to dismiss the second cause of action for breach of contract is denied.

C. *Fraud (First Cause of Action)*

Plaintiffs contend that Mankovsky entered into negotiations and executed the Letter with knowledge that he would not fulfill his obligations, and only to get Noryb to transfer $750,000 to him and Stanley Capital prior to December 31, 2008. *See* Second Am. Compl. ¶¶ 62-70. In response to the complaint, and in support of the motion for summary judgment, the defendants assert that Stanley Capital, Mankovsky, Margaret, and Consulting did not make any knowing misrepresentation of material fact that was intended to induce Noryb into making an investment. In any event, Defendants maintain that Byron is a savvy businessman who has experience in finance and business management, and that he performed his own due diligence with unfettered access to Stanley Capital's financial records and employees. Generally, these assertions are insufficient to support granting summary judgment.

Notwithstanding, to the extent that Noryb's claim is based on the allegation that Mankovsky never intended to comply with the Agreement, it is unsustainable alongside a

properly pleaded cause of action for breach of contract alleging the same damages. For example, in *Coppola v. Applied Elec. Corp.*, 288 A.D.2d 41, 42 (1st Dep't 2001), the Court noted that:

> [p]laintiff's fraud claim, based on the allegation that defendant Herman harbored the undisclosed intention from the outset to never comply with the parties' stock purchase agreement, was properly dismissed as merely duplicative of his breach of contract cause of action . . . [i]t is clear that the claimed fraud was not collateral or extraneous to the contract, did not allege any damages, including those for foregone opportunities, that would not be recoverable under a contract measure of damages, and failed to plead a breach of duty separate from a breach of the contract.

Moreover, it is well established that a "contract action cannot be converted to one for fraud merely by alleging that the contracting party did not intend to meet its contractual obligations." *Rocanova v. Equitable Life Assurance Soc'y of U.S.*, 83 N.Y.2d 603, 614 (1994). As a result, "general allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support [a claim for fraud]." *New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 318 (1995); *accord Pacnet Network Ltd. v. KDDI Corp.*, 78 A.D.3d 478, 479 (1st Dep't 2010) (bare allegation that "defendant knew the performance prediction was false is indefinite and conclusory, and therefore not actionable, absent allegations that the prediction was contradicted by a concrete, existing fact that defendant either intentionally failed to disclose or negligently failed to discover." (citation omitted).

All this being said, it is nonetheless well-established that "[a] fraud-based cause of action is duplicative of a breach of contract claim when the *only* fraud alleged is that the defendant was not sincere when it promised to perform under the contract." *Mañas v. VMS Assoc., LLC*, 53 A.D.3d 451, 453 (1st Dep't 2008) (emphasis added). Where, as here, there are further allegations that the

> plaintiff . . . was induced to enter into a contract based on the defendant's promise to perform and that the defendant, at the time it made the promise, had a preconceived and undisclosed intention of not performing the contract, such a promise constitutes a representation of present fact collateral to the terms of the contract and is actionable in fraud.

Id. at 453-54 (internal quotation marks omitted); *see also Deerfield Commc'n Corp. v. Chesebrough-Ponds*, 68 N.Y.2d 954, 956 (1986).

Here, Byron alleges that Mankovsky improperly paid himself immediately upon receipt of the investment funds, and that Mankovsky had a fraudulent enterprise with his spouse in place to raid the funds in violation of the Agreement. Stanley Capital itself has indicated a long-running relationship with Consulting, and Byron, with the benefit of every favorable inference, alleges that Consulting, as a whole, is a sham company. *See* Byron Aff. ¶¶ 40-46. Thus, Noryb has demonstrated issues of fact, aside from the bare allegation that Mankovsky never intended to perform. *See First Bank of Ams. v. Motor Car Funding*, 257 A.D.2d 287, 291 (1st Dep't 1999). As such, the motion for summary judgment dismissing the cause of action for fraud is denied.

D . *Breach of Implied Covenant of Good Faith and Fair Dealing (Third Cause of Action)*

Plaintiffs contend that there was a contract between Mankovsky and/or Stanley Capital, and that the course of events constituted a breach of the covenant of good faith and fair dealing. Mankovsky argues that there has been no breach of the covenant because Stanley Capital performed all of its contractual obligations in good faith. In any event, as there was no contract between Noryb on the one hand, and Mankovsky, Margaret, and Consulting on the other, Mankovsky contends that those Defendants could not have breached the covenant.

Every contract has an implied covenant of good faith and fair dealing, "which is breached *when a party to a contract* acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." *Jaffe v. Paramount Commc'n*, 222 A.D.2d 17, 22-23 (1st Dep't 1996) (emphasis added).

Here, Defendants Mankovsky, Margaret, and Consulting were not signatories to the Letter. Despite repeated and over-arching allegations that Consulting was a sham entity, and the alter ego of these Defendants, alter ego liability, even if found, does not transform Margaret and Consulting into actual signatories of the Agreement. They are not subject to a cause of action for breach of the covenant. With regard to those Defendants, the cause of action is not sustainable, and it is dismissed.

With regard to Stanley Capital, the allegedly improper actions of Mankovsky in spending the funds invested by Noryb fall within the context of the breach-of-contract claim, and are, therefore, also not within the covenant of good faith and fair dealing. This is because the claim arises from the same facts as the cause of action for breach of contract and seeks the identical damages for each alleged breach. *See Amcan Holdings, Inc.*, 70 A.D.3d at 425; *see also Logan Advisors, LLC v. Patriarch Partners*, LLC, 63 A.D.3d 440, 443 (1st Dep't 2009). As such, the cause of action is dismissed as to Stanley Capital.

As a final consideration, regardless of how the funds invested by Noryb were spent, it is unclear that Defendants deprived Noryb of any benefit of the contract beyond the issuance and/or transfer of the designated 46% shareholder interest that was the subject of the Agreement. Indeed, Noryb itself offers that the invested capital disappeared almost immediately after it was paid out. *See* Byron Aff. ¶ 46. As there was no apparent fruit (*i.e.* benefit) from the investment, the 46% ownership rights were the main predicate of the Agreement. *See e.g. Forman v. Guardian Life Ins. Co. of Am.*, 76 A.D.3d 886 (1st Dep't 2010) (only claims not predicated on contractual terms may be subject to a claim of breach of the covenant). The actions of Mankovsky did not deprive Noryb of a non-predicate benefit of the Agreement.

The third cause of action for breach of the covenant of good faith and fair dealing is dismissed as duplicative of the second cause of action for breach of contract.

E. *Unjust Enrichment (Fifth Cause of Action)*

In support of their fifth claim, Plaintiffs contend that an investment was made in Stanley Capital, and that money was improperly spent, unjustly enriching Defendants. Defendants seek dismissal of this claim on summary judgment, arguing that Stanley Capital paid fair consideration pursuant to the Agreement, and therefore was not, enriched at plaintiffs' expense. Moreover, Defendants contend that it is not against equity or good conscience to permit Stanley Capital to retain the investment. However, Defendants point to no evidence whatsoever in support of these arguments. Thus, Defendants present bare allegations, unsupported by any evidence, which all have been denied (with the benefit of every favorable inference). Thus, Defendants' arguments are not sufficient to demonstrate entitlement to judgment as a matter of law.

Nonetheless, as a general proposition, recovery for unjust enrichment or quasi-contract is barred by the existence of a valid and enforceable contract, whether oral or written, governing the same subject matter. *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009). Where there is doubt as to the existence of such an agreement, a plaintiff may proceed upon a theory of quasi-contract as well as breach of

contract, and is not required to elect remedies. *Curtis Prop. Corp. v. Greif Co.*, 236 A.D.2d 237, 239 (1st Dep't 1997). Here, there is no doubt as to the existence of an Agreement; Noryb's claim for unjust enrichment, as against Stanley Capital, is barred.

However, as noted by Defendants themselves, Noryb does not have a contract with Mankovsky, Margaret, or Consulting. Thus, if, as is claimed by Byron, those Defendants cooperated to defraud Noryb of its investment, Noryb may recover from them to the extent that they were unjustly enriched. *See e.g. Bradkin v Leverton*, 26 N.Y.2d 192, 196-97 (1970) (quoting *Miller v Schloss*, 218 N.Y. 400, 407 (1916)) (a quasi-contract is a fiction "imposed by law where there has been no agreement or expression of assent, by word or act, on the part of either party involved. The law creates it, regardless of the intention of the parties, to assure a just and equitable result").

Defendants argue that Noryb implicates Margaret and Consulting in order to vengefully harass them, after a written threat to Mankovsky's family. Relying on *Mandarin Trading Ltd. v. Wildenstein,* 16 N.Y.3d 173, 182-83 (2011), Defendants argue that the relationship between Noryb on the one hand, and Margaret and Consulting on the other hand, is too attenuated to warrant an unjust enrichment claim. This reliance is misplaced.

In *Mandarin Trading*, the plaintiff's claim for unjust enrichment was insufficient because it was based solely upon a written appraisal letter that only stated the value of a

painting, with no apparent expectation that the plaintiff would see it. 16 NY3d at 177. Further, the relationship of the appraiser to the parties was not even pleaded. *Id.* Here, in stark contrast, according to defendants, Byron was a 46% owner of Stanley Capital, so Consulting's services were arguably rendered directly to plaintiff. In addition, the relationship of Margaret and Consulting to Stanley Capital is extensively pleaded. The relationship between a vendor and the putative 46% owner of a company is not "attenuated."

Although there is no agreement or expression of assent, by word or act, on the part of Margaret or Consulting, there are any number of material facts precluding summary judgment, including an alleged conspiracy to defraud Noryb of its investment, open questions as to the actual provision of Consulting's services, and the value of the services purportedly provided. In an abundance of caution and to assure a just and equitable result, *see Clark-Fitzpatrick v Long Is. R. R. Co.*, 70 N.Y.2d 382, 388-89 (1987), the motion for summary judgment dismissing the cause of action for unjust enrichment as against Margaret and Consulting is denied.

F. *Constructive Trust (Eighth Cause of Action), Breach of Fiduciary Duty (Ninth, as Against Mankovsky), Aiding and Abetting a Breach of Fiduciary Duty (Twelfth, as Against Margaret and Consulting)*

Plaintiffs also seek recovery based upon a constructive trust stemming from Mankovsky's alleged breach of fiduciary duty and from Margaret's and Consulting's role in contributing to Mankovsky's breach. The four elements that must be proven in order to impose a constructive trust, under the eighth cause of action, are: (i) the existence of a confidential or fiduciary relationship; (ii) a promise made in that capacity; (iii) a transfer in reliance on that promise; and (iv) unjust enrichment. *See Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 (1976); *see also Bankers Sec. Life Ins. Soc'y v. Shakerdge*, 70 A.D.2d 852, 852 (1st Dep't 1979), *aff'd* 49 N.Y.2d 939 (1980).

Meanwhile, the ninth and twelfth causes of action also rely on the existence of a fiduciary relationship. Hence, the validity of all three causes of action rely on the existence of a fiduciary relationship between Byron and Noryb on one part, and Mankovsky and Stanley Capital on the other part.

Defendants argue that a constructive trust should not be imposed upon them because plaintiffs cannot establish that there was a fiduciary relationship between Stan Mankovsky, Margaret, or Consulting, or that the promise in the Agreement was not fulfilled. The court does not strongly accredit this argument because, as a general rule, the proponent of a summary judgment motion "cannot obtain summary judgment by

pointing to gaps in plaintiffs' proof." *Torres v. Indus. Container*, 305 A.D.2d 136, 136 (1st Dep't 2003). However, all three causes of action must still fail.

"A fiduciary relation 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." *Mandelblatt v. Devon Stores*, 132 A.D.2d 162, 168 (1st Dep't 1987) (quoting Restatement (Second) of Torts § 874, cmt. (a)).

Plaintiffs' allegations regarding the existence of a fiduciary relationship is inadequate to withstand a motion for summary judgment. More specifically, Plaintiffs first assert that they transferred the invested capital to Defendants in reliance upon the promises set forth in the Letter Agreement, which included a promise not to use those funds for any personal expenditures. Plaintiffs next contend that Defendants violated that promise with the active involvement of Margaret and Consulting. These allegations simply restate the breach of contract claim and nothing more. They do not indicate any fiduciary relationship, and therefore cannot be the basis of a breach of fiduciary duty.

Plaintiffs go on to argue that in actuality, the "fiduciary relationship arises out of Mankovsky's position as director and majority shareholder of Stanley Capital, not out of the Letter Agreement," that Noryb transferred funds to Stanley Capital in reliance on Mankovsky's promises in the Letter, and that Mankovsky violated those promises. *See* Opp. Br. at 26. Ignoring for a moment the timing issues in that argument (*i.e.* that the

alleged fiduciary duty could only have arisen after the Letter and Agreement and the issuance of shares to Byron), *the whole complaint, and all the evidence submitted by plaintiffs, coalesce around the basic allegation that Byron never became a shareholder in Stanley Capital*. There could be no fiduciary duty arising from Byron's position as a shareholder if he never became one.

Given the absence of a fiduciary relationship between the parties, the eighth, ninth, and twelfth causes of actions, which all rely on the existence of such a relationship, are each properly dismissed.

G. *Tortious Interference with Contract (Fourth Cause of Action)*

A claim for tortious interference with contract requires the existence of an enforceable contract, and that deliberate and improper interference by a defendant resulted in a breach of that contract. *Steinberg v. Schnapp*, 73 A.D.3d 171, 176 (1st Dep't 2010).

Plaintiffs assert that at all relevant times, Mankovsky exercised sole dominion and control over all of Stanley Capital's and its affiliates' affairs, and, together with Margaret, exercised similar dominion and control over Consulting. Plaintiffs further contend that Mankovsky, Margaret, and Consulting, by improper means, induced, participated in, and aided and encouraged Stanley Capital to breach the Letter and the Agreement.

In support of the motion for summary judgment, Defendants simply assert that they did not intentionally procure, or play any role in, Stanley Capital's alleged breach of the Letter and Agreement. Defendants then go on to argue that there is no proof that Defendants interfered with Stanley Capital's performance of its obligations.

The motion is denied. As a preliminary matter, a simple conclusory assertion that the defendants did not intentionally interfere with the Letter or Agreement is insufficient as a matter of law to support the granting of summary judgment. *See Zuckerman*, 49 N.Y.2d at 562 ("mere conclusions, expressions of hope, unsubstantiated allegations, or assertions are insufficient" to defeat a summary judgment motion).

Secondly, as noted above, the allegation that there is no proof of interference is also insufficient to support a motion for summary judgment. *Torres v. Indus. Container*, 305 A.D.2d 136, 136 (1st Dep't 2003) (the proponent of a summary judgment motion "cannot obtain summary judgment by pointing to gaps in plaintiffs' proof."). Noryb is not required to *prove* anything at this stage of the litigation; on their own motion for summary judgment, it is Defendants that must prove entitlement to judgment. CPLR 3212.

H. *Money Lent (Sixth Cause of Action), and Money Had and Received (Seventh)*

Plaintiff next asserts claims for money lent and money had and received, both of which are essentially equitable in nature. "A cause of action for money lent need plead only that defendant owes a sum of money lent." *Manufacturers Hanover Trust Co. v. Chemical Bank*, 160 A.D.2d 113, 124 (1st Dep't 1990). Meanwhile, "an action for money had and received is an equitable quasi-contract claim analogous to quantum meruit." *Parsa v. State of New York*, 64 N.Y.2d 143, 148 (1984), *rearg. denied* 64 N.Y.2d 885 (1985); *see also Interstate Adjusters v. First Fid. Bank, N.J.*, 251 A.D.2d 232, 234 (1st Dep't 1998).

Here, however, there was no "money lent." All the parties agree that the funds provided by Noryb were an investment in Stanley Capital. Notably, the Letter is entirely silent about any indication that the money invested would be repaid. Instead, the Letter purports – and no party has presented any evidence to the contrary – that the moneys turned over by Noryb to Stanley Capital were in exchange for 46% of the issued and outstanding shares in the company. As there was no money lent, the cause of action is deficient on its face, and must be dismissed. *See, e.g., In re Shulman Transp. Enters.*, 744 F.2d 293, 295 (2d Cir. 1984) ("[a]n investment in a partnership is not transformed into a loan by a disclaimer that a partnership relationship exists") (citing *Rubenstein v. Small*, 273 A.D. 102, 104 (1st Dep't 1947) ("[f]or a true loan it is essential to provide for

repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard"); *see also Bernstein v. Lerner*, 38 N.Y.S.2d 928, 930 (City Ct. Kings Cnty. 1942) ("[t]he essentials of the causes of action for money loaned are the loaning of the money and the terms on which it was to be repaid").

In addition, as both of these causes of action are based in quasi-contract, the existence of the Letter and Agreement precludes recovery under either of these theories. *See Melcher v. Apollo Med. Fund Mgmt. L.L.C.*, 105 A.D.3d 15, 27 (1st Dep't 2013) ("[a] cause of action for money had and received is one of quasi-contract, and the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter"). The sixth and seventh causes of action are dismissed.

I. *Accounting (Tenth Cause of Action)*

Plaintiffs seek an accounting by defendants of all books, records, financial statements, income, revenues, expenses, profits, benefits, losses, liabilities, obligations, distributions and other financial transactions since December 2008, based on the allegation that defendants have wrongfully misappropriated the investment made by Noryb.

Under normal circumstances, where there is no obvious fiduciary relationship, accounting should not be granted. *Elghanian v. Elghanian*, 277 A.D.2d 162, 162 (1st Dep't 2000). However, the right to an accounting may also lie: (i) in the case of a joint venture agreement, in a situation in which the seller is to participate in losses as well as profits; or (ii) where special circumstances are present warranting equitable relief in the interest of justice. *Grossman v Laurence Handprints-N.J.*, 90 AD2d 95, 104 (2nd Dept 1982); *see also Kaminsky v. Kahn*, 23 A.D.2d 231, 237 (1st Dep't 1965) (an accounting may be ordered by the court based upon the "true character and over-all effect of the transaction between the parties, and in light of the nature, quality and effect of the defendant's wrongful acts in derogation of the plaintiff's rights.").

Here, curiously, Defendants argue that they lacked a specific intent not to properly account to Noryb and Byron. This leaves open the question of why, then, no accounting was voluntarily made. If, as defendants repeatedly assert, Noryb had been granted 46% of the issued and outstanding shares of Stanley Capital, then Noryb had every right to examine all the books, records, etc. of Stanley Capital.

In any event, all parties agree that the Letter and the Agreement were executed with the intention of Noryb or Byron becoming the 46% owner of Stanley Capital. Thus, Plaintiffs were entitled to participate in the losses as well as the profits of the company. Given the nature of the claims, including that Mankovsky, Margaret, and Consulting

systematically colluded to deny Stanley Capital of the investment made by Noryb, an accounting could conceivably be directed by the court. Defendants' conclusory statement that they "did not have a specific intent not to properly account to Noryb and Bryon" calls for a credibility determination, which is improper on a motion for summary judgment. *See S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 (1974). The motion for summary judgment dismissing the tenth cause of action is denied.

J. *Conversion (Eleventh Cause of Action)*

Plaintiffs likewise contend that they have an interest in the assets of Stanley Capital, and that defendants interfered with that interest by siphoning off and diverting the funds that properly belonged to plaintiffs. Defendants maintain that they have not converted Plaintiffs' property because Noryb and Byron did not have any right to possession of the invested funds, and they did not divert those funds from Stanley Capital. While the latter assertion of defendants is conclusory, the former, that Noryb and Byron did not have any possessory right to the invested funds, is clearly supported by the evidence submitted by all parties. As such, the claim is deficient on its face, and must be dismissed.

It has long been established that money may be the subject of an action for conversion. *See Gordon v. Hostetter*, 37 N.Y. 99 (1867); *Thys v. Fortis Sec. LLC*, 74

A.D.3d 546, 547 (1st Dep't 2010). However, to sustain such an action, the plaintiff must show a superior right to possession of the money. *Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 A.D.2d 384, 385 (1st Dep't 1992). Conversion only takes place "when someone, intentionally, *and without authority*, assumes or exercises control over personal property *belonging to someone else*." *Colavito v. New York Organ Donor Network*, 8 N.Y.3d 43, 49-50 (2006) (emphasis added).

Here, Noryb and Byron have no *possessory right* at all to the invested funds. They have pled and brought causes of action based on their right to receive 46% of the issued and outstanding shares of Stanley Capital. Stanley Capital, at all times, had authority, and rights, to use the invested funds for the business, and Noryb and Byron did not have any superior rights. Only if successful on their claim for breach of the Letter or Agreement, would Noryb be eligible to recover damages in that amount; that right would not exist until such a claim is established. At best, the invested funds could be viewed as a debt owed back to Noryb and Byron; such a position does not give rise to a cause of action in conversion. *Calisch Assoc. v. Mfrs. Hanover Trust Co.*, 151 A.D.2d 446, 448 (1st Dep't 1989). The eleventh cause of action is dismissed.

III. Conclusion

Accordingly it is hereby

ORDERED that the motion of defendants, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety is partially granted as follows:

A. The third cause of action for breach of implied covenant of good faith and fair dealing is dismissed;

B. The fifth cause of action for unjust enrichment, which was brought against all defendants, is dismissed as against Stanley Capital and Mankovsky;

C. The sixth cause of action for money lent is dismissed;

D. The seventh cause of action for money had and received is dismissed;

E. The eighth cause of action for constructive trust is dismissed;

F. The ninth cause of action for breach of fiduciary is dismissed;

G. The eleventh cause of action for conversion is dismissed;

H. The twelfth cause of action for aiding and abetting a breach of fiduciary duty is dismissed; and it is further

ORDERED that Defendants' motion is otherwise denied and that the action shall continue as to all remaining causes of action; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 442, on February 25, 2014, at 10 a.m.

Dated: New York, New York
January 16, 2014

ENTER

Hon. Eileen Bransten, J.S.C.