

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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MARCIA KAUFMAN,

**TRIAL/IAS PART: 25
NASSAU COUNTY**

Plaintiff,

-against-

Index No: 005064-07

**BURR ENTERPRISES LTD. d/b/a PREFERRED
EMPIRE MORTGAGE COMPANY and
DOUGLAS ELLIMAN REALTY, LLC.**

**Motion Seq. Nos: 1 and 2
Submission Date: 5/8/09**

Defendants.

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**BURR ENTERPRISES LTD. d/b/a PREFERRED
EMPIRE MORTGAGE COMPANY and
DOUGLAS ELLIMAN REALTY, LLC,**

Counterclaim Plaintiffs,

-against-

MARCIA KAUFMAN,

Counterclaim Defendant.

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The following papers have been read on these motions:

**Notice of Motion, Affidavits (2) and Exhibits.....X
Plaintiff/Counterclaim Defendant's Memorandum of Law.....X
Notice of Motion.....X
Defendants/Counterclaim Plaintiffs' Memorandum of Law in Support.....X
Affirmation of A. Arkin and Exhibits.....X
Defendants/Counterclaim Plaintiffs' Memorandum of Law in Opposition.x**

Papers read (cont.)

Affidavit of M. Kaufman.....X
Affidavit of K. Evans and Exhibit.....X
Plaintiff/Counterclaim Defendant’s Affidavit in Opposition and Exhibits...X
Defendants/Counterclaim Plaintiffs’ Affirmation and Exhibits.....X
Plaintiff/Counterclaim Defendant’s Memorandum of Law in Opposition...X
Reply Affidavit and Exhibit.....X
Defendants/Counterclaim Plaintiffs’ Reply Memorandum of Law.....X
Defendants/Counterclaim Plaintiffs’ Supplemental Affirmation.....X
Plaintiff/Counterclaim Defendant’s Reply Memorandum of Law.....X

This matter is before the Court for decision on the motion filed by Plaintiff/Counterclaim Defendant Marcia Kaufman (“Plaintiff” or “Ms. Kaufman”) on November 3, 2008 and the motion filed by Defendants/Counterclaim Plaintiffs (“Defendants” or “Preferred”) on November 3, 2008, which were submitted to this Court on May 8, 2009.¹ The Court 1) grants Plaintiff’s motion in part and denies it in part; and 2) grants Defendants’ motion in part and denies it in part. For the reasons set forth below, the Court’s decision is as follows: The Court 1) grants Plaintiff’s motion for summary judgment to the extent that the Court dismisses Defendants’ second counterclaim for breach of fiduciary duty as to all allegations in support of that counterclaim, except the allegation that Ms. Kaufman improperly took commissions and her defense that defendants consented to or ratified her receipt of those commissions; 2) grants Defendants’ motion for summary judgment to the extent that the Court dismisses the first, second, third, fourth, and fifth causes of action of the amended complaint; 3) grants Defendants’ motion for summary judgment with respect to Plaintiff’s sixth cause of action, except to the extent that Plaintiff may prove that Defendants waived enforcement of paragraph 13 of Plaintiff’s Letter of Intent; 4) denies, as premature, Defendants’ motion to dismiss Plaintiff’s seventh cause of action which seeks payment for distributions of profits as a 20% shareholder of Preferred for 2005 and 2006; 5) denies Defendants’ motion for summary judgment on their first cause of action for declaratory relief; and 6) denies Defendants’ further request for summary judgment on their alternative third cause of action for judicial creation of a two-year restrictive covenant and summarily dismisses this third cause of action.

¹ This Court assumed responsibility for this case in May 2008.

BACKGROUND

A. Relief Sought

Plaintiff Marcia Kaufman (“Ms. Kaufman”) moves pursuant to CPLR § 3212 for summary judgment dismissing the second counterclaim of Defendants Burr Enterprises Ltd. d/b/a Preferred Empire Mortgage Company (“Preferred”) and Douglas Elliman Realty, LLC (“Elliman”). Defendants move for summary judgment dismissing all seven causes of action in Ms. Kaufman’s complaint and granting judgment on their three counterclaims.

B. The Parties’ History

In January, 1998, Ms. Kaufman formed Select Mortgage LLC (“Select”), which was originally licensed as a mortgage broker but eventually converted into a mortgage company. In November, 2000, Ms. Kaufman was approached to work for Preferred as its chief operating officer. Both sides were represented by counsel during the negotiation process. Ms. Kaufman executed a Letter of Intent dated November 21, 2000, with Preferred (“the Letter”).

The Letter provides, at paragraph 2, that the assets and operations of Select were to be transferred to and become a part of the operations of Preferred, and that Ms. Kaufman was to enter into an at-will employment agreement with Preferred. Ms. Kaufman was to receive a minimum annual base salary of \$175,000 per year, health insurance coverage, a monthly automobile allowance and a bonus structure tied to the profitability of Preferred (Letter, ¶ 2). In addition, the Letter provides that in consideration of Select being transferred to Preferred, Ms. Kaufman was to receive a 4% equity ownership of Preferred on the first five 12-month anniversary dates of the effective date, defined as the date of the closing of the transaction, provided that she is an employee of Preferred (Letter, ¶ 2).

At paragraph 6, the Letter reiterates that the salary of Ms. Kaufman will be \$175,000, and that Preferred will also cover her automobile expenses and health care. At paragraph 10, the Letter provides that it sets forth the entire understanding of the parties and could “be modified only by a writing executed by the parties.”

The Letter further provides, at paragraph 13, as follows:

Except for Paragraphs 6 through 13 hereof, which Paragraphs are binding upon the parties hereto, it is agreed between the parties that the balance of this letter of intent is not intended to create or constitute any legally binding obligation of

either party. If an Agreement is not executed and delivered for any reason, except with respect to a breach of any of Paragraphs 6 through 13 hereof, neither party shall have any liability to the other party under this letter of intent or otherwise. Until the Agreement has been executed and delivered, any drafts of agreements circulated between the parties with respect to the transaction contemplated herein shall be for discussion purposes only and are not intended to memorialize any agreement. It is not the intention of the parties hereto to be bound by any statements or tentative commitments which might be made during the negotiation of this transaction.

Significantly, paragraphs 6 through 13 do not address either equity ownership of Preferred or Ms. Kaufman's bonus.

It is undisputed that the parties failed to execute a further Agreement as contemplated by the Letter. The parties vigorously disagree as to the cause of that failure. Ms. Kaufman insists that issues between the other shareholders precluded finalization of any Agreement, and that she was verbally assured of her equity ownership by several people, including Mr. Lorber, Ms. Herman, and Mr. Cusano (principals of Preferred), Allan Marrus (CFO of defendant Elliman), and others (Kaufman moving affidavit at ¶¶ 24-27). Defendants argue that it was Ms. Kaufman who refused to sign proposed agreements, first because she wanted to structure the transaction as a tax-free reorganization, and later because she was unhappy with a restrictive covenant. Nevertheless, Ms. Kaufman did begin employment with Preferred.

In 2006, Preferred was seeking to enter into a joint venture with a mortgage lender. Ms. Kaufman then arranged for Preferred's senior management to meet on several occasions with representatives from American Home Mortgage ("AHM"). Ms. Kaufman projected that a joint venture between AHM and Preferred could yield up to a \$10,000,000 increase in Preferred's profits (Minutes of Meeting of Board of Managers of Elliman, the owner of Preferred, annexed as Exhibit D to Arkin affidavit dated 12/5/08 at DER 000004).

On November 16, 2006, Ms. Kaufman signed an employment agreement with AHM with an annual salary of \$750,000 (exhibit E to Arkin Affirmation dated 12/5/08). She tendered her resignation from Preferred on January 3, 2007, and commenced her new employment with AHM on January 20, 2007. Defendants then refused to deliver to Ms. Kaufman stock certificates representing 20% of Preferred, and refused to pay her a bonus for 2006. Thereafter Ms. Kaufman commenced this lawsuit.

The amended complaint alleges claims for constructive trust, breach of fiduciary duty, conversion, promissory estoppel and unjust enrichment, as well as claims for an unpaid 2006 bonus, and unpaid distributions of profits for 2005 and 2006. In their answer, Defendants deny the allegations of the amended complaint and allege counterclaims for a declaratory judgment, breach of fiduciary duty, and in the alternative, breach of contract.

C. The Parties' Positions

In her motion, Ms. Kaufman seeks partial summary judgment dismissing Defendants' second counterclaim for breach of fiduciary duty, submitting that Defendants have failed to demonstrate triable issues of fact. Defendants oppose Ms. Kaufman's motion, submitting that Ms. Kaufman engaged in a pattern of faithless and disloyal conduct designed to enrich herself at the expense of Preferred. They argue that factual issues preclude summary judgment on their second counterclaim. Defendants submit, further, that the Court should 1) grant summary judgment to Defendants with respect to Plaintiff's claims for a) imposition of a constructive trust, b) breach of fiduciary duty, c) conversion, d) promissory estoppel, e) unjust enrichment, f) a 2006 bonus, and g) a distribution of profits for 2005 and 2006; and 2) grant summary judgment to Defendant/Counterclaim-Plaintiffs' with respect to their claims for a) a declaratory judgment stating, *inter alia*, that there was no enforceable agreement between Kaufman and Preferred or Elliman, b) breach of fiduciary duty, and c) breach of contract.

RULING OF THE COURT

A. Standard for Summary Judgment

The party seeking summary judgment must establish an entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). If the party moving for summary judgment fails to establish a *prima facie* entitlement to judgment as a matter of law, the motion must be denied. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985); *Widmaier v. Master Products, Mfg.*, 9 A.D.3d 362 (2d Dept. 2004); and *Ron v. New York City Housing Auth.*, 262 A.D.2d 76 (1st Dept. 1999). CPLR § 3212(b) further requires that, in ruling on a motion for summary judgment, the court must determine if the movant's papers justify holding as a matter of law "that there is no defense to the cause of action or that the cause of action has no merit." In

making this determination, the Court must view the evidence submitted by the moving party in a light most favorable to the non-movant. *Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2d Dept. 1990). The Court may only grant summary judgment when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 (1979).

Summary judgment is the procedural equivalent of a trial. *Capelin Assoc., Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 (1974). It is a drastic remedy that will only be granted where the proponent establishes that there are no triable issues of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324. Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations. *Zuckerman v City of New York*, 49 N.Y.2d at 562. On a motion for summary judgment, the court should refrain from making credibility determinations. *Ferrante v American Lung Assn.*, 90 N.Y.2d 623, 631 (1997).

B. Plaintiff's Motion for Summary Judgment on Defendants' Second Counterclaim for Breach of Fiduciary Duty

Defendants' second counterclaim for breach of fiduciary duty is based upon allegations that Ms. Kaufman a) usurped corporate opportunities belonging to Preferred; b) caused herself to be paid commissions for loans that she brought to Preferred, but which were handled by Preferred's loan officers; and c) and failed to pay certain expenses (Answer, ¶ 102). In addition, Defendants allege that Ms. Kaufman improperly changed the compensation structure of Preferred's managers, took her business pipeline and relationships with her to AHM, and solicited employees of Preferred to AHM (Answer, pp. 90, 95-96). Defendants seek damages in an amount to be determined at trial (Answer, ¶ 103).

The elements of a claim for breach of fiduciary duty are: (1) existence of a fiduciary relationship, (2) misconduct, and (3) damages directly caused by the wrongdoer's misconduct. *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 A.D.3d 664 (2d Dept. 2008); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007). Officers of corporations stand in a fiduciary relationship to their corporation and owe the corporation their undivided loyalty. *Yu Han Young v. Chiu*, 49 A.D.3d 535 (2d Dept. 2008). Thus, an officer may not,

without consent, divert and exploit for his or her own benefit any opportunity that should be deemed an asset of the corporation. *Id.*; *Commodities Research Unit [Holdings] Ltd. v. Chemical Week Assoc.*, 174 A.D.2d 476, 477 (1st Dept. 1991).

The relevant test to determine whether a venture should be considered a “corporate opportunity” is whether the corporation has a “tangible expectancy” in the opportunity that is less than “ownership,” but more than a “hope” or “desire.” *Alexander & Alexander of New York, Inc. v. Fritzen*, 147 A.D.2d 241, 247 (1st Dept. 1989); *see also Adirondack Capital Management, Inc. v. Ruberti, Girvin and Ferlazzo, P.C.*, 43 A.D.3d 1211 (3d Dept. 2007), *lv. app. den.* 9 N.Y.3d 817 (2008). The opportunity need not be “essential to” or “necessary” for the business of the corporation. *Fritzen*, 147 A.D.2d at 248.

1. Usurpation of Corporate Opportunity

The primary factor on which Defendants rely in support of their counterclaim that Ms. Kaufman breached a fiduciary duty by usurping a corporate opportunity is an alleged conversation between Howard Lorber (a major shareholder of New Valley Mortgage Corporation now known as Vector Group which invested in Preferred) and Michael Strauss, the president of AHM, during which they allegedly discussed Ms. Kaufman’s defection from Preferred to AHM. During that conversation, Strauss allegedly commented that, instead of entering into an agreement with a company, AHM at times entered into an agreement with an individual “if they felt the individual could basically just bring in the business.” (Lorber transcript, at pp. 104-105).

These statements are hearsay, as they are Lorber’s recollection of Strauss’ statements, and are offered for the truth of the matter asserted. Hearsay does not constitute competent evidence to defeat Plaintiff’s motion for summary judgment. *Rivers v. Murray*, 29 A.D.3d 884 (2d Dept. 2006); *Orelli v. Showbiz Pizza Time Inc.*, 302 A.D.2d 440, 441 (2d Dept. 2003). Thus, the Court may not consider Mr. Strauss’ alleged comments in determining whether there is sufficient evidence to sustain Defendants’ counterclaim for breach of fiduciary duty.

The circumstantial evidence on which Defendants rely, including the timing of Ms. Kaufman’s employment with AHM and the failure of any follow-up between Preferred and AHM, does not suffice because Preferred did not have a “tangible expectancy” in a joint venture

with AHM. *Gesuale v. Tully*, 178 A.D.2d 631 (2d Dept. 1991). Rather, at the time Ms. Kaufman executed the employment agreement with AHM, the joint venture was more of a “hope” than anything else. Consequently, the Court finds that Defendants have failed to raise a triable issue of fact as to whether Ms. Kaufman engaged in misconduct by usurping for herself the corporate opportunity of business between Preferred and AHM, and holds that Ms. Kaufman is entitled to summary judgment dismissing this allegation in support of the second counterclaim.

2. Payment of Commissions

As noted above, consent by the allegedly aggrieved corporation precludes a finding of breach of fiduciary duty. In addition, the corporation’s knowledge of allegedly improper payments without the voicing of any objection establishes ratification and acquiescence. *Winter v. Bernstein*, 177 A.D.2d 452 (1st Dept. 1991).

Here, the commissions appear to total \$190,000 (Answer, ¶ 91), there is no contractual provision for payment of commissions to Ms. Kaufman, and no other officers received commissions. Ms. Kaufman, however, insists that she discussed the matter with Howard Lorber, and she further points out that the checks for the commissions went through the comptroller’s office and were reviewed by auditors in the regular course of business (Kaufman transcript, vol. 2, p. 338).

Defendants argue that there is a factual dispute as to whether any of Defendants’ officers were aware of, much less approved, Ms. Kaufman’s loan commissions. Defendants further argue that such commissions were never a part of Ms. Kaufman’s compensation package and were against company practice and policy for officers (Lorber transcript, vol. 2, pp. 315-318). Lorber specifically denies ever having discussed commissions with Ms. Kaufman, because commissions were not a part of her compensation package.

The Court may not determine the credibility of these competing allegations on a motion for summary judgment. Defendants have presented competent evidence of their practice regarding commissions. On this record, a triable issue of fact exists as to consent or ratification with regard to the commissions Ms. Kaufman received while an officer of Preferred.

3. Failure to Pay Expenses

The sole evidence of Ms. Kaufman’s alleged failure to pay certain expenses is an unpaid

\$10,000 bill for Preferred's sponsorship of a Real Estate Board of New York ("REBNY") event in June 2006. It is unclear whether Preferred ultimately paid this expense. As there has been no showing that the failure by Ms. Kaufman to pay one bill in more than six years rises to the level of a breach of fiduciary duty, Ms. Kaufman is entitled to summary judgment dismissing this allegation in support of Defendant's second counterclaim.

4. Change in Compensation Structure

Defendants argue that Ms. Kaufman's changes to the compensation structure of Preferred's managers manifested self-dealing because the changes were made to improve Preferred's financial conditions and thereby ensure Ms. Kaufman's year-end bonus (Defendants' Memorandum of Law, p. 14). Ms. Kaufman insists that changes she made to the compensation structure of Preferred's managers are protected by the business judgment rule. Pursuant to the business judgment rule, the courts must respect business judgments absent bad faith, fraud, self-dealing or other misconduct. *Pugliese v. Mondello*, 57 A.D.3d 367 (2d Dept. 2008). In essence, business decisions are not actionable simply because they turn out to be unwise or inexpedient. *Auerbach v. Bennett*, 47 N.Y.2d 619, 630 (1979).

The Court need not address the application of the business judgment rule because the Defendants have failed to provide sufficient facts to support their allegations. Indeed, Defendants have not shown how changes in the compensation structure for managers improved Preferred's financial condition and affected Ms. Kaufman's year-end bonus. In the absence of a triable issue of fact as to the changes in the compensation structure for managers, Ms. Kaufman is entitled to summary judgment dismissing this allegation in support of the second counterclaim.

5. Additional Allegations

The allegations that 1) Ms. Kaufman solicited at-will employees of Preferred to AHM; 2) several employees followed her to AHM in the months following her departure, and 3) those former employees did not comply with subpoenas, do not support a claim for breach of fiduciary duty. Defendants have failed to produce any evidence of solicitation, and the Court notes that Defendants took no action to compel compliance with the subpoenas. In short, Ms. Kaufman is entitled to summary judgment dismissing this allegation in support of the second counterclaim.

Finally, there is no evidence that Ms. Kaufman improperly took her business pipeline and

relationships with her to AHM. Ms. Kaufman was an at-will employee. She resigned and commenced new employment at AHM. On this record, in the absence of a showing of improper conduct, Plaintiff is entitled to summary judgment dismissing this allegation as a basis for the second counterclaim.

In sum, Defendants' second counterclaim for breach of fiduciary duty shall proceed to trial on the limited issue of whether Preferred consented to or ratified Ms. Kaufman's allegedly improper commissions of \$190,000.

C. Defendants' Motion for Summary Judgment

Defendants have moved for summary judgment dismissing the complaint and awarding them judgment on their first and third counterclaims.

1. Plaintiff's First Cause of Action for a Constructive Trust

In her first cause of action, Ms. Kaufman seeks a constructive trust over 20% of all outstanding shares of Preferred. She alleges that she is the current owner of the shares, which are being held by Elliman, the owner of Preferred, "for administrative and business convenience and simplicity." (Amended complaint, par. 25)

The four elements of a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance on the promise, and (4) unjust enrichment. *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 (1976); *O'Brien v. Dalessandro*, 43 A.D.3d 1123, 1124 (2d Dept. 2007). Careful review of the complaint reveals that there is no allegation of a transfer in reliance on a promise, and without such a transfer, Ms. Kaufman has no claim for a constructive trust. *Williams v Eason*, 49 A.D.3d 866, 868 (2d Dept. 2008). Accordingly, Defendants are entitled to summary judgment dismissing Ms. Kaufman's first cause of action.

2. Plaintiff's Second Cause of Action for Breach of Fiduciary Duty

Ms. Kaufman alleges that her minority ownership interest in Preferred creates a fiduciary duty to her by the alleged majority owner, Elliman. She claims that Elliman breached that duty by interfering with Ms. Kaufman's rights as a shareholder and by failing to pay her certain distributions and bonuses.

While a majority shareholder may have a fiduciary duty to a minority shareholder, in this case it is Preferred, and not Elliman, that is alleged to have denied distributions and bonuses. To

the extent such payments are sought in this counterclaim, such payments are based upon the Letter with Preferred and/or oral promises by Preferred, not Elliman. On this record, Plaintiff has failed to raise a triable issue of fact as to any breach of fiduciary duty by Elliman, and consequently the Court grants Defendants summary judgment on this count, and dismisses the second cause of action.

3. Plaintiff's Third Cause of Action for Conversion

Ms. Kaufman alleges that, pursuant to the parties' agreement and course of dealing, she is the owner of 20% of the outstanding shares of Preferred. She alleges that Elliman has converted her shares by exercising dominion over them. Her claims fails as a matter of law. Conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. *Colavito v. New York Organ Donor Network Inc.*, 8 N.Y.3d 43, 49 (2006). Unauthorized dominion and control over a party's interest in a corporation merely restates a cause of action to recover damages for breach of an agreement (here the entire Letter, with a waiver of paragraph 13), and does not allege a separate taking. *See Tornheim v. Blue & White Food Products Corp.*, 56 A.D.3d 761 (2d Dept. 2008). Moreover, a claim of conversion cannot be predicated upon a mere breach of contract. *Hochman v. LaRea*, 14 AD3d 653 (2d Dept. 2005). Accordingly, Defendants are entitled to summary judgment dismissing the third cause of action for conversion.

4. Plaintiff's Fourth Cause of Action for Promissory Estoppel

Ms. Kaufman alleges that she merged Select into Preferred in reliance on Defendants' promise of an equity ownership in Preferred capped at 20%, and that she reasonably relied on this promise to her detriment. This claim also fails as a matter of law.

To establish a viable claim for promissory estoppel a plaintiff must allege (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise. *Williams v Eason*, 49 A.D.3d 866, 867 (2d Dept. 2008). Plaintiff must prove all three elements to sustain a cause of action for promissory estoppel. *Kennedy v. Leibowitz*, 303 A.D.2d 375 (2d Dept. 2003). Moreover, where the parties entered into a letter agreement stating their intention not to be bound until a further

agreement was executed, plaintiff cannot have reasonably relied on defendant's alleged promises. *Hollinger Digital, Inc. v. Looksmart, Ltd*, 267 A.D.2d 77 (1st Dept. 1999); *Prestige Foods Inc. v. Whale Securities Co., LP*, 243 A.D.2d 281 (1st Dept. 1997). Here, the Letter specifically precludes the element of reasonable reliance upon oral promises. Accordingly, Defendants are entitled to summary judgment dismissing the fourth cause of action.

5. Plaintiff's Fifth Cause of Action for Unjust Enrichment

Ms. Kaufman alleges that Elliman's wrongful conduct has caused it to retain 100% ownership of Preferred, and thus Elliman has been enriched at her expense. Defendants are entitled to summary judgment on this claim.

The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215 (2007) citing *Paramount Film Distributing Corp. v. State of New York*, 30 N.Y.2d 415, 421, *cert. den.* 414 U.S. 829 (1973). A claim for unjust enrichment does not lie to relieve a party of the consequences of the party's own failure to exercise caution with respect to a business transaction. *Dragon Inv. Co. II LLC v. Shanahan*, 49 A.D.3d 403 (1st Dept. 2008); *Charles Hyman, Inc. v. Olsen Industries, Inc.*, 227 A.D.2d 270 (1st Dept. 1996).

In this case, Ms. Kaufman's payment by Preferred included a salary, bonus, automobile expenses, health coverage, and the commissions she received. There has been no showing as to the value of Select. Most importantly, under the circumstances of this case, there has been no showing that Elliman obtained a benefit that in equity and good conscience belongs to Ms. Kaufman. Finally, her self-serving and conclusory allegations do not suffice. Thus where, as here, Plaintiff has failed to raise a triable issue of fact, summary judgment dismissing the fifth cause of action for unjust enrichment is appropriate. *Wallkill Medical Development LLC v. Sweet Constructors, LLC*, 56 A.D.3d 764 (2d Dept. 2008), *lv. app. dsmd.* __NY2d__ (2009); *Old Republic Nat. Title Ins. Co. v Luft*, 52 A.D.3d 491 (2d Dept. 2008); *Harvest Moon Inc. v Arochas*, 270 A.D.2d 138 (1st Dept. 2000); *Fandy Corp. v Chang*, 272 A.D.2d 369 (2d Dept. 2000).

6. Plaintiff's Sixth Cause of Action for Failure to Pay 2006 Bonus

In her sixth counterclaim, Ms. Kaufman seeks payment of a bonus for 2006 in the amount of \$175,000 "for her employment with Preferred in 2006." (Amended complaint, ¶ 53) Earlier in her amended complaint, Ms. Kaufman states that she is "entitled to a guaranteed bonus of \$175,000 per year" if Preferred met certain profitability standards (Amended complaint, ¶ 11). Ms. Kaufman's claim that she was to receive a bonus is supported by the deposition testimony of Mr. Lorber that he "had the understanding with [Ms. Kaufman] that if she met her budget she would get a bonus equal to 100 percent of her salary." (Lorber transcript, p. 215)

Defendants argue that bonuses were based upon profits exceeding the budget. Defendants further insist that bonuses were not paid to someone who was not with the company at the time the company normally paid the bonuses, and especially were not paid to someone who quit and went to work for a competitor (Lorber transcript, pp. 265-269).² Secondly, Defendants argue that Ms. Kaufman's misconduct in paying herself commissions, usurping Preferred's opportunity to enter into a joint venture with AHM, and in secretly signing an employment agreement with AHM, preclude her from receiving a bonus for 2006.

To the extent that Plaintiff's claim for a 2006 bonus is governed by the Letter, her entitlement to this bonus as a matter of express contract will be determined at the trial on Defendants' first counterclaim as set forth below in Section D. Any remaining theory under which this cause of action is presented must fail as a matter of law.

Unpaid bonuses do not constitute wages. *Truelove v. Northeast Capital & Advisory, Inc.*, 95 N.Y.2d 220 (2000). Rather, bonuses may be governed by contract and/or employee handbook, or may be subject to an employer's discretion. *Truelove*; *Hunter v. Deutsche Bank AG, New York Branch*, 56 A.D.3d 274 (1st Dept. 2008); *Nikitovich v. O'Neal*, 40 A.D.3d 300 (1st Dept. 2007).

There has been no showing that Preferred met the profitability standards required for a bonus to Ms. Kaufman for the year 2006. More importantly, other than by self-serving testimony, Plaintiff has failed to establish a factual or legal basis (other than the Letter) for her

² It is undisputed that Plaintiff resigned without notice in early January of 2007, before the 2006 bonuses could be determined and paid.

claim that her bonus is “guaranteed” and vested on December 31, 2006 (*see generally Truelove*). Plaintiff has failed to address how her abrupt departure from Preferred affects her cause of action for a bonus, other than by a vague claim based on hearsay, alleging exemption from any company policy requiring continued employment at the time of payment (Plaintiff’s Memorandum of Law in Opposition, p. 32).

Under all of the circumstances of this case, the Court grants summary judgment as to this count and dismisses the sixth cause of action for a “guaranteed” bonus for 2006, except to the limited extent that, as set forth in Section D below, such bonus depends upon Defendants’ waiver of paragraph 13 of the Letter.

7. Plaintiff’s Seventh Cause of Action for Distributions of Profits for 2005 and 2006

In her seventh cause of action, Ms. Kaufman seeks payment for distributions of profits as a 20% shareholder of Preferred for 2005 and 2006. This cause of action seeks damages to which Plaintiff may be entitled if she can establish at trial that Defendants waived their right to rely on paragraph 13 of the Letter in connection with Defendants’ first counterclaim. As a triable issue of fact has been shown regarding that alleged waiver (explained in more detail below), the Court denies, as premature, summary judgment with respect to Plaintiff’s seventh counterclaim.

D. Defendants’ Motion for Summary Judgment on Their First Counterclaim for Declaratory Judgment

A declaratory judgment requires a “justiciable” or actual controversy and may not be used to obtain an advisory opinion. CPLR § 3001; *Watson v. Aetna Cas. & Sur. Co.*, 246 A.D.2d 57, 62 (2d Dept. 1998). Here, Defendants’ first counterclaim seeks judgment declaring that (1) there is no enforceable agreement between Defendants and Ms. Kaufman for the transfer of stock in Preferred to Ms Kaufman; (2) that Elliman owns 100% of the stock of Preferred; and (3) that Defendants owe Ms. Kaufman no bonus for the year 2006. At the outset, the second proposed declaration is beyond the scope of this action and the claims between the parties. There is an actual controversy between these parties as to the first and third proposed declarations sought in Defendants’ first counterclaim. There are, however, issues of fact that preclude summary judgment on those declarations.

A contract, such as the Letter, is to be interpreted so as to give effect to the intention of

the parties as expressed in the unequivocal language used. *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 548 (1995). Where the terms are unambiguous, the parties' intent must be gleaned from the "plain meaning" of the words used by the parties. *American Bridge Co v. Acceptance Ins. Co.*, 51 A.D.3d 607 (2d Dept. 2008); *Fukilman v. 31st Ave Realty Corp.*, 39 A.D.3d 812, 813 (2d Dept. 2007); see *Hugh O'Kane Elec, Co., Inc. v. County of Westchester*, 54 A.D.3d 660 (2d Dept. 2008). By contrast, an unambiguous letter of intent, wherein the parties agree not to be bound until a formal agreement is signed, is not binding except to the extent specifically noted. *2004 McDonald Ave. Realty, LLC v. 2004 McDonald Ave. Corp.*, 50 A.D.3d 1021, 1022 (2d Dept. 2008).

The plain meaning of paragraph 13 of the Letter is that, in the absence of a further Agreement between the parties, only paragraphs 6 through 13 are binding upon the parties. The provisions for Ms. Kaufman's equity ownership of 20% of Preferred and her annual bonus are found in paragraph 2, and therefore not within the binding portion of the Letter. Under these circumstances, the parties have no written contractual claims against each other pursuant to the Letter.

Ms. Kaufman's claim that Defendants prevented her from executing an Agreement is not demonstrated in the record. Rather, there is some evidence that both sides delayed the signing of an Agreement. As to Defendants, that delay was apparently due to the change of control application with the New York State Department of Banking; as to Plaintiff, that delay was apparently due to tax issues and problems with a proposed restrictive covenant. On this record, in which Defendants have demonstrated that Plaintiff was presented with drafts of various agreements in 2001 and 2006,), Plaintiff has failed to raise a triable issue of fact to support a claim of frustration of the requirements of the Letter.

Plaintiff's further defense of waiver is, however, sufficiently proven to withstand summary judgment on the proposed declarations. Plaintiff alleges that Defendants waived the requirement of a further formal Agreement. Waiver is the voluntary relinquishment or abandonment of a known right; it is a matter of intent to be proven. See *Jeppaul Garage Corp. v. Presbyterian Hosp. in the City of New York*, 61 N.Y.2d 442, 449 (1984). Waiver should not be lightly presumed; it must be based on a clear manifestation of intent to forgo a contractual

protection. *Fundamental Portfolio Advisors, Inc v. Tocqueville Asset Management, LP.*, 7 N.Y.3d 96, 104 (2006). The intent to forgo such a right is generally a question of fact. See *Jefpaul Garage Corp.* and *Fundamental Portfolio Advisors, Inc.*

Plaintiff's claim of waiver is based upon her receipt of \$100,000 in 2005. She insists that the \$100,000 represents her portion of a distribution of profits for 2004 for Preferred. According to Ms. Kaufman, she received the 20% distribution even though she was only 16% vested, as a matter of "good faith" (Kaufman transcript, vol. 2, p. 296).

The Court notes that, pursuant to an e-mail dated May 13, 2005 from Alan Marrus (Chief Financial Officer of Elliman) to Todd Chalfen, the \$100,000 payment to plaintiff was a "2005 distribution" (Exhibit D to Hutcher affidavit dated 12/5/08), and plaintiff would have vested 20% by December 1, 2005, under the provisions of paragraph 2 of the Letter. Plaintiff also points to an e-mail by Bryant Kirkland (Chief Financial Officer of Vector Group - Howard Lorber's company) dated May 24, 2004 (Exhibit F to Hutcher affidavit dated 12/5/08), wherein Kirkland states that plaintiff "has already vested in 12 of the 20% and will vest another 4% around December 1, 2004." Here, the hearsay exclusion does not prevent consideration of this e-mail evidence because it falls within the parameters of the exception for declarations against interest. *Kelleher v. FME Auto Leasing Corp.*, 192 A.D.2d 581 (2d Dept. 1993); see generally *Pittman v. SP Lenox Realty, LLC*, 49 A.D.3d 621 (2d Dept. 2008).

Defendants insist that the \$100,000 distribution was "obviously" a "bonus" (Lorber transcript, p. 219). The nature of the \$100,000 payment raises a triable issue of fact as to Plaintiff's defense of Defendants' waiver of a further Agreement providing for her equity interest in Preferred and a bonus for 2006. For this reason, the Court denies Defendants' request for summary judgment on its first counterclaim.

E. Defendants' Third Counterclaim, in the Alternative, for Breach of Contract

In their third counterclaim Defendants purport to allege, in the alternative, that if this Court finds that Kaufman is entitled to a 20% interest in Preferred, then she has breached a two-year restrictive covenant associated with her equity interest. This counterclaim has no basis in fact, as Ms. Kaufman never executed any agreement containing a two-year restrictive covenant. Accordingly, the Court denies Defendants' application for summary judgment on this third

counterclaim, and summarily dismisses that counterclaim.

CONCLUSION

Based on the foregoing, the Court grants Plaintiff's motion for summary judgment dismissing Defendants' second counterclaim for breach of fiduciary duty as to all allegations in support of that counterclaim, except the allegation that Ms. Kaufman improperly took commissions and her defense that Defendants consented to or ratified her receipt of those commissions.

The Court grants Defendants' motion for summary judgment dismissing the amended complaint as to the first, second, third, fourth, and fifth causes of action. The Court grants summary judgment dismissing the sixth cause of action, except to the extent that Plaintiff may prove that Defendants waived enforcement of paragraph 13 of the Letter. The Court denies, as premature, the application for summary judgment dismissing the seventh cause of action.

The Court denies Defendants' motion for summary judgment on their first cause of action for declaratory relief. Triable issues of fact are presented as to whether Defendants waived the requirement of a further written agreement. The Court denies Defendants' further request for summary judgment on their alternative third cause of action for judicial creation of a two-year restrictive covenant, and summarily dismisses this third cause of action.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel are reminded of their required appearance before the Court on July 10, 2009 at 9:30 a.m.

ENTER

DATED: Mineola, NY
June 2, 2009

HON. TIMOTHY S. DRISCOLL
J.S.C.