

C St. Movie, LLC v Sturtevant
2016 NY Slip Op 31845(U)
September 30, 2016
Supreme Court, New York County
Docket Number: 155549/15
Judge: Geoffrey D. Wright
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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C STREET MOVIE, LLC, a NY Limited Liability
Company,

Plaintiff,

Index No.: 155549/15
DECISION/ORDER

-against-

COLLEEN STURTEVANT, an Individual,

Defendants.

-----X

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the
review of this Motion/Order for summary judgment.

PAPERS NUMBERED

Notice of Motion and Affidavits Annexed.....	_____ 1 _____
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	_____ 2 _____
Replying Affidavits.....	_____ 3 _____
Exhibits.....	_____
Other.....cross-motion.....	_____ 4 _____

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

In this breach of contract action, plaintiff C Street Movie, LLC (C Street) moves to dismiss several of the counterclaims of defendant Colleen Sturtevant (Sturtevant) as well as for sanctions, and Sturtevant cross-moves for an order to disqualify C Street’s counsel (together, motion sequence number 002). For the following reasons, the motion is granted in part and denied in part, and the cross motion is denied.

BACKGROUND

C Street is a movie production company organized as a New York State limited liability corporation. See notice of motion, exhibit A (complaint), ¶ 1. Sturtevant is an individual

residing in New York who works as a still photographer for films. *Id.*, ¶¶ 2-4. On May 3, 2015, C Street executed a contract with Sturtevant to retain her as a still photographer for a film that it was making (the photography agreement). *Id.*, ¶ 4; exhibit B. The relevant portions of the photography agreement provide as follows:

- “1. Photographer [i.e., Sturtevant] will cover (2) days of filming of the feature film from April 30th to May 17th on location in Brooklyn, NY. Photographer will capture all essential photographic images (including trade shots) in digital format of the production shoot to the best of [her] ability.
2. Photographer will deliver (1) drop box copy of all photographic images captured on location to Company [i.e., C Street] no later than 30 business days following the completion of the shoot.
3. Compensation for (2) shooting days at the rate of \$50.00 per day for a total of \$100.00.
4. Photographer will retain the rights and interest in the copyright of the photographs taken pursuant to this agreement. However, Photographer agrees not to use or to authorize others to use the photographs without first obtaining the prior written consent of Company. You hereby grant Company: (a) an exclusive license to use and authorize Company and its licensees to use the photographs throughout the world in any and all media now known or hereafter devised for a period beginning with the date of this Agreement and continuing until one (1) year after the initial release of the film; and (b) thereafter, a non-exclusive license to use and authorize its licensees to use the photographs in connection with the Program, including, but not limited to, broadcast tune-in advertising, DVD, VOD, companion book and other program-related product packaging, and in any and all media now known or hereafter devised, including on the internet, throughout the world in perpetuity. In connection with the foregoing, Company agrees to include a photo credit to Photographer in the completed film.”

Id.; exhibit B. C Street alleges that the above-mentioned movie is still in production and had not yet been released, but that Sturtevant has nevertheless repeatedly “used, posted and shared” the film stills of the movie that she had shot in violation of the photography agreement. *Id.*;

Lewis affidavit, ¶ 4.

For her part, Sturtevant alleges that, prior to beginning work on C Street's movie, she was contacted by the executive producer, C Street principal Anne Luster (Luster), with whom she discussed working as a set photographer, and who sent her \$120.00, which Sturtevant understood to be an advance to help her cover the cost of expenses for film and computer storage material that she would incur as a set photographer. *See* notice of cross motion. Sturtevant affidavit, ¶¶ 11-14. Sturtevant next states that she worked on the movie set from April 30, 2015 through May 15, 2015, and avers that she was contacted via email each day by C Street before reporting to the set. *See* notice of cross motion, Sturtevant aff, ¶¶ 2-3. Sturtevant has presented copies of the emails and the "call sheets" that were generated each day to list the employees that were authorized to be on the movie's set. *Id.*; exhibits A, B. Sturtevant further states that she was "shocked" when she subsequently received the photography contract, which provided for a flat fee of \$100.00 for her services, but avers that she signed it and continued reporting to the set for work because she was told contemporaneously that she would soon receive a "deal memo" to supplement the photography contract and provide her with "standard rates of compensation going forward." *Id.*, ¶ 15. Sturtevant presents copies of email correspondence between herself and Luster which she claims memorialize this understanding. *See* notice of motion exhibit C. Sturtevant states that never received the "deal memo." *Id.* Sturtevant additionally states that, in addition to working as a set photographer, she also prepared one of her copyrighted photographs for use as promotional material for the movie, but received no compensation for it. *Id.*, ¶¶ 4-6. Sturtevant also states that, in addition to this work, she was also requested to appear in the movie as an extra, that she did so, that she was never given any release to sign in connection with her

appearance and that she received no compensation for it. *Id.*; ¶ 24. Finally, Sturtevant claims that she and her counsel initially sought to resolve her dispute with C Street, but asserts that counsel for C Street - who is also a part owner of C Street - did not did not respond in good faith, but rather engaged in a series of improper personal attacks on her. *See* notice of cross motion, Sturtevant affidavit; Quainton affirmation. As a result, Sturtevant asks that C Street's counsel/owner be disqualified from participating in this litigation. *Id.*

C Street commenced this action on June 3, 2015 by filing a summons and complaint that sets forth one cause of action for breach of contract that seeks injunctive relief. *See* notice of motion, exhibit A. On August 17, 2015, Sturtevant filed an second amended answer that includes counterclaims for: 1) fraudulent inducement; 2) fraudulent misrepresentation; 3) negligent misrepresentation; 4) breach of implied contract; 5) breach of the duty of good faith and fair dealing; 6) quantum meruit; 7) promissory estoppel; 8) violation of NY Civil Rights Law § 51; 9) unjust enrichment; and 10) breach of fiduciary duty. *Id.*; exhibit D.

Now before the court are C Street's motion to dismiss Sturtevant's counterclaims and to impose sanctions, and Sturtevant's cross motion to disqualify C Street's counsel (together, motion sequence number 002).

DISCUSSION

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference." *See Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 (2106), citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002). It has been held, however, that where the documentary evidence submitted flatly contradicts the

plaintiff's factual claims, the entitlement to the presumption of truth and the favorable inferences are both rebutted. *Scott v Bell Atlantic Corp.*, 282 AD2d 180, 183 (1st Dept 2001), *affd as mod Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002). Here, C Street seeks dismissal of all eight of Sturtevant's counterclaims, each of which the court will examine in turn.

Sturtevant's first counterclaim alleges fraudulent inducement. *See* notice of motion, exhibit D (amended answer), ¶¶ 62-70. Specifically, Sturtevant's answer alleges, in relevant part, as follows:

“63. Defendant [i.e., C Street] misrepresented material facts to induce Plaintiff [i.e., Sturtevant] to accept an offer to render services to Defendant by: offering her the position of set photographer, identifying her as the set photographer during the April 20, 2015 production meeting, publishing her name and her position at the film's set photographer in the crew production list disseminated after the April 20, 2015 production meeting, creating the false impression that Plaintiff would be provided reasonable compensation commensurate with her status as set photographer and her level of skill and experience, and stating that Plaintiff would be entitled to keep her 'raw' photos and would only have to transfer edited images, while failing to disclose the material facts that Defendant (a) never intended to pay Plaintiff a reasonable rate pay commensurate with industry standards, (b) intended to limit Plaintiff's compensation to the unconscionable sum of \$100.00 and ©) intended to obtain all of Plaintiff's 'raw' photos for free, notwithstanding its representations to the contrary.

65. Defendant further misrepresented material facts to induce Plaintiff to agree to render services as set photographer from May 5, 2015 to May 16, 2015 by making assurances that a new deal memo with more satisfactory terms would be provided and issuing Crew Calls to Plaintiff, while continuing to fail to disclose the material facts that Defendant (a) never intended to pay Plaintiff a reasonable rate pay commensurate with industry standards, (b) never intended to pay Plaintiff beyond the \$100.00 paid on May 3, 2015, ©) never intended to provide plaintiff with a standard 'deal mamo' and (d) intended to obtain all of Plaintiff's 'raw' photos for free.

67. Defendant further induced Plaintiff to agree to render photographic services to Defendant for marketing and publicity purposes while failing to disclose that defendant never intended to obtain proper authorization from or provide compensation to Plaintiff, and hoped to acquire her 'raw' images from the publicity and marketing shoot for free.

69. But for Defendant's misrepresentations and omissions, Plaintiff would not have agreed to work as set photographer from April 30 through May 3, 2015, would not have continued working for eight (8) days after May 3, 2015 as set photographer pursuant to an implied contract that she would be fairly compensated for such work, would not have suffered the loss of income from the commercial use of her images, photographs and artwork, would not have suffered economic damage as a result of lost wages and compensation that otherwise could have been earned working for other clients or on other photographic assignments during the twelve (12) total days Plaintiff provided services to Defendant, would not have lost compensation and opportunities during additional hours spent editing images off the set would not have incurred unreimbursed kit fee and travel expenses and would not have suffered the disruption of her work and life, damage to her reputation and mental anguish.

WHEREFORE. Plaintiff demands judgment in her favor and against defendant for Fraudulent Inducement to Contract in an amount to be proven at trial."

Id. C Street first argues that "the second amended complaint fails to plead the elements of fraud with any particularity." *See* plaintiff's memorandum of law at 8. Next, C Street states that:

"... Sturtevant's story, at best, alleges breach of an oral contract to pay her a non-specified amount of money for continuing to report to the set ... beyond the number of days she was required to do so. This does not constitute fraud. Nor does it state any cognizable cause of action, as the [photography] agreement cannot be modified absent a signed writing."

Id. The court observes that these two statements do not go together, because they pertain to different, separate arguments. The former is drawn from the statutory language of CPLR 3016

(b) that “[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.” Nevertheless, C Street’s second statement sets forth a separate argument - i.e., that Sturtevant has failed to plead a cause of action for fraud, as a matter of law. Clearly, this is a legal argument rather than a statutory argument. Thus, the court concludes that C Street has stated two dismissal arguments in its memorandum. With respect to the former, the court notes, parenthetically, that paragraphs 63, 65 and 67 do contain the required detailed recitations of the alleged fraudulent activity. Therefore, the court finds that C Street’s statutory argument fails.

With respect to its second argument, C Street cites *Bank Leumi Trust Co. of N.Y. v D'Evori Intl.* (163 AD2d 26 [1st Dept 1990]) for the proposition that the proponent of a fraud claim must “prove all five of the traditional elements of fraud: representation of a material fact, the falsity of such representation, scienter, reliance and damages.” 163 AD2d at 31-32. C Street also cites *Caniglia v Chicago Tribune-N.Y. News Syndicate* (204 AD2d 233 [1st Dept 1994]) for the proposition that “[i]t is well settled that a cause of action for fraud does not arise, where ... the only fraud alleged merely relates to a contracting party's alleged intent to breach a contractual obligation.” 204 AD2d at 234. Sturtevant responds that “[c]ontrary to plaintiff’s analysis ... false statements, promissory in nature are actionable as fraud.” See defendant’s memorandum of law at 6. Sturtevant cites the decision of the Appellate Division, First Department, in *GoSmile, Inc. v Levine* (81 AD3d 77 [1st Dept 2010]) for the proposition that allegations of “misrepresentation[s] of then present facts that [were] collateral to the contract sufficiently allege[] a cause of action sounding in fraud.” 81 AD3d at 81. C Street replies that this rule is inapposite because it does not “address a case where a party asserted fraud claims predicated on

an alleged promise to perform a contract without the intent to perform it.” See plaintiff’s reply memorandum at 3. However, C Street is incorrect because it mischaracterizes the allegations in Sturtevant’s answer. Reading her counterclaims in the light most favorable to her, it is clear that Sturtevant nowhere alleged that C Street did not intend to perform the photography contract. Rather, she has alleged that C Street made additional promises of other, subsequent remuneration separate from the photography contract in order to induce her to sign the photography contract. Thus, the court cannot accept C Street’s contention that “the only fraud alleged merely relates to a contracting party’s alleged intent to breach a contractual obligation.” Therefore, the court rejects C Street’s dismissal argument. This does not end the inquiry, however. In *J.P. Morgan Sec. Inc. v Ader* (127 AD3d 506 [1st Dept 2015]), the Appellate Division, First Department, recently observed that:

“a defrauded party to a contract may elect to either disaffirm the contract by a prompt rescission or stand on the contract and thereafter maintain an action at law for damages attributable to the fraud.”

127 Ad3d at 507-508, citing *Big Apple Car v City of New York*, 204 AD2d 109, 110–111 (1st Dept 1994). Here, the demand clause of Sturtevant’s first counterclaim clearly requests “judgment ... in an amount to be proven at trial;” i.e., money damages. See notice of motion, exhibit D, ¶70. However, as was previously observed, Sturtevant’s first counterclaim also plainly alleges that C Street fraudulently induced her to enter the contract via promises of remuneration that are outside the subject matter of the photography contract. Thus, the court finds that the nature of Sturtevant’s counterclaim is unclear, since the theory of damages that she intends to pursue cannot now be divined. As a result, the court concludes that the most prudent course of action is to dismiss her first counterclaim with leave to replead it in accordance with

the governing law.

Sturtevant's second counterclaim alleges "fraudulent misrepresentation," and specifically asserts that:

"72. As more fully set forth in paragraphs 63-67 above, [C Street] misrepresented and omitted material facts knowing that its statements were false or materially misleading, and with the purpose of inducing [Sturtevant] to render professional photographic services to the C-Street movie..."

See notice of motion, exhibit D, ¶72. Since this counterclaim is clearly based on the same allegations as the first counterclaim, it does appear to merely be a repeat, and, as such, to be duplicative. However, according Sturtevant the latitude in pleading to which she is entitled on a CPLR 3211 motion, the court again finds that the prudent course is to dismiss this counterclaim with leave to replead it, in the event that she actually intends to seek relief on a different basis from the first counterclaim.

Sturtevant's third counterclaim alleges negligent misrepresentation. See notice of motion, exhibit D (amended answer), ¶¶ 74-79. This counterclaim requires its proponent to allege "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." See *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 (2007), citing *Parrott v Coopers & Lybrand*, 95 NY2d 479, 484 (2000); *Murphy v Kuhn*, 90 NY2d 266, 270 (1997). C Street argues that no such "special or privity-like relationship" exists in this case, as a matter of law. See plaintiff's memorandum of law at 11-12. Sturtevant responds that C Street's principal "Ms. Luster is a senior movie executive with particular knowledge about industry practice and a long-standing friend in whom [she] placed a high degree of trust." See

defendant's memorandum of law at 13. C Street replies that "there is simply no basis under the law - and defendant cites none - for a finding that a production still photographer stands in a 'special relationship' to a film production company." See plaintiff's reply memorandum at 4. C Street is correct. As the Court of Appeals noted in *Mandarin Trading Ltd. v Wildenstein* (16 NY3d 173 [2011]), "[a] special relationship may be established by 'persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified.'" 16 NY3d at 180, quoting *Kimmell v Schaefer*, 89 NY2d 257, 263 (1996). However, the Appellate Division, First Department, has also recently observed "[t]hat [a party] ... had superior knowledge of her company's business and finances is not the type of special knowledge or expertise that will support this claim." *Zohar CDO 2003-1 Ltd. v Xinhua Sports & Entertainment Ltd.*, 111 AD3d 578, 579 (1st Dept 2013), citing *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 296-297 (1st Dept 2011). Here, because Sturtevant has merely alleged that Ms. Luster was knowledgeable about the film production business, she has failed to adequately allege the existence of a "special relationship" between herself and plaintiff, and her negligent misrepresentation claim fails, as a matter of law. Therefore, the court grants so much of C Street's motion as seeks dismissal of this counterclaim.

Sturtevant's fourth counterclaim alleges breach of implied contract. See notice of motion, exhibit D (amended answer), ¶¶ 80-84. C Street's memorandum of law does not contain any argument directed specifically against this claim. At one point, C Street states that Sturtevant's subsequent cause of action for breach of the duty of good faith and fair dealing "simply rehashes the allegations underlying her ... breach of implied contract claim[.];" however, this allegation is

not followed by any further argument. *See* plaintiffs memorandum of law at 12. For her part, Sturtevant quotes the holding of the Appellate Division, Third Department, in *Matter of Pache v Aviation Volunteer Fire Co.* (20 AD3d 731, 732-733 [3d Dept 2005]) that “it is well settled that a contract may be implied in fact where inferences may be drawn from the facts and circumstances of the case and the intention of the parties as indicated by their conduct [citation omitted].” She then notes that her counterclaim alleges that C Street’s production management treated her as if she were responsible for more and different work than was specified in the photography agreement. *See* defendant’s memorandum of law at 15-16. The court notes that C Street’s reply memorandum contains no rebuttal argument to these claims. Therefore, the court deems that C Street has abandoned its request that Sturtevant’s fourth counterclaim be dismissed, and denies so much of C Street’s motion as seeks this relief.

Sturtevant’s fifth counterclaim alleges breach of the duty of good faith and fair dealing, which is implied into all contracts as a “pledge that ‘neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’” *See Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886, 888 (1st Dept 2010), quoting *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 (1995). C Street argues that this counterclaim should be dismissed as duplicative of Sturtevant’s fraud and breach of implied contract claims. *See* plaintiff’s memorandum of law at 12. Sturtevant responds that the allegations in her answer regarding this claim are different from those that she made in support of her breach of implied contract counterclaim. *See* defendant’s memorandum of law at 16-17. A review of those pleadings indicates that Sturtevant is correct. *See* notice of motion, exhibit D (amended answer), ¶¶ 85-88. However, as an initial matter, the court notes that C Street’s

argument is legally flawed, insofar as a breach of implied contract claim is an equitable claim that is raised in the absence of an extant contract, whereas a breach of implied covenant claim is a contractual claim that is generally raised either in conjunction with, or instead of, a breach of contract claim. There is no way to view one as duplicative of the other. In any case, Sturtevant is certainly free to plead alternative theories of relief. *See e.g. Kerzhner v G4S Govt. Solutions, Inc.*, 138 AD3d 564 (1st Dept 2016). Further, because the court has declined to dismiss either Sturtevant's fraud or breach of implied contract counterclaims, it does not avail C Street to allege that her breach of implied covenant counterclaim is duplicative of either one of them. In conclusion, the court denies so much of C Street's motion as seeks dismissal of this counterclaim.

Sturtevant's sixth and seventh counterclaims allege the right to equitable relief pursuant to the doctrines of quantum meruit and promissory estoppel, respectively. *See* notice of motion, exhibit D (amended answer), ¶¶ 89-94. C Street argues that these counterclaims should be dismissed because the existence of the photography contract precludes Sturtevant from seeking equitable relief, as a matter of law. *See* plaintiff's memorandum of law at 13. Sturtevant responds by noting that she raised these counterclaims in the event that "the court would determine that [she] had no contract based remedies and the [photography agreement] was void, unenforceable or otherwise inapplicable." *See* defendant's memorandum of law at 19-20. Sturtevant then goes on to recite the elements of the two equitable doctrines, and to delineate how the statements in her answer allege the existence of all of those elements. *Id.* at 20-23. The court notes that C Street's memoranda of law do not contain any argument directed against the sufficiency of Sturtevant's pleadings with respect to either her quantum meruit or promissory

estoppel counterclaims. The court also reiterates that Sturtevant is correct to assert that she is free to plead alternative theories of relief. *See e.g. Kerzhner v G4S Govt. Solutions, Inc.*, 138 AD3d 564 (1st Dept 2016). At this juncture, that includes pleading both contractual and equitable claims. Therefore, the court rejects C Street’s argument, and denies so much of its motion as seeks dismissal of Sturtevant’s sixth and seventh counterclaims.

Sturtevant’s eighth counterclaim alleges violation of NY Civil Rights Law § 51. *See* notice of motion, exhibit D (amended answer), ¶¶ 95-96. That statute provides, in pertinent part, as follows:

“Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided [in section 50] may maintain an equitable action ... to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use.”

The Court of Appeals has repeatedly held that the limited statutory right to privacy that is set forth in NY Civil Rights Law § 51 “is to be narrowly construed and ‘strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person.’” *See Messenger v Gruner + Jahr Print. & Publ.*, 94 NY2d 436, 441 (2000), quoting *Finger v Omni Publs. Intl.*, 77 NY2d 138, 141 (1990). C Street argues that the statute does not apply because “there are no allegations ... that Ms. Sturtevant’s image was used in any way in connection with advertising purposes.” *See* plaintiff’s memorandum of law at 15. Sturtevant responds that “it is undisputed that [she] was instructed to appear in the C Street movie without her written consent and that the C Street movie was a for profit commercial movie.” *See* defendant’s memorandum of law at 18. C Street replies that “the brief appearance of an unknown extra in a film does not give rise to a cause of action under” the statute. *See* plaintiff’s

reply memorandum at 5-6. C Street is partially correct. Well settled appellate case law holds that where “the use of a person’s picture ‘is “fleeting and incidental”, it will not be actionable as a nonconsensual use of that person’s [picture] for the purpose of advertising.” See *Doe v Darien Lake Theme Park & Camping Resort*, 277 AD2d 967, 967 (4th Dept 2000), quoting *Marks v Elephant Walk*, 156 AD2d 432, 434 (2d Dept 1989), quoting *Delan v CBS, Inc.*, 91 AD2d 255, 260 (2d Dept 1983). However, appellate case law also holds that “[w]hether a particular use is incidental is determined through an assessment of the ‘relationship of the references to a particular individual “to the main purpose and subject of the [work in issue],”’ which is generally a question of fact. *Doe v Darien Lake Theme Park & Camping Resort*, 277 AD2d at 967, quoting *Delan v CBS, Inc.*, 91 AD2d at 260, quoting *Ladany v Morrow & Co.*, 465 F Supp. 870, 882 (SDNY 1978). Where no such relationship exists, the only possible purpose for the presence of the plaintiff’s likeness is commercial - i.e., “for the sale of the work.” See *Foster v Svenson*, 128 AD3d 150, 159 (1st Dept 2015). Here, Sturtevant has alleged that she appeared on film in C Street’s movie, was not compensated for her efforts and did not sign a release. See notice of motion, exhibit D, ¶¶ 19, 22-28, 59. Whether her appearance there was “incidental” or not is a question of fact, however her pleadings are sufficient to sustain the counterclaim at this juncture. Accordingly, the court denies so much of C Street’s motion as seeks dismissal of Sturtevant’s eighth counterclaim.

Sturtevant’s ninth counterclaim alleges unjust enrichment. See notice of motion, exhibit D (amended answer), ¶¶ 97-100. “The criteria for recovery under a theory of unjust enrichment are: ‘(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the

reasonable value of the services.” *Joan Hansen & Co. v Everlast World’s Boxing Headquarters Corp.*, 296 AD2d 103, 108 (1st Dept 2002), quoting *Moors v Hall*, 143 AD2d 336, 337-338 (2d Dept 1988). C Street argues that “a cause of action for unjust enrichment cannot stand where the party that was allegedly unjustly enriched never received the benefit of the services it is alleged not to have paid for.” See plaintiff’s memorandum of law at 15. Sturtevant responds that C Street did receive “benefit” from her - specifically, in the form of the promotional photographs that she prepared for the movie and her services as an extra - “without providing [her with] anything other than partial reimbursement for her out-of-pocket expenses.” See defendant’s memorandum of law at 23. This is clearly a factual dispute having nothing to do with the sufficiency of Sturtevant’s pleadings which, the court notes, do recite all of the elements of an unjust enrichment claim. Accordingly, the court rejects C Street’s argument and denies so much of its motion as seeks dismissal of Sturtevant’s ninth counterclaim.

Sturtevant’s final counterclaim alleges breach of fiduciary duty. See notice of motion, exhibit D (amended answer), ¶¶ 101-104. C Street argues that this claim should be dismissed for a similar reason as Sturtevant’s negligent misrepresentation claim; i.e., that there was no fiduciary relationship between Sturtevant and itself. See plaintiff’s memorandum of law at 11-12. Sturtevant asserts that “the existence of a special relationship for negligent misrepresentation purposes is analytically very close to the existence of a fiduciary relationship for breach of fiduciary duty purposes.” See defendant’s memorandum of law at 13-14. This statement is somewhat accurate. In *Sergeants Benevolent Assn. Annuity Fund v Renck* (19 AD3d 107 [1st Dept 2005]), the Appellate Division, First Department, restated the rule that “a court will look to whether a party reposed confidence in another and reasonably relied on the other’s superior

expertise or knowledge.” 19 AD3d at 110, quoting *Wiener v. Lazard Freres & Co.*, 241 AD2d 114, 122 (1st Dept 1998). Here, Sturtevant states that she “entered into the relationship with [C Street] as a result of a close personal relationship with one of the movie’s executive producers.” See defendant’s memorandum of law at 13. There are no allegations of “superior expertise or knowledge,” but only of friendship. This is clearly insufficient to make out a claim that a fiduciary relationship had arisen between C Street and plaintiff. Therefore, the court agrees that Sturtevant’s breach of fiduciary duty claim must fail, as a matter of law, and grants so much of C Street’s motion as seeks dismissal of this counterclaim.

The balance of C Street’s motion seeks sanctions, however it is devoid of any legal argument to justify the imposition of said sanctions. Therefore the court denies C Street’s request.

Sturtevant’s cross motion seeks an order to disqualify C Street’s counsel. However, her moving papers are devoid of any legal basis for doing so. The one case that Sturtevant’s counsel cites involved the imposition of a fine on an attorney who falsely accused opposing counsel of having committed perjury. *1050 Tenants Corp. v Lapidus*, 13 Misc 3d 1220(A), 2006 NY Slip Op 51925(U) (Civ Ct, NY County, 2006). The remainder of Sturtevant’s memorandum of law cites provisions of the NY Rules of Professional Conduct, the appropriate remedy for the violation of which is to file a complaint with the Appellate Division that has jurisdiction over counsel, not to seek relief from the trial court. Accordingly, because she has provided no legal basis for her cross motion, the court finds that Sturtevant’s cross motion should be denied.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of plaintiff C Street Movie, LLC is granted solely to the extent that the first, second and third counterclaims of the second amended answer are dismissed, but is otherwise denied; and it is further

ORDERED that the defendant Colleen Sturtevant is granted leave to serve a third amended answer with counterclaims so as to replead the first and/or second counterclaims within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that defendant Colleen Sturtevant fails to serve and file an amended answer in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk, upon service of a copy of this order with notice of entry and an affirmation/affidavit by plaintiff's counsel attesting to such non-compliance, is directed to enter judgment in favor of plaintiff with respect to those counterclaims, and with costs and disbursements to the plaintiff as taxed by the Clerk; and it is further

ORDERED that the cross motion of defendant Colleen Sturtevant is denied.

Dated: September 30, 2016

ENTER: 
GEOFFREY D. WRIGHT
AJSC

Hon. Geoffrey D. Wright, J.S.C.