NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------X
BRYAN RILEY,

Index No. **814943/2021E**

Plaintiff,

Hon. **FIDEL E. GOMEZ**
Justice

- against -

MARSHA KNIGHT; TANGELA KNIGHT; 138 S&H REALTY CORPORATION (a New York Corporation); KIDS SPACE BRONX CHILDCARE, INC. (a New York Corporation); GEORGE T. PETERS, ESQ. (in both his personal and professional capacities); LAW OFFICE OF GEORGE T. PETERS, PLLC; A DREAM KID'S SPACE, LLC; A KID'S SPACE TO DREAM CHILDCARE, LLC; A KID'S SPACE TO DREAM, LLC; JOHN AND JANE DOES 1-20; AND BUSINESS ENTITIES A-K,

Defendants.
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The following papers numbered 1 to 3, read on this motion, noticed on 3/23/2022, and duly submitted as no. 2 on the Motion Calendar of 8/16/2022.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	

Defendants Marsha Knight, Tangela Knight, George T. Peters, Esq., Law Office of George T. Peters, PLLC, A Dream Kid's Space, LLC, A Kid's Space To Dream Childcare, LLC, and A Kid's Space To Dream, LLC's motion is decided in accordance with the Decision and Order annexed hereto.

Dated:
10/28/22

Hon. _____
FIDEL E. GOMEZ, A.J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION IS..... ☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT
X NEXT APPEARANCE DATE: **December 12, 2022, at 2:00 p.m.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------X
BRYAN RILEY,

Plaintiff, **DECISION AND ORDER**

- against - Index No. **814943/2021E**

MARSHA KNIGHT; TANGELA KNIGHT; 138 S&H REALTY CORPORATION (a New York Corporation); KIDS SPACE BRONX CHILDCARE, INC. (a New York Corporation); GEORGE T. PETERS, ESQ. (in both his personal and professional capacities); LAW OFFICE OF GEORGE T. PETERS, PLLC; A DREAM KID'S SPACE, LLC; A KID'S SPACE TO DREAM CHILDCARE, LLC; A KID'S SPACE TO DREAM, LLC; JOHN AND JANE DOES 1-20; AND BUSINESS ENTITIES A-K,

Defendants.
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Defendants Marsha Knight, Tangela Knight, George T. Peters, Esq., Law Office of George T. Peters, PLLC, A Dream Kid's Space, LLC, A Kid's Space To Dream Childcare, LLC, and A Kid's Space To Dream, LLC ("Defendants") move for an order dismissing this action pursuant to CPLR § 3211(a)(1) and (7). Plaintiff Bryan Riley ("Plaintiff") opposes.

For the reasons which follow, Defendants' motion is granted, in part.

BACKGROUND:

On November 1, 2021, Plaintiff commenced the instant action by filing a summons and verified complaint. The complaint alleges eleven causes of action: fraud and conspiracy to commit fraud, imposition of a constructive trust, accounting, unjust enrichment, breach of fiduciary duty, tortious interference, breach of duty of loyalty, breach of the covenant of good faith and fair dealing, conversion, receivership, attorney's fees, and punitive damages. The complaint is verified by Plaintiff. The relevant facts are stated in the Decision and Order on Mot. Seq. 1, issued simultaneously with this Decision and Order.

On February 15, 2022, Defendants filed the instant motion. On August 16, 2022, the motion was marked fully submitted.

DISCUSSION:

In support of their motion, Defendants submitted, *inter alia*, an affirmation of counsel; an affidavit by MK; an affidavit by TK, a New York State Department of State online filing receipt for Kids Space; and two identical unsigned form 2553.

First Cause of Action – Fraud, as Against All Defendants:

CPLR 3015:

Defendants move to dismiss the first cause of action, arguing that Plaintiff has not alleged sufficient facts to support a cause of action for fraud. Defendants also argue that Plaintiff "failed under C.P.L.R. §3015, to demonstrate how he is absolved from performing the condition precedent of obtaining funding." Defendants argue that since Plaintiff admitted that he was unable to secure funding, the cause of action for fraud must be dismissed. In support, Defendants cite par. 55.

Here, Defendants have not demonstrated that the cause of action for fraud must be dismissed. Initially, contrary to Defendants' argument, the complaint alleges a cause of action for fraud (Compl. ¶ 53-62). Other than stating in one conclusory sentence that Plaintiff has not alleged sufficient facts, Defendants have not argued how the facts alleged in the complaint are insufficient.

Additionally, Defendants have not demonstrated that Plaintiff admitted that he was unable to secure the requisite funding. Defendants do not point to any allegation in the complaint in which Plaintiff admits as such. Paragraph 55 of the complaint states that: "Further, Plaintiff (by and through the company) retained Peters and GTP for the purpose of acting as the business' counsel thus creating a fiduciary duty" (Compl. ¶ 55). Paragraph 50, which Defendants point to in other parts of their memorandum of law, states that: "Further, the ultimate purpose of Plaintiff's involvement was to obtain substantial funds in order to get the daycare center operating and then act as a silent partner to collect his piece of the profit derived which was, through initial prospective calculations, upwards of $75,000-100,000 per month per member (ie gross profits of approximately $150,000 to $200,000 per month). Thus, by conspiring to remove Plaintiff from the business, the potential gross income for the Knights would be double of what they would otherwise be entitled to, and which could be, feasibly, pushing a Million Dollars annually" (Compl. ¶ 50).

Plaintiff does not allege in either of these paragraphs that he was unable to obtain the necessary funding.

In any case, this argument lacks merit. CPLR 3015 does not require Plaintiff to demonstrate or allege in the complaint that a condition precedent has been performed (CPLR 3015[a] ["The performance or occurrence of a condition precedent in a contract need not be pleaded. A denial of performance or occurrence shall be made specifically and with particularity. In case of such denial, the party relying upon the performance or occurrence shall be required to prove on the trial only such performance or occurrence as shall have been so specified."]; *Allis-Chalmers Mfg. Co. v Malan Const. Corp.*, 30 NY2d 225, 232-233 [1972]; *Arnell Construction Corp. v New York City School Construction Authority*, 177 AD3d 595, 597 [2d Dept 2019]). Rather, it is Defendants who are required to deny the performance of a condition precedent (*1199 Hous. Corp. v Int'l Fid. Ins. Co.*, 14 AD3d 383, 384 [1st Dept 2005] ["In an action on a contract, the obligation to raise the issue of compliance with condition precedent rests on the party disputing their performance or occurrence. Thus, the burden to plead 'specifically and with particularity' that any condition precedent has not been fulfilled rests on the party resisting enforcement of the contract"]).

To the extent that Defendants may be relying on the affidavits of MK and TK to demonstrate that Plaintiff did not provide this funding, the affidavits may not be considered on a motion made pursuant to CPLR 3211 (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007] [holding that affidavits "are generally intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims"]; *Magee-Boyle v Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 1157, 1159 [2d Dept 2019] ["letters, emails and affidavits fail to meet the requirements for documentary evidence"]; *Amsterdam Hospitality Group, LLC v Marshall-Alan Associates, Inc.*, 120 AD3d 431, 432 [1st Dept 2014] ["We have held that affidavits that 'do no more than assert the inaccuracy of plaintiffs' allegations [] may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint … and do not otherwise conclusively establish a defense to the asserted claims as a matter of law"]; *Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]). As such, Defendants have failed to demonstrate that Plaintiff failed to provide the requisite funding or that he is required to allege performance of such act in his complaint.

Justifiable Reliance:

Defendants argue that the complaint does not allege facts to demonstrate that Plaintiff acted in justifiable reliance on any allegedly fraudulent statements made by Defendants.

Here, Defendants have not demonstrated that the cause of action for fraud must be dismissed. Initially, contrary to Defendants' argument, the complaint alleges that Plaintiff reasonably relied on Defendants' misrepresentation that they would act in good faith in order to secure and create a daycare center and that in reliance on those misrepresentations, he facilitated the creation of the daycare center, which included forming the corporation, and investing time and money (Compl. ¶ 56-57, 59-60). Other than stating in one conclusory sentence that Plaintiff has not alleged sufficient facts, Defendants have not argued how the facts alleged in the complaint are insufficient. Moreover, the Court notes that "the question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss" (*ACA Financial Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 [2015]).

Doctrine of In Pari Delicto:

Defendants argue that the doctrine of *in pari delicto* bars Plaintiff from recovering on any fraud claim because he admitted to actively participating in fraud. In support, Defendants cite par. 55, which allegedly states that: "The lease was executed on behalf of the business by MK who was identified as President – despite not being a corporate officer of the business (TK was President)".

"The doctrine of in pari delicto mandates that the courts will not intercede to resolve a dispute between two wrongdoers" (*Kirschner v KPMG LLP*, 15 NY3d 446, 464 [2010]). "The doctrine of in pari delicto bars a party that has been injured as a result of its own intentional wrongdoing from recovering for those injuries from another party whose equal or lesser fault contributed to the loss" (*Rosenbach v Diversified Group, Inc.*, 85 AD3d 569, 570 [1st Dept 2011]).

As a preliminary matter, the allegations that Defendants cite in support of this argument are found at paragraph 21 of the complaint, not paragraph 55.

Here, it cannot be determined that as alleged in the complaint, Plaintiff was at equal or greater fault than Defendants. Defendants point to the allegation in which Plaintiff alleges that he allowed MK to sign the Lease on Kids Space's behalf as President, even though she was not the President. However, the wrongdoing that Plaintiff alleges against the Defendants is not merely that MK signed the Lease or the termination agreement as the President of Kids Space, when she was not the President. It goes further than that. Plaintiff alleges that the lease termination was wrongful

because "it was not agreed to by the majority of the owners of the company" (Compl. ¶ 48). Plaintiff alleges that MK signed the termination agreement without his knowledge or authorization (Compl. ¶ 31), and that MK and TK, with Mr. Peters and GTP's aid, created the Replacement Companies to take over the daycare business and to push him out of the business venture (Compl. ¶ 39-44, 46-47). As such, at this juncture, the Court finds that dismissal is not warranted pursuant to the doctrine of in pari dilecto.

Accordingly, Defendants' motion to dismiss the first cause of action for fraud is denied.

Second Cause of Action – Constructive Trust, as Against MK, TK, Kids Space, and the Replacement Companies:

Defendants move to dismiss the second cause of action, arguing that Plaintiff has not alleged the elements of a cause of action to impose a constructive trust. Defendants also argue that "Plaintiff, by his own admission, was solely responsible or his 'ultimate purpose' was to 'obtain substantial funds in order to get the daycare operating. As Plaintiff was unable to obtain any funds in order to open and/or operate the daycare. Nonetheless, Plaintiff only signed a contract to be a lease guarantor."

"Generally, a constructive trust may be imposed '(w)hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest'" (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). "[A] party claiming entitlement to a constructive trust must establish: (1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment." (*Wachovia Securities, LLC v Joseph*, 56 AD3d 269, [1st Dept 2008]; *Sanxhaku v Margetis*, 151 AD3d 778, 779 [2d Dept 2017]). "'[T]hese factors, or elements, serve only as a guideline, and a constructive trust may still be imposed even if all four elements are not established' because 'the constructive trust doctrine is given broad scope to respond to all human implications of a transaction in order to give expression to the conscience of equity and to satisfy the demands of justice" (*Sanxhaku* at 779).

Here, contrary to Defendants' conclusory argument, Plaintiff alleged the elements for the imposition of a constructive trust (Compl. ¶ 65-67, 72-74). Defendants fail to argue how these allegations are insufficient.

It is unclear what Defendants meant to argue by arguing that Plaintiff was solely responsible for obtaining funds, that he was unable to obtain any funds, and that he was only a

lease guarantor. It appears that Defendants urge dismissal of this cause of action on grounds that Plaintiff's damages are solely the result of his own conduct. However, as explained above, Plaintiff did not allege that he did not provide the requisite funding for the daycare business, and Defendants have not demonstrated that he did not provide the requisite funding. Moreover, the complaint alleges that Plaintiff was more than a lease guarantor. The complaint alleges, *inter alia*, that Plaintiff was a 50% shareholder of Kids Space (Compl. ¶ 16), that he was Kids Space's vice president (Compl. ¶ 18), and that the parties were engaged in a business together as partners (Compl. ¶ 26-29, 50).

Accordingly, Defendants' motion to dismiss the second cause of action for constructive trust is denied.

Third Cause of Action – Accounting, as Against MK, TK, Kids Space, and the Replacement Companies:

Defendants move to dismiss the third cause of action, arguing that Plaintiff has not alleged a cause of action for accounting. Defendants argue that an accounting should not be granted because Plaintiff had no property. Defendants also argue that "Plaintiff, per his own admission, was solely responsible or his 'ultimate purpose' was to 'obtain substantial funds in order to get the daycare operating'" and that "[a]s Plaintiff was unable to obtain any funds in order to open and/or operate the daycare he had no interest in any daycare. Nonetheless, Plaintiff only signed a contract to be a lease guarantor."

"An equitable accounting involves a remedy designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession. The elements include a fiduciary or confidential relationship, money entrusted to the defendant imposing the burden of an accounting, the absence of a legal remedy, and in some cases a demand and refusal" (*Metropolitan Bank & Trust Co. v Lopez*, 189 AD3d 443, 446 [1st Dept 2020]; *Unitel Telecard Distribution Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011]; *Blaustein v Lazar Borck & Mensch*, 161 AD2d 507, 508 [1st Dept 1990]; *LMEG Wireless, LLC v Farro*, 190 Ad3d 716, 720-721 [2d Dept 2021]).

Here, Defendants have not demonstrated that the third cause of action must be dismissed. Indeed, the complaint pleads a cause of action for an accounting (Compl. ¶ 76-82). It is unclear how Plaintiff allegedly having no property is relevant to this cause of action. The remaining

arguments regarding Plaintiff's alleged failure to provide funding and that he was only a lease guarantor are without merit for the reasons stated above.

Accordingly, Defendants' motion to dismiss the third cause of action for an accounting is denied.

(First) Fourth Cause of Action – Unjust Enrichment, as Against All Defendants:

Defendants move to dismiss the fourth cause of action, arguing that Plaintiff has not alleged a cause of action for unjust enrichment. Defendants argue that the landlord returned Plaintiff's security deposit. As such, Defendants argue that no party was enriched. Defendants also argue that "Plaintiff, per his own admission, was solely responsible or his 'ultimate purpose' was to 'obtain substantial funds in order to get the daycare operating'" and that "[a]s Plaintiff was unable to obtain any funds in order to open and/or operate the daycare he had no interest in any daycare. Nonetheless, Plaintiff only signed a contract to be a lease guarantor."

"The theory of unjust enrichment is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another" (*Mannino v Wells Fargo Home Mortg., Inc.*, 155 AD3d 860, 862 [2d Dept 2017] [internal quotation marks omitted]). "The essential inquiry in any action for unjust enrichment … is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

To plead a cause of action for unjust enrichment, "a plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Mannino* at 862; *Mandarin* at 182; *McMurray v Hye Won Jun*, 168 AD3d 435, *1 [1st Dept 2019]). Moreover, "[a]lthough privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated" (*Mandarin Trading Ltd.* at 182; *Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 408 [1st Dept 2011] ["although privity is not required for an unjust enrichment claim, a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part"]).

Here, the complaint alleges that Defendants have been unjustly enriched, not by the receipt of Plaintiff' security deposit, but by obtaining benefits which were due to Plaintiff had he not been improperly removed from the business (Compl. ¶ 50, 85). The remaining arguments regarding

Plaintiff's alleged failure to provide funding and that he was only a lease guarantor are without merit for the reasons stated above.

Accordingly, Defendants' motion to dismiss the fourth cause of action for unjust enrichment is denied.

(Second) Fourth Cause of Action - Breach of Fiduciary Duty, as Against Mr. Peters and GTP:

Defendants move to dismiss the (second) fourth cause of action, arguing that Plaintiff has not alleged a cause of action for breach of fiduciary duty. Defendants argue that Plaintiff did not allege that Mr. Peters was his fiduciary. Defendants argue that the only time Plaintiff alleges that Mr. Peters and GTP represented him is in paragraph 55 of the complaint, but that the representation was through representation of Kids Space. Defendants argue that Plaintiff did not receive personal representation from Mr. Peters and GTP through their representation of Kids Space.

Defendants again argue that "Plaintiff, per his own admission, was solely responsible or his 'ultimate purpose' was to 'obtain substantial funds in order to get the daycare operating'" and that "[a]s Plaintiff was unable to obtain any funds in order to open and/or operate the daycare he had no interest in any daycare. Nonetheless, Plaintiff only signed a contract to be a lease guarantor."

"To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Burry v Madison Park Owner, LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). "A cause of action sounding in breach of fiduciary duty must be pleaded with particularity" (*Board of Managers of Brightwater Towers Condominium v FirstService Residential New York, Inc.*, 193 AD3d 672, 673 [2d Dept 2021]; *Litvinoff v Wright*, 150 AD3d 714, 715 [2d Dept 2017]).

"A fiduciary relationship may exist when one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge. An arm's-length business relationship does not give rise to a fiduciary obligation, as the core of a fiduciary relationship is a higher level of trust than normally present in the marketplace between those involved in arm's-length business transactions" (*Board of Managers of Brightwater Towers Condominium*, 193 AD3d 672 at 673). "A 'defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations'" (*Id.* at 674). "While courts generally look to the parties' contractual agreement to discover the nature of their relationship, the existence

of a fiduciary relationship is not dependent solely upon an agreement or contractual relation. Rather, the actual relationship between the parties determines the existence of a fiduciary duty" (*Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 673, 676 [2d Dept 2017]).

Here, Defendants have demonstrated that the cause of action for breach of fiduciary duty must be dismissed. The complaint alleges that Mr. Peters and GTP owed a fiduciary duty to Kids Space, as they were retained to serve as counsel for Kids Space (Compl. ¶ 90, 91). The complaint also alleges that Mr. Peters and GTP owed a fiduciary duty to Plaintiff, as 50% shareholder of Kids Space (Compl. ¶ 92, 94). Plaintiff's affidavit in opposition also states that Mr. Peters and GTP were retained to represent Kids Space (Affidavit of Bryan Riley, ¶ 8-9). Case law is well-settled that unless the parties have expressly agreed otherwise in the circumstances of a particular matter, a corporation's attorney represents the corporate entity, not its shareholders or employees (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562 [2009]; *Polovy v Duncan*, 269 AD2d 111, 112 [1st Dept 2000]; *Talvy v American Red Cross in Greater New York*, 205 AD2d 143, 149 [1st Dept 1994]; *Kalish v Lindsay*, 47 AD3d 889, 891 [2d Dept 2008]). The complaint and Plaintiff's affidavit in opposition do not allege any facts to demonstrate that the parties agreed that Mr. Peters and GTP represent Plaintiff in his individual capacity or that they affirmatively assumed any duty to represent Plaintiff in his individual capacity.

Plaintiff's arguments in opposition do not raise an issue of fact warranting a denial of Defendants' motion. Plaintiff's arguments regarding privity with Mr. Peters and GTP are irrelevant, as they relate to a cause of action for negligent misrepresentation,[1] not one for breach of fiduciary duty.

Accordingly, Defendants' motion to dismiss the second (fourth) cause of action for breach of fiduciary duty is granted.

Fifth Cause of Action – Tortious Interference, as Against Mr. Peters and GTP:

Defendants move to dismiss the fifth cause of action, arguing that Plaintiff has not alleged a cause of action for tortious interference. Defendants argue that the complaint does not allege that there is a contract between Plaintiff and a third party. Defendants also argue that "Plaintiff, per his

[1] The elements for a cause of action for negligent misrepresentation are: 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 correct; and (3) reasonable reliance on the information (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 840 [1st Dept 2011]).

own admission, was solely responsible or his 'ultimate purpose' was to 'obtain substantial funds in order to get the daycare operating'" and that "[a]s Plaintiff was unable to obtain any funds in order to open and/or operate the daycare he had no interest in any daycare. Nonetheless, Plaintiff only claims to be a lease guarantor."

The elements of a cause of action for tortious interference with contract are: "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]; *Nostalgic Partners, LLC v New York Yankees Partnership*, 205 AD3d 426, 428 [1st Dept 2022]; *EVEMeta, LLC v Siemens Convergence Creators Corporation*, 173 AD3d 551, 551 [1st Dept 2019]; *Kimso Apartments, LLC v Rivera*, 180 AD3d 1033, 1035 [2d Dept 2020]). "The plaintiff must also establish that the defendant intentionally procured the breach of contract 'without justification'" (*Kimso Apartments, LLC* at 1035). However, "[m]alice is not an element of tortious interference with contract" (*EVEMeta, LLC* at 553-554). "[T]o avoid dismissal of a tortious interference with contract [cause of action], a plaintiff must support his [or her cause of action] with more than mere speculation" (*id.*).

Here, the complaint alleges that Mr. Peters and GTP were privy to certain contracts which were to benefit Kids Space and their shareholders (Compl. ¶ 96), that they assisted MK in canceling the Lease (Compl. ¶ 97), that among the contracts cancelled was a personal guaranty that Plaintiff executed (Compl. ¶ 98), and that these defendants interfered with these contracts (Compl. ¶ 99).

Contrary to Plaintiff's arguments, it is clear from the allegations in the complaint that Plaintiff alleges, or attempts to allege, a cause of action for tortious interference with contract, not one for tortious interference with prospective economic advantage.[2] Since Plaintiff does not dispute that he has no contract with a third party upon which he can base his cause of action for tortious interference with contract, dismissal of this cause of action is warranted.

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[2] The elements of a cause of action for tortious interference with prospective economic advantage are: (1) the existence of a business relationship between plaintiff and a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]; *Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299-300 [1st Dept 1999]; *Tsatskin v Kordonsky*, 189 AD3d 1296, 1298 [2d Dept 2020]).

Accordingly, Defendants' motion to dismiss the fifth cause of action for tortious interference is granted.

Sixth Cause of Action – Breach of the Duty of Loyalty, as Against MK and TK:

Defendants move to dismiss the sixth cause of action, arguing that Plaintiff has not alleged a cause of action for breach of the duty of loyalty. Defendants argue that although Plaintiff alleges that both MK and TK are president of Kids Space, only MK was president of the company. Defendants again argue that "Plaintiff, per his own admission, was solely responsible or his 'ultimate purpose' was to 'obtain substantial funds in order to get the daycare operating'" and that "[a]s Plaintiff was unable to obtain any funds in order to open and/or operate the daycare he had no interest in any daycare. Nonetheless, Plaintiff only claims to be a lease guarantor."

Here, Defendants have not demonstrated that the cause of action for breach of the duty of loyalty should be dismissed, as Defendants fail to make an intelligible argument in support of dismissal. To the extent that Defendants may be arguing that the cause of action should proceed only as against MK, as she was president of Kids Space, the argument is without merit, as the complaint alleges that TK is the president of the company (Compl. ¶ 17, 104). The remaining arguments regarding Plaintiff's alleged failure to provide funding and that he was only a lease guarantor are without merit for the reasons stated above.

Accordingly, Defendants' motion to dismiss the sixth cause of action for breach of the duty of loyalty is denied.

Seventh Cause of Action – Breach of the Covenant of Good Faith and Fair Dealing, as Against MK; Eighth Cause of Action - Conversion, as Against MK, TK, and the Replacement Companies; Ninth Cause of Action – Receivership, as Against the Replacement Companies; Tenth Cause of Action – Attorney's Fees, as Against All Defendants; Eleventh Cause of Action – Punitive Damages, as Against All Defendants:

Defendants move to dismiss the seventh, eighth, ninth, tenth, and eleventh causes of action, arguing that Plaintiff has not alleged a cause of action. Defendants argue that "Plaintiff, per his own admission, was solely responsible or his 'ultimate purpose' was to 'obtain substantial funds in order to get the daycare operating'" and that "[a]s Plaintiff was unable to obtain any funds in order to open and/or operate the daycare he had no interest in any daycare. Nonetheless, Plaintiff only claims to be a lease guarantor."

Here, Defendants have not demonstrated that these causes of action should be dismissed. Defendants do not argue how these causes of action have not been properly alleged. Moreover, the arguments regarding Plaintiff's alleged failure to provide funding and that he was only a lease guarantor are without merit for the reasons stated above.

The Court notes that the eleventh cause of action for punitive damages was already dismissed in its entirety pursuant to the Decision and Order on Defendant 138 S&H Realty Corp.'s motion to dismiss, issued simultaneously with this Decision and Order. The wherefore clause in the complaint sufficiently alleges a request for punitive damages. As such, this cause of action is denied for the further reason that it is moot.

Accordingly, Defendants' motion to dismiss the seventh, eighth, ninth, tenth and eleventh causes of action is denied.

It is hereby

ORDERED that the Clerk dismiss the second (fourth) cause of action for breach of fiduciary duty and the fifth cause of action for tortious interference; and it is further

ORDERED that the parties appear for a **Preliminary Conference** on **Monday, December 12, 2022, at 2:00 p.m.**; and it is further

ORDERED that Defendants serve a copy of this Decision and Order upon Plaintiff, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated:
10/28/22

Hon. **FIDEL E. GOMEZ, A.J.S.C.**