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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 604399/2005

IOANNOU, LEONE

VS

SNAP PRODUCTIONS

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE 10/5/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the amended complaint for failure to state a cause of action (CPLR 3211[a][7]), is denied, except that the plaintiff's third cause of action for sexual harassment is dismissed as academic; and it is further

ORDERED that plaintiff's motion for summary judgment on the issue of liability is denied, as premature, without prejudice to renew at the close of discovery; and it is further

ORDERED that the parties shall appear for a preliminary conference on December 19, 2006, 2:15 p.m.; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
NOV 16 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/9/06

HON. CAROL EDMEAD J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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LEONE IOANNOU,

Plaintiff,

-against-

SNAP PRODUCTIONS, LLC, SNAP PRODUCTIONS and ANDREW SIMPSON,

Defendants.

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Index No. 604399-2005
Sequence #001

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff, Leone Ioannou ("plaintiff"), commenced this action against defendants Snap Productions, LLC, Snap Productions, and Andrew Simpson (collectively "defendants"), alleging causes of action for (1) sexual harassment, (2) hostile work environment, (3) declaratory judgment, (4) breach of fiduciary duty and accounting, (5) fraud, (6) malicious prosecution, (7) conversion, (8) breach of contract, and (9) constructive trust.

Defendants now move to dismiss the amended complaint for failure to state a cause of action (CPLR 3211[a][7]), except to the extent that plaintiff can prove her claims based upon moneys lent and for unpaid wages. Plaintiff opposes dismissal, and cross moves for partial summary judgment on the issue of liability.

Factual Background

According to the amended complaint, plaintiff is a pre-eminent producer in New York, and defendant Simpson was experienced in the financial, organizational and administrative aspects of the production business. In February 2004, plaintiff and defendant entered into an agreement to organize a business named "Snap Productions." Snap Productions was intended to

provide production services for still photography shoots, budget management, location sourcing and scouting, equipment rentals, crew transport and catering. Plaintiff and Simpson agreed that each would receive membership/partnership interests in Snap on a 50-50 basis, that each would receive an annual salary of $125,000, and that they would share profits equally (collectively referred to as the "Agreement"). Plaintiff was employed by Snap from February 2004 though November 2005.

Plaintiff claims that she was paid only $2,065 of her salary in 2004 and $42,541.70 in 2005. Further, plaintiff claims that she loaned defendants $10,000, and that defendants failed to repay her upon demand of repayment. Also, defendants allegedly charged extensive business and personal expenses on plaintiff's credit cards totaling $70,000. Plaintiff further claims that in January 2005, defendants sold her a 1998 Land Rover Discovery automobile for $11,000, and have refused to deliver title to plaintiff. It is also alleged that defendants knowingly filed a false criminal complaint accusing plaintiff of stealing said vehicle. Furthermore, during her employment at Snap, plaintiff was subjected to Simpson's unwelcomed sexual advances and explicit comments, which created a hostile work environment. Plaintiff contends that her rejection of Simpson's sexual advancements was linked to defendants' refusal to pay plaintiff her salary, repay her loan and credit cards, and refusal to deliver her equity interest in Snap Productions.

Defendants' 3211 (a)(7) Motion

Defendants argue that plaintiff failed to plead facts sufficient to establish a claim for breach of contract with regard to the Agreement or defendants' failure to incorporate Snap. Plaintiff failed to allege the terms of the "Agreement," that the moneys lent to defendants for the

formation of Snap or that her employment comprised independent consideration for the alleged "Agreement" to issue plaintiff the 50% membership interest in Snap, pay her wages, and incorporate Snap. Nor did plaintiff allege that defendants were obligated under the Agreement to transfer any membership interests in Snap to plaintiff, or that defendants agreed to be bound by the terms of the alleged Agreement.

Also, plaintiff's claim for fraud is nothing more than a claim for moneys lent, and lacks the requisite particularity. And, merely adding that defendants never intended to perform under the alleged Agreement does not turn the claims that defendants failed to incorporate or issue a 50% membership interest in Snap to plaintiff into one for fraud. Nor can plaintiff obtain exemplary or punitive damages for the alleged fraud claim.

It is also argued that plaintiff's declaratory judgment claim fails because the controversy is not alleged with sufficient detail and the alleged moneys due on the various loans clearly demonstrate that plaintiff has an adequate remedy at law.

Defendants further contend that the claims for breach of fiduciary duty and accounting, and constructive trust fail because of the absence of any confidential or fiduciary relationship in connection with the demand and other loans to defendants. A conventional business relationship alone does not give rise to a fiduciary relationship.

Defendants also argue that all of plaintiff's claims based on Simpson's alleged conduct against plaintiff in violation of New York Human Rights Law fail to set forth allegations rising to a *prima facie* claim. There are no allegations establishing that plaintiff's repudiation of defendants' proscribed conduct affected any term of condition of plaintiff's employment so as to sustain a clam for *quid pro quo* sexual harassment. Similarly, the numerous allegations of

harassment, taken together, comprise of hearsay and fail to support a claim for hostile work environment. Further, plaintiff's sexual harassment hostile work environment claim fails because there are no allegations showing that the complained of conduct was so pervasive so as to alter plaintiff's terms of employment or that the unwelcome sexual advances were a precondition for other employment conditions. And, since there are separate causes of action for *quid pro quo* sexual harassment and sexual harassment hostile work environment, plaintiff cannot allege yet another cause of action sexual harassment.

Further, plaintiff's malicious prosecution claim is allegedly insufficient because plaintiff failed to allege that the criminal proceeding in issue was resolved in her favor.

Finally, defendants argue, plaintiff's claim for conversion fails because as the documentary evidence demonstrates, plaintiff never had legal ownership of the claimed vehicle.

In opposition, plaintiff argues that there is no basis to dismiss any of the causes of action, in that each of her causes of action are sufficiently pled and alleged with the sufficient particularity.

Plaintiff also argues that summary judgment is warranted on her claims for declaratory judgment and the imposition of a constructive trust. Plaintiff contends that the documentary evidence[1] establishes, as a matter of law, that she made a $10,000 loan to defendant, that she worked for defendant in 2004 and 2005 and is therefore entitled to the salary allegedly owed, and that she incurred approximately $70,0000 in credit card debt, plus finance charges, on behalf of

[1] In support of summary relief, plaintiff submits a carbon copy of the $10,000 check made payable to Snap; documents purporting to be Snap's balance sheets; copies of her W-2 statements for 2005 and bi-weekly pay stubs from Snap; her American Express statements; and a January 5, 2005 letter and January 6, 2005 invoice documenting the sale of the Land Rover from Snap to plaintiff.

defendants, all of which defendants failed to pay. Plaintiff also contends that the record demonstrates that she purchased the Land Rover from defendants, and that they have refused to deliver title to the vehicle.

In opposition to summary judgment, defendants argue that plaintiff's motion is premature, given that issue is not joined as to plaintiff's amended complaint since defendants have not yet filed their amended answer. In any event, argue defendants, issues of fact exist as to defendants' liability for the sums sought.[2] Defendants contend that the balance sheets on which plaintiff relies to support her claim for the $10,000 loan were not prepared or maintained by or at the direction of any of the defendants. As to the claim for unreimbursed credit card charges in the approximate amount of $70,000, defendants point out that it cannot be determined whether the charges were in the course of Snap's business, for plaintiff's personal expenses, or for expenses totally unrelated to the matters in issue herein. Defendants also argue that the copies of plaintiff's W-2 earning statements and bi-weekly pay stubs do not establish that she was employed at an annual salary of $125,000. As to the Land Rover, defendants argue that Snap paid for the vehicle on January 4, 2006, and that the signatures appearing on the purported sale documents submitted by plaintiff are forgeries.

In further support of their motion to dismiss, defendants argue that plaintiff's submissions fail to correct the deficiencies in the amended complaint.

In reply, plaintiff argues that pursuant to CPLR 3212(c), the Court may entertain her

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[2] Defendants submit "title documents" for the Land Rover indicating that Simpson purchased the Land Rover from the Chapter 7 Trustee from the estate of a Bruce Karamer, listing Simpson as the registered owner. Defendants also contend that he paid for the vehicle on January 4, 2005 by wiring the amount of $11,000 to the Estate of Bruce Kramer from Snap Productions' Citibank account.

motion for summary judgment in the absence of joinder of issue, upon notice to defendants of the Court's intent to address the motion, and requests that the Court issue such notice.

Analysis

Defendants' Motion Pursuant to CPLR 3211 [a][7]

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]), and the criterion becomes ""whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v*

Ginzburg, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a] [7] where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

Breach of Contract (First Cause of Action)

To state a cause of action for breach of contract, the proponent of the pleading must specify the making of an agreement, the performance by that party, breach by the other party, and resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court New York County 2006], *citing Furia v Furia,* 116 AD2d 694, 695 [2d Dept 1986]). The complaint must allege the essential terms of the parties' purported contract upon which liability is predicated by specifically referring to the relevant portions of the contract (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071 *citing Sud v Sud*, 211 AD2d 423, 424

[1st Dept 1995]; and *Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]) or by attaching a copy of the contract to the complaint (*Atlantic Veal & Lamb, Inc. v Silliker, Inc.*, 11 Misc 3d 1072, 816 NYS2d 693 (Supreme Court New York County 2006] *citing Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [1987] and *accord Valley Cadillac Corp. v Dick,* 238 AD2d 894, 894 [1987]).

Contrary to defendants' contentions, plaintiff plead sufficient facts to state a claim for breach of contract with regard to the Agreement to organize and incorporate Snap, receive 50% of the membership interests, and receive a salary at $125,000 per year for her services. Plaintiff alleges that in 2004, she and defendant entered into an agreement to organize "Snap Productions" to provide production services for still photography shoots, budget management, location sourcing and scouting, equipment rentals, crew transport and catering. Plaintiff and Simpson agreed that each would receive membership/partnership interests in Snap on a 50-50 basis, that each would receive an annual salary of $125,000, and that they would share profits equally. In her first cause of action for breach of Agreement,[3] plaintiff alleges that defendants failed to incorporate Snap and issue to plaintiff membership certificates of plaintiff's 50% interest in Snap. Plaintiff also submitted documentary evidence in the form of emails she and defendant Simpson sent to various individuals in 2004 and 2005. Such emails indicate that they had "formed Snap productions" as their "new venture." In three of his emails, defendant Simpson referred to plaintiff as his "partner." Such facts are sufficient to allege defendants' obligation to transfer to plaintiff the purported 50% membership

[3] Plaintiff also claims that defendants failed to repay her for a $10,000 loan to Snap that Snap promised to repay on demand; failed to pay plaintiff's credit cards for Simpson's personal expenses in approximately $70,000; failed to deliver to plaintiff a 1998 Land Rover that for which plaintiff charged on her credit card despite defendants' agreement to repay such debt.

interest in Snap. It is also alleged that plaintiff provided services to Snap from February 2004 though November 2005, but was not paid the agreed upon compensation of $170,000, in that she was only paid $2,065 of her salary in 2004 and $42,541.70 in 2005, amounting to a purported breach of the Agreement. Plaintiff contends that she continued to work by contributing her exclusive efforts to the company and using her reputation and industry contacts to bring clients to the company. Accordingly, as it cannot be said that plaintiff's breach of contract claim is insufficiently pled, the branch of defendant's motion to dismiss the breach of contract claim is denied.

Plaintiff New York Human Rights Claims

Plaintiff also alleges claims for "*quid pro quo*" sexual harassment, sexual harassment, and hostile work environment (second, third, and fourth causes of action, respectively), pursuant to New York State Human Rights Law, Executive Law 290.

In order to state a claim of *quid pro quo* sexual harassment, plaintiff must allege that she was subject to unwelcome sexual conduct and that her reaction to that conduct was then used as a basis for decisions affecting the compensation, terms, conditions or privileges of her employment (*Samide v Roman Catholic Diocese of Brooklyn*, 194 Misc 2d 561, 754 NYS2d 164 [Supreme Court Queens County 2003]). Contrary to defendants' contention, the amended complaint alleges that plaintiff's rejection of Simpson's sexual advances formed the basis of defendants' decisions concerning plaintiff's employment and terms of the Agreement. Specifically, plaintiff alleges that her rejection of Simpson's sexual advances formed the basis of defendants' denial of plaintiff's salary, failure to repay her loan and credit cards, and failure to deliver her equity interest in Snap, which allegedly were terms of her employment and Agreement with Simpson.

In order to state a claim for hostile work environment sexual harassment, the complaint must

assert "(1) that [the plaintiff] is a member of a protected class; (2) that the conduct or words upon which her claim of sexual harassment is predicated were unwelcome; (3) that the conduct or words were prompted simply because of her gender; (4) that the conduct or words created a hostile work environment which affected a term, condition or privilege of her employment; and (5) that the defendant is liable for such conduct" (*Kazimierski v New York University*, 11 Misc 3d 1087, 819 NYS2d 848 [Supreme Court New York County 2006] *citing Samide v Roman Catholic Diocese of Brooklyn*, 194 Misc 2d 561, 754 NYS2d 164 [Supreme Court Queens County 2003]). The complaint must allege conduct severe or pervasive enough to create a work environment that a reasonable person would find hostile or abusive, and it must allege that the victim subjectively perceived the environment to be hostile (*Kazimierski v New York University*, 11 Misc 3d 1087, *supra*). It must either indicate that a "single incident was extraordinarily severe," or that a series of incidents were "sufficiently continuous and concerted" to have altered the conditions of her working environment. Generally, the harassing conduct must be sufficiently "severe" or "pervasive" that it changes the condition of the plaintiff's employment and creates an abusive working environment *(Samide v Roman Catholic Diocese of Brooklyn*, 194 Misc 2d 561; *McGarvey v Foley, Hickey, Gilbert & O'Reilly*, 294 AD2d 226, 741 NYS2d 858 [1st Dept 2002] [plaintiff's allegations must portray the subject workplace as one "permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of [her] employment. . . .'"]).

Plaintiff alleges that Simpson made repeated sexual advances to plaintiff, related dreams explicit in nature that he had about plaintiff, made inappropriate, unlawful and unwelcome physical contact with plaintiff while at work, made sexually harassing comments to plaintiff about her appearance and physical features, and invited himself to plaintiff's apartment on *numerous occasions*

and made other inappropriate and unlawful lewd propositions to plaintiff. Plaintiff allegedly demanded that Simpson cease such activity to no avail, and advised Simpson that she was aware of his sexual comments and behavior toward other female colleagues. That plaintiff did not specifically allege that she was part of a protected class is not fatal, given that she, a woman, is clearly part of a protected group. And, assuming the allegations are true, it may be inferred from the factual allegations that Simpson's sexually charged comments were prompted because of her gender. At the pleading stage, it cannot be said that the repeated nature of unwelcomed sexual advances made by Simpson toward the plaintiff were not pervasive. However, whether Simpson's sexually based conduct was so "severe" or "pervasive" that it changed the condition of plaintiff's employment and created an abusive working environment is an issue to be fleshed out during discovery, and if appropriate, the subject of summary judgment motion practice.

Having sufficiently alleged claims for sexual harassment hostile work environment and *quid pro quo* discrimination, plaintiff's separate claim for sexual harassment is dismissed as academic (*see Mauro v Orville*, 9 AD2d 89, 697 NYS2d 704 [3d Dept 1999][a plaintiff seeking to recover for sexual harassment must proceed under one of two theories, *i.e.*, sexual harassment by reason of a hostile work environment or *quid pro quo* sexual harassment]; *Father Belle Community Center v New York State Div. of Human Rights on Complaint of King*, 221 AD2d 44, 642 NYS2d 739 [4th Dept 1996 [same]; *Samide v Roman Catholic Diocese of Brooklyn*, 194 Misc 2d 561, *supra* [a claim of sexual harassment may be brought under two theories: (1) hostile work environment discrimination and (2) *quid pro quo* discrimination in violation of the New York State Human Rights Law, Executive Law § 296]; *Zveiter v Brazilian Nat'l Superintendency of Merchant Marine,* 833 F Supp 1089 [SDNY 993][sexual harassment claims are of two types: hostile work environment which

concerns sexually offensive conduct creating a pervasive hostile environment for workers, and *quid pro quo* harassment where an employer alters an employee's work conditions or withholds an economic benefit due to the employee's refusal to accede to sexual demands]).

Accordingly, the third cause of action is dismissed.

Declaratory Judgment (Fifth Cause of Action)

CPLR 3001 provides:

> The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. . . .

A declaratory judgment action is generally appropriate only where a conventional form of remedy is not available (*Bartley v Walentas*, 78 AD2d 310, 434 NYS2d 379 [1st Dept 1980]). Where alternative conventional forms of remedy are available, such as an action at law for damages, resort to a formal action for declaratory relief is generally unnecessary and should not be encouraged *(Elkort v 490 West End Ave. Co.*, 38 AD2d 1, 4).

Apart from her claim for moneys due on the various loans plaintiff alleges she made to defendants, plaintiff also seeks a declaration directing defendants to issue to plaintiff title to 50% of the assets owned by Snap and certificates evidencing a 50% membership interest in Snap. Plaintiff's claim for 50% of the assets and corresponding certificates stems from the purported Agreement between the parties. A direction by the Court to issue to plaintiff title to 50% of the assets owned by Snap and certificates evidencing a 50% membership interest in Snap requires an initial determination of the rights of the parties under the purported Agreement. Thus, contrary to defendant's contention, any order by the Court directing an issuance of certificates is not tantamount to money damages, so as to render declaratory relief inappropriate. Nor is a declaratory judgment

action for the issuance of shares uncommon (*see Sands Bros. & Co., Ltd. v Generex Pharmaceuticals, Inc.*, 279 AD2d 377, 720 NYS2d 450 [1st Dept 2001]; *Brola Holding Corp. v Wallkill Farms Homeowners Ass'n, Inc.*, 151 AD2d 539, 543 NYS2d 915 [2d Dept 1989]; *Hillary Holding Corp. v Brooklyn Jockey Club*, 273 AD 538, 78 NYS2d 151 [1st Dept 1948]). Therefore, the branch of defendant's motion to dismiss the declaratory judgment claim on the ground that declaratory relief is unnecessary is denied.

Breach of Fiduciary Duty and Accounting (Sixth Cause of Action)

Plaintiff's breach of fiduciary duty claim is based on defendant Simpson's alleged failure to share the profits of Snap, refusal to pay the credit card charges, loans, and salary, and by reaping the benefits of plaintiff's skill and acumen and client relationships for Simpson's personal benefit, and failing to render a full accounting as demanded by plaintiff. Plaintiff's sixth cause of action also seeks an accounting from defendants of all of Snap's business transactions.

Contrary to defendants' contention, as alleged partners in Snap, plaintiff and defendant owed each other a fiduciary duty and a duty of loyalty and good faith (*see Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180, 710 NYS2d 578 [1st Dept 2000]; *see generally, Prohealth Care Associates, LLP. v April*, 4 Misc 3d 1017, 798 NYS2d 347 [Supreme Court New York County 2004] [stating that partner of doctors in a limited liability partnership engaged in providing medical care and services owe each other and the partnership a fiduciary duty and a duty of loyalty and good faith]). It has been stated that:

> The acts of loaning money, working in concert, and managing an LLC, all in relation to another member of a two member LLC, arguably give rise to a relationship analogous to the embarkation on a joint venture or partnership. . . ."(P)artners in joint ventures, *however constituted* (emphasis added), owe one another a fiduciary duty of loyalty. The duty includes an obligation not to favor one's own interests over those of the joint venture, to unfairly

> manipulate or control corporate processes to retain control or to appropriate for oneself an opportunity that belongs to the joint venture. A partner has a fiduciary obligation to other partners in the organization and owes a duty of individual and undiluted loyalty to those whose interests the fiduciary is to protect ··· This is an inflexible rule of fidelity which bars not only blatant self-dealing but also requires avoidance of situations in which a fiduciary's personal interest might possibly conflict with the interests of those to whom the fiduciary owes a duty of loyalty ··· (citations omitted).
> (*Zulawski v Taylor*, 11 Misc 3d 1058, 815 NYS2d 496 [Supreme Court Erie County 2005]).

Defendants' reliance on *DDCLAB, Ltd. v E. I. DuPont De Nemours and Co.* 2005 WL 425495 [SDNY 2005] [a special or fiduciary duty is not imposed upon DuPont as a result of it becoming a minority shareholder in DDCLAB by virtue of the Investment Agreement]) is misplaced. In the instant matter, the relationship between plaintiff and defendants cannot merely be described as one between co-shareholders in Snap, or as that of an employer and employee as defendants suggest. The amended complaint and the submissions indicate that the relationship between the plaintiff and defendant is one between joint partners or joint venturers of Snap. Thus, it cannot be said that there is no fiduciary relationship between the plaintiff and defendants, so as to warrant dismissal of the breach of fiduciary claim. Accordingly, the branch of defendants' motion to dismiss the sixth cause of action is denied.

Fraud (Seventh Cause of Action)

To state a claim for fraud, plaintiff must allege that defendants fraudulently made a misrepresentation of fact, opinion, intention, or law for the purpose of inducing the plaintiff to act or refrain from action in reliance thereon in a business transaction, that their reliance was justifiable upon the misrepresentation, and injury (*see Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403 [1958] citing REST TORT § 525; *see also Shea v Hambros PLC*, 244 AD2d 39 [1st Dept 1998] [finding that a material omission can satisfy the misrepresentation element for a fraudulent

inducement claim]). Further, pursuant to CPLR § 3016 [b], a claim based on fraud must clearly inform the defendant of the circumstances constituting the alleged fraud (*see Big Apple Car, Inc. v City of New York*, 204 AD2d 109 [1st Dept 1994]; *see generally Ghandour v Shearson Lehman Bros. Inc.*, 213 AD2d 304 [1st Dept 1995]). Though plaintiff need not specify the exact date, time or the precise contents of Simpson's misrepresentations, nor indicate how she came to rely on Simpson's statements to allege a claim for fraud (*see Kaufman v Cohen*, 307 AD2d 113, 760 NYS2d 157 [1st Dept 2003]), plaintiff need provide "sufficient detail to inform defendants of the substance of the claims" (*id., citing Bernstein v Kelso & Co.*, 231 AD2d 314, 320, 659 NYS2d 276 [1st Dept 1997]).

A plaintiff may assert fraud and breach of contract claims in the same complaint so long as the fraud is not simply a misrepresentation of the promise to perform in the future (*J.A.O. Acquisition Corp. v Stavitsky*, 192 Misc 2d 7, 745 NYS2d 634 [Supreme Court New York County 2001, *citing First Bank of the Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 690 NYS2d 17 [1st Dept 1999]). As defendants maintain, a breach of contract claim does not give rise to a separate cause of action in tort unless the plaintiff pleads a breach of duty separate from, or in addition to, a breach of contract (*Clark-Fitzpatrick v Long Island Rail Road Co.*, 70 NY2d 382 [1987]). For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim *(J.A.O. Acquisition Corp. v Stavitsky*, 192 Misc 2d 7, *supra citing First Bank of the Americas, supra*). Thus, a fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, *i.e.*, when the only fraud alleged is that the defendant was not sincere when it promised to perform under the

contract. Here, plaintiff's allegations that defendant made false statements to plaintiff to induce her to loan funds, extend credit, continue her employment, and made false statements regarding her compensation, the status of the organization of Snap, and the issuance of membership interests are redundant of plaintiff's breach of contract claim. Similarly, plaintiff's claim that Simpson made false statements to plaintiff and failed to disclose the material facts that Simpson caused Snap to pay extensive personal expenses and debts of Simpson including personal credit card bills, debts, and taxes is insufficiently vague and lacks specificity to support a fraud claim.

However, with respect to plaintiff's fraud claim arising from her purchase of the Land Rover, plaintiff alleges that Simpson made false statements to plaintiff regarding her purchase of the 1998 Land Rover, in that defendant misrepresented that he would use plaintiff's credit card to purchase said vehicle and deliver same to plaintiff. Based on this misrepresentation, plaintiff caused $11,000 to be charged against her credit card, and Simpson knew that his representations were false, and would induce payment by plaintiff. Such claims sufficiently specify and detail the nature of the alleged fraud, and pleads a breach of duty separate from plaintiff's breach of contract claim.

Similarly, plaintiff's fraud claim arising from Simpson's purported false statements regarding the ownership of a valuable location library used by Snap is sufficiently detailed and pleads a breach of duty separate from plaintiff's breach of contract claim. Plaintiff asserts that the location library had been misappropriated by Simpson from his previous employer, and caused Snap to incur substantial legal expenses. Plaintiff also alleges that Simpson misrepresented the terms of the acquisition by Snap of a London-based production company, in order to induce plaintiff to loan money and extend credit to, and continue employment with Snap. As such allegations are sufficient to state a claim for fraud, the branch of defendants' motion to dismiss the seventh cause of action

for fraud is denied.

Malicious Prosecution (Eighth Cause of Action)

To state a claim for malicious prosecution, plaintiff must allege (1) the commencement or continuation of a ··· proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the [plaintiff], (3) the absence of probable cause for the ··· proceeding and (4) actual malice" (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 797 NYS2d 83 [1st Dept 2005] *citing Broughton v State of New York*, 37 NY2d 451, 457, 373 NYS2d 87 [1975], cert. denied sub nom. *Schanbarger v Kellogg*, 423 US 929, 96 SCt 277 [1975]). An action brought with actual malice is one brought with "conscious falsity" (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, *supra*). Furthermore, plaintiff must allege that the underlying action was filed with "a purpose other than the adjudication of a claim," and that there was "an entire lack of probable cause in the prior proceeding" (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, *supra*). A plaintiff must also allege (and prove) "special injury" (*Id. citing Engel v CBS, Inc.*, 93 NY2d 195, 201, 689 NYS2d 411 [1999]).

In support of her malicious prosecution claim, plaintiff alleges that defendants filed and prosecuted a false criminal complaint that plaintiff was driving a stolen vehicle and caused plaintiff to be arrested and incarcerated by the New York City police, with full knowledge that plaintiff purchased said vehicle. Plaintiff also alleges that Simpson caused title to this vehicle to be transferred to himself and has refused to transfer title to plaintiff. Plaintiff has also submitted an American Express statement issued in her name for a purchase amount of $11,000, an invoice billed by Snap to plaintiff for the "purchase of Land Rover Discovery . . . . and "charged to AMEX card" for the amount of $11,000. That Simpson denies signing the letter dated January 5, 2005 for the

terms of sale of the Land Rover does not overcome the showing that the amended complaint sufficiently states a claim for malicious prosecution. Further, plaintiff's submission of the certificate of disposition, which indicates that the arraignment charge under CPL 165.45 (criminal possession of stolen property in the fourth degree) was "dismissed and sealed" is sufficient to overcome defendants' claim that the amended complaint fails to allege that the proceeding was terminated in her favor. Therefore, the branch of defendants' motion to dismiss the malicious prosecution claim is denied.

Conversion (Ninth Cause of Action)

Conversion is established when "one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner (*Republic of Haiti v Duvalier*, 211 AD2d 379, 626 NYS2d 472 [1st Dept 1995]). Thus, in order to state a cause of action, a plaintiff must establish legal ownership or the right to possession of a specific identifiable piece of property and the defendant's exercise or interference with the property in defiance of the plaintiff's rights (*see Imprimis Investors LLC v Insight Venture Management, Inc.*, 300 AD2d 109, 752 NYS2d 26 [1st Dept 2002]; *Ahles v Aztec Enterprises, Inc.*, 120 AD2d 903, 502 NYS2d 821 [3d Dept 1986]).

Plaintiff has alleged that she purchased the Land Rover on January 6, 2005 and that defendants have failed to deliver title to the vehicle and that defendants have converted the Land Rover to their benefit and to the detriment of plaintiff, in the amount of approximately $11,000. The amended complaint sufficiently states a claim for conversion. Although plaintiff did not expressly allege that she "owns" the Land Rover, the submissions support plaintiff's assertion that she purchased this vehicle from defendants with her American Express charge card in the amount of

$11,000, and is arguably the owner of the vehicle or has the right to possess such vehicle and its title. Thus, there are sufficient allegations to support a claim for conversion, and defendants' motion to dismiss plaintiff's conversion claim is denied.

Imposition of Constructive Trust (Tenth Cause of Action)

Based on the alleged acts of defendants, and to prevent the unjust enrichment of defendants, plaintiff also seeks a constructive trust and equitable lien over defendants' property interests, including Simpson's shares of stock in Snap, the assets and profits of Snap, the Land Rover, and such other property that plaintiff and defendants have obtained together during this partnership, and the reallocation of such property between the parties.

To seek the imposition of a constructive trust, plaintiff must allege: (1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment (*Panetta v Kelly*, 17 AD3d 163, 792 NYS2d 455 [1st Dept 2005], *citing Crown Realty Co. v Crown Heights Jewish Community Council*, 175 AD2d 151, 572 NYS2d 38 [1991]). As alleged by plaintiff, Simpson, as a member of a joint venture, owes a fiduciary duty to plaintiff, which includes the duty of undivided loyalty (*see Madison Hudson Associates, LLC v Neumann*, 8 Misc 3d 1025, 806 NYS2d 445 [Supreme Court New York County 2005]; *see also Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc. v Holiday Organization, Inc.*, 12 Misc 3d 1182 [2006], *citing Clark v Daby,* 300 AD2d 732, 751 NYS2d 622 [3d Dept 2002] and *Kagan v K-Tel Entertainment, Inc.*, 172 AD2d 375, 568 NYS2d 756 [1s t Dept 1991]; *Clark v Daby, supra; Prestige Caterers v Kaufman,* 290 AD2d 295, 736 NYS2d 335 [1st Dept 2002]).

The amended complaint alleges various promises made by said defendants, and the acts undertaken by plaintiff in reliance thereon. Further, the amended complaint alleges a claim for

unjust enrichment, as it is claimed that plaintiff performed services for, and at the bequest of the defendants, which resulted in the defendants being unjustly enriched by retaining profits due to plaintiff as well as assets, including the Land Rover.

Defendants' reliance on *Modica v Modica* (15 AD3d 635, 791 NYS2d 134 [2d Dept 2005]) is misplaced. In *Modica*, the trial Court granted judgment dismissing the constructive trust claim, as a matter of law, after a *nonjury trial*. Without setting forth a description of the evidence presented at trial, the Second Department determined, in conclusory fashion, that there was no "evidence establishing that there was a promise, a transfer in reliance, or unjust enrichment." Thus, *Modica* fails to offer this Court any guidance as to the factual assertions necessary to sustain a constructive trust claim. Moreover, since the sufficiency of the amended complaint is at issue herein, plaintiff need not present any evidence to defeat defendants' motion, which is not one brought pursuant to CPLR 3212, but is one brought under CPLR 3211(a)(7).

Therefore, the branch of defendant's motion to dismiss plaintiff's claim for the imposition of a constructive trust is denied.

Plaintiffs' Cross-Motion for Summary Judgment

CPLR 3212 (a) provides that "Any party may move for summary judgment in any action, after issue has been joined . . . ." Thus, in the absence of joinder, a motion court lacks the power to grant summary judgment under CPLR 3212 (*Weinstock v Handler*, 254 AD2d 165, 679 NYS2d 48 [1st Dept 1998] *citing Republic Nat. Bank of New York v Winston, Inc.*, 107 AD2d 581, 582, 483 NYS2d 311; *accord, State Univ. Constr. Fund v Aetna Cas. & Sur. Co.*, 169 AD2d 52, 55, 571 NYS2d 135 [since issue not joined as to cause of action asserted in amended complaint, court was "powerless to grant summary judgment"]; *Grinblat v Taubenblat*, 107 AD2d 735, 736, 484 NYS2d

96 [court "improperly entertained plaintiff's motion for summary judgment prior to joinder of issue"]). The Court of Appeals has held that where issue is yet joined, the requirement prescribed in CPLR 3212(a) must be "strictly adhered to" (*Weinstock v Handler*, 254 AD2d 165 *citing City of Rochester v Chiarella,* 65 NY2d 92, 101, 490 NYS2d 174).

Given that summary judgment is sought on causes of action for which an amended answer has not been filed and served, this Court is obliged to decline to entertain plaintiff's cross- motion for summary judgment (*see Weinstock v Handler*, 254 AD2d 165, *citing Cox v J.D. Realty Assocs.*, 217 AD2d 179, 184, 637 NYS2d 27 and *Valentine Transit v Kernizan,* 191 AD2d 159, 161, 594 NYS2d 180).

While, CPLR 3211(c) provides that "[w]hether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment," the Court declines to furnish the parties with such notice, given that discovery, including depositions of the parties, is necessary to address the issues raised on summary judgment.

Therefore, plaintiff's cross-motion for summary judgment is denied, without prejudice to renew upon the completion of discovery.

Based on the foregoing, it is hereby

ORDERED that defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the amended complaint for failure to state a cause of action (CPLR 3211[a][7]), is denied, except that the plaintiff's third cause of action for sexual harassment is dismissed as academic; and it is further

ORDERED that plaintiff's motion for summary judgment on the issue of liability is denied, as premature, without prejudice to renew at the close of discovery; and it is further

ORDERED that the parties shall appear for a preliminary conference on December 19, 2006, 2:15 p.m.; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: November 9, 2007

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD