

**Foster v Kovner**

2006 NY Slip Op 30201(U)

October 3, 2006

Supreme Court, New York County

Docket Number: 0601349/2006

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03  
Justice

-----X  
RICHARD N. FOSTER,  
Plaintiff,

-against-

BRUCE KOVNER, ROBERT WILSON, CAXTON  
HEALTH HOLDINGS, LLC and CAXTON  
ASSOCIATES, INC.,  
Defendants.

INDEX NO 601349/2006  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits \_\_\_\_\_  
Answering Affidavits -- Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

**FILED**

OCT 06 2006

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: October 03, 2006

\_\_\_\_\_  
KARLA MOSKOWITZ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

-----X

RICHARD N. FOSTER,

Plaintiff,

Index No. 601349/2006

-against-

BRUCE KOVNER, ROBERT WILSON, CAXTON  
HEALTH HOLDINGS, LLC and CAXTON ASSOCIATES,  
INC.,

**DECISION AND ORDER**

Defendants.

-----X

**KARLA MOSKOWITZ, J.:**

Plaintiff Richard N. Foster (“Foster”) sues defendants for the benefits of his contributions and efforts in helping defendants create defendant company Caxton Health Holdings, LLC (“CHH”). Specifically, Foster sues defendants Bruce Kovner (“Kovner”), Robert Wilson (“Wilson”), CHH and Caxton Associates, Inc. (“Caxton”) for breach of contract, unjust enrichment, promissory estoppel, breach of fiduciary duty, tortious interference with prospective business relations and tortious interference with contractual relations.

By this motion (sequence number 001), defendants move to dismiss the complaint pursuant to CPLR 3211(a)(1), (5) and (7) on the grounds that documentary evidence contradicts plaintiff’s claims, the Statute of Frauds bars plaintiff’s contract claims and the complaint fails to state a cause of action.

**FACTS**

The court derives the following facts from the complaint and other documents that the parties submitted on this motion.

Plaintiff Foster is a business consultant and advisor who specializes in healthcare and private equity consulting. Prior to his involvement with CHH, Foster was a Senior Partner and

Director at McKinsey & Company (“McKinsey”), where he worked for thirty years. Defendant Caxton is in the business of managing investment hedge funds. CHH manages a new group of investment funds focused on the healthcare sector and is an “autonomous part of the Caxton family of funds.” (Complaint, ¶¶ 3, 11). Defendants Kovner and Wilson are principals of CHH. Kovner is also the founder and chairman of Caxton and Wilson is also the chairman of CHH.

Foster is also a founding investor of Synta, another company, not a party to this action. Foster invested in Synta through Mountain Trail Investment Co., (“Mountain Trail”) a company that Foster co-founded. Foster was an original member of Synta’s Board of Directors. It is unclear from the papers how long Foster was a board member, but eventually “Foster resigned . . . although he remained an investor and continued to participate in board meetings.” (Complaint, ¶ 27). Kovner and Caxton were also investors in Synta. Foster became acquainted with Kovner through their activities at Synta, where Kovner was a member of the Board of Directors as well.

Foster claims that, in 2003 he “conceived of an investment structure to capitalize on the expanding healthcare opportunities” and that he shared his ideas with Kovner who later proposed that Foster and Kovner jointly implement Foster’s ideas. (Complaint, ¶ 3). Foster claims that on January 6, 2004, Kovner invited Foster to his office and told Foster that Kovner’s company, Caxton, would be interested in Foster’s “healthcare investment enterprise.” (Complaint, ¶ 30). Later during that meeting, Foster claims that Foster and Kovner began to lay out a structure for the venture. They agreed that the “venture would manage an initial four funds: a hedge fund, a long-only fund, a private equity fund and a venture capital fund.” (Complaint, ¶ 31).

Foster also alleges that he and Kovner thought it would be useful to find a third person to help start up the venture. Foster suggested that they bring Wilson on board, a recently retired

\* 4 ]

Vice Chairman of Johnson & Johnson. Foster subsequently brought Wilson into the planning and “the three collaborated in the establishment of CHH, a new group of funds.” (Complaint, ¶ 3). Foster alleges that “Foster, Wilson and Kovner, the latter acting on his own personal behalf and on behalf of Caxton Associates, LLC . . . agreed that Foster and Wilson would be co-equal in the new enterprise, sharing responsibility for all major decisions at CHH. They also agreed that Foster and Wilson would be compensated equally.” (Complaint, ¶ 4).

Foster, Kovner and Wilson “expected that CHH would take at least two to three years to get off the ground.” (Complaint, ¶ 35). They estimated that after the first few years, the CHH funds would return approximately 20% per year. According to Foster, Kovner’s responsibilities were to include setting general risk parameters to guide CHH investment strategy, while Foster and Wilson were to have discretion over CHH’s daily operations. Foster agreed to assume major responsibilities in the development of CHH including establishing CHH’s offices, developing the infrastructure and facilities of CHH, recruiting CHH’s key employees and leading CHH in its efforts to raise \$1 billion in investment funds.

As to compensation, Foster claims that he, Kovner and Wilson met on March 11, 2004 and agreed that each would hold the same 10% equity interest in CHH and receive the same annual compensation of \$1,000,000. Kovner allegedly promised to write a letter describing the terms of compensation for Wilson and Foster. Kovner never created any formal agreement despite continued assurances that a formal written document “embodying the terms of his compensation would be forthcoming.” (Complaint, ¶ 6).

Although the parties did not enter into any formal written agreements outlining the alleged joint venture or the terms of compensation, Caxton sent Foster a letter on March 18, 2004

[\* 5 ]  
("March 18th Letter") that provided,

Dear Dick:

We are extremely pleased with the progress we are making in the Caxton Health Holdings project. While there are numerous, substantive issues remaining to be resolved, we would like to confirm our agreement concerning the following:

1. At commencement on April 19, 2004, you will assume the position of Chief Executive Officer of Caxton Health Holdings LLC ("CHH"). . .
4. We agree that the full details of your compensation (including terms for continuation, expansion and termination of employment) need to be worked out and will depend on multiple factors. We agree that your initial compensation by CHH will include a base salary of \$500,000 per annum and a draw of \$500,000. The draw will be netted against any other compensation (other than the base salary) you may earn. The base salary and draw will be payable concurrently on a semi-monthly basis, with the initial aggregate gross (i.e. pretax) payment of \$38,461.54 payable on or about April 30, 2004.

We remain very enthusiastic about the potential for this project . . .

(Notice of Motion, Exh. A). Foster does not claim that this letter constituted any sort of formal written agreement between the parties.

According to Foster, at the meeting on March 11, 2004, Kovner asked Foster to start working on CHH immediately. Although Foster had promised McKinsey that he would stay through the end of the year, Foster asserts that "in reliance on Kovner's promises and representations, Foster arranged to leave McKinsey nine months earlier, thereby forgoing a substantial salary and share of McKinsey profits." (Complaint, ¶ 41). Foster claims that immediately after leaving McKinsey he began to establish business relationships with key investors for CHH. Foster alleges he "personally brought in excess of \$350,000,000 from various investors including The Blackstone Group L.P., Societe Generale and Papamarkou Asset

Management, the U.S. arm of a group of wealthy European investors.” (Complaint, ¶ 49). Foster also contends that he raised an additional \$450,000,000 from existing Caxton clients, while Caxton provided \$200,000,000. Foster claims that due to his efforts, CHH achieved the target of raising \$1,000,000,000 by December 31, 2004.

Despite Kovner’s alleged promises that “documentation of the partnership agreement” was forthcoming, Kovner terminated Foster’s employment as CEO of CHH on July 29, 2005. (Complaint, ¶¶ 54, 59). Since Foster’s termination, Foster alleges defendants have denied him the promised equity interest and have discontinued the annual \$1 million payments.

Separate from his claims for compensation, Foster alleges that defendants interfered with his relationships at Synta. Foster claims that he was supposed to serve as an advisor to Synta’s Board of Directors and receive a yearly salary of \$40,000 for his role as advisor. Foster alleges that “counsel for Synta drafted an agreement providing for Foster’s appointment as an advisor representing Mountain Trail Investment Co.” and that “the draft agreement was sent to Caxton for approval.” (Complaint, ¶ 68). However, Foster contends Caxton held the agreement and refused to consent to Foster’s appointment as an advisor because Caxton felt Foster did not have sufficient time to serve as both an advisor at Synta and the CEO of CHH. According to Foster, after his termination on July 29, 2005, Foster attempted to exercise “the contractual right of Mountain Trail to nominate a director of Synta” and that Foster nominated himself. Thereafter, the founder and Chairman of Synta, Keith Gollust (“Gollust”) informed Foster that his nomination “would not be honored as long as Foster was ‘causing trouble’ and ‘being hard to get along with’ at Caxton.” (Complaint, ¶ 71). Mountain Trail eventually nominated another individual to serve on the Synta Board of Directors.

## DISCUSSION

On a motion to dismiss, a court will “accept as true the facts as alleged in the complaint, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]). The applicable standard in ruling on a motion to dismiss is “so liberal that the test is simply ‘whether the proponent of the pleading has a cause of action,’ not even ‘whether he has stated one.’” (*Wiener v Lazard Freres & Co.*, 672 NYS2d 8, 13 [1st Dept 1998] [citations omitted]).

### **I. First Cause of Action: Breach of Contract (Compensation Agreement)**

Foster alleges that he, Kovner, CHH and Caxton entered into an oral compensation agreement on March 11, 2004 for Foster’s compensation of “\$1,000,000 per year plus a 10% equity in CHH in consideration for his work as CEO of CHH.” (Complaint, ¶ 76). Foster claims defendants breached the terms of the contract by refusing to pay Foster the promised equity interest and “ceasing payment of the \$1,000,000 per year that was promised.” (Complaint, ¶ 79). Foster also argues that the Statute of Frauds is inapplicable because the measure of his promised compensation “was fixed and earned” during a one-year period and defendants’ obligation to continue making these payments does not bring the oral agreement within the one-year proscription of the Statute of Frauds. (*See Cron v Hargo Fabrics*, 91 NY2d 362 [1998]).

Defendants argue that the March 18th Letter is documentary evidence that proves there was no definitive agreement between the parties. In addition, defendants argue that, if the court determines there was an oral agreement, the alleged oral agreement was incapable of performance within one year and thus fails to satisfy the Statute of Frauds. Specifically, that

Foster seeks, “further annual payments indefinitely” and “assuming arguendo that such an oral agreement existed (and it did not), it is unenforceable under New York’s State of Frauds, because it patently could not be performed within one year of its making.” (Memorandum of Law in Support of Motion to Dismiss, pp. 10-11).

The elements of a breach of contract are the existence of a contract, plaintiff’s performance under the contract, defendants’ breach of that contract and resulting damages. (*See Furia v Furia*, 116 AD2d 694 [2d Dept 1986]; *Kaplan v Jones*, 2006 WL 1440874 [Sup Ct, NY County, April 18, 2006]). To assert a cause of action for breach of contract, a party must allege the breach of a specific contractual provision. (*Kraus v Visa Intl. Serv. Assn.*, 304 AD2d 408 [1st Dept 2003]).

Here, the March 18th Letter that provides, “we agree that the full details of your compensation . . . need to be worked out and will depend on multiple factors,” does not bar Foster’s breach of contract claim as a matter of law. An agreement may exist even where parties acknowledge that they intend to subsequently finalize the details of the agreement. (*See Richbell Info. Servs., Inc. v Jupiter Partners, LP*, 309 AD2d 288 [1st Dept 2003]).

In addition, accepting plaintiff’s allegations as true, Foster sufficiently alleges the existence of an oral agreement. Foster alleges that the parties entered into an oral agreement on March 11, 2004 and relies upon the specific provision in the oral agreement that provides his compensation would be “\$1,000,000 per year plus a 10% equity in CHH in consideration for his work as CEO of CHH.” (Complaint, ¶ 76). Foster alleges his performance under the agreement as well as Kovner, CHH and Caxton’s breach of the agreement “by refusing Mr. Foster his promised equity interest in CHH and ceasing payment of the \$1,000,000 per year that was

promised.” (Complaint, ¶¶ 78-79). Foster also alleges damages resulting from the breach “reflecting the value of his 10% share in [CHH] . . . and his \$1,000,000 annual payment.” (Complaint, ¶ 80).

Although the March 18th Letter defendants proffer does not preclude Foster’s breach of contract claim, the court must turn to whether the alleged oral agreement satisfies the Statute of Frauds. General Obligations Law, § 5-701(a)(1) provides:

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged . . . if such agreement, promise or undertaking . . . [b]y its terms is not to be performed within one year from the making thereof . . .

(NY Gen Oblig Law § 5-701[a][1]). Thus, a promise or agreement for compensation that cannot be performed within one year must be memorialized in writing and signed by the party to be charged. Nothing short of full performance by both parties will take an oral contract out of the Statute of Frauds and “both parties must be able to complete their performance of the contract within one year.” (*Sheehy v Clifford Chance Rogers & Wells LLP*, 3 NY3d 554 [2004]).

Here, the alleged oral agreement for compensation falls within the Statute of Frauds because full performance of its terms is not capable within a one-year period. Although Foster argues that his measure of compensation was fixed and therefore, defendants’ obligation of payment was capable of performance within one year, Foster admits that defendants would have to continue annual compensation payments to Foster for the duration of the joint venture, that has already exceeded one year. (*See* Transcript of Oral Argument, pp. 16-17). Therefore, pursuant to the oral agreement, the compensation that Foster seeks from defendants requires defendants to continue performance for a period exceeding one year and Foster’s allegation of unilateral

performance does not take the agreement out of the Statute of Frauds.

Defendants' reliance on *Cron* is misplaced because *Cron* involved an at-will employment agreement with a one-time payment of a bonus that could not be calculated until after the passage of a year. (*See* 91 NY2d 362). Here, Foster alleges that the oral agreement requires defendants to pay Foster an annual compensation of \$1,000,000 for as long as the fund continued to exist. Thus, defendants would have an ongoing obligation to pay Foster that they cannot terminate. (*Cf. Grossberg v Double H. Licensing Corp.*, 86 AD2d 565 [1st Dept 1982]).

Although Foster alleges that the 10% equity in CHH became due during the one year that he allegedly performed under the oral agreement, as discussed more completely below, Foster's performance under the terms of the alleged joint venture agreement was to exceed a one-year period. Therefore, the alleged oral agreement for 10% equity in exchange for Foster's contribution of "business concepts," "labor," "personal services" and "managing the day-to-day operations of CHH," was not capable of being performed within one year. (*See* Complaint ¶¶ 5, 7, 85).

Accordingly, the court grants that part of defendants' motion to dismiss the first cause of action.

## **II. Second Cause of Action: Breach of Contract (Joint Venture or Partnership Agreement)**

To support this cause of action, Foster claims that he and Caxton, Kovner and Wilson "agreed to be associated in a joint venture or partnership to found CHH" and that "the parties' subsequent actions in planning the venture and running it together show their continued intent to act as joint venturers." (Complaint, ¶ 84). Foster contends that he performed his duties under the alleged agreement and that Caxton, Kovner and Wilson "materially breached the express terms of

this contract and its implied obligation of good faith and fair dealing by refusing Mr. Foster his equity interest in the joint venture and ceasing payment of the promised \$1,000,000 per year.” (Complaint, ¶ 89). Defendants argue the March 18th Letter is documentary evidence that proves there was no definitive agreement between the parties and the Statute of Frauds precludes this claim.

As discussed previously, the March 18th Letter does not preclude a claim for breach of contract. However, while an oral agreement to create a joint venture may be sufficient, the agreement must satisfy the Statute of Frauds. (*See Rothfield v Clinger*, 91 AD2d 939 [1st Dept 1983]; *Sugar Creek Stores, Inc. v Pitts*, 198 AD2d 833 [4th Dept 1993]). “In determining whether an agreement can be fully performed within a year, courts must consider the duration of the entire agreement and not merely a single phase.” (*RTC Properties, Inc. v Bio Resources, Ltd.*, 295 AD2d 285 [1st Dept 2002] [citing *Durante Bros. Constr. Corp v College Point Sports Assn.*, 207 AD2d 379 [2d Dept 1994]).

While Foster argues that he performed his obligations under the joint venture agreement within one year (*see* Memorandum of Law in Opposition to Motion to Dismiss, p. 9), the complaint’s allegations support the inference that his obligations under the alleged joint venture agreement were to continue beyond a one year period. The complaint alleges that Foster and defendants discussed that “CHH would take at least two to three years to get off the ground” and that “during the first two years of this formative stage, the enterprise would not be expected to show a profit.” (Complaint, ¶ 35). Further, the complaint alleges that part of the agreement to enter into the joint venture included Foster’s promise to “assume major responsibilities critical to the development and eventual success of CHH, in addition to managing the day-to-day

operations of CHH.” (Complaint, ¶ 5). Foster continued to perform these duties, pursuant to the alleged oral joint venture agreement, beyond the first twelve months of CHH’s operation.

Therefore, the alleged joint venture agreement, by its terms, could not be performed within one year. Because the alleged joint venture agreement “was not to be performed within one year” it is thus barred by the Statute of Frauds. (*See e.g. Chow v Anew XCVIII, Inc.*, 30 AD3d 253 [1st Dept 2006]).

Accordingly, the court grants that part of defendants’ motion to dismiss the second cause of action.

### **III. Third Cause of Action: Unjust Enrichment**

Foster claims that defendants have been unjustly enriched by Foster’s contributions to CHH and the funds that Foster raised for CHH. Further, that “it is against equity and good conscience to permit CHH, Caxton and Mr. Kovner to retain that portion of the monies they owe to Mr. Foster in exchange for his original business ideas, work, labor, services and personal business contacts.” (Complaint, ¶ 96). Defendants argue that this cause of action is merely a restatement of Foster’s breach of contract causes of action and that Foster may not assert an unjust enrichment claim to circumvent the Statute of Frauds.

To support a cause of action for unjust enrichment, a plaintiff must plead that plaintiff conferred a benefit upon defendants and that defendants will obtain that benefit without adequately compensating plaintiff. Further, plaintiffs must plead that defendants have reaped the benefit, and equity and good conscience require restitution. (*Korff v Corbett*, 10 AD3d 248 [1st Dept 2005]). Although the Statute of Frauds is not always an automatic bar to a cause of action for unjust enrichment (*see RTC Properties, Inc. v Bio Resources, Ltd.*, 295 AD2d 285 [1st Dept

2002]), a plaintiff may not use unjust enrichment to circumvent the Statute of Frauds. (*See JE Capital Inc. v Karp Family Assoc.*, 285 AD2d 361 [1st Dcpt 2001]).

Under the first two causes of action for breach of contract, Foster seeks damages for defendants' alleged promises of \$1,000,000 per year and 10% equity interest. As discussed previously, those causes of action fail because they do not satisfy the Statute of Frauds. The specific allegations that underlie the breach of contract claims are that Foster contributed the original business concept, managed day-to-day operations, recruited employees, and provided business contacts. (*See* Complaint, ¶ 46). Foster contends he performed all those duties (Complaint, ¶¶ 78, 88), and he repeats these allegations for his unjust enrichment claim (Complaint, ¶ 93 [alleging the same contributions of "original business idea, work, labor, services and personal business contacts" that plaintiff did for the breach of contract claim]). Because these allegations could not support breach of contract claims, they cannot also serve as a basis for an unjust enrichment claim. Further, Foster admits that CHH paid him his compensation up until the date of termination on July 29, 2005. (Complaint ¶ 61). Therefore, defendants did adequately compensate plaintiff for the benefit he conferred, so plaintiff has no cause of action for unjust enrichment.

Foster also alleges that he is entitled to a percentage of the investment funds he raised. Foster alleges that "alternatively, Mr. Foster should be entitled to compensation for his role in raising the \$1,000,000,000, which would be between \$10,000,000 and \$20,000,000 under prevailing industry standards (1%-2% of the funds raised), plus a trailer of twenty-five 'basis points' on the value of the invested funds thereafter, likely to exceed \$2,500,000 per year." (Complaint, ¶ 98). This allegation is separate from those allegations that Foster asserts to

support his breach of contract claims. In *Andrews v. Cerberus Partners*, the court concluded that “any argument that plaintiff was entitled to a 15% equity interest as a result of the information he imparted to defendant concerning the business that it eventually purchased is barred by General Obligations Law §5-701 (a) (10). . . .” (*Andrews v Cerberus Partners*, 271 AD2d 348 [1st Dept 2000]; see also *Kuhl v Piatelli*, 31 AD3d 1038 [3d Dept 2006] [finding that, under General Obligations Law §5-701 (a) (1), plaintiffs’ claim that defendant orally agreed to pay plaintiffs a 10% interest in their new venture for preparation of a business plan and contacts with prospective investors fell under the Statute of Frauds]). Therefore, the Statute of Frauds does preclude this part of Foster’s claim for unjust enrichment.

Accordingly, the court grants defendants’ motion to dismiss the third cause of action.

The court must also determine whether Foster may maintain this cause of action against individual defendants Kovner and Wilson. Defendants contend that there are no allegations that Kovner or Wilson acted for his own personal benefit and that the allegations in the complaint are insufficient to warrant piercing of the corporate veil. Foster, however, specifically contends that Kovner acted in a personal capacity and is therefore liable. (Complaint, ¶ 9).

In order for a plaintiff to pierce the corporate veil to hold an individual member of a limited liability company personally liable, plaintiff must allege “that the [LLC] was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or iniquitous consequences.” (*Retropolis, Inc. v 14th Street Development LLC*, 17 AD3d 409 [1st Dept 2005] [citations omitted] [applying doctrine of piercing corporate veil to limited liability companies]). Plaintiff must plead that the individual defendant “disregard[ed] the corporate form” and “exercised such dominion and control over operations that the corporation became his alter ego, a vehicle for purely personal rather than corporate

ends.” (*Bonanni v Straight Arrow Publishers, Inc.*, 133 AD2d 585, 587 [1st Dept 1987]).

“To disregard the corporate form, it must be established not only that an individual controlled a corporation, but also that the corporation was used for the transaction of [a] shareholder's personal business.” (*Id.*).

Here, Foster fails to allege facts to support that either Kovner or Wilson acted outside the scope of their positions with Caxton or CHH. Plaintiff alleges only that Kovner “made representations and acted on his own personal behalf *and on behalf of Caxton*” and that “CHH is controlled and managed by Caxton, which is controlled by Kovner.” (Emphasis added) (Complaint, ¶¶ 4, 9, 75). However, these allegations are insufficient to support piercing the corporate veil. (*See e.g. Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103 [1st Dept 2002]). Plaintiff does not sufficiently allege either domination of the corporation or the wrongful consequences that result from the domination. In addition, because plaintiff does not sufficiently allege domination by the individual defendants, he does not indicate how they might have used the corporation for personal ends. Accordingly, the court grants that part of defendants' motion to dismiss the third cause of action against individual defendants Kovner and Wilson.

#### **IV. Fourth Cause of Action: Promissory Estoppel**

Foster claims that he relied upon Kovner's “clear and unambiguous promises that Mr. Foster would receive a 10% equity interest in CHH and annual payments of \$1,000,000” to his detriment and that he “forewent nine months of his salary and share of McKinseys' profits” when he went to work for CHH. Defendants assert that Foster cannot recast his failed breach of contract claims in the form of a claim for promissory estoppel. Defendants also argue that the March 18th Letter negates any reasonable reliance Foster claims to have placed on defendants'

promises because the letter explains there are substantive issues remaining to be resolved.

To support a claim of promissory estoppel, a plaintiff must allege, “a clear and unambiguous promise; a reasonable and foreseeable reliance by [plaintiff] to whom the promise is made; and an injury sustained by [plaintiff] by reason of his reliance.” (*Ripple’s of Clearview, Inc. v Le Havre Assocs.*, 88 AD2d 120, 122 [2d Dept 1982] [citations omitted]). “[T]he legal insufficiency of [a] breach of contract cause of action requires the dismissal of [a] promissory estoppel claim as well.” (*Prospect Street Ventures I, LLC v Eclipsys Solutions Corp.*, 2005 WL 3006036 [1st Dept 2005]).

Here, Foster alleges that “by refusing Mr. Foster his 10% equity interest in CHH and ceasing the payments of \$10,000,000 per year, Caxton and Mr. Kovner are breaching the promise to Mr. Foster’s detriment.” (Complaint, ¶ 107). However, as discussed previously, Foster’s first two causes of action for breach of contract fail to satisfy the Statute of Frauds. The allegation that Foster relied upon promises of continued compensation and equity interest cannot remedy the legally insufficient breach of contract claims. (*See e.g. Brown v Brown*, 12 AD3d 176 [1st Dept 2004]). In addition, a plaintiff’s claim of promissory estoppel will allow plaintiff to circumvent the Statute of Frauds but only if there is “infliction of unconscionable injury on plaintiff as a result of any reliance he placed on defendant’s alleged promises.” *Melwani v Jain*, 281 AD2d 276, 277 [1st Dept 2001]). Here, there are no allegations of “unconscionable injury” in the complaint; nor is the conduct that Foster complains of so egregious as to circumvent the Statute of Frauds. (*See e.g. Cunnison v Richardson Greenshields Securities, Inc.*, 107 AD2d 50 [1st Dept 1985] [change of job or missed opportunity based upon oral agreement insufficient to trigger promissory estoppel because legal harm not sufficiently egregious to defeat Statute of Frauds]).

Accordingly, the court grants that part of defendants' motion to dismiss the fourth cause of action. Because the court has dismissed this cause of action for other reasons, it need not address defendants' argument as to whether plaintiffs reasonably relied upon defendants' alleged promises.

#### **V. Fifth Cause of Action: Breach of Fiduciary Duty**

Foster claims that he "clearly pleads the existence of a joint venture or partnership relationship among the parties, pursuant to which the fiduciary duties to plaintiff arise as a matter of New York law." (Memorandum of Law in Opposition to Motion to Dismiss, pp. 15-16). Defendants argue that Foster does not allege any relationship between the parties other than an arm's length relationship and an arm's length relationship does not give rise to fiduciary duties. According to defendants, "as there is no enforceable agreement, any claim for breach of fiduciary duty allegedly arising out of any such agreement must be dismissed as well." (Memorandum of Law in Support of Motion to Dismiss, p. 20).

A breach of fiduciary duty claim requires the existence of a fiduciary or confidential relationship between the parties. (*See Tradewinds Financial Corp. v Resco Securities, Inc.*, 5 AD3d 229 [1st Dept 2004]). Ongoing conduct between parties may give rise to a fiduciary relationship that the courts recognize even in absence of a written agreement. (*Wiener v Lazard Freres & Co.*, 241 AD2d 114 [1st Dept 1998]). However, absent extraordinary circumstances, parties dealing at arm's length in a commercial transaction lack the requisite level of trust or confidence between them necessary to give rise to a fiduciary obligation. (*See Tradewinds*, 5 AD3d at 230; *WIT Holding Corp. v Klein*, 282 AD2d 527 [2d Dept 2001]). A court will dismiss as duplicative a cause of action for breach of fiduciary duty based entirely on allegations supporting a breach of contract claim, even if that claim is unenforceable. (*See LaSalle v Hotel*

*Lessee, Inc. v Marriott Services, Inc.*, 29 AD3d 464 [1st Dept 2006]; *William Kaufman Org., Ltd.*, 269 AD2d 171 [1st Dept 2000]).

Here, there is no relationship between Foster and Caxton, Wilson or Kovner that would give rise to a fiduciary duty. As discussed previously, although Foster attempts to plead a joint venture, Foster's claim for breach of the joint venture or partnership agreement fails to satisfy the Statute of Frauds. Because the complaint offers no other basis for a fiduciary relationship, other than the joint venture/partnership, it follows that there is no fiduciary relationship. Without a joint venture, the court is left with allegations of an arm's length business relationship only, that does not give rise to a fiduciary obligation.

Accordingly, the court grants that part of defendants' motion to dismiss the fifth cause of action.

#### **VI. Sixth Cause of Action: Tortious Interference with Prospective Business Relations**

To support this cause of action, Foster alleges that Caxton and Kovner tortiously interfered with prospective business advantage when they "caused Mr. Gollust to refuse to consent to Mr. Foster's appointment as an advisor" on the Synta Board. (Complaint, ¶ 116). Foster argues that Gollust's refusal to consent to his advisory position on the board resulted in Foster's loss of \$40,000 per year. Defendants argue that Foster fails to allege specific facts to support the inference that defendants engaged in any wrongful means necessary to support this cause of action and that Foster's allegations are too conclusory.

In order to plead tortious interference with prospective business relations, a plaintiff must allege that "defendant's conduct was motivated solely by malice or to inflict injury by unlawful means, beyond mere self-interest or other economic consideration." (*Shared Communications Services of ESR, Inc. v Goldman Sachs & Co.*, 23 AD3d 162, 163 [1st Dept 2005]). Although it

is permissible for a party to act in its own economic self interest, it may not behave in a way that amounts to more “culpable” conduct. For example, criminal or tortious conduct would obviously be wrong. (*Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]). The Appellate Division, First Department has interpreted “wrongful means” to include physical violence, fraud, misrepresentation, some degree of economic pressure or lawsuits. (*See e.g. Americanpara Professional Systems v Hooper Homes, Inc.*, 13 AD3d 167 [1st Dept 2004]).

Here, Foster fails to plead that defendants’ alleged interference “was motivated solely by malice” to prevent a third party from extending a contractual relationship to the plaintiff. Indeed, as defendants point out, Foster admits that Caxton claimed the reason it refused to consent to Foster’s appointment was because Caxton did not believe Foster would “have sufficient time to serve as both an advisor at Synta and the CEO of CHH. . . .” (Complaint, ¶ 68).

The complaint is also deficient of any allegations that defendants engaged in “wrongful means” and Foster does not provide any details that would give rise to an inference of physical violence, fraud, misrepresentation, some degree of economic pressure or lawsuits. Foster’s allegations that “Caxton and Mr. Kovner caused Mr. Gollust to refuse to consent to Mr. Foster’s appointment as an advisor” and that defendants “intended to cause the destruction of or harm to Mr. Foster’s relationship with Synta, for the improper purpose of coercing Mr. Foster to relinquish rights in connection with CHH” are insufficient to support a cause of action for tortious interference with prospective business relations. None of the allegations in the complaint indicate that defendants acted beyond mere self-interest or other economic considerations.

Accordingly, the court grants that part of defendants’ motion to dismiss the sixth cause of

action.

## VII. Seventh Cause of Action: Tortious Interference with Contractual Relations

To support this cause of action, Foster alleges that Caxton, Kovner and Wilson tortiously interfered with Foster's contractual relations with Synta. Foster argues that Mountain Trail had a "contractual right" to nominate a Synta director, but that Kovner, Caxton, CHH and Wilson caused the founder and chairman of Synta, Gollust, to deny Mountain Trail "and, thus, Mr. Foster the contractual right to nominate a director." (Complaint, ¶¶ 121 - 123). Defendants argue that Foster had no "contractual right" to nominate a Synta director and that the right belonged to Mountain Trail only. Therefore, Foster fails to plead a cause of action for tortious interference with contractual relations.

In order to state a cause of action for tortious interference with contractual relations, plaintiff must plead: (1) the existence of a valid contract between plaintiff and a third party; (2) defendants' knowledge of that contract; (3) defendants' intentional procurement of the third party's breach of contract without justification; (4) actual knowledge of the contract and (5) resulting damages. (*See Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413 [1996]).

Here, defendants are correct in their contention. Foster does not allege that he had a right to personally nominate a Synta director. Rather, Foster admits that the contractual right belonged to Mountain Trail. Foster attempts to argue that, because Foster was a partner in Mountain Trail, the contractual right belonged to him. However, Foster cannot assume for himself Mountain Trail's right to nominate a Synta director "and have that nomination given serious consideration" to himself. (*See* Complaint, ¶ 121). Even defendants' counsel admits that this cause of action may be "a stretch." (*See* Transcript of Oral Argument, dated July 20, 2006, pp. 23-24).

Accordingly, the court grants that part of defendants' motion to dismiss the seventh cause


of action.

Accordingly it is

ORDERED that the motion of defendants Bruce Kovner, Robert Wilson, Caxton Health Holdings, LLC and Caxton Associates, LLC to dismiss the action is granted; and it is further ORDERED, the Clerk is directed to enter judgment dismissing the complaint accordingly.

Dated: October 03, 2006

ENTER:



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J.S.C.

**FILED**

OCT 06 2006

NEW YORK  
CLERK OF COURT