Serko v Serko Simon Gluck & Kane LLP

2007 NY Slip Op 33995(U)

November 30, 2007

Supreme Court, New York County

Docket Number: 0601247/2007

Judge: Karla Moskowitz

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SCANNED ON 12/12/2007
[* 1]

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

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DAVID SERKO,

Plaintiff,

- v -

SERKO SIMON GLUCK & KANE LLP, f/k/a SERKO & SIMON LLP, JOEL K. SIMON, DANIEL J. GLUCK, and CHRISTOPHER M. KANE

Defendants.

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INDEX NO. 601247/2007

MOTION DATE ______

MOTION SEQ. NO. 001

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	

FILED
DEC 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is

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

Dated: November 30 2007

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

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

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DAVID SERKO,

Plaintiff, Index No. 601247/2007

- v -

SERKO SIMON GLUCK & KANE LLP, f/k/a SERKO & SIMON LLP, JOEL K. SIMON, DANIEL J. GLUCK, and CHRISTOPHER M. KANE

DECISION and ORDER

FILED
DEC 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

Defendants.

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MOSKOWITZ, J.:

This lawsuit arose from an agreement between the plaintiff, David Serko ("Serko"), and the defendants, Serko Simon Gluck & Kane LLP ("SSG&K" or "firm"), Joel K. Simon ("Simon"), Daniel J. Gluck ("Gluck") and Christopher M. Kane ("Kane"). Serko was a founding partner of SSG&K. The agreement in dispute provided that Serko would retire and receive certain payments from SSG&K.

Simon, Gluck and Kane moved (motion sequence 001) pursuant to CPLR 3211(a) (1) and (a) (7) to dismiss those portions of Serko's complaint against them as individuals, namely: (1) the third cause of action for breach of contract; (2) the fourth cause of action for an accounting; (3) the fifth cause of action for tortious interference with contract; (4) the sixth cause of action for injunctive relief and (5) the seventh cause of action for imposition of a constructive trust. At oral argument on September 6, 2007, the court granted defendants' motion to dismiss the fourth cause of action for an accounting against the individuals because plaintiff did not oppose dismissal of this claim. (*See* Tr. dated Sept. 6, 2007, at p. 12).

For the reasons discussed below, the court denies that part of defendants' motion to dismiss plaintiff's claims for breach of contract and grants that part of defendants' motion to dismiss plaintiff's claims for tortious interference with contract, injunctive relief to the extent it is against the individual defendants and imposition of a constructive trust to the extent it is against the individual defendants.

In addition, Serko moved pursuant to CPLR 3211 (a) (1) and (7) to dismiss the individual defendants' first and second counterclaims for fraud in the inducement and negligent misrepresentation. For the reasons discussed below, the court grants plaintiff's cross-motion to dismiss defendant SSG&K's first and second counterclaims.

FACTS and BACKGROUND

The court derives the following facts from the complaint.

In 1974, Serko and Simon founded the law firm that is now called SSG&K. (Complaint, ¶ 7). The partnership agreement between Serko and Simon ("Partnership Agreement") designated each as a "Variable Income Partner," entitling them to retire at 60 years of age and receive payments from the firm including, *inter alia*, 20 equal quarterly payments from the retiring partner's capital account, 120 equal monthly pension payments based on the retiring partner's prior income, a payment from in-progress contingency cases and payment of medical insurance for the retiring partner and his spouse for 10 years following retirement. (Complaint, ¶¶ 8, 9).

On September 13, 2001, Simon demanded that Serko retire, and the parties entered into an agreement regarding the retirement terms (the "Addendum") in February 2002. (Complaint, ¶ 10). Under the terms of the Addendum, Serko would assume the title "Of Counsel" and the firm

would pay Serko for this position regardless of whether he performed any work in this new capacity. (Complaint ¶ 11).

The Addendum provided that Serko would receive 20 equal quarterly payments of $11,039.78 from his capital account that contained $220,795.67. (Complaint ¶ 12). The calculation of the amount in Serko's capital account included an estimated $41,250.00 in "extra expenses" due the firm under its business interruption insurance.[1] (Complaint ¶ 12). Because this amount was only an estimate, the actual amount the firm would pay to Serko from his capital account was subject to an adjustment based on the actual payment from the insurance company for "extra expenses." (Complaint ¶ 12). In addition, the Addendum entitled Serko to $1,444,740.00 in pension payments; 33% of the amount the firm received as a "loss of income" payment from its business interruption insurance; up to 33%, based on a sliding scale, of contingency fees the firm collected on certain cases it was handling at that time; 50% of any recovery from the firm's then-pending litigation involving the 1993 World Trade Center bombing; 33% of any recovery for any future litigation involving the September 2001 attacks; 33% of any unused monies that the firm's casualty insurance paid it as "replacement value;" monthly payments of $4,166.67 for Serko's first three years as "Of Counsel" to the firm; $2,083.33 for the next two years that Serko is "Of Counsel" and payments for the cost of medical insurance for Serko and his wife. (Complaint ¶¶ 13-15).

In the Addendum, both the firm and the remaining partners agreed to make the financial

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[1] From 1978 until September 11, 2001, the firm maintained a principal place of business at One World Trade Center. The September 11th attacks on the World Trade Center interrupted the firm's business and triggered potential payments from the firm's business interruption insurance.

records of the firm available to Serko for purposes of verifying compliance with the payment terms. (Complaint ¶ 16). In addition, the remaining partners agreed to personal liability for the financial obligations described in the Addendum in the case of fraud or willful malfeasance. (Complaint ¶ 16). Gluck and Kane signed the Addendum in their personal capacities. Simon signed in both his personal capacity and as managing partner of the firm. (Complaint ¶ 16).

In February 2002, the firm made its first payment to Serko. (Complaint ¶ 17). On July 8, 2002, Serko received a letter from Simon stating that the firm was adjusting Serko's capital account balance as of December 31, 2001 from $220,795.67 to $189,585.00 because of a "recalculation" of the firm's accounts payable. (Complaint ¶ 18). On February 28, 2003, Simon again wrote to Serko to inform him that the firm adjusted its "work in progress" calculations from December 31, 2001 and thereby further decreased Serko's capital account balance by $49,062.50. (Complaint ¶ 19). In addition, the firm's recalculation of Serko's 2001 income resulted in a $37,264.00 reduction in Serko's pension payments. (Complaint ¶ 19). Serko contends that the Addendum does not authorize any of these adjustments. (Complaint ¶ 19).

From September 2004 to January 2005 and in September 2006, Serko demanded that the firm make payments to him. (Complaint ¶ 20). Aside from a partial payment in January 2007, the firm has not made any of Serko's pension payments or medical insurance payments from September 2006 to April 2007. (Complaint ¶ 20). Simon has given Serko elaborate excuses for not making payments pursuant to the Addendum, and Serko contends that during the time that Serko has not received payments, Simon, Gluck and Kane have received draws and distributions of partnership profits and the firm has hired additional personnel and sponsored a reception. (Complaint ¶ 21). Simon informed Serko that a reason for delaying or not making payments to

Serko is that Simon believes there cannot be personal liability against him or his partners for the amounts due to Serko. (Complaint ¶ 22).

On March 28, 2007, Serko's counsel wrote a letter to the firm demanding immediate payment of the amounts due to Serko and access to the firm's financial records to verify its compliance with the Addendum. (Complaint ¶ 23). Serko contends that the firm is neither willing to pay amounts due to him nor planning to make future payments to him pursuant to the Addendum. (Complaint ¶ 23).

In their answer, the defendant SSG&K counterclaimed for fraud in the inducement, negligent misrepresentation and breach of fiduciary duty. SSG&K seeks damages, rescission of the Addendum, a return of monies SSG&K paid to Serko under the Addendum, interest, costs and attorney's fees.

DISCUSSION

Third Cause of Action for Breach of Contract

The parties set down their agreement regarding the terms of Serko's retirement in the Addendum. The Addendum entitles Serko to certain payments. Section 5.3 of the Addendum expressly limits to circumstances of fraud or willful malfeasance the individual partners' liability for the Addendum obligations. Though the parties agree on this interpretation of Section 5.3, they dispute the meaning of "willful malfeasance" and the individual defendants' personal liability. As explained below, plaintiff has sufficiently alleged that the individual defendants have engaged in willful malfeasance.

A. Limited Liability Partnership

SSG&K is a limited liability partnership. Defendants argue that therefore the partners

cannot be individually liable.

1. Section 5.3 of the Addendum - The Limited Liability Clause

However, under Section 5.3 of the Addendum, the individual defendants can be liable under certain circumstances.

Section 5.3 of the Addendum states:

> [n]otwithstanding anything to the contrary contained in this Agreement, all obligations of the Firm to David Serko shall be the obligations solely of the Firm and no partner shall have any individual obligation or liability in respect thereof except in case of fraud or willful malfeasance.

Serko alleges that the individual defendants have triggered avoidance of Section 5.3's limitation on liability by engaging in willful malfeasance.

Under New York law, the term "willful malfeasance" covers a variety of conduct, including: (1) "acting solely in furtherance of [defendant's] own interests and in derogation of [defendant's] duty to [plaintiff] as a minority member of the LLC" (*Petrakis v Rose*, 12 Misc 3d 1194(A) *5 [Sup Ct, Nassau County 2006]); (2) violating a trust instrument and fiduciary obligations by "negligently and wastefully [managing]" trust assets (*Ross v Ross*, 108 NYS2d 674, 676 [Sup Ct, NY County 1951]; (3) performing duties with "a corrupt intent" (*In re Mann's Will*, 251 AD 739 [2d Dept 1937]); (4) imprudently executing a $150,000 unsecured contract with a buyer that already owed $250,000 to the company (*Brassco, Inc. v Klipo*, 2006 WL 223154 *14 [SD NY 2006]) and (5) self-interested counseling of a law firm client in order to generate legal fees for itself and failing to use reasonable care before making a recommendation to the client (*New York Cooling Towers, Inc. v Goidel and Borah Goldstein Altschuler Schwartz & Nahins, P.C.*, 10 Misc 3d 219, 221 [Sup Ct, Queens County 2005]).

[* 8]

Accepting plaintiff's allegations as true, plaintiff has sufficiently alleged that the individual defendants violated the terms of the Addendum by unilaterally reducing certain amounts due to plaintiff under the Addendum and refusing to make certain payments to plaintiff while still receiving draws and distributions of profits from the firm themselves. Plaintiff's allegations therefore set forth individual defendants' actions that suggest a promotion of self-interest that is in tune with the meaning of "willful malfeasance" under New York law and supports a claim for individual liability under the Addendum.

2. Partnership Registration

Plaintiff next argues that defendants should be individually liable because SSG&K's partnership registration lapsed, thereby relieving defendants of protection from the limited liability partnership. Section 121-1500 (g) and (h) of New York Partnership Law permit limited liability partnership status to take effect retroactively when registration lapses, however, so even if the firm's registration lapsed, the partnership status and its attendant protections were effective once the firm became current on its registration.

B. Defendants' Signatures on the Addendum

Defendants also argue that they are not individually liable under the Addendum because they did not sign it in their personal capacities. "'[W]here individual responsibility is demanded the nearly universal practice is that the officer signs twice–once as an officer and again as an individual." (*Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961]). "Although two signatures are not required in order to impose personal liability on the agent, the existence of only one signature weighs against imposition of personal liability. (*Integrated Mktg. & Promotional Solutions, Inc. v JEC Nutrition, LLC & Kelly Lockwood*, 2006 WL 3627753, *3

[SD NY 2006]). In addition, pre-printing of a signatory's title below the signature line of a contract is indicative of parties' intent not to impose personal liability. (*PNC Capital Recovery v Mech. Parking Sys., Inc.*, 283 AD2d 268, 270 [1st Dept 2001]).

On the signature page of the Addendum, defendant Simon signed twice: (1) on a signature line that has pre-printed below it the words, "Joel K. Simon" and (2) on a signature line that has preprinted before it the words, "Serko & Simon LLP[2] By" and below it the words, "Joel K. Simon, a General Partner." Simon's two signatures and the pre-printed text below his signature lines indicate Simon's intent to be individually liable. The other individual defendants, Gluck and Kane, each signed the Addendum once in the same section that Simon signed as "Joel K. Simon." Preprinted below their signature lines are the words "Daniel J. Gluck" and "Christopher M. Kane," respectively. Though Gluck and Kane only signed the Addendum once, the pre-printed text below their signature lines and the presence of their signatures in the same section that Simon signed as an individual suggest that both Gluck and Kane also intended to be individually liable. When viewed in conjunction with the Section 5.3 limitation of liability clause, the signatures of Simon, Gluck and Kane manifest an intent to assume personal liability.

The court therefore denies defendants' motion to dismiss plaintiff's claim for breach of contract against the individual defendants.

<u>Fifth Cause of Action for Tortious Interference with Contract</u>

The Addendum is between plaintiff, the firm and the individual defendants. This tortious interference claim is against the individual defendants only. Plaintiff alleges that the

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[2] Serko & Simon is now doing business as SSG&K.

individual defendants have tortiously interfered with the Addendum as between him and SSG&K by paying themselves draws and distributions out of SSG&K funds that SSG&K could have used to make payments to plaintiff pursuant to the Addendum. Defendants argue that plaintiff has failed to state a cause of action because: (1) plaintiff does not allege that there is a contract between plaintiff and a third party and (2) defendants' conduct was economically justified and plaintiff does not allege that defendants acted with malice or had an intent to harm plaintiff.

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]).

An action for tortious interference against parties who were signatories to a contract that "formed the basis for the interference claim," however, will not stand. (*Shea v Hambro Am. Inc.*, 200 AD2d 371, 371 [1st Dept 1994]); *see also MTI/Image Group, Inc. v Fox Studios, Inc.*, 262 AD2d 20, 23-24 [1st Dept 1999] [concluding it was error for lower court not to dismiss a claim for tortious interference where defendant companies were agents of the signatory to the contracts at issue]). "It is well established that only a stranger to a contract, such as a third party, can be liable for tortious interference with a contract." (*Koret, Inc. v. Christian Dior, S.A.*, 161 AD2d 156, 157 [1st Dept 1990]; *see also Leber Assocs., LLC v Entertainment Group Fund, Inc.*, 2003 WL 21750211 [SD NY 2003] ["[A]n aggrieved party in a breach-of-contract case may not always hold 'third parties' liable for tortious interference if

those 'third parties' actually have certain relationships with the breaching party (citations omitted).")).

In this case, the individual defendants are signatories to the Addendum, not third-party strangers. Indeed, Simon himself "played a role in negotiation of the . . . agreement and executed same." (*Koret, Inc.*, 161 AD2d at 157 [vacating an award to plaintiff against defendant for tortious interference because defendant, the corporate parent, was protecting its economic interests, as evinced by its involvement in negotiations]).

Responding to defendant's contention that the tortious interference claim fails because of the absence of a third party, plaintiff cites two New York cases that examined whether corporate officers should be liable for tortious interference with the corporation's contract with a third party because the corporate officers acted "with the motive for personal gain as distinguished from gain to their corporations." (*Potter v Minskoff*, 2 AD2d 513, 515 [4th Dept 1956] [concluding that the pleading did not sufficiently allege that the corporate officers acted for personal gain or induced a third party to breach its contract]; *see Hoag v Chancellor, Inc.*, 246 AD2d 224 [1st Dept 1998] [concluding that the complaint sufficiently alleged that the defendant corporate officers "act[ed] for [their] personal, rather than the corporate[,] interests"]). In particular, plaintiff attempts to align the circumstances here with those in *Hoag*. This case is distinguishable from *Hoag*, however, because the *Hoag* defendants were not signatories to the contracts at issue. (*See* 246 AD2d at 533 n. 1 [noting that the tortious interference claim against one of the defendants could only stand as to one of the contracts because defendant was a signatory on the other contract]). Here, the defendants are signatories to the Addendum. This cause of action therefore fails. Because the court dismisses this cause

of action for tortious interference with contract, the court does not reach defendants' argument that they had an economic justification for the interference.

Further, to allow a tortious interference claim against the individual defendants when the parties explicitly limited in the Addendum the individual defendants' personal liability to fraud or willful malfeasance would destroy the purpose of the limited liability clause. (*Cf. Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters, Corp.*, 296 AD2d 103, 109 [1st Dept 2002] [quoting *Matter of Brookside Mills (Raybrook Textile Corp.)*, 276 AD 357, 367 [1st Dept 1950] ["As a matter of public policy, '. . . [t]o hold otherwise would be dangerous doctrine, and would subject corporate officers and directors continually to liability on corporate contracts and go far toward undermining the limitation of liability which is one of the principal objects of corporations.'"]).

The court therefore grants defendant's motion to dismiss plaintiff's cause of action for tortious interference.

<u>Sixth Cause of Action for Injunctive Relief</u>

Plaintiff seeks an order enjoining individual defendants from taking future draws and distributions from SSG&K during any time when payments under the Addendum are due and owing. Plaintiff argues that the absence of such relief will prevent him from securing future payments due him under the Addendum. Defendants argue that plaintiff has failed to plead the necessary elements for a claim for injunctive relief because he has not pleaded that money damages would not fully compensate him for any harm.

"A preliminary injunction is an extraordinary remedy and should be granted only with great caution upon a showing that a clear right to such relief is appropriate." (*Glen Briar Co. v*

Silberman, 129 Misc 2d 439, 441 [Sup Ct, NY County 1985]). In order to plead properly a claim for injunctive relief, a party must "demonstrate: (1) a likelihood of success on the merits; (2) the prospect of irreparable harm if the preliminary injunction is withheld; and (3) a balance of equities tipping in its favor." (*Credit Index, L.L.C. v Riskwise Intl. L.L.C.*, 282 AD2d 246, 247 [1st Dept 2001]). "Damages compensable in money and capable of calculation, *albeit* with some difficulty, are not irreparable." (*SportsChannel Am. Assocs. v Natl. Hockey League*, 186 AD2d 417, 418 [emphasis in original] [1st Dept 1992]).

Here, plaintiff seeks an injunction in order to ensure that he receives future payments under the Addendum. Defendants' non-payment, however, will not result in irreparable harm to plaintiff. Any damages from non-payment would be compensable and the terms of the Addendum allow for easy calculation of these damages. The court therefore grants defendants' motion to dismiss this cause of action to the extent it is against the individual defendants.

<u>Seventh Cause of Action for Imposition of a Constructive Trust</u>

Plaintiff alleges that defendants are in possession of assets in which plaintiff has superior right, title and interest and that defendants came into possession of those assets by fraud, deceit and breach of trust. Plaintiff seeks imposition of a constructive trust over these assets and any profits that defendants earned while in possession of those assets. Defendants contend that plaintiff has not stated a cause of action for imposition of a constructive trust.

"In the development of the doctrine of constructive trust . . . , the following four requirements were posited: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment (citations omitted)." (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). In order to make a proper claim for a constructive trust, however, the

plaintiff must have an inadequate remedy at law. (*Evans v Winston & Strawn*, 303 AD2d 331, 333 [1st Dept 2003] ["Plaintiffs' claim for a constructive trust was properly dismissed since plaintiffs do not claim that [defendant] is unable to repay plaintiffs' capital contributions, and it does not otherwise appear that the legal remedy of damages will be inadequate (citations omitted)."]). "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter (citations omitted)." (*Clark-Fitzpatrick, Inc. v Long Island R,R, Co.*, 70 NY2d 382, 388 [1987]; *see Spanierman Gallery, PSP v Love*, 2003 WL 22480055, *4 [SD NY 2003] [construing New York law and dismissing "the constructive trust claims . . . because those claims are duplicative of the breach of contract claim"]).

In this case, plaintiff has an adequate remedy at law. The Addendum is an enforceable written agreement, and the issue of unpaid payments to plaintiff is a matter that stems from the Addendum. Plaintiff does not claim the defendants are unable to pay the monies owed to him, "and it does not otherwise appear that the legal remedy of damages will be inadequate (citations omitted)." (*Evans*, 303 AD2d at 333). Plaintiff therefore has not made a proper claim for a constructive trust, and the court grants defendant's motion to dismiss this cause of action.

Defendant SSG&K's Counterclaims for Fraud in the Inducement and Negligent Misrepresentation

I. Fraud in the Inducement

SSG&K alleges that Serko misrepresented his total net income for the years 1997-2001 in order to inflate the calculations under the Addendum and thereby secure higher payments to himself. (Answer, ¶¶ 72-75). SSG&K points to a discrepancy between the figures on Serko's

1997-2001 K-1s ("K-1 Figures") and the figures that the parties actually used to calculate Serko's pension payments under the Addendum ("Addendum Figures"), contending that these numbers should have been the same. (Simon Aff., ¶ 31). SSG&K further supports its fraud claim against Serko by alleging that Serko had exclusive control of the financial records and therefore knew the falsity of the Addendum Figures.

"To state a claim for fraud in the inducement, a plaintiff 'must prove [1] a misrepresentation or a material omission of fact [2] which was false and known to be false by defendant, [3] made for the purpose of inducing the other party to rely upon it, [4] justifiable reliance of the other party on the misrepresentation or material omission, and [5] injury.'" (*NM IQ LLC v OmniSky Corp.*, 31 AD3d 315, 317 [1st Dept 2006] [quoting *Lama Holding Co.*, 88 NY2d 413, 421 (1996)]). In addition, "each of these essential elements must be supported by factual allegations sufficient to satisfy CPLR 3016 (b), which requires . . . that the circumstances constituting the wrong shall be stated in detail" and "imposes a more stringent standard of pleading than the generally applicable 'notice of the transaction' rule of CPLR 3013 . . . ." (*Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 307-08 [1st Dept 1995] [quoting *Lanzi v Brooks*, 54 AD2d 1057, 1058]). There is no justifiable reliance on a misrepresentation or material omission, however, when "plaintiffs [have] the means to ascertain the truth of the alleged representations." (*Rotterdam Ventures, Inc.*, 300 AD2d at 966).

Without deciding that there is a misrepresentation, the court does observe a discrepancy between the K-1 Figures and Addendum Figures. The court concludes, however, that SSG&K did not justifiably rely on the Addendum Figures. Serko and Simon were equal partners in SSG&K and as such, they received equal payments from the firm. Simon therefore could have

checked the Addendum Figures against his own 1997-2001 K-1s to see whether they matched. Morever, regardless of whether Serko controlled SSG&K's financial records, Simon had access to his own personal financial records, and a brief inspection of them would have revealed what the Addendum Figures arguably should have been. Despite this ready tool for comparison, SSG&K relied on the Addendum Figures. Given that SSG&K had the means to ascertain the truth of Serko's total net income by simple comparison to Simon's total net income, the court concludes that SSG&K did not justifiably rely on the Addendum Figures and dismisses SSG&K's counterclaim for fraud.

II. Negligent Misrepresentation

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). Though "the question of whether a party's reliance is reasonable is generally left for the trier of fact," reliance is unreasonable where plaintiffs rely on information supplied to them "despite their own evidence to the contrary." (*Orlando v Kukielka* 40 AD3d 829, 832 [2d Dept 2007]; *see also J.A.O. Acquisition Corp. v Stavitsky*, 23 AD3d 200, 201 [1st Dept 2005], *affd* 8 NY3d 144 [holding that there was no reasonable reliance because the "plaintiff was or should have been aware" of the financial situation of the company despite the defendant's representations]).

As the court discussed above regarding the counterclaim for fraud, SSG&K's reliance on the Addendum Figures was unreasonable. Serko and Simon were equal partners making equal incomes from the firm, and Simon therefore should have been aware of Serko's total net

income. The court therefore dismisses SSG&K's counterclaim for negligent misrepresentation.

Accordingly, it is

ORDERED THAT the court denies that part of Joel K. Simon, Daniel J. Gluck and Christopher M. Kane's motion to dismiss David Serko's third cause of action for breach of contract; and it is further

ORDERED THAT the court grants that part of Joel K. Simon, Daniel J. Gluck and Christopher M. Kane's motion to dismiss David Serko's fifth cause of action for tortious interference with contract, sixth cause of action for injunctive relief to the extent it is against the individuals and seventh cause of action for imposition of a constructive trust to the extent it is against the individuals; and it is further

ORDERED THAT the court grants David Serko's motion to dismiss Serko Simon Gluck & Kane LLP's first counterclaim for fraud and second counterclaim for negligent misrepresentation.

Dated: November 20, 2007

FILED
DEC 12 2007
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ENTER:

J.S.C.