SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

JOANNE DIEHL,

Plaintiff,

INDEX No. 019444/07

MOTION DATE: March 28, 2008
Motion Sequence # 001, 002, 003

-against-

LAURENCE LEVINE, KAREN SUSS, LARKAV, INC, KARLAR, INC., JONATHAN LUPKIN, FLEMMING ZULACK, WILLIAMSON ZAUDERER LLP, RICHARD HOROWITZ and HELLLER HOROWITZ & FEIT, P.C.,

Defendants.

The following papers read on this motion:

Order to Show Cause..... X
Notice of Motion..... XX
Affirmation in Opposition..... X
Memorandum of Law XXXX
Reply Memorandum of Law..... XX

This motion, brought on by order to show cause pursuant to CPLR 3211[a][1],[7] by the defendants Heller, Horowitz & Feit, P.C. and Richard Horowitz for an order dismissing the amended complaint insofar as asserted against them; and a motion pursuant to CPLR 3211[a][1], [3], [5],[7], 3211[b] by the plaintiff Joanne Diehl for an

order dismissing stated counterclaims and affirmative defenses interposed by codefendants Laurence Levine, Karlar Temporaries, Inc and Larkav, Inc.; and a motion pursuant to CPLR 3211[a][1],[7] by the defendants Jonathon Lupkin and Flemming Zulak Williamson Zauderer, LLP, for an order dismissing the complaint insofar as asserted against them, are **all** determined as hereinafter set forth.

In 1993, the plaintiff Joanne Diehl became an employee of Lexstra Temporaries, Inc ["Lexstra"] – a provider of professional staffing services formed by codefendant Laurence Levine in 1992 and later jointly operated with codefendant Karen Suss.

In accord with an employment agreement dated September 30, 1994 [the "employment agreement"], Lexstra issued to the plaintiff, 5% of its non-voting, common stock (8 shares) – which amount was later increased to 8% in August of 1997. Suss and Levine were the majority of shareholders in Lexstra and in a related entity, Lexus Temporaries, Inc.. The plaintiff's employment agreement also contained certain prohibitions, which precluded the plaintiff from, among other things, soliciting Lexstra employees and/or competing with Lexstra.

In October of 1998, Lexus and Lexstra entered into a so-called Asset Purchase Agreement ["Asset Agreement"], with an entity known as MSX International Inc ["MSX"], a "global provider of engineering information technology and staffing services" (Levine Ans., ¶¶ 88- 93; Cmplt.,¶ 15; Pltff's Brief at 3-4). Pursuant to the Asset Agreement, MSX acquired the assets of Lexstra and Lexus for $24 million, with the purchase amount to be allocated to Lexstra and Lexus in the percentages of 56.54% and 43.46%, respectively .

The Asset Agreement provides in part, that "[a]t the closing * * * Sellers [Lexus and Lexstra] will convey, transfer and assign to Buyer [MSX], and Buyer will purchase, all of the business, assets and rights of Sellers, whether or not reflected on the books of Sellers, including without limitation all customer lists, employee list, customer agreements and employee contracts * * * trade names (including the names 'Lexstra' and 'Lexsus' and variants thereof * * * trademarks, intellectual property, databases, patents inventions, accounts receivable, prepaid expenses, cash, notes receivable, fixed assets, furniture and office equipment * * *" (Agreement, ¶ 1.01)(Pltff's Mot., Exh., "B").

Subject to stated exceptions, the Agreement states further that, "[i]n the case of each Seller, Buyer will assume at the Closing all of such Sellers's obligations which first arise after the date of Closing, under all of the contracts, commitments and obligations * * * transferred to the * * *Buyer * * *" (Agreement, I, ¶ 1.02[i]).

Most significantly, the Asset Agreement also provided for three annual "earnout" payments for the years 1998, 1999, and 2000, which payments were to be based upon the "financial performance of the business associated with the asset purchase" (Agreement, ¶¶ 2.02[ii], 2.06, 2.11)(Cmplt.,¶¶ 16-17; Levine Ans., ¶¶ 92-93).

According to the plaintiff, the earnout payments were to be distributed in proportionate amounts based upon the 56.54% and 46.46% purchase price allocation. Levine asserts, however, that when the MSX agreement closed it was agreed that all payments to be made by MSX would be "consolidated" and not allocated between the two selling corporations.

Around the time the 1998 Asset Agreement was executed, Lexstra and Lexus changed their names, respectively, to "Larkav, Inc" and "Karlar, Inc." – although Suss and Levine still retained their status as majority shareholders in both of the newly renamed entities. As a result of the name change, the plaintiff's original Lexstra shares were cancelled and replaced with 8 shares of stock in "Larkar" and the plaintiff became a full time employee of MSX.

Notably, the defendants claim that "the earnout opportunity established in 1998 under the Asset Purchase Agreement "created a joint venture among MSX, Larkav and Karlar which "existed for the Earnout Period" and further that the plaintiff's employment agreement "inured to the benefit" of the alleged joint venture (Cmplt., ¶¶ 107-109).

Levine avers that although the plaintiff then held 8% interest in Larkav, he and Suss – acting on behalf of Karlar and Larkav – offered the plaintiff a 4% interest in the consolidated MSX payments, which offer she allegedly accepted. Moreover, Levine asserts that the plaintiff agreed with him and Suss to establish an employee "bonus pool" whose goal was to motivate employees to maximize the overall earnout amounts due form MSX.

According to the plaintiff, in 1998 and 1999, Levine and Suss received the

contractual "earnout" payments from MSX, but improperly allocated them on a equal, 50%-50% basis – instead of the contractually prescribed allocation of 56.54% and 43.46%. In 1999 and 2000, the plaintiff received distributions from Larkav based on the MSX earnout payments for 1998 and 1999 in the amounts of $189,452.00 and $589,485.00, respectively. The plaintiff claims, however, that the reduced "earnout" allocation attributed to Larkav – 50% instead of 56.54% – correspondingly and improperly reduced her own distribution payments. Specifically, the plaintiff claims that by virtue of the improper allocation she effectively received only a 4% of the above-referenced earnout payments, instead of the 4.532% to which she was allegedly entitled. The plaintiff further advises that she demanded the remaining portion of the sums due her (the additional .5232% remaining share of the 1998 and 1999 earnouts), but that no additional payments were forthcoming.

In October of 1999, plaintiff's employment was terminated. Levine and Suss assert that before she terminated her employment, the plaintiff had already begun to establish her "own competing business," diverted clients from her former employer and induced employees to leave with her as well (Levine Ans., ¶ 97).

Thereafter, at some point in 2001, MSX commenced a lawsuit against Levine, accusing him of engaging in misconduct, including maliciously interfering with MSX's employment relationships and inflating the amount due from MSX for the 2000 "earnout" payment.

In light of this ongoing acrimony, MSX elected to withhold the 2000 earnout payment from both Larkav and Karlar. Notably, codefendant Suss retained the defendant lawfirm of Heller, Horowitz & Feit., P.C. in 2001 to represent her in connection with the MSX litigation.

Levine and Suss responded with their own lawsuit, alleging that MSX had breached the terms of the Asset Agreement. The litigation between the parties was consolidated in the Federal District Court for the Southern District of New York and ultimately resolved in November of 2004.

A settlement was ultimately reached pursuant to which MSX agreed to make a payment of $11.25 million to Suss and Levine, constituting the 2000 earnout amount.

The settlement was to be paid out as follows: $4 million to be distributed

immediately, with the remaining $7.25 million to be paid in twelve monthly installments. The settlement has now been fully paid, although the plaintiff claims that she has not received any distribution based thereon.

At the time the settlement was completed, Levine and Suss – on behalf of Larkav and Karlar – created a joint deposit escrow account into which the 2004 MSX settlement amounts were to be deposited. Signature Bank was the named escrow agent under the terms of the Agreement. According to Suss and Horowitz, both she and Levine agreed that no disbursements would be permissible from the escrow except pursuant to "letters of instruction" executed by both of them. An escrow agreement was drafted by counsel for the bank, who also prepared the Bank's own "template" for the "Letters of Instruction".

The Bank allegedly insisted that the signatures of Suss and Levine be witnessed by: (1) Jacob Heller or Horowitz for Suss' signature; and (2) Mark Zauderer or Jonathon Lupkin for Levine's signature. Lupkin is currently a partner in the defendant firm Flemming Zulak Williamson Zauderer, LLP, and according to the complaint, "is counsel to Defendant Levine" (Cmplt., ¶ 7).

Horowitz and Lupkin subsequently prepared on behalf of their respective clients (Suss and Levine), the Letters of Instruction for the disbursement of funds. Their sole function in connection with the escrow was allegedly to witness signatures on the Letters of Instruction concerning the disbursement of funds therefrom.

The plaintiff contends that Horowitz and Limpkin were responsible for drafting the distribution requests made on behalf of Levine and Suss and also allegedly had actual knowledge of the terms of the purchase agreement including the earnout provisions; and knew or should have known of plaintiff' s alleged claims and/or entitlement to stated percentages of the three earnout distributions.

Despite this knowledge, Lupkin and Horowitz and their respective firms "willingly permitted" Levine and Suss to exercise "unauthorized dominion and control" over the escrow proceeds, thereby assisting them in allegedly converting sums purportedly owing to the plaintiff.

Based on these and additional allegations of wrongdoing, the plaintiff commenced the within action against, **inter alia**, Larkav, Karlar, Levine, Lupkin Horowitz, and the

defendants law firms, interposing causes of action sounding in conversion, aiding and abetting conversion, tortious interference, breach of contract, breach of fiduciary duty and claims for an accounting.

The defendants have answered, denied the material allegations of the complaint and interposed several affirmative defenses and counterclaims, including claims against the plaintiff sounding in breach of her employment agreement, tortious interference with prospective economic advantage/contractual relations, and breach of fiduciary duty/duty of loyalty.

The plaintiff moves to dismiss the various counterclaims and affirmative defenses interposed by Levine, Suss, Larkav and Karlar.

Codefendants Lupkin, Flemming Zulak Williamson Zauderer, LLP, Richard Horowitz and his firm, Heller Horowitz and Feit, P.C. [the "defendant attorneys"] all move to dismiss the complaint insofar as interposed against them pursuant to CPLR 3211[a][1],[7].

It is settled that on pursuant to CPLR 3211[a][7], the Court will accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory" (**Sokoloff v. Harriman Estates Development Corp.**, 96 NY2d 409, 414 [2001]; see, **AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.**, 5 NY3d 582, 591 [2005]; **Leon v. Martinez**, 84 NY2d 83, 87-88 [1994]).

On the other hand, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration" (**Morris v. Morris**, 306 AD2d 449; see, **Maas v. Cornell University**, 94 NY2d 87, 91-92 [1999]; **Salvatore v. Kumar**, 45 AD3d 560, 563).

Moreover, "[t]o succeed on a motion to dismiss pursuant to CPLR 3211[a] [1], the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (**Cohen v. Nassau Educators Federal Credit Union**, 37 AD3d 751, 752; see, **AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.**, **supra**, at 591;

Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; **Leon v Martinez**, **supra**, at 87-88; **Delacruz v. 236-1 Development Associates (Green), LP**, 48 AD3d 614).

That branch of the defendant-attorneys' motion which is to dismiss the plaintiff's "aiding and abetting" cause of action, is **granted**.

On a claim grounded upon aiding and abetting tortious conduct, a plaintiff must: (1) identify the underlying tort committed by the primary violator; (2) demonstrate the defendant knowingly induced or participated in its commission; and (3) establish that he or she sustained damage as a result of the tortious conduct at issue (**Kaufman v. Cohen**, 307 AD2d 113, 125-6; see also, **Bullmore v. Ernst & Young Cayman Islands**, 45 AD3d 461, 464-465; **Caprer v. Nussbaum**, 36 AD3d 176, 193 cf., **Wechsler v. Bowman**, 285 NY 284, 291-292 [1941];). A person knowingly participates in the commission of a tortious conduct "only when he or she provides 'substantial assistance' to the primary violator" (**Kaufman v. Cohen**, **supra**, at 126; **Velazquez v. Decaudin**, 49 AD3d 712, 716; **Caprer v. Nussbaum**, **supra**, at 193; **Global Minerals and Metals Corp. v. Holme**, 35 AD3d 93, 101; **King v. George Schonberg & Co.**, 233 AD2d 242, 243; **National Westminster Bank USA v. Weksel**, 124 AD2d 144, 148-149).

"Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling * * * [the tortious conduct] to occur" (**Kaufman v. Cohen**, **supra**; **Velazquez v. Decaudin**, **supra**; see, **Eurycleia Partners, LP v. Seward & Kissel, LLP**, 46 AD3d 400, 402; **Caprer v. Nussbaum**, **supra**).

Further,"'[a]ctual knowledge, as opposed to merely constructive knowledge, is required and a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach * * *" (**Bullmore v. Ernst & Young Cayman Islands**, **supra** at 464, quoting from, **Global Mins. & Metals**, **supra**, 35 AD3d at 101-102).

In general "[a]llegations of mere inaction * * * are insufficient to sustain a claim for aiding and abetting" "since [n]either lawyers nor accountants are required to tattle on their clients in the absence of some duty to disclose" (**Morin v. Turpin**, 711 F.Supp. 97, 113 [S.D.N.Y.1989]; **Barker v. Henderson, Franklin, Starnes & Holt**, 797 F.2d 490, 497, 7th Cir.1986).

Applying these principles to the facts presented supports the defendant-attorneys' assertions that, even liberally construed, "the aiding and abetting" cause of action fails to state a claim upon which relief can be granted (Cmplt.,¶¶ 39-42).

More particularly, a review of the amended complaint reveals that operative allegations are, at best, "sparse," vague and fail to meaningfully identify any actionable misconduct perpetrated by the defendant-attorneys (**Bullmore v. Ernst & Young Cayman Islands**, **supra**, at 464; see also, **Hyman v. New York Stock Exchange, Inc.**, 46 AD3d 335; CPLR 316[b]).

Rather, the aiding and abetting cause of action is essentially founded on a few, cryptically framed allegations to the effect that the defendant attorneys – in some unexplained fashion, "willingly permitted" the non-attorney defendants to "exercise unauthorized dominion and control" over the MSX earnout proceeds (Cmplt., ¶ 41).

The details underlying this alleged wrongful inaction or failure to intervene are not provided; nor is it explained precisely how the defendants' alleged inaction actually or substantially assisted Levine and Suss – or why the defendants would owe an affirmative duty to intervene on behalf of a third party with whom they had no contractual relationship. These allegations do not demonstrate or adequately allege that the defendant-attorneys substantially assisted any purported attempt to convert funds supposedly owed to the plaintiff (see, **Kaufman v. Cohen**, **supra**; **Velazquez v. Decaudin**, **supra**; **Bullmore v. Ernst & Young Cayman Islands**, **supra**; see also, **Auricle Partners, LP v. Seward & Kissel, LLP**, **supra**; **National Westminster Bank USA v. Weksel**, **supra**).

Further, there is nothing in the Escrow Agreement which adds anything of substance to the plaintiff's aiding and abetting theory. To the contrary, the operative terms of that document support the defendant-attorneys' contentions that their role was functionally ministerial and non-substantive in terms of the challenged disbursements, i.e., their role was to witness signatures set forth on the letters of instruction, which were then delivered to the escrow agent, Signature Bank (see, Escrow Agreement, Schedule "A"). The defendant-attorneys were not signatories to the escrow agreement; nor were they empowered thereby to disburse funds or to decide how and to what extent the funds would be disbursed; nor were they the agents holding the proceeds.

Further, there is nothing in the agreement which supports the strained theory that

the defendant-attorneys, merely by witnessing signatures or drafting disbursement requests, thereby acquired actual knowledge of the plaintiff's disputed claims – much less that they were then duty-bound to intervene and/or assert an authoritative role with respect to the amounts actually disbursed from the account.

The agreement does not ascribe to the defendants a role above and beyond the narrow duty set forth in "Schedule A," *i.e.*, to witness the signatures of Levine and Suss "in writing." Indeed, upon the allegations made here, Levine and Suss could have chosen anyone to perform the same witnessing task undertaken by the defendants – which performance would be no more or less indicative of wrongdoing than the defendant-attorneys' conduct under the Agreement at issue here. Additionally, while "an escrow agent owes his or her beneficiary a fiduciary duty" they must "comply with the escrow agreement" (**Talansky v. Schulman**, 2 AD3d 355, 359), and the defendant-attorneys were not escrow agents and no breach of the escrow agreement has been established or alleged.

The Court similarly agrees that the fiduciary duty (sixth) cause of action interposed against the defendant-attorneys is lacking in merit.

In general, "[a] fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation' (Restatement [Second] of Torts § 874, Comment a). Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (**EBC I, Inc. v. Goldman Sachs & Co.**, 5 NY3d 11, 19 [2005]; **Northeast Gen. Corp. v Wellington Adv.**, 82 NY2d 158, 162 [1993]; **Pergament v. Roach**, 41 AD3d 569, 571; **HF Management Services LLC v. Pistone**, 34 AD3d 82, 84).

While an attorney owes a fiduciary duty to his own client (see, **Graubard Mollen Dannett & Horowitz v Moskovitz**, 86 NY2d 112, 118),"[a] direct cause of action by a nonclient against a law firm is not generally cognizable" (**Mayes v. UVI Holdings, Inc.**, 280 AD2d 153, 161; **Singer v. Whitman & Ransom**, 83 AD2d 862). Specifically, "courts have not recognized any liability of the lawyer to third parties * * * where the factual situations have not fallen within one of the acknowledged categories of tort or contract liability," i.e.,"fraud, collusion, malicious acts, or other special circumstances*** " (**Drago v. Buonagurio**, 46 NY2d 778, 780 [1978];**Nelson v. Kalathara**, 48 AD3d 528; **Chinello v. Nixon, Hargrave, Devans & Doyle, LLP**, 15 AD3d 894, 895; **Ginsberg v.**

Gamiel, 13 AD3d 79, 80; **Singer v. Whitman & Ransom**, **supra**; see also, **AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.**, 5 NY3d 582, 595 [2005]).

Further, "absent fraud or other special circumstances, an attorney is not liable to third parties for purported injuries caused by services performed on behalf of a client or advice offered to that client" (**Levine v. Graphic Scanning Corp.**, 87 AD2d 755, 756; see also, **State v. Poulson**, 26 AD3d 650, 651; **Zhang v. Wang**, ___F.Supp2d___, 2006 WL 2927173, at 2 [E.D.N.Y. 2006]).

Here, the complaint does not identify the basis for any fiduciary duty owed directly by the defendant-attorneys to the plaintiff – a non-client with whom the defendants were not in contractual privity (see, **Tal v. Superior Vending, LLC**, 20 AD3d 520). To the contrary, the subject cause of action rests upon a series of nebulous allegations to the effect that the defendant-attorneys – strangers to the plaintiff – owed her some sort of free-floating duty of care, *i.e.*, a purported duty "to communicate openly" with her; to provide her "with truthful information" and, in general, to "act to further * * * [her] interests" (Cmplt., ¶ 54) (**Zhang v. Wang**, **supra**). There is nothing in the record which would support the imposition of such a duty.

Nor does the complaint allege – or the record otherwise support – a relationship functionally tantamount to contractual privity or establish the existence of a "relationship of trust and confidence" between the defendant attorneys and the plaintiff (**EBC I, Inc. v. Goldman Sachs & Co.**, **supra**, at 19 cf., **Shapiro v. McNeill**, 92 NY2d 91, 97 [1998]; **Prudential Ins. Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood**, 80 NY2d 377, 382-383 [1992]). Further, cases involving self-dealing attorneys who represent trustees – and thereby breach fiduciary duties to trust beneficiaries – are not applicable to the factual circumstances presented at bar (see, **Heaven v. McGowan**, 40 AD3d 583, 585-586; **Chinello v. Nixon, Hargrave, Devans & Doyle, LLP**, ***supra***, 15 AD3d at 896 see also, **Ginther v. Scinta**, 31 AD3d 1135, 1036).

Since the Court has dismissed the plaintiff's equitable theories sounding in breach of fiduciary duty, there is no predicate upon which to base the related equity-based claim for an accounting as set forth in the seventh cause of action (**Simons v. Ross**, 309 AD2d 667; **Gebbia v. Toronto-Dominion Bank**, 306 AD2d 37, 38; **Michnick v. Parkell Products, Inc.**, 215 AD2d 462, 463).

The fourth cause of action, sounding in tortious interference with contract alleges,

in sum, that the defendant-attorneys wrongfully caused Levine and Suss to "withhold the plaintiff's proportionate share" of the earnout proceeds – a claim which is not pleaded with fact-specific allegations explaining precisely how this misconduct was perpetrated (Cmplt.,¶¶ 47-51).

"In order to succeed on a cause of action to recover damages for tortious interference with contract, the plaintiff must establish, **inter alia**, the existence of a valid contract between it and a third party, and that the defendant intentionally procured the third party's breach of that contract without justification" (**Dome Property Management, Inc. v. Barbaria**, 47 AD3d 870; see, **Lama Holding Co. v. Smith Barney Inc**., 88 NY2d 413, 424 [1996]; **Foster v. Churchill**, 87 NY2d 744 [1996]; **New York Merchants Protective Co., Inc. v. Rodriguez**, 41 AD3d 565; **Monex Financial Services Ltd. v. Dynamic Currency Conversion, Inc**., 19 Misc.3d 1113(A), 2008 WL 880209 at 7 [Supreme Court, Nassau County 2008]).

Further, "a plaintiff must allege that the contract would not have been breached 'but for' the defendant's conduct" (**Burrowes v. Combs**, 25 AD3d 370, 373; **Washington Ave. Associates, Inc. v. Euclid Equipment, Inc.**, 229 AD2d 486, 487). Significantly, "to avoid dismissal of a tortious interference * * * claim a plaintiff must support his claim with more than mere speculation" (**Burrowes v. Combs**, **supra**, at 373; **Chestnut Hill Partners, LLC v. Van Raalte**, 45 AD3d 434; **Black Car and Livery Ins., Inc. v. H & W Brokerage, Inc.**, 28 AD3d 595,).

Apart from the fact that essentially the same circuitous allegations of wrongdoing have again been repeated in support of the tortious interference theory (**Burrowes v. Combs**, **supra**, at 373; Schuckman Realty, Inc. v. Marine Midland Bank, *N.A.*, 244 AD2d 400, 401), the foregoing interference claim is defective for the additional reason that the plaintiff was not a party to the contract on which she claims was breached, *i.e.*, the MSX Asset Purchase Agreement. To the contrary, the parties to the Assert Purchase Agreement were exclusively and solely MSX, Lexstra and Lexus (Horowitz OSC, Exh., "B" at 1).

The plaintiff's assertion that the defendant-attorneys have agreed that she entitled to certain earnout payments under the agreement is immaterial, inasmuch as her rights do not derive from her status as a party thereto. Moreover, the language of the tortious interference claim itself is, at best, veiled and oblique, since it never clearly alleges that the defendants, in fact, intentionally procured the breach of a specific contract to which the plaintiff was a party (**Washington Ave. Associates, Inc. v. Euclid Equipment, Inc., supra**,).

Lastly, the Court agrees that the plaintiff's own theory of recovery suggests that the "but for" component of the injury allegedly flowing from the interference is lacking . Specifically, there has been no showing by way of explanatory averments or otherwise, that Levine or Suss would have disbursed or otherwise dealt with the escrow funds in any different fashion but for the defendant-attorneys' alleged conduct – the precise nature of which is never fully detailed in the complaint anyway (**Burrows v. Combs**, **supra**, see generally, **68 Burns New Holding, Inc. v. Burns Street Owners Corp.**, 18 AD3d 857; **Velazquez v. Lackmann Food Services at Old Country Road, Inc.**, 251 AD2d 495 cf., **Whitman Realty Group, Inc. v. Galano**, 41 AD3d 590, 593).

Accordingly, the motion by codefendants Jonathon Lupkin and Flemming Zulak Williamson Zauderer, LLP, for an order dismissing the complaint insofar as asserted against them is **granted**.

However, the Court notes that the codefendants Heller, Horowitz & Feit, P.C. and Richard Horowitz have not specifically addressed, or sought dismissal of, the claim sounding in tortious interference with contract, and therefore, their motion is **denied** with respect to that claim.

Turning to the plaintiff's motion to dismiss the affirmative defenses and counterclaims interposed by defendants Levine, Karlar, Larkav ["the defendants"] – which are interposed exclusively as defensively setoff-type claims – the Court notes that the foregoing claims essentially arise out of the defendants' assertions that the plaintiff was a disloyal employee in 1999; namely that the plaintiff created a competing business and lured employees away violation of her alleged fiduciary duties to the defendants. The defendants identically assert in support of each separate counterclaim, that they sustained injury because plaintiff's improper competition/conduct had the effect of decreasing MSX's profits, and thereby reducing the earnout payment due from that MSX. Based on this key allegation, the defendants have advanced claims sounding in breach of employment agreement, breach of fiduciary duty/duty of loyalty, and tortious interference with prospective economic advantage/contractual relations. In support of her motion to dismiss, the plaintiff asserts, as a threshold matter, that none of the defendants possesses standing to assert the claims advanced inasmuch as Lexstra/Lexus conveyed their all of their rights and assets to MSX – which entity, is therefore the real, but unnamed, party in interest and true owner of the claims interposed. The plaintiff's claims possess merit. "In general, under New York law, an assignor of a claim retains no right to pursue that claim upon assignment and the assignee is the real party in interest with respect to that claim"

(**U.S. Fidelity & Guar. Co. v. Petroleo Brasileiro S.A.-Petrobras**, ___F.Supp.2d___, 2001 WL 300735 [S.D.N.Y. 2001] see, **James McKinney & Son v. Lake Placid 1980 Olympic Games**, 61 NY2d 836, 838, 1984).

However, "[o]nly where there is a properly executed assignment does an assignee become the 'real party in interest' and acquire standing to enforce the rights of an assignor * * *"(**James McKinney & Son v. Lake Placid 1980 Olympic Games**, **supra**, at 838; **In re Stralem**, 303 AD2d 120,123 *see,* **Maxus Leasing Group, Inc. v. Kobelco America, Inc.**,___F.Supp2d___, 2007 WL 655779 at 2 [N.D.N.Y. 2007]). "[T]o effect an assignment * * * there [must] be a perfected transaction between the assignor and assignee, intended by those parties to vest in the assignee a present right in the things [or rights] assigned" (**Leon v. Martinez**, **supra**,, 84 NY2d at 88, *citing*, 4 Corbin, Contracts, § 879, at 528 [1951] see also, **National Financial Co. v. Uh**, 279 AD2d 374, 375; **Rockland Lease Funding Corp. Inc. v. Waste Management of New York Inc.**, 245 AD2d 779). Applying these principles to the facts presented supports the plaintiff's argument that the counterclaim parties (Larkav and Karlar), lack standing to advance the subject counterclaims. A review of the Asset Purchase Agreement itself leaves no doubt that the assignment of assets and all rights was complete, comprehensive and intended "to vest in the assignee a present right in the things [or rights] assigned" – including as it does – "*all of the business, assets and rights* of Sellers, whether or not reflected on the books of Sellers, *including without limitation* all customer lists, employee list, customer agreements and *employee contracts* * * * trade names (including the names 'Lexstra' and 'Lexsus' and variants thereof * * * trademarks, intellectual property, databases, patents inventions, accounts receivable, prepaid expenses, cash, notes receivable, fixed assets, furniture and office equipment * * *" (Agreement, ¶ 1.01)[emphases added].

The defendants do not seriously dispute – and have not in any event demonstrated – that the assignment was not complete and decisive in terms of all assets, rights, and contracts. The defendants' primary opposition to the plaintiff's standing claim is their alternative theory – which has been relegated to a single footnote in an opposing brief (**Dow Jones & Company, Inc. v. International Securities Exchange, Inc.**, 451 F.3d 295, 301 fn 7, 2nd Cir., 2006; **U.S. v. Restrepo**, 986 F.2d 1462, 1463, 2nd Cir., 1993)(see, Defs' Opp., at 10, fn 1). The defendants contend, in sum, that Karlar and Larkav are joint venturers (with MSX) and therefore possess standing concurrently with MSX to assert claims against the plaintiff. The Court disagrees.

" 'An indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses' " (**Community Capital Bank v. Fischer & Yanowitz**, 47 AD3d 667, 668, quoting from, **Matter of Steinbeck v. Gerosa**, 4 NY2d 302, 317 [1958]; **Schnur v. Marin**, 285 AD2d 639, 640; **Accent Associates, Inc. v. Wheatley Const. Corp** ., 268 AD2d 494; see also, **Natuzzi v. Rabady**, 177 AD2d 620, 622). Significantly,"[a] joint venture does not arise simply because two parties have agreed together to act in concert to achieve some stated economic objective" (**Rocchio v. Biondi**, 40 AD3d 615, 616-617; **Accent Associates, Inc. v. Wheatley Const. Corp**., **supra**). Additionally, the mere "assertion that there was an agreement to distribute the proceeds of an enterprise on a percentage basis does not suffice to establish the existence of a joint venture" (**Maalin Bakodesh Society, Inc. v. Lasher**, 301 AD2d 634; **Wiener v. Lazard Freres & Co.**, 241 AD2d 114. 121-122; **Gold Mechanical Contractors, Inc. v. Lloyds Bank P.L.C.**, 197 AD2d 384). The failure to plead these substantive requisites warrants dismissal of claims predicated on the existence of an alleged joint venture or partnership (**Latture v. Smith**, 1 AD3d 408, 408-409; see also, **Rocchio v. Biondi**, **supra**; **Davella v. Nielsen**, 208 AD2d 494).

Here, while the defendants' answer contains an unelaborated statement that a joint venture arose with MSX, the pleading itself contains no reference to the requisite elements of a joint venture, *i.e.*, there are no allegations to the effect the purported joint venturers exchanged "mutual promises" or undertook "to share in the profits of the business and submit to the burden of making good the losses'" (**Community Capital Bank v. Fischer & Yanowitz**, **supra**). Nor does the complaint identify the specific provisions in the Asset Purchase Agreement which actually support the claim that a joint venture arose between MSX and the defendants. Counsel's conclusory assertion, in the footnote devoted to this issue, that there was a pooling of skills and assets, is not a substitute for citation to documentary evidence and/or other materials which actually document the existence of a joint venture. In any event, the Asset Purchase Agreement does not contain provisions sufficiently evidencing a jointly consummated understanding that the parties would "share in the profits of the business and submit to the burden of making good the losses", and the defendants have not identified, for the Court's benefit, those provisions of the agreement which allegedly establish as much. Claims referring to a distribution of assets and/or evidence of concerted action to "achieve some stated economic objective" – not even clearly alleged here – will not suffice (**Rocchio v. Biondi**, **supra**; **Maalin Bakodesh Society, Inc. v. Lasher**, **supra**).

Although pleadings are to be liberally construed on a motion pursuant to CPLR 3211[a][7], conclusory assertions and those contradicted by documentary submissions – here the Asset Purchase Agreement – are not entitled to such favorable treatment (**Mass v. Cornell University**, **supra**; **Davella v. Nielsen**, **supra**). Lastly, the Court agrees that any subsequent or oral agreements relative to the alleged existence of a joint venture are precluded by the Agreement's merger clause (see, **Tilden of New Jersey, Inc. v. Regency Leasing Systems, Inc.**, 230 AD2d 784, 785).

Accordingly, inasmuch as the defendants lack standing to interpose the causes of action interposed herein, that branch of the plaintiff's motion which is to dismiss the defendants' four counterclaims is **granted**.

The plaintiff also moves to dismiss several of the defendants' twelve affirmative defenses, including the defenses alleging statute of limitations, setoff, offset, accord and satisfaction, unclean hands and laches.

Preliminarily, the plaintiff's motion to dismiss is **denied** with respect to the limitations defense, inasmuch as the defendants have adduced evidence tending to establish that plaintiff's claims based on the 1998 and 1999 earnout payments are untimely (**Swift v. New York Med. Coll.**, 25 AD3d 686, 687; **Gravel v. Cicola** , 297 AD2d 620; **Savarese v. Shatz**, 273 AD2d 219, 220 see, **In re Schwartz**, 44 AD3d 779). The plaintiff's conclusory and unsupported reply assertions fail to address and/or meaningfully refute the defendants' fact-specific claims with respect to the accrual dates and untimeliness of the 1998 and 1998 "earnout" claims (*cf.*, **Reiner v. Jaeger**, ___AD3d___ , 2008 WL 1073538, 2nd Dept., 2008). Nevertheless, the plaintiff has established – at least at this juncture – that issues of fact exist with respect to the timeliness of the 2000 earnout claim – and the defendants have not argued to the contrary (**Rehberger v. Garguilo & Orzechowski, LLP** , ___AD3d___, 854 NYS2d 650, 2nd Dept., 2008; **In re Schwartz**, **supra**)(see, Defs' Brief at 22).

Further, and as to the setoff/offset claims, the defendants themselves advise that these defenses are redundant since they are "essentially Defendants' counterclaims restated" and that if their four counterclaims are viable then so too, are these defenses. However, since the Court has already dismissed the counterclaims, by the defendants' own construction, the foregoing setoff/offset defenses are now similarly not viable and must also be **dismissed**.

However, the defendants' accord and satisfaction defense, will be sustained at this pre-discovery juncture, since unresolved factual questions and issues of intent exist with respect to the import of plaintiff's initial acceptance of earnout payments amounting to only 4% – as opposed to the 4.5232% which she claims she should have received (cf., **Denburg v. Parker Chapin Flattau & Klimpl**, 82 NY2d 375, 383 [1993]; **Envirex, Inc. v. Cecil M. Garrow Const., Inc.**, 99 AD2d 307, 309).

That branch of the plaintiff's motion which is to dismiss the "unclean hands" and "laches" defenses is **granted**.

Upon the Court's own review (**Glenesk v. Guidance Realty Corp.**, 36 AD2d 852, 853), the foregoing defenses are pleaded as one-line conclusions of law, "bereft of factual data" (**Glenesk v. Guidance Realty Corp.**, **supra**). It is settled that "[d]efenses which merely plead conclusions of law without supporting facts are insufficient and should be stricken"(**Petracca v. Petracca**, 305 AD2d 566, 567; see, **Plemmenou v. Arvanitakis**, 39 AD3d 612, 613; **Staten Island-Arlington, Inc. v. Wilpon**, 251 AD2d 650; **Bentivegna v. Meenan Oil Co., Inc.**, 126 AD2d 506, 508; **Falk v. Gallo**, ____Misc3d___,2008 WL 638419, at 3 [Supreme Court, Nassau County 2008]).

The Court has considered the parties' remaining contentions and concludes that none warrants an award of relief on the pending motions beyond that **granted** above.

The foregoing constitutes the decision and order of the Court.

A Preliminary Conference has been scheduled for July 1, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated JUN 10 2008

ENTERED
JUN 12 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Stephen A. Bucaria
J.S.C.