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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Gersh

- v -

Fortnow

INDEX NO. 602167/07

MOTION DATE 6/9/08

MOTION SEQ. NO. 002

MOTION CAL. NO. ____

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

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby ✓

ORDERED that the branch of the motion by defendant Matthew Fortnow pursuant to CPLR 2221 for leave to reargue his prior motion to dismiss, is GRANTED; and it is further

ORDERED that the branch of the motion by defendant Matthew Fortnow for an order dismissing plaintiffs' unjust enrichment claim pursuant to CPLR 3211(a)(1) and (a)(7), on the ground that no such claim may be maintained as a matter of law because a written agreement exists governing the same subject matter, is granted; and it is further

ORDERED that defendant Matthew Fortnow shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 7/14/08

HON. CAROL EDMEAD J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

----------X

MICHAEL GERSH, DAVID HERSH, KHALED MATAR, PETER PEZARIS AND JAMES PRICE,

Plaintiffs,

Index No. 602167-2007

-against-

MATTHEW FORTNOW,

Defendant.

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MEMORANDUM DECISION

Defendant Matthew Fortnow ("Fortnow") moves pursuant to CPLR 2221 for leave to reargue his prior motion to dismiss, and upon reargument, dismissing the unjust enrichment claim pursuant to CPLR 3211(a)(1) and (a)(7), on the ground that no such claim may be maintained as a matter of law because a written agreement exists governing the same subject matter.

Factual Background

Plaintiffs Michael Gersh, David Hersh, Khaled Matar, Peter Pezaris and James Price ("plaintiffs") and Fortnow are former shareholders of a company, Daedalus World Wide Corporation ("Daedalus"), which had developed an Internet fantasy sports website. Daedalus merged with another company, SportsLine.com, Inc. ("SportsLine") to form a new entity, Commissioner.com ("Commissioner") in early December 1999 pursuant to a merger agreement (the "Merger Agreement").

Article XII of the Merger Agreement[1] required the former shareholders to indemnify the new entity against post-closing claims asserted within a year of the closing (other than for fraud), by early December 2000, which were predicated upon pre-closing events giving rise to breaches of representations, warranties or covenants contained in the merger agreement.

In connection with its merger with SportsLine, Daedalus engaged Broadview International, LLC ("Broadview") as a financial advisor to assist it in the negotiation and transaction with SportsLine (the "Engagement Agreement"). When Broadview's invoices went unpaid, Broadview brought suit against Commissioner to recover fees under the Engagement Agreement (the "Broadview Action"). Commissioner then asserted counterclaims against the shareholders (plaintiffs and Fortnow).

Commissioner retained the law firm of Kantor, Davidoff, Wolfe, Mandelker & Kass ("Kantor PC"), which sent a Letter Agreement, addressed to SportsLine, Gersh, Pezaris, Price, Matar and Fortnow, agreeing to represent the interests of the individuals in light of the shareholders' indemnification obligations under the Merger Agreement. Gersh, Pezaris, Price and Matar executed the Letter Agreement, wherein they "acknowledge[d] and agree[d]" that each of them were jointly and severally obligated under the Merger Agreement to indemnify and hold SportsLine and Commissioner, harmless from and against any and all damages incurred by them

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[1] The Merger Agreement provided that the "Principal Shareholders" and

> "each other Shareholder will (to the extent of the Escrow Fund deposited in escrow . . .) jointly and severally indemnify and hold harmless SportsLine and the Surviving Corporation [Commissioner] . . . from and against (ii) any and all claims . . . costs and expenses, including, without limitation, reasonable attorneys' fees, other professional and experts' fees . . . that are directly or indirectly incurred, result from or arise out of any . . . breach of, or default in, any of the representations, warranties or covenants given or made by [Daedalus] or the Principal Shareholders in this Agreement or in the Disclosure Letter or in any certificate delivered by or on behalf of [Daedalus] or the Principal Shareholders pursuant hereto." (Article XII, Section 12.2).

in respect of the litigation. Fortnow did not sign the Letter Agreement.

In 2006, Broadview obtained judgments against Commissioner in the approximate amount of $700,000. On behalf of Commissioner, SportsLine then negotiated a settlement with Broadview for approximately $500,000 (the "SportsLine Settlement"), and sought to negotiate a payment of $399,000 from the shareholders. Plaintiffs unanimously voted to indemnify SportsLine and pay SportsLine the reduced amount of $399,000. When asked to participate in this payment, Fortnow responded to the plaintiffs by email, stating that he had "no interest in settling with Broadview or SportsLine, and [] [did] not intend to pay either of them anything."

Plaintiffs paid SportsLine the full amount. However, Fortnow did not contribute his share of $89,775.00 toward the SportsLine Settlement. Consequently, this action for breach of contract, unjust enrichment, breach of fiduciary duty, contribution, and punitive damages ensued.

After discovery, Fortnow moved to dismiss the complaint on the grounds that (1) all of the causes of action are conclusively refuted by documentary evidence (CPLR 3211(a)(1)); (2) the breach of fiduciary duty claim is duplicative of the breach of contract claim (CPLR 3211(a)(7)); (3) documentary evidence establishes that defendant was no longer a shareholder, officer, or director of the subject corporation at the time of the alleged activity complained of, and therefore, owed no fiduciary duty to the plaintiffs (CPLR 3211(a)(1) and (7)); (4) no claim lies for contribution in a contract case such as this one (CPLR 3211(a)(7)); (5) the unjust enrichment claim fails since a written contract exists governing the subject matter of this action (CPLR 3211(a)(1) and (7)); and (6) punitive damages may not be awarded in this private, contract dispute (CPR 3211(a)(7)).

The Court granted Fortnow's motion to dismiss, except as to plaintiffs' claim for unjust

enrichment. The Court concluded that "SportsLine's release in the Settlement Agreement of all claims, 'whether in law or in equity, whether matured or unmatured and whether known or unknown or otherwise, which SportsLine ever had, now have, or hereafter can, shall or may have against' the Shareholders of Daedalus . . . , creates an issue of fact . . . as to whether Fortnow received a benefit from the Settlement Agreement."

Instant Motion

Fortnow contends that the Court's prior order, dated March 6, 2008 (the "March Order") granted his motion to dismiss the complaint, except as to plaintiff's fourth cause of action for unjust enrichment. Fortnow argues that in so doing, the Court overlooked the branch of his motion asserting that no such claim may be maintained as a matter of law, because a written agreement, *i.e.* the merger agreement, exists governing the parties' indemnification obligations. In support of reargument, Fortnow contends that his prior motion set forth the proposition that an unjust enrichment claim may not be maintained where, as here, a written agreement exists governing the same subject matter, *i.e.*, the parties' indemnity obligations. Plaintiffs' statement, that it "would be unjust for the Court to allow Fortnow to back out of his obligations, which led Plaintiffs' to settle in the first place," demonstrates that plaintiffs agree that their unjust enrichment claim arose from the parties' indemnification. Fortnow's reply memorandum pointed out that plaintiffs' opposing papers did not challenge the fundamental principle that the existence of a valid written contract governing the parties' indemnification obligations is fatal to their unjust enrichment claim. However, the March Order did not address this principle. Therefore, Fortnow's motion to dismiss the complaint should be granted in its entirety.

Opposition

In opposition, plaintiffs argue that the Court was correct in finding that issues of fact exist as to their unjust enrichment claim and that dismissal of said claim is inappropriate at this juncture. Plaintiffs contend that Fortnow breached certain oral agreements made among the shareholders in 2001, separate and apart from the agreements and promises made in the Merger Agreement. As set forth in their prior opposition, upon Broadview's commencement of its action in 2001, the shareholders agreed, among themselves, to indemnify SportsLine for Broadview's claims. Said agreement was separate from any indemnification promises and/or obligations made in the Merger Agreement, which Fortnow claims expired in December 2000. In light of Fortnow's contention that the indemnification obligations in the Merger Agreement expired in December 2000, it is logical that the Shareholders made a separate agreement to indemnify SportsLine relating to the merger thereafter.

Further, according to plaintiffs, Fortnow was actively involved in the 2001 decision to indemnify SportsLine, and suggested that the shareholders retain Kantor PC to represent SportsLine. Fortnow also paid all of Kantor PC's legal fees in connection with said defense. As further evidence of his agreement to indemnify SportsLine in 2001, Fortnow was also involved in the day-to-day defense of the Broadview Action, and as such, all legal bills were sent to "c/o Fortnow." Fortnow was also involved in the prosecution of Hughes Hubbard & Reed, LLP ("Hughes Hubbard"), in connection with said firm's misrepresentation of the shareholders during the merger. Fortnow agreed that the ultimate goal in pursuing and prosecuting Hughes Hubbard was to recover enough funds to cover monies due to SportsLine as a result of any finding of liability or settlement in connection with the Broadview Action. Thus, when the Hughes

Hubbard litigation settled, and each shareholder received his proportionate share of the settlement proceeds, the shareholders agreed to maintain such proceeds to apply against any SportsLine liability or settlement of the Broadview Action. Notwithstanding Fortnow's breach, plaintiffs agreed to abide by their 2001 promise to indemnify SportsLine, and paid Fortnow's share. As a result, all of the shareholders received a release from any potential liability to SportsLine relating to the merger and/or the Broadview Action. By his refusal to participate in the settlement, Fortnow was unjustly enriched at the expense of plaintiffs.

Therefore, while Fortnow relies on the Merger Agreement to avoid liability of the other causes of action in the complaint, Fortnow does not dispute that he made a separate agreement with plaintiffs in 2001, after the indemnification clause in the Merger Agreement expired, to indemnify SportsLine in connection with the Broadview Action, retained Kantor PC and paid all of said firm's legal fees, and after 2001, agreed to commence the Hughes Hubbard litigation to recover funds due to SportsLine.

Plaintiffs argue that the Merger Agreement does not govern the same subject matter underlying the cause of action for unjust enrichment. The indemnification obligations under the Merger Agreement concern the agreement to indemnify SportsLine for any breaches by the shareholders occurring one year after the closing of the merger, and the indemnification obligations undertaken by Fortnow were made after those obligations in the Merger Agreement already expired.

The settlement resolved potential lengthy and costly litigation and resulted in SportsLine's release of Fortnow in connection with the merger and/or the Broadview Action. Fortnow should not be allowed to "back out" of his obligations, made separate from the Merger

Agreement in 2001, which obligations plaintiffs relied upon when they agreed to settle the Broadview Action.

Reply

The alleged subsequent unenforceable oral agreement governed the same subject matter, *to wit*: to indemnify SportsLine. The Court previously determined that the alleged oral agreement was not capable of enforcement as a matter of law in view of the no oral modification provision of the Merger Agreement and Section 15-301 of the General Obligations Law. As further pointed out in Fortow's previous reply, only SportsLine could seek to enforce the alleged oral agreement by Fortnow and his fellow shareholders to indemnify it. No one but SportsLine could possibly have standing to assert an unjust enrichment claim in the face of such an unenforceable agreement. However, SportsLine's settlement agreement with the other shareholders recites the Merger Agreement alone as the basis for indemnification.

In addition, the plaintiffs' breach of contract claim centers on the indemnification clause in the Merger Agreement, and plaintiffs' complaint relied upon Article XII in fashioning all of its other claims against Fortnow. And, this Court previously rejected plaintiffs' assertions that Fortnow engaged Kantor PC and orally agreed to sue Hughes Hubbard and retain any resulting damage award to satisfy an indemnity obligation.

Analysis

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*,182 AD2d 22 [1st Dept 1992]). Reargument is not designed to

afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588; *Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27, 588 NYS2d 8 [1st Dept 1992], *lv denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

Upon a reading the submissions, it appears that the Court did not address the legal principle concerning the viability of an unjust enrichment claim in the face of an established written contract governing the subject matter giving rise to the unjust enrichment claim. Therefore, the Court grants reargument on the issue of whether plaintiffs' fourth cause of action for unjust enrichment should be dismissed in light of such principle.

It is well settled that "plaintiffs cannot recover for unjust enrichment while simultaneously alleging the existence of an express contract covering the same subject matter" (*Sergeants Benev. Ass'n Annuity Fund v Renck*, 19 AD3d 107, 796 NYS2d 77 [1st Dept 2005] *citing MJM Adv. v Panasonic Indus. Co.*, 294 AD2d 265, 266, 741 NYS2d 874 [2002] and *Hohenberg Co. v Iwai New York*, 6 AD2d 575, 578, 180 NYS2d 410 [1958]). The existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract for events arising out of the same subject matter (*PKO Television, Ltd. v Time Life Films, Inc.*, 169 AD2d 582, 564 NYS2d 434 [1st Dept 1991]). Thus, tort claims which are duplicative of a breach of contract claim may properly be dismissed (*23/23 Communications*

Corp. v General Motors Corp., 257 AD2d 367, 683 NYS2d 43 [1st Dept 1999]; *see also Apfel v Prudential-Bache Securities Inc.*, 81 NY2d 470 [1993] [finding that unjust enrichment on a quasi-contract theory was improperly reinstated where transaction was controlled by the express agreement of the parties and their rights and liabilities are to be determined solely on theories of breach of contract]).

Further, a breach of contract claim may not be considered a tort unless a legal duty independent of the contract, *i.e.*, one arising out of circumstances extraneous to, and not constituting elements of, the contract itself-has been violated (*Brown v Brown*, 12 AD3d 176, 785 NYS2d 417 [1st Dept 2004]).

In plaintiffs' second cause of action for breach of contract, plaintiffs allege that (1) the shareholders, including Fortnow, contracted with SportsLine and Commissioner, whereby they agreed to indemnify SportsLine from all claims and losses arising from certain third party claims that may be asserted after the closing of the merger transaction; (2) plaintiffs paid their proportionate shares of the SportsLine Settlement, as well as Fortnow's share; (3) as a direct result of Fortnow's breach of the Merger Agreement, plaintiffs were forced to pay Fortnow's share.

In plaintiffs' fourth cause of action for unjust enrichment, plaintiffs allege that pursuant to the SportsLine Settlement, (1) Fortnow "received a broad and general release of his obligations *arising from the indemnification claims*," (2) without contributing his proportionate share, and (3) that equity and good conscience demand that Fortnow "pay his share" of the SportsLine Settlement" in the amount of $89,775.00 (emphasis added).

The Merger Agreement sets forth the obligation of the shareholders, including Fortnow,

to indemnify SportsLine and Commissioner. The Merger Agreement required indemnification against certain post-closing claims asserted within a year of the closing (other than for fraud), which were in turn predicated upon pre-closing events giving rise to breaches of representations, warranties or covenants contained in such Agreement. SportsLine's ultimate monetary liability to Broadview is the very subject of plaintiffs' complaint in this action, in that SportsLine sought and recovered compensation from plaintiffs on the basis of their indemnification obligations, and plaintiffs now seek to impose indemnification obligations against Fortnow. However, Fortnow's indemnification obligations to SportsLine are expressly governed by the Merger Agreement, as alleged in plaintiffs' second cause of action for breach of contract.

That plaintiffs' breach of contract claim was dismissed, based on this Court's interpretation of the indemnification clause in the Merger Agreement, does not negate the fact that such clause governs the issue of indemnification.

Moreover, to the extent plaintiffs seek to create a "new" indemnification obligation by virtue of oral promises and agreements allegedly made by Fortnow, such attempt is unavailing to sustain an unjust enrichment claim.

In this regard, as stated in the Court's March Order, Article XII, section 12.9 of the Merger Agreement, provides that

> Third Party Claims
>
> (f) The rights and remedies of SportsLine and the Shareholders under this Section 12.2 are exclusive and in lieu of any and all other rights and remedies which SportsLine or the Shareholders . . . may have against the other under this Agreement or otherwise. . . . All claims for indemnifications must be asserted, if at all, . . . in accordance with the provisions of this Section 12.2.[2]

[2] The Court cited to Article XII, section 12.9 in its March Order also.

Furthermore, any oral agreement that modifies Fortnow's indemnification obligations under the Merger Agreement is insufficient. As stated in the March Order, the Merger Agreement contains a provision precluding the modification of its terms except by a writing signed by all parties (Section 15.4; *Opton Handler Gottlieb Feiler Landau & Hirsch v Patel*, 203 AD2d 72, 610 NYS2d 26 [1st Dept 1994]).

A judgment dismissing a cause of action pursuant to CPLR 3211(a)(l) is warranted where "a defense is founded upon documentary evidence," provided the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]).

Further, when considering a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," or evidentiary material, they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st

Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]).

Here, plaintiffs' indemnification dispute is governed by the clear and unambiguous terms of an express contract, *i.e.*, the Merger Agreement (*Prichard v 164 Ludlow Corp.*, 14 Misc 3d 1202, 831 NYS2d 362 [Supreme Court New York County 2006] ["where a written agreement unambiguously contradicts the allegations of a breach of contract cause of action, the contract itself constitutes documentary evidence warranting dismissal of the complaint, pursuant to CPLR 3211(a)(1), regardless of any extrinsic evidence or self-serving allegations offered by the plaintiff"]). Further, there is no legally cognizant indemnification obligation independent of the Merger Agreement. Therefore, the cause of action for unjust enrichment is dismissed as duplicative of plaintiffs' breach of contract claim.

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by defendant Matthew Fortnow pursuant to CPLR 2221 for leave to reargue his prior motion to dismiss, is GRANTED; and it is further

ORDERED that the branch of the motion by defendant Matthew Fortnow for an order dismissing plaintiffs' unjust enrichment claim pursuant to CPLR 3211(a)(1) and (a)(7), on the ground that no such claim may be maintained as a matter of law because a written agreement exists governing the same subject matter, is GRANTED; and it is further

ORDERED that defendant Matthew Fortnow shall serve a copy of this order with notice

of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: July 14, 2008

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