

<b>Reich v Somerset Invs. Corp.</b>
2009 NY Slip Op 33013(U)
December 10, 2009
Supreme Court, Nassau County
Docket Number: 020263-07
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X  
**JULES REICH,**

**TRIAL/IAS PART: 25  
NASSAU COUNTY**

**Plaintiff,**

**-against-**

**Index No: 020263-07**

**SOMERSET INVESTORS CORP., and  
RANDI MARCUS,**

**Motion Seq. Nos: 1 and 2  
Submission Date: 11/2/09**

**Defendants.**

-----X  
**SOMERSET INVESTORS CORP., and  
RANDI MARCUS,**

**Defendants/Third-Party Plaintiffs,**

**-against-**

**SOMERSET FINANCIAL GROUP, INC. and  
JOHN and JANE DOE "1-10," said names being  
fictitious and intended to refer to individuals  
whose actual identity is unknown to the third-  
party plaintiffs at this time.**

**Third-Party Defendants.**

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**The following papers have been read on these motions:**

- Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits....X**
- Defendants/Third Party Plaintiffs' Memorandum of Law.....X**
- Affirmation in Further Support and Exhibits.....X**
- Defendants/Third Party Plaintiffs' Memorandum of Law in  
Opposition/Further Support.....X**

**Notice of Cross Motion, Affirmation in Opposition/Support,  
Affidavit in Opposition/Support and Exhibits.....X  
Plaintiffs/Third Party Defendants’ Memorandum in Opposition/Support.....X  
Reply Affirmation in Further Support of Cross Motion and Exhibits.....X  
Reply Memorandum in Further Support of Cross Motion.....X**

This matter is before the Court for decision on 1) the motion filed by Defendants/Third Party Plaintiffs Somerset Investors Corp. and Randi Marcus on June 8, 2009 for an Order a) granting summary judgment and dismissing the causes of action in the complaint (“Complaint”) against them; and b) granting them summary judgment on the issue of liability on their counterclaims against Plaintiff Jules Reich, and 2) the cross motion filed by Plaintiff Jules Reich and Third-Party Defendant Somerset Financial Group, Inc. on October 22, 2009 for an Order a) granting Plaintiff summary judgment on all of the causes of action in the Complaint; b) granting Plaintiff summary judgment dismissing Defendants’ fourth, eighth, ninth and eleventh counterclaims against him; c) granting Third-Party Defendant Somerset Financial Group, Inc. summary judgment dismissing Defendants’ second and third causes of action against it for tortious interference with prospective business relations and diversion of corporate opportunities respectively; and d) awarding Plaintiff and Third-Party Defendant Somerset Financial Group, Inc. costs and counsel fees. These motions were submitted on November 2, 2009. For the reasons set forth below, the Court denies both the motion and the cross motion.

**BACKGROUND**

**A. Relief Sought**

Defendants/Third-Party Plaintiffs Somerset Investors Corp. (“Somerset”) and Randi Marcus (“Marcus”) (collectively “Defendants”) move for an Order a) granting summary judgment to Defendants dismissing the causes of action in the Complaint against them; and b) granting Defendants summary judgment on the issue of liability on their counterclaims against Plaintiff Jules Reich (“Reich” or “Plaintiff”).

Plaintiff Reich and Third-Party Defendant Somerset Financial Group, Inc. (“Somerset Financial”) oppose Defendants’ motion.

Reich and Somerset move for an Order 1) granting Plaintiff summary judgment on all the causes of action in the Complaint; 2) granting Plaintiff summary judgment dismissing

Defendants' fourth, eighth, ninth and eleventh counterclaims against him for unjust enrichment, tortious interference with prospective business relations, diversion of corporate opportunities and misrepresentation, respectively; 3) granting Somerset Financial summary judgment dismissing Defendants' second and third, third-party causes of action against Somerset Financial for tortious interference with prospective business relations and diversion of corporate opportunities, respectively; and 4) awarding Reich and Somerset Financial costs and attorneys' fees.

B. The Parties' History

The Complaint, dated November 9, 2007, alleges as follows:

Plaintiff and Defendants were parties to an Accord and Satisfaction Agreement ("Agreement") dated February 15, 2006. Pursuant to the Agreement, the parties revised a series of agreements they had previously reached, including but not limited to a consulting agreement, a survival agreement, an escrow agreement, a promissory note, an assignment of stock and stock power, and an agreement and plan of acquisition.

Pursuant to the Agreement, Defendants were required to pay Plaintiff the sum of \$12,000 per month, to and including December 3, 2008, when the last payment was due. Defendants made the required payments through March 31, 2007, but failed to make the required payments for April through November of 2007, except that Defendants paid to Plaintiff the sum of \$17,739.97, for which Plaintiff credited Defendants. Plaintiff has demanded from Defendants the amounts due Plaintiff, and Defendants have failed and refused to make those payments.

The first cause of action sounds in breach of contract, and alleges that the Defendants are jointly and severally liable to Plaintiff in the sum of \$78,260.25, representing sums owed for the months of April through November of 2007. The second cause of action sounds in repudiation and anticipatory breach of contract, and alleges that the Defendants are jointly and severally liable to Plaintiff in the sum of \$234,260.25, representing all unpaid amounts due under the Agreement through December 3, 2008.

Defendants served an Answer with Counterclaims dated December 3, 2007 in which they deny many of Plaintiff's allegations, and assert eleven (11) counterclaims, which are as follows:

First Counterclaim - alleges Plaintiff's breach of the consulting agreement ("Consultant Agreement") by engaging in activities that were competitive with Somerset's business,

Second Counterclaim - alleges Plaintiff's breach of the mortgage agreement ("Mortgage Agreement") by improperly assigning the Mortgage,

Third Counterclaim - alleges Plaintiff's breach of his common law duty of loyalty arising out of employment by engaging in activities that were competitive with Somerset's business,

Fourth Counterclaim - alleges unjust enrichment by Plaintiff in keeping excess payments that Defendants made to Plaintiff pursuant to the Consultant Agreement,

Fifth Counterclaim - alleges Plaintiff's breach of the implied covenant not to impair good will by, *inter alia*, using Somerset's name and corporate opportunities without the permission of Defendants,

Sixth Counterclaim - alleges unfair competition by Plaintiff by using Somerset's name in the mortgage banking industry to cause confusion within the industry and mislead actual and potential customers to solicit Plaintiff rather than Somerset,

Seventh Counterclaim - seeks an accounting from Plaintiff, who owes a fiduciary duty to Defendants, regarding monies that Plaintiff may have wrongfully withheld from Defendants,

Eighth Counterclaim - alleges Plaintiff's tortious interference with prospective economic relations by interfering with Defendants' business relations with potential customers by, *inter alia*, misrepresenting that he was acting on behalf of Somerset,

Ninth Counterclaim - alleges Plaintiff's diversion of corporate opportunities by improperly diverting corporate opportunities that properly belonged to Somerset,

Tenth Counterclaim - alleges Plaintiff's misappropriation of good will by intentionally misleading the public into believing that the products and services that Plaintiff offered were being offered by Somerset,

Eleventh Counterclaim - alleges misrepresentation by Plaintiff who, despite having sold Somerset to Marcus, continues to hold himself out to the public as an officer of Somerset.

Defendants also filed a Third Party Summons and Complaint ("Third Party Complaint") dated December 3, 2007 in which they named Somerset Financial Group, Inc. ("Somerset Financial"), as well as "John and Jane Doe '1-10'", as Third Party Defendants. The Third Party Complaint contains four (4) causes of action against Somerset Financial:

First Cause of Action - alleges unfair competition by Somerset Financial by its use of the

[\* 5]  
Somerset name in a manner designed to cause confusion within the mortgage banking industry and to mislead actual and potential customers of Somerset,

Second Cause of Action - alleges Somerset Financial's tortious interference with prospective economic relations by misrepresenting itself as Somerset and interfering with Defendants' business relations with potential customers of Somerset,

Third Cause of Action - alleges Somerset Financial's diversion of corporate opportunities by diverting and exploiting, for its own benefit, corporate opportunities that belonged to Somerset,

Fourth Cause of Action - alleges Somerset Financial's misappropriation of good will by misleading the public into believing that the products and services that Somerset Financial offered were, in fact, those offered by Somerset.

In support of their motion, Defendants provide an Affidavit in Support of Randi Marcus ("Marcus") dated June 4, 2009. Marcus affirms as follows:

This case arises out of Reich's sale of Somerset to Marcus. In connection with that sale, Reich and Marcus entered into several agreements on December 3, 2003, including a Consultant Agreement of which Marcus provides a copy. Section five (5) of the Consultant Agreement is titled "Restrictive Covenant" and includes a provision reflecting Reich's agreement that, during his employment with Somerset, and for three years after his termination and/or expiration of the Consultant Agreement, he will not compete with Somerset within the Tri-State area.

As part of the purchase and sale of Somerset, on October 9, 2002, Reich and Marcus entered into an Agreement and Plan of Acquisition. In addition, on December 3, 2009, also as part of that purchase and sale, Reich and Marcus entered into a Survival Agreement, an Escrow Agreement, a Promissory Note, an Assignment of Stock and Stock Power, a Mortgage and a Satisfaction. Both Reich and Marcus were represented by counsel with respect to the transaction and all the agreements.

Reich's attorney was appointed escrow agent pursuant to the Escrow Agreement, which provided for the Satisfaction to be held in escrow and released upon the occurrence of certain events, including the payment and/or satisfaction of the Promissory Note. Marcus provides a copy of the Escrow Agreement. Paragraph 2(a) provides that the Satisfaction was to be held in

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escrow by the escrow agent, and could be released only upon certain conditions, including:

Upon full payment of principal and interest under a certain Promissory Note of even date herewith, and upon which such payment and/or filing of the satisfaction, a certain Consultant Agreement of even date herewith shall be deemed terminated other than with respect to those specific provisions of the Consultant Agreement, as provided in the Consultant Agreement, which survive termination;

After the closing, a dispute arose between Reich and Somerset and, on February 15, 2006, Reich and Marcus entered into an Accord and Satisfaction Agreement. After the parties entered into the Accord and Satisfaction Agreement, Reich marked the Promissory Note dated December 3, 2003 "satisfied and paid in full." Marcus provides a copy of that Promissory Note which contains the handwritten words "Satisfied and Paid in Full, Jules Reich, 2/15/06" on the second page (Ex. 8 to Ds' Motion).

Marcus submits that the satisfaction of the Promissory Note terminated the Consultant Agreement, pursuant to the language of the Escrow Agreement, and extinguished Defendants' obligations under the Consultant Agreement. Due to an error by Somerset's accounting department, however, payments continued to be made to Reich after he marked the Promissory Note paid in full. Upon learning of the error, Defendants asked Plaintiff to reimburse Somerset for the excess funds and Plaintiff refused.

At the time of the closing on the sale, in December 2003, Marcus was unaware that Reich had formed a new company called Somerset Financial Group, Inc., which was conducting business out of Somerset's former office in Great Neck, New York. Marcus never consented to the formation of Somerset Financial. Marcus affirms that, had she known about Somerset Financial, she would have objected to the formation of the company, due to the possibility of confusion of Somerset and Somerset Financial in the marketplace. She also affirms that Somerset Financial's marketing brochure trades off of Somerset's reputation and goodwill.

Finally, Marcus affirms that, during discovery, Defendants' counsel learned that Somerset Financial was extending loans to individuals, in violation of the Restrictive Covenant. Marcus provides documentation regarding those loans, which occurred in 2004 - 2007 (Exhibits 10-15 of Ds' Mot. to Dismiss). Marcus also affirms that, on or about October 1, 2007, a potential customer advised Somerset that he had mistakenly called Somerset Financial in Great Neck

looking for a residential mortgage and was referred to Sterling National Bank. Marcus affirms that, after learning this information, the managing director of Somerset instructed Dan Riley (“Riley”), an employee of Somerset, to telephone Somerset Financial’s Great Neck office and record the conversation. That conversation was recorded on a compact disc, which is Exhibit 18 to Defendants’ Motion to Dismiss.<sup>1</sup> Marcus affirms that, during this conversation, a representative of Somerset Financial referred Riley to Truen & Michaels, and then to Sterling National Bank, demonstrating Somerset Financial’s improper diversion of Somerset’s customer leads. The Court has reviewed that transcript, which reflects a conversation between Riley and a woman named Jessica who says that she is with “Sterling” (Tr. at Conversation 2, p.1) and responds to Riley’s questions regarding negotiating a new mortgage on his home. Based on the Court’s review, this transcript does not provide clear evidence of Reich’s violation of the Restrictive Covenant.

Defendants also submit that Reich has falsely asserted that his daughter is not involved with Somerset Financial. Defendants affirm that Reich’s daughter, Randi Kahn, 1) testified that she used the “Somerset” name in her real estate development work as a “marketing name” (Ds’ Memo. of Law at p. 16); 2) was listed as “President, Somerset Financial Group” when she appeared as a panelist in a symposium in February of 2008; and 3) signed an Assignment of Mortgage in August 2006 on behalf of Somerset Financial listing her title as Vice President. In light of the foregoing, Defendants submit that they have established Reich’s unauthorized use of the Somerset name.

Reich and Somerset Financial provide an Affidavit in Opposition/Support of Reich dated August 20, 2009. In that Affidavit, Reich affirms as follows:

In 2002, Reich decided to sell Somerset and move to Florida, so that he could spend more time with his family and focus his attention on Somerset Financial, his real estate and investment and development business. On December 3, 2003, he completed the closing of the sale of Somerset to Marcus for a price of approximately \$200,000. On the closing date, he entered into several agreements with Defendants, including the Consultant Agreement. Pursuant to the

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<sup>1</sup> At the Court’s request, Somerset and Marcus provided the Court with a transcript of this recording on or about December 3, 2009.

Consultant Agreement, he agreed to act as an advisor to Somerset in return for minimum monthly payments of \$10,000, which would be increased to a maximum of \$25,000 per month based on Somerset's monthly income.

In 2005, Defendants complained that Somerset's payments to Reich were cutting into its advertising budget and were too favorable to Reich. Despite his belief that he was entitled to the payments, Reich agreed to renegotiate the terms of the Consultant Agreement. The parties negotiated the terms of the new agreement, and on February 15, 2006, Reich entered into the Accord and Satisfaction Agreement with the Defendants. Pursuant to that Accord and Satisfaction Agreement, Reich gave up increases in his payments based on Somerset's profitability and, instead, agreed to a flat fee of \$12,000 for the duration of the Accord and Satisfaction.

Defendants then stopped paying Reich his monthly fee, and Reich instituted this lawsuit to recover those payments. He affirms that the last payment that he received from Defendants was in the sum of \$48,000, representing four (4) monthly payments for December of 2006, and January, February and March of 2007. Other than an additional payment of \$17,739.35 by Marcus, which was credited to amounts owed to Reich pursuant to the Accord and Satisfaction Agreement, Defendants have made no other payments to Reich. Reich affirms that Defendants owe him a total of \$234,260, plus interest.

### C. The Parties' Positions

Defendants/Third-Party Plaintiffs Somerset Investors Corp. and Randi Marcus submit, that the Court should grant summary judgment dismissing Plaintiff's claims, and grant Defendants summary judgment as to liability on their Counterclaims. Defendants argue, *inter alia*, that 1) pursuant to the language of the Escrow Agreement, the satisfaction of the Promissory Note terminated the Consultant Agreement and, therefore, the Court should dismiss Plaintiff's claims pursuant to the Consultant Agreement, and award Defendant summary judgment in the sum of \$180,000 on their Fourth Counterclaim for their excess payments to Plaintiff; 2) Plaintiff extended loans in violation of the Restrictive Covenant and, therefore, the Court should grant Defendants summary judgment as to liability on their First Counterclaim and direct further discovery and a trial on the issue of damages; 3) Plaintiff's continued use of the "Somerset"

name subsequent to the closing entitles Defendants to summary judgment as to liability on their Sixth Counterclaim, and warrants further discovery and a trial on the issue of damages; and 4) in light of evidence that, after he sold all of his stock and interest in Somerset to Marcus, Reich continued to use the Somerset name, and trade off its reputation, the Court should grant Defendants summary judgment as to liability on their Fifth Counterclaim, and order further discovery and a trial on the issue of damages.

With respect to Defendants' applications for additional discovery, Reich and Somerset Financial submit that these requests are improper, both because 1) the parties previously certified that all discovery was complete; and 2) there is no authority for the granting of discovery to a party *seeking* summary judgment, as opposed to a party opposing summary judgment, simply to provide it with more facts in support of its motion.

Reich and Somerset Financial also submit that Reich is entitled to summary judgment on his breach of contract claims because there is no dispute that Defendants owe Reich substantial sums pursuant to the Accord and Satisfaction. They also dispute Defendants' contention that the payment of the Promissory Note terminated the parties' obligations pursuant to the Accord and Satisfaction.

Reich and Somerset submit, further that 1) the Court should dismiss Defendants' First Counterclaim for breach of the Restrictive Covenant because the loans that Reich made, one to a close friend and the other to a business acquaintance, do not violate the Restrictive Covenant because they are non-competitive or are, at most, *de minimis*, non-material breaches of the Restrictive Covenant; 2) the Court should deny Defendants' motion to summary judgment on their Sixth Counterclaim for unfair competition because Defendants are unable to demonstrate a "likelihood of confusion" among customers simply because Somerset Financial, which does not advertise or compete with Defendants, shares the name "Somerset" with Defendants, particularly in light of the existence of over 100 active businesses in New York state with that name; 3) the Court should dismiss Defendants' Fifth Counterclaim for breach of the implied covenant not to impair good will because Defendants have failed to identify any customer(s) that Reich approached or solicited, and the transcript of the telephone conversation does not support Defendants' allegations in this regard; and 4) the Court should dismiss Defendants'

Counterclaims against Reich for unjust enrichment, tortious interference with prospective business relations, diversion of corporate opportunities and misrepresentation, as well as their causes of action against Somerset Financial for tortious interference with prospective business relations and diversion of corporate opportunities, as Defendants have failed to satisfy the elements of all these causes of action.

### RULING OF THE COURT

#### A. Standard for Summary Judgment

The party seeking summary judgment must establish an entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). If the party moving for summary judgment fails to establish a *prima facie* entitlement to judgment as a matter of law, the motion must be denied. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985); *Widmaier v. Master Products, Mfg.*, 9 A.D.3d 362 (2d Dept. 2004); and *Ron v. New York City Housing Auth.*, 262 A.D.2d 76 (1st Dept. 1999). CPLR § 3212(b) further requires that, in ruling on a motion for summary judgment, the court must determine if the movant's papers justify holding as a matter of law "that there is no defense to the cause of action or that the cause of action has no merit." In making this determination, the Court must view the evidence submitted by the moving party in a light most favorable to the non-movant. *Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2d Dept. 1990). The Court may only grant summary judgment when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 (1979).

Summary judgment is the procedural equivalent of a trial. *Capelin Assoc., Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 (1974). It is a drastic remedy that will only be granted where the proponent establishes that there are no triable issues of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324. Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations. *Zuckerman v. City of New York*, 49 N.Y.2d at 562. On a motion for summary judgment, the court should refrain from making credibility determinations. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 631 (1997).

## B. The Factual Disputes Render Summary Judgment Inappropriate

### 1. Legal Standards

#### (a) Breach of Contract

The elements of a cause of action for breach of contract are the existence of a contract between the plaintiff and defendant, consideration, performance by the plaintiff, breach by the defendant and damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). Plaintiff must establish the provisions of the contract the defendant is alleged to have breached. *Sud v. Sud*, 211 A.D.2d 423 (2d Dept. 1995); *Atkinson v. Mobil Oil Corp.*, 205 A.D.2d 719 (2d Dept. 1994).

A contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562 (2002); *Katina, Inc. v. Famiglietti*, 306 A.D.2d 440 (2d Dept. 2003). The terms of an agreement are to be interpreted in accordance with their plain meaning. *Greenfield v. Philles Records, Inc., supra*; *Tikotzky v. New York City Transit Auth.*, 286 A.D.2d 493 (2d Dept. 2001). The court is to give practical interpretation to the language employed and the parties' reasonable expectations. *Slamow v. Del Col*, 174 A.D.2d 725, 726 (2d Dept. 1991), *aff'd*. 79 N.Y.2d 1016 (1992).

Parol evidence will not be considered in interpreting a contract unless the contract is ambiguous. *South Road Assocs., LLC v. IBM Corp.*, 4 N.Y.2d 272 (2005); *767 Third Avenue, LLC v. Orix Capital Markets, LLC*, 26 A.D.3d 216 (1st Dept. 2006). The question of whether an agreement is ambiguous is a question of law to be determined by the Court. *Innophos, Inc. v. Rhodai, S.A.*, 10 N.Y.3d 25 (2008); *JJFN Holdings, Inc. v. Monarch Investment Properties, Inc.*, 289 A.D.2d 528 (2d Dept. 2001). Ambiguity exists where the terms of the agreement are susceptible to two reasonable interpretations. *Uribe v. Merchants Bank of New York*, 92 N.Y.2d 336 (1998); *Around the Clock Delicatessen, Inc. v. Larkin*, 232 A.D.2d 514 (2d Dept. 1996). Ambiguity does not exist simply because the parties urge different interpretations of its terms. *Bethlehem Steel Co. v. Turner Construction Co.*, 2 N.Y.2d 456 (1957); *Elletson v. Bonded Insulation Co., Inc.*, 272 A.D.2d 825 (3d Dept. 2000).

#### (b) Accounting

In order to maintain an action for an accounting, the party seeking the accounting must

[\* 12]

establish that a fiduciary or trust relationship exists. *Schantz v. Oakman*, 163 N.Y. 148 (1900); *Akkaya v. Prime Time Transport*, 45 A.D.3d 616 (2d Dept.2007); *Darlagiannis v. Darlagiannis*, 48 A.D.2d 875 (2d Dept.1975).

(c) Unjust Enrichment

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d 58 (1st Dept. 2001).

(d) Unfair Competition

The essence of an unfair competition claim under New York law is that the defendant misappropriated the fruit of plaintiff's labors and expenditures by obtaining access to plaintiff's business idea either through fraud or deception, or an abuse of a fiduciary or confidential relationship. *Telecom International v. AT&T*, 280 F.3d 175, 197 (2d Cir. 2001), citing *Katz Dochrermann & Epstein, Inc. v. Home Box Office*, [citations omitted], (S.D.N.Y. March 31, 1999). The Second Circuit, in *Telecom International, supra*, expounded on this cause of action as follows:

In sum, New York's law of unfair competition is a [']broad and flexible doctrine that depends more upon the facts set forth...than in most causes of action. It has been broadly described as encompassing any form of commercial immorality, or simply as endeavoring to reap where one has not sown; it is taking the skill, expenditures and labors of a competitor, and misappropriati(ng) for the commercial advantage of one person...a benefit or property right belonging to another.['] [Citations omitted]. An unfair competition claim under New York law is not, therefore...dependent upon a showing of confusion or deception as to the origin of a product or service.

*Id.* at 197-198.

To sustain a cause of action to recover damages for unfair competition through the use of a trade name, the plaintiff must establish that the defendant's acts constituted an unfair appropriation or exploitation of a special quality attached to plaintiff's name. *V.S. Distributors v. Emkay Trading*, 1 A.D.3d 350 (2d Dept. 2003). To sustain a cause of action for tortious interference with prospective business opportunities, plaintiff must allege a specific business relationship they were prevented from entering into by reason of the purported tortious interference, that defendants acted with the sole purpose of harming plaintiff, or that defendant used wrongful means. *Schoettle v. Taylor*, 282 A.D.2d 411, 411-412 (1st Dept. 2001).

One who sells a business to another has a legal duty to refrain from acting to impair the good will that the seller transferred to the purchaser in exchange for part of the purchase price. *Slomin's Inc. v. Gray*, 176 A.D.2d 934, 935 (2d Dept. 1991). The seller must refrain from soliciting his former customers after he has sold his business, and the accompanying good will, to another. *Id.*

Finally, corporate fiduciaries may not, without consent, divert and exploit for their own benefit an opportunity that should be deemed an asset of the corporation. *Alexander v. Fritzen*, 147 A.D.2d 241 (1st Dept. 1989).

(e) Fraud

To establish a cause of action sounding in fraud, plaintiff must allege:

1) misrepresentation of a material fact, 2) scienter, 3) justifiable reliance, and 4) injury or damages. *In Re Garvin*, 210 A.D.2d 332, 333 (2d Dept. 1994).

2. Application of Legal Principles to the Present Case

The Court concludes that it cannot, as a matter of law, glean the parties' intent from the four corners of the relevant agreements and, therefore, extrinsic evidence is appropriate on the issue of the parties' intent. For example, the Restrictive Covenant does not define the word "compete." Given the breadth of the financial lending industry, the Court cannot conclude, based solely on the language of the Restrictive Covenant, whether the allegedly improper loans that Reich made constituted improper competition. Moreover, notwithstanding the existence of those agreements, the Court concludes that the unjust enrichment cause of action may proceed because

there is an issue whether the promissory note terminated the Consultant Agreement. Given the factual issues regarding the parties' obligations under and compliance with the various agreements, the Court concludes that summary judgment is inappropriate on the cause of action for unjust enrichment.

With respect to the various causes of action alleging unfair competition by Reich in, *inter alia*, using the Somerset name and competing with Somerset, the Court concludes that there are disputed issues of fact that make summary judgment inappropriate on those claims as well. These issues include whether there is a likelihood of confusion in the marketplace by Reich's use of the "Somerset" name, which Reich and Somerset Financial submit is a commonly used company name. The Court also denies summary judgment as to the Counterclaim for an accounting, in light of the factual disputes regarding the parties' obligations to each other, and denies the application for counsel fees and costs.

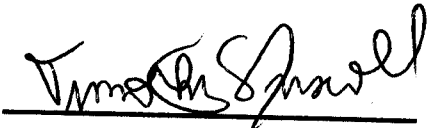
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel are reminded of their required appearance before the Court for a Pretrial Conference on January 7, 2010 at 9:30 a.m.

DATED: Mineola, NY  
December 10, 2009

ENTER

  
HON. TIMOTHY S. DRISCOLL

**ENTERED**

DEC 16 2009

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**