600 Mgt. LLC v Lencheski
2010 NY Slip Op 33886(U)
September 8, 2010
Supreme Court, New York County
Docket Number: 602353/09
Judge: Jane S. Solomon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SCANNED ON 9/9/2010

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

PRESENT: JANE S. SOLOMON PART 55

Justice

Index Number : 602353/2009

600 MANAGEMENT LLC

VS.

LENCHESKI, CHRISTOPHER J.

SEQUENCE NUMBER : 007

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... 1-3

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

SEP 09 2010

NEW YORK

COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

for amended decision

+ order.

NS 10/18/10 PC set at

end

Dated: 9/8/10

JANE S. SOLOMON

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 ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

----------X

600 MANAGEMENT LLC and
600 MANAGEMENT HOLDINGS LLC,

Index No. 602353/09

Plaintiffs,

-against-

CHRISTOPHER J. LENCHESKI,
SHARON MORRIS-LENCHESKI,
GABLE PERITZ MISHKIN LLP and
KENNETH S. FREBOWITZ,

Defendants.

----------X

FILED
SEP 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

Solomon, J.:

In this action, plaintiffs 600 Management LLC and 600 Management Holdings LLC (together, 600 Management) claim that they were fraudulently induced to purchase non-party SKI & Company LLC and its affiliated business (SKI), based upon financial statements prepared by the defendant accountants Gable Peritz Mishkin LLP (GPM) and one of its partners, Kenneth Frebowitz (Frebowitz) and provided to 600 Management by SKI's owners, defendants Christopher Lencheski (Lencheski) and Sharon Morris-Lencheski (Morris). The 10-count amended complaint asserts causes of action for breach of contract, breach of fiduciary duty, misappropriation of company assets, fraudulent inducement, aiding and abetting fraudulent inducement, contractual indemnification, and imposition of a constructive trust.

Defendants GPM and Frebowitz now move (in motion sequence number 006) to dismiss the amended complaint for lack of jurisdiction, failure to state a cause of action, and based upon documentary evidence. In motion sequence number 007, defendant Morris moves to dismiss the claims asserted against her for failure to state a cause of action, except for the breach of contract claims asserted in the seventh and a portion of the first causes of action. The motions are decided together.

Factual Allegations

In 2003, Lencheski formed SKI, a company in the business of managing, marketing and owning sports-related content, including teams and sporting events, with a significant portion of its revenue generated from sponsorships for sports-related content owned by SKI. Lencheski owned 99% of SKI and his wife, Morris, owned 1%.

In 2007, plaintiffs began negotiating for the purchase of SKI, and Lencheski and Morris allegedly presented them with financial statements prepared by Frebowitz and GPM. On March 31, 2008, plaintiffs purchased SKI and its affiliates, SKI Motorsports DE, LLC and SKI Motorsports NC, LLC, for $1.5 million. Three agreements dated March 31, 2008 were executed: a Securities Purchase Agreement among 600 Management LLC, Lencheski and Morris (Purchase Agreement); an Employment Agreement between plaintiffs and Lencheski (Employment Agreement) whereby the

latter was hired as the president and CEO for a five-year term at an annual salary of $500,000 ; and the Operating Agreement of 600 Management LLC, entered into between 600 Management Holdings LLC and Lencheski (Operating Agreement). In the transaction, Lencheski received a 30% membership interest in 600 Management LLC, and became one of three members of its board of directors.

According to plaintiffs, SKI's 2007 financial statements stated that SKI earned $1,347,381 from sponsorship commissions, and that SKI's net income was $1,019,761. However, in 2009, they found corrected financial statements in SKI's internal records, showing that SKI's 2007 financial statements improperly included $600,000 of income from a sponsorship agreement with non-party Fuze Beverage, LLC that would not be earned until 2008, so that SKI's 2007 revenue and net income figures were significantly overstated. Moreover, the financial projections for 2008 presented by Lencheski included the same $600,000, double-counting it to fraudulently induce plaintiffs to acquire SKI. Plaintiffs claim that GPM and Frebowitz prepared the corrected 2007 financial statements on May 2, 2008, with the financial projections for 2008, but that plaintiffs never were told of the correction or that the 2007 financials were inaccurate.

Plaintiffs also aver that, prior to closing on the sale of SKI, Lencheski used the inflated financial statements to

increase SKI's bank line of credit from $250,000 to $500,000, and then transferred $150,000 to Morris's personal checking account, thereby secretly creating additional liabilities to plaintiffs. Plaintiffs further claim that Lencheski took an unauthorized distribution of $163,539 from 600 Management LLC, and that he usurped a corporate opportunity belonging to them by secretly purchasing the franchise to the Quad City Mallards (Mallards), a member of the International Hockey League, using SKI's resources, goodwill and proprietary information to do so. Plaintiffs learned of this conduct on July 23, 2009, and fired him for cause on July 31.

Plaintiffs are Delaware limited liability companies. Lencheski, Morris and Frebowitz are Pennsylvania residents. GPM is a Pennsylvania limited liability company with its principal place of business in Pennsylvania and an office in New Jersey. Additional facts relevant to the resolution of defendants' motions are stated in the Discussion below.

Motion Sequence Number 006

GPM and Frebowitz argue that they are not subject to jurisdiction, because they are not parties to the Purchase Agreement and because there is no long-arm jurisdiction under CPLR 302(a). Plaintiffs counter that jurisdiction exists under CPLR 302(a).

The Purchase Agreement

Plaintiffs do not seriously dispute that GPM and Frebowitz are not parties to the Purchase Agreement, although the amended complaint alleges that "[t]his Court has personal jurisdiction over all Defendants ... pursuant to a contractual exclusive jurisdiction clause" contained in section 9.4 of the Purchase Agreement. Amended Complaint, ¶ 12. Section 9.4 states that the Purchase Agreement "shall be governed and construed in accordance with the Laws of New York, and the Parties irrevocably submit to the exclusive jurisdiction of the federal and state courts located in New York, New York for resolution of any disputes hereunder." Because neither GPM nor Frebowitz are parties to the Purchase Agreement, it cannot be relied on to create jurisdiction over them. *ComJet Aviation Mgt. v Aviation Invs.*, 303 AD2d 272 (1st Dept 2003) (non-party could not enforce forum selection clause); *M. Paladino, Inc. v Lucchese & Son Contr. Corp.*, 247 AD2d 515, 515 (2d Dept 1998) ("plaintiff may not maintain a cause of action for breach of contract against the appellant ... since it had no contractual relationship with the appellant, and was not in privity with it").

This conclusion is consistent with the terms of the Purchase Agreement, which provides in section 9.10 that "[n]othing in this Agreement, whether express or implied, is intended to confer rights or remedies under or by reason of this

Agreement on any person other than the Parties ... and their respective successors and assigns ... ." Plaintiffs do not claim that GPM or Frebowitz are successors or assignees under the Purchase Agreement. Therefore, the plain meaning of section 9.10 excludes GPM and Frebowitz from the forum selection clause. *Lopez v Fernandito's Antique*, 305 AD2d 218, 219 (1st Dept 2003) ("[c]lear and unambiguous terms should be understood in their plain, ordinary, popular and nontechnical meaning").

CPLR 302(a)(1)

Plaintiffs argue that jurisdiction over GPM and Frebowitz exists under CPLR 302(a)(1), which provides for New York jurisdiction over a non-domiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state." "By this single act statute ... proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 (2006) (internal quotation marks and citations omitted).

In *Deutsche Bank Sec., Inc.*, upon which plaintiffs rely, the Court of Appeals acknowledged that it had "in the past recognized CPLR 302(a)(1) long-arm jurisdiction over commercial

actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions." *Id.* The Court upheld jurisdiction because the defendant was "a sophisticated institutional trader that entered New York to transact business here by knowingly initiating and pursuing a negotiation with [the plaintiff's] employee in New York that culminated in the sale of $15 million in bonds." *Id.* at 71-72. The Court reasoned that "[n]egotiating substantial transactions such as this one was a major aspect of [the defendant's] mission - part of its principal reason for being," and that "over the preceding 13 months, [the defendant] had engaged in approximately eight other bond transactions with [the plaintiff's] employee in New York, availing itself of the benefits of conducting business here, and thus had sufficient contacts with New York to authorize our courts to exercise jurisdiction over its person." *Id.* at 72 (internal quotation marks and citation omitted).

To support this argument, plaintiffs submit e-mails exchanged among Lencheski, Morris and Frebowitz on December 10, 11 and 13, 2007. Morris's e-mails inform Frebowitz that Lencheski "would like to talk with [Frebowitz] about making a budget like [he] did last year" (Webber Aff., Ex. 4), and in one e-mail states:

> We have to go to NYC on Friday for a meeting with their whole side and our whole side

> (principals, attorneys, etc.). [Lencheski] wanted to know if you would be available for an hour or so over the next day or so to put together a nice budget like you did for us last year? He thinks it might be helpful in that meeting.

Id., Ex. 5. Morris copied Frebowitz on another e-mail titled "SKICO Legal Due Diligence Checklist - PLEASE REVIEW," in which she stated that she had "completed the attached checklist andaccompanyingnotes [sic]. Please review and let me know if you think there are particular changes that should be made anywhere. I am putting this in a binder and courier delivering it to NYC per request tomorrow." *Id.*, Ex. 6. In another e-mail to Frebowitz, copying another GPM partner, Morris stated that Lencheski "would welcome a call to discuss this budget project b/c we need it for a meeting Friday am in NYC." *Id.*, Ex. 8. Of the two Frebowitz e-mails submitted by plaintiffs, one answers several of Morris's specific tax questions, and the other is addressed to Lencheski, copying Morris and another GPM partner, stating: "[a]s discussed earlier, I am attaching a revised projection for 2008 at worst case, middle range, and best case scenarios. ...I will be available to make changes if necessary so you can take them with you to New York tomorrow." *Id.*, Ex. 9.

However, unlike in *Deutsche Bank Sec., Inc.*, plaintiffs never claim that GPM or Frebowitz had direct dealings with 600 Management prior to the execution of the Purchase Agreement. To the contrary, they fail to rebut Frebowitz's affidavit, which

states that neither he nor GPM communicated with plaintiffs until after the sale was consummated. Moreover, none of the e-mails submitted by plaintiffs were initiated by GPM or Frebowitz, nor were Plaintiffs direct recipients of any of those transmissions. Rather, all were initiated by Morris, and were transmitted among Pennsylvania residents. *Compare Deutsche Bank Sec., Inc.*, 7 NY3d at 72 ("[a]s Professor Siegel has observed, where a defendant 'deals directly with the broker's New York office by phone or mail [or e-mail] in a number of transactions instead of dealing with the broker at the broker's local office outside New York, long-arm jurisdiction may be upheld' [citation omitted]").

Neither of the other cases cited by plaintiffs support a different result. *See Longines-Wittnauer Watch Co. v Barnes & Reinecke*, 15 NY2d 443, 457-58 (1965), *cert denied* 382 US 905 (upholding New York jurisdiction where defendants engaged in "substantial" negotiations during a two-month period in New York, executed a contract in New York, shipped machines to New York, and supervised the installation and testing of machines in New York); *see also Liberatore v Calvino*, 293 AD2d 217, 221 (1st Dept 2002) (upholding New York jurisdiction where defendant contracted with plaintiff to legally represent her in a New York personal injury action concerning "New York tortfeasors in accordance with New York law"; "[h]e transacted business in New York by purposefully pursuing redress for plaintiff over a three-year

period from various New York entities"; and "[h]e engaged in numerous written and telephonic communications with New York entities on plaintiff's behalf in an effort to broker a settlement and earn legal fees"). Accordingly, plaintiffs cannot rely on CPLR 302(a)(1) for jurisdiction.

CPLR 302(a)(2)

CPLR 302(a)(2) provides for New York jurisdiction over a non-domiciliary who "commits a tortious act within the state ... ." Plaintiffs argue that GPM and Frebowitz are subject to jurisdiction as co-conspirators with Lencheski and Morris by preparing the 2007 financial statements and 2008 projections used to fraudulently induce 600 Management to acquire SKI. Plaintiffs cite to *Louros v Cyr*, 175 F Supp 2d 497, 519 (SD NY 2001), where the court stated that jurisdiction may be exercised "over a defendant who acted through an agent even if that defendant never physically entered New York. A formal agency relationship is not required to establish that an out-of-state defendant acted through his agent [internal quotation marks and citation omitted])." Rather, "[p]laintiffs need only convince the court that [the agent] engaged in purposeful activities in this State in relation to [plaintiffs'] transaction for the benefit of and with the knowledge and consent of the [ ] defendants and that they exercise[d] some control over [the agent] in the matter." *Id.*, quoting *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467

(1988)(internal quotation marks and citations omitted).

In *Louros*, the court exercised jurisdiction based upon the fact that Wilkinson, the out-of-state defendant, knew, approved of, and benefitted from the purposeful activities of his co-defendants in New York, and "exercised some control over the other defendants . . ." *Id.*

Plaintiffs have not alleged that Lencheski or Morris committed any tortious acts in New York in furtherance of an alleged conspiracy for the benefit of GPM or Frebowitz, or with their knowledge and consent. Nor have plaintiffs alleged that GPM and Frebowitz exercised any control over Lencheski or Morris in connection with the alleged fraud conspiracy. In short, plaintiffs fail to show that GPM or Frebowitz was "a primary actor in the specific matter in question." *Barron Partners, LP v Lab123, Inc.*, 2008 WL 2902187, *10, 2008 US Dist LEXIS 56899, *3 (SD NY 2008); *see also Lehigh Val. Indus., Inc. v Birenbaum*, 527 F2d 87, 93-94 (2d Cir 1975) ("New York law seems to be clear that the bland assertion of conspiracy or agency is insufficient to establish jurisdiction for the purposes of section 302[a][2]"; there must be "allegations of specific facts which would connect [the defendant] with any New York activity"). Accordingly, there is no jurisdiction over GPM or Frebowitz under CPLR 302(a)(2).

CPLR 302(a)(3)

Plaintiffs next argue that GPM and Frebowitz are

subject to jurisdiction under CPLR 302(a)(3), which provides for New York jurisdiction over a non-domiciliary who:

> commits a tortious act without the state causing injury to person or property within the state ... if he
>
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce ... .

"It is well established that, for the purposes of Section 302(a)(3), the situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff." *Kowalski-Schmidt v CLS Mtge., Inc.*, 981 F Supp 105, 110 (ED NY 1997); *see also Kramer v Hotel Los Monteros S. A.*, 57 AD2d 756, 757 (1st Dept 1977) (same, stating that, "[t]o hold otherwise would open a veritable Pandora's box of litigation subjecting every conceivable prospective defendant involved in an accident with a New York domiciliary to defend actions brought against them in the State of New York"). "[T]he injury in New York must be direct and not remote or consequential ..., such as lost commercial profits which occur in New York only because the plaintiff is domiciled or doing business here." *Lehigh Val. Indus., Inc.*, 527 F2d at 94.

The "original injury" here (*Kramer*, 57 AD2d at 757) was the accountants' alleged preparation of misstated 2007 financial statements and 2008 financial projections (Amended Complaint, ¶¶ 1, 2, 20, 27, 28, 32, 36, 38, 76). Frebowitz's affidavit states that any accounting and tax services were performed outside of New York (Frebowitz Aff., ¶ 18) for a Pennsylvania-based company owned by Pennsylvania residents, and plaintiffs concede that SKI was not authorized to do business in New York. Thus, all of GPM and Frebowitz's alleged wrongdoings occurred outside of New York.

Plaintiffs rely upon *Hargrave v Oki Nursery, Inc.* (636 F2d 897 [2d Cir 1980]) in support of the argument that their reliance upon the accountants' alleged misrepresentations in New York fixes the situs of the injury in New York. In *Hargrave*, the plaintiffs brought a fraud action after they purchased grape vines from a California nursery that shipped the vines to plaintiffs' New York winery. *Id.* at 898. According to the plaintiffs, the nursery represented that its vines "would be healthy, free of disease, and suitable for wine production," but they were not *Id.* The Court exercised jurisdiction over the nursery because it made "knowingly false statements as to the condition of the vines" to the plaintiffs domiciled and doing business in New York (*id.* at 899), "where [the plaintiffs] were located when they received the misrepresentations, and where the vines were to be shipped," and because "the only state in which

plaintiffs had 'property' which could sustain 'injury' was New York" (*id.* at 900). The Court concluded that "the immediate consequence which [defendant] foresaw, indeed which it sought to bring about by its sales representations, was payment to it directly by a New York domiciliary. Nothing could be a 'closer' or more 'direct' result from [defendant's] representations than the extraction of money from plaintiffs in New York." *Id.*

Conversely, plaintiffs here acquired interests in a Pennsylvania-based company. The accountants sent nothing to plaintiffs and, according to Frebowitz's affidavit, had no communications with them prior to execution of the Purchase Agreement. Plaintiffs have "not suffered an in-state injury as required by § 302(a)(3), merely because, allegedly, [they] received fraudulent statements ... in New York ... ." *Weiss v Brant*, 1995 WL 362394, *4, 1995 US Dist LEXIS 22233, *13 (ED NY 1995). Indeed, "[i]t would be anomalous to hold that the receipt in New York of fraudulent out-of-state communications by itself constitutes an in-state injury, when the out-of-state nature of such communications requires that the fraud be deemed to have occurred outside the state." *Weiss*, 1995 WL 362394, at *4. To the extent that plaintiffs suffered indirect financial injury as a result of their New York residence or domicile, such injury "is not a sufficient predicate for jurisdiction." *Fantis Foods, Inc. v Standard Importing Co.*, 49 NY2d 317, 326 (1980) ("residence or

domicile of the injured party within a State is not a sufficient predicate for jurisdiction"). For the foregoing reasons, *Hargrave* is distinguishable on its facts, and jurisdiction does not exist under CPLR 302(a)(3). Accordingly, GPM and Frebowitz's motion to dismiss is granted.

Motion Sequence Number 007

The first cause of action of the amended complaint against Morris is for her breach of restrictive covenants in the Purchase Agreement by acquisition of an interest in, promoting, or seeking sponsorship for the Mallards, and otherwise competing with SKI and 600 Management, or conspiring with Lencheski in doing so. Morris seeks dismissal to the extent it is asserted by 600 Management Holdings LLC, because this entity was not a party to the Purchase Agreement. Plaintiffs counter that, as an intended third-party beneficiary of the Purchase Agreement, it has standing to sue for breach of contract.

Paragraph 9.10 of the Purchase Agreement states that "[n]othing in this Agreement, whether express or implied, is intended to confer rights or remedies under or by reason of this Agreement on any persons other than the Parties, each Indemnified Party and their respective successors and assigns; 600 Management Holdings LLC is not a "Party" or "Indemnified Party" in the Purchase Agreement. This provision is controlling, and the Purchase Agreement, "by its own terms, expressly negates

enforcement of the contract by third parties ... ." *Board of Mgrs. of Alexandria Condominium v Broadway/72nd Assoc.*, 285 AD2d 422, 424-25 (1st Dept 2001). Accordingly, the first cause of action, to the extent asserted by 600 Management Holdings LLC, is dismissed against Morris.

Morris also argues that the first, second and third causes of action should be dismissed to the extent that they are based upon allegations that she conspired with Lencheski to breach his employment and non-disclosure obligations to plaintiffs. Morris's argues that a claim for conspiracy to breach a contract "cannot be sustained since one of the alleged conspirators was a party to that agreement." *Health-Loom Corp. v Soho Plaza Corp.*, 209 AD2d 197, 198 (1st Dept 1994). Plaintiffs do not challenge this authority or her contention that no such conspiracy claim is recognized under New York law. Instead, they argue that their claims against her for breach of the non-competition provisions of the parties' agreements should be sustained as claims for tortious interference with contractual relations.

"In a contract interference case ... the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages." *White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 (2007).

"Specifically, 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 (1st Dept 2006). No such allegation is made by plaintiffs. While the amended complaint states that "Morris was involved in all aspects of Lencheski's efforts to acquire the Mallards" (Amended Complaint, ¶ 58), it fails to describe her involvement. Similarly, plaintiffs aver generally that "Morris knowingly and intentionally agreed and conspired with Lencheski to, among other things, violate ... restrictive covenants in the Purchase Agreement, the Employment Agreement, and the Operating Agreement, and took at least one overt act in furtherance of the conspiracy" (*id.*, ¶¶ 85, 92, 99, 107, 115), but make no allegation of causation. Plaintiffs also claim that Lencheski repeatedly requested that 600 Management "release Morris from her restrictive covenants under the Purchase Agreement," but the pleading then concedes that plaintiffs refused to do so. *Id.* Plaintiffs claim that Lencheski transferred funds to Morris's personal checking account, but again, plaintiffs fail to allege any conduct by Morris, as opposed to conduct by Lencheski, that "was a proximate cause of their alleged loss." *Turk v Angel*, 293 AD2d 284, 284 (1st Dept 2002). In other words, the essence of plaintiffs' purported tortious interference claim is that Lencheski breached the parties' contracts, and that Morris went along with him in the

conduct. Without asserting how Morris's conduct proximately caused a loss to plaintiffs, they fail to state a claim for tortious interference with contractual relations. Accordingly, the first, second and third causes of action are dismissed against Morris, except for the portion of the first cause of action that is a direct claim against Morris based upon her alleged breach of her own non-competition obligations in the Purchase Agreement.[1]

The fourth cause of action asserts a claim for breach of fiduciary duty against Lencheski, and that Morris conspired with him to breach this duty. Morris argues that this claim must be dismissed because, "in order to prevail on a claim for conspiracy to breach a fiduciary duty, a plaintiff must demonstrate that *all* members of the alleged conspiracy independently owed a fiduciary duty to the plaintiff" (*Design Strategies, Inc. v Davis*, 2004 WL 1394327, *8, 2004 US Dist LEXIS 11367, *27 [SD NY 2004] [emphasis in original]), and the pleading fails to allege that she owed any fiduciary duties to plaintiffs. Plaintiffs do not challenge Morris's argument, but rather, argue that the allegations of the fourth cause of action support a claim against Morris for aiding and abetting Lencheski's breach

[1] In footnote 4 of Morris's reply brief, she withdraws the portion of her motion to dismiss the first cause of action for breach of the Purchase Agreement that is based upon her ownership interest in the Mallards.

of fiduciary duties.

A cause of action for aiding and abetting breach of fiduciary duty "requires a prima facie showing of a fiduciary duty owed to plaintiff ..., a breach of that duty, and defendant's substantial assistance ... in effecting the breach, together with resulting damages." *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 11 (1st Dept 2008). "Actual 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 of fiduciary duty." *Global Mins. and Metals Corp. v Holme*, 35 AD3d 93, 101-102 (1st Dept 2006). Moreover, "the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff." *Id.* at 102 (internal quotation marks and citation omitted).

The aiding and abetting claim is based primarily upon plaintiffs' allegations that "Morris knowingly and intentionally agreed and conspired with Lencheski to, among other things, violate his fiduciary duties, and took at least one overt act in furtherance of the conspiracy" (Amended Complaint, ¶ 107), and that Lencheski deposited $150,000 of SKI's funds into Morris's personal checking account (*id.*, ¶¶ 4, 59). However, this conduct does not constitute "substantial assistance" under New York law

(*Global Minerals and Metals Corp.*, 35 AD3d at 102; *see also Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003]), and plaintiffs' conclusory allegations of Morris's knowledge are insufficient to sustain this claim. Therefore, the fourth cause of action for aiding and abetting breach of fiduciary duty, as asserted against Morris, is dismissed. For the same reasons, plaintiffs' fifth cause of action, which seeks to hold Morris liable for aiding and abetting Lencheski's misappropriation of corporate assets, is dismissed as asserted against Morris.

The sixth cause of action seeks to impose a constructive trust over Morris's interest in the Mallards. "The elements of a claim for a constructive trust are 'a confidential or fiduciary relationship, a promise, a transfer in reliance upon the promise, and unjust enrichment.'" *Matter of Gupta*, 38 AD3d 445, 446 (1st Dept 2007) (citation omitted). Here, plaintiffs fail to allege a confidential or fiduciary relationship with Morris. Therefore, this claim is dismissed as asserted against her.

The eighth cause of action alleges that defendants' $600,000 overstatement of SKI's financial condition fraudulently induced 600 Management LLC to enter into the Purchase Agreement. Morris argues that this claim should be dismissed as duplicative of the seventh cause of action for breach of the Purchase Agreement. Plaintiffs counter that the fraud claim should be sustained, because it is based on misstatements of then-existing material

facts.

> A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract. By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract. For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim. Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty.

First Bank of Ams. v Motor Car Funding, 257 AD2d 287, 291-92 (1st Dept 1999).

Here, Article IV of the Purchase Agreement contains "REPRESENTATIONS AND WARRANTIES OF THE SELLERS," and section 4.9(a) states that the year-end financial statements for 2007 "fairly present in all material respects the financial condition of SKI as of the dates set forth therein, and the results of operations, cash flows and changes in financial position of SKI for the periods indicated, and are reconcilable to the books and records of SKI." This section goes on to state that "[a]ll accounts, books, ledgers and official and other records material to the Business have been fully, properly and accurately kept in

all material respects, and there are no material inaccuracies or discrepancies contained or reflected therein." Thus, here, as in *First Bank of Americas*, plaintiffs' fraud claim is "premised on allegations that defendants misrepresented various pertinent facts about the individual [assets] that plaintiff[s] purchased under the [Purchase] Agreement. This cannot be characterized merely as an insincere promise of future performance." *Id.* at 292. Specifically, the fraudulent inducement cause of action is based upon plaintiffs' allegation that defendants misrepresented SKI's 2007 financial results, which is an alleged misrepresentation of present fact, not of a future intent to perform. Thus, the fraud claim is properly pleaded "even though the same circumstances also give rise to the [plaintiffs'] breach of contract claim." *Id.* at 291-92. Therefore, Morris's motion to dismiss the eighth cause of action for fraudulent inducement is denied.

Morris seeks dismissal of the tenth cause of action for contractual indemnification, arguing that it is duplicative of the seventh cause of action for breach of the Purchase Agreement, and because it is improperly based upon aiding and abetting and conspiracy.

Section 8.2 of the Purchase Agreement provides that Lencheski and Morris "jointly and severally, from and after the Closing ... indemnify ... Buyer ... for ... any and all Losses

suffered, sustained, [or] incurred ... arising out of or resulting from" certain breaches of the Purchase Agreement. The tenth cause of action seeks contractual indemnification based upon Lencheski and Morris's overstatement of SKI's financial statements and their breaches of restrictive covenants contained in the parties' agreements, which are the same alleged breaches contained in the seventh and first causes of action, respectively. However, the tenth cause of action is different from the first and seventh causes of action in that, if 600 Management LLC does not prevail on the latter claims, it may pursue contractual indemnification against Morris for losses resulting from Lencheski's improper actions, because the indemnification provision imposes joint and several liability on Lencheski and Morris. *See Pekofsky v Nanuet Auto Parts*, 210 AD2d 208, 209 (2d Dept 1994) (upholding joint and several liability based upon contract). Moreover, CPLR 3014 permits "[c]auses of action ... [to] be stated alternatively or hypothetically." Therefore, Morris's motion to dismiss the tenth cause of action as duplicative is denied. However, for the reasons discussed above, to the extent that the tenth cause of action is based upon conspiracy or aiding and abetting, it is dismissed as a matter of law against Morris.

Accordingly, it is hereby

ORDERED that the motion of defendants Gable Peritz Mishkin

LLP and Kenneth Frebowitz (motion sequence number 006) to dismiss the amended complaint herein is granted and the amended complaint is dismissed in its entirety against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal of Gable Peritz Mishkin LLP and Kenneth Frebowitz and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the motion of defendant Sharon Morris-Lencheski (motion sequence number 007) to dismiss the amended complaint is granted to the extent that

(a) the first cause of action is dismissed as against defendant Sharon Morris-Lencheski, except to the extent it asserts plaintiff 600 Management LLC's direct claim for breach of non-competition obligations under the

parties' Securities Purchase Agreement dated 31 March 2008;

(b) the second, third, fourth, fifth and sixth causes of action are dismissed, as against defendant Sharon Morris-Lencheski;

(c) the tenth cause of action is dismissed, as against Sharon Morris-Lencheski, to the extent it is based upon conspiracy or aiding and abetting;

and the motion is otherwise denied; and it is further

ORDERED that defendant Sharon Morris-Lencheski is directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 55, on October 18, 2010 at 11 AM, of which a courtesy copy hereof is notice.

Dated: September 8, 2010

FILED
SEP 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

J.S.C.

JANE S. SOLOMON