

Byung Chul An v Dyche
2011 NY Slip Op 30945(U)
April 5, 2011
Supreme Court, New York County
Docket Number: 604430/2006
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JOAN A. MADDEN

DECEMENT.

J.S.C.

PART 11

Index Number : 604430/2006

AN, BYUNG CHUL

vs

DYCHE, SANDRA

Sequence Number : ~~002~~ 12

Summary Judgment

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross motion are*
determined in accordance with the annexed
decision and order.

FILED

APR 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 5, 2011



HON. JOAN A. MADDEN ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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BYUNG CHUL AN and HYANG OK AN,

Plaintiffs,

Index No. 604430/2006

-against-

SANDRA DYCHE (a/k/a Sandra Dychiovic,
Back Soon Kim, Back Sandra Kim, and
Sandra Oyche), JERRY A. JANKOVIC,
BACK C. KIM, 21st CENTURY MORONGO,
ENERGY, LLC, 21st CENTURY ENERGY
HOLDINGS, LLC, SECURITY, EQUITY, &
YIELDS, LLC, SANDTEC, INC.,
AMERICAN GATEWAY ENERGY, L.L.C.
(a/k/a The LLC), and MIN HYE SHIM,
and DOES 1 through 100 inclusive,

FILED

APR 12 2011

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

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JOAN A. MADDEN, J.:

This is an action in which plaintiffs, Byung Chul An and Hyang Ok An (the Ans) principally assert that, as a result of fraud, they invested \$1,200,000 in a sham energy power plant project and lost their entire investment. Defendants, Sandra Dychie (Dychie), her niece, Min Hye Shim (Shim), and American Gateway Energy, LLC (Gateway), now move for an order dismissing plaintiffs' amended complaint, pursuant to CPLR 3212 and CPLR 3211 (a) (1), based on the documentary evidence. The motion also seeks the identical relief on behalf of defendant 21st Century Morongo Energy, LLC (Morongo), but this court previously granted a default judgment against Morongo, and an inquest was ordered to

be held at the time of the trial of this action.¹ The Ans oppose the motion and cross-move for an order granting them summary judgment, claiming that they have established their fraud cause of action. No relief is sought from either side with respect to Dyche's counterclaim, which will, therefore, not be addressed.

Background

Dyche, in 1999, sought out, for investment purposes, codefendant, Jankovic, who was involved in energy power plant development. In about 1999, Dyche and Jankovic allegedly commenced negotiations to build a gas-fired power plant and hydroponic farm (the Morengo project) near Banning, California, on property owned by the Morengo tribe. The projected cost of the project was more than \$100,000,000, most of which was allegedly to have been financed by a loan, which never materialized. The tribe operated an old casino on the property. Dyche allegedly had monthly meetings with the Morongo tribe since 1999. Dyche examination before trial (ebt), at 55. She was aware that state approval was needed, as was a signed contract from the tribe. Although, she never saw it, Dyche claimed that a permit application for the power plant had been submitted by an attorney, in the beginning of 2000 (*id.* at 66), and that she had

¹Default judgments against named defendants Jerry A. Jankovic (Jankovic), Dyche's brother, Back C. Kim (Back), 21st Century Energy Holdings, LLC (21st Century), Security Equity & Yields, LLC (Security), and Sandtec, INC. (Sandtec) have also been granted, with inquests to be held at the time of trial.

expected to get the permit within six months of applying (*id.* at 70), but that it was never approved or disapproved, that she never heard back from the State of California (*id.* at 67-68), and that the permit was still "kind of pending" (*id.* at 87). Dyche, who was deposed over three sessions, testified that the Morongo tribe had prepared a draft contract, which they gave her in about early 2000 (*id.* at 58, 72), which concededly was never signed or finalized. She claimed that the permit could not be obtained without a contract from the tribe and that the contract could not be obtained without the permit. *Id.* at 67-68, 88. Neither a copy of the draft contract, nor of the permit application, has been produced in this action, and no affidavit from any attorney involved in the proposed project has been presented here. Dyche takes the position that she is still expecting a permit, and that negotiations with the Morongo tribe have not ended.

The Ans, South Koreans, came to this country as a married couple, in 1986, and opened a deli. They eventually saved money, which they wanted to invest, and spoke to a Soona Lee,² a member

²The County Clerk's file in an action commenced against Back, Lee, and Gateway, to set aside a conveyance of the apartment in which Dyche and Shim reside (Index # 113591/2005), reveals that Lee, at some point, married Back, a defaulting defendant in the instant action. An affidavit submitted by Dyche in another action commenced by her against Back, indicated that she had introduced Back to his current wife in 2001. Kim aff. of 9/29/10, ex. 6.

of their Buddhist temple. Dyche's brother, Back, attended that temple, and Dyche started to attend there too in about 2000, according to plaintiffs, to target temple members as fraud victims (Amended complaint, ¶ 24). Dyche could not recall if it was Lee or Back who told her about the Ans. Dyche ebt, at 93. Lee, in about 2000, arranged for the Ans to meet Dyche (*id.* at 93-94), who informed them that she was the chairman of a large architectural design firm, N2, gave them a booklet about N2, and also told them of her experience as a real estate developer. *Id.* at 126-131. Dyche was not actually N2's chairman, and now claims that she was a friend of one of its owners, and was the chairman of N2's international department, and, as such, was charged with trying to find international clients. She admittedly never obtained any, and had neither a salary, nor an office, at N2.

Dyche informed the Ans of an opportunity to invest with her and Jankovic in the Morongo project. According to the Ans, the Morongo project was also to involve the construction of a new casino, to replace the existing one. Dyche gave the Ans booklets from ESA Holdings, Inc. (ESA), an engineering firm, and Powerplant Maintenance Specialists, Inc. (PMSI), which had allegedly worked with Jankovic before, and were represented by Dyche as having been working on the Morongo project. Dyche allegedly explained and translated the booklets for the Ans. Dyche inconsistently testified that ESA had no contract for the

Morongo project, because there was no written agreement yet with the tribe (*id.* at 63), and that there was a contract with ESA for that project (*id.* at 133). She further testified that she was sure that there was a contract with PMSI, but that she had never seen it. No contract with PMSI or ESA was ever produced in this action. The materials given by Dyché to the Ans showed, among other things, unrelated projects worked on by ESA, and were given to the Ans as examples of what the Morongo project would resemble. Dyché also presented the Ans with a one-page profit projection, prepared by ESA, for the proposed Morongo energy plant, which showed a one-year net cash flow of about \$34,000,000 and a 10-year net cash flow of about \$389,000,000.

According to the Ans, in about April 2001, Dyché represented that, if they invested in the project, their initial investment of \$1,000,000 would be returned within a year of their final payment; that the shareholders and the tribe were meeting soon, and that the project was scheduled to begin "right away" and would take a year to finish; that, once the project was completed, the Ans would receive monthly income of at least \$100,000; and that Mr. An would be given a management role in one of the new casino's restaurants (the oral promises). Amended complaint, ¶¶ 33-34.

Dyché introduced the Ans to Jankovic, who gave them a tour of the Morongo site, and showed them farming operations, which

were represented as similar to those to be built. Jankovic allegedly guaranteed that the Ans' initial investment would be repaid in a year, and "reconfirmed" all of Dyche's oral promises. An aff., ¶ 13. Dyche took the Ans to the Mohegan Sun complex in Connecticut, and represented that the Morongo casino would be similar, but Dyche claims that she never promised the Ans any role in the new casino's restaurant.

On May 6, 2001, Jankovic, as president of 21st Century, wrote to Mr. An welcoming his participation in the Morongo project, and advised that 21st Century "propose[d] to immediately construct" the energy plant. An aff., ex. 3. That letter indicated that for Mr. An's million dollar investment, he would be given a five percent interest in a new Nevada limited liability company, that he would have a "preferred" return on his investment, that the only other owner would be 21st Century, and that he would be a manager of the new entity. The letter further indicated that the new entity's operating and members' agreement would provide that Mr. An's investment would be repaid before any other distributions were made.

By proposal, signed on May 7, 2001, by Dyche, as Morongo's CFO, by Jankovic, as its CEO, and by Mr. An, indicating his acceptance, it was agreed that he would invest one million dollars, for a five percent share of Morongo, would be one of its managers, and that his investment would be repaid before

distributions were made to any other member. That document indicated that Morongo proposed to develop and construct the Morongo project. Before deciding to invest, plaintiffs evidently did not consult an attorney, financial advisor, or an accountant. See Amended complaint, ¶ 32.

On May 8, 2001, Dyche and Jankovic signed articles of organization for Morongo, which listed the managers as Jankovic, Dyche, and Mr. An, and recited that Morongo was to be managed by its managers. The stated purpose for which Morongo was organized was the design, development, and management of the Morongo power plant and farm "AND FORT BRAGG ENERGY DEVELOPMENT."³ Dyche aff. of 6/10, ex. 10. The period of Morongo's duration was to be until May 1, 2029. On May 9, 2001, those articles were also signed by Mr. An, and Back, as managers. A copy of Morongo's operating agreement and a unanimous consent of its managers (consent agreement) were given to Mr. An, who evidently signed the consent, which was adopted, and was effective as of May 11, 2001.

The operating agreement provided, among other things, that Dyche was Morongo's president and treasurer. Pursuant to the former role, she was Morongo's CEO and had general management, and control of the Morongo's business and property, in its

³The parties do not specifically address this latter development.

ordinary course of business, and had the power to agree on and execute all contracts and other Morongo obligations. As treasurer, Dyche was obligated to have custody of Morongo's funds, keep accurate accounts of receipts and disbursements, audit all financial statements, supervise Morongo's auditing and accounting practices, and be in charge of matters relating to taxation. Jankovic was Morongo's Chairman of the Board, and had any powers and duties "prescribed by the Board of Managers." Operating agreement, ¶ 6.05. The operating agreement provided that regular meetings of the Board of Managers "may be held" at times designated by resolution of that board. An aff., ex. 6. Special meetings of that board could be called by any two managers.

The Board of Managers could create a reserve fund. Morongo's cash flow was to be determined annually by the Board of Managers. Profits and losses were to be allocated proportionately among Morongo's members. The cash flow remaining, "if any," after tax distributions, was to be distributed pro-rata at the times and in the amounts as the Board of Managers decided. Operating agreement, ¶ 8.05 (b). Morongo was to keep correct and full books and records of account, and minutes of meetings.

The operating agreement listed the members as Security, by Jankovic, President; Dyche; the Ans; and Sandtec, by Back. There

is an absence of any explanation as to why 21st Century was not a Morongo shareholder, much less why it was not the only other shareholder, as was represented in Jankovic's May 6 letter to Mr. An.

Pursuant to the consent agreement, all withdrawal of funds had to be signed by both Dyche and another individual. The consent agreement indicated that "Jankovic (Security, Equity & Yields, LLC)" and Dyche each owned 430,000 shares, that each of the Ans owned 25,000 shares, and that "Back C. Kim (Sandtec, Inc.*)" owned 50,000 shares. Mr. An's aff., ex. 6. It further listed Mrs. An as one of the managers.

According to Mr. An, his English and that of his wife, were not good, and Dyche translated and explained documents, including, apparently, the May 7 document, as well as the operating and consent agreements, assuring them that they were consistent with the oral promises. In May and June 2001, the Ans wired a total of \$1,000,000 to Morongo.

Dyche testified that she was the sole owner of Sandtec; that it had ceased operating in 1994; that it was not a shareholder of Morongo or of 21st Century; that neither Back nor Jankovic had any involvement in Sandtec; and that its last bank record was from 1993. Dyche ebt, at 237-241. Dyche further testified that she had no interest in 21st Century (*id.* at 187), that it was the holding company for Morongo and a major shareholder of that

entity, and that Morongo and 21st Century were "all the same" (*id.* at 97-98), but later testified that, after the Ans became shareholders, Morongo bought \$100,000 worth of 21st Century's stock, and was an owner of 21st Century, and that the two entities "kind of owned each other" (*id.* at 165-166). Dyche also testified that Jankovic owned Security; that Morongo was part of Security; that she was not an owner or officer of Security; that Security was like 21st Century; and that Morongo subsequently bought an interest in Security, for a sum in excess of \$600,000. *Id.* at 151, 243, 345-346.

Dyche further testified that she and Jankovic were in charge of Morongo (see also Dyche's response to plaintiffs' interrogatory # 26, in which she describes her role in the Morongo project as "President. All aspects of planning and development."); that she, the Ans, and Jankovic were the sole investors in Morongo; and that Morongo had only one bank account, by which she meant that it had a checking and savings account at one bank, presumably, the bank revealed to plaintiffs during discovery, Bank of America. Dyche *ebt.* at 108, 106, 150-151. At a later deposition session, Dyche claimed that her niece, codefendant Shim, was also a Morongo investor (*ebt.* at 326), but apparently is no longer claiming that, evidently because Shim testified that she was not familiar with the Morongo project, did not do anything for Morongo, and never heard, or did not know

whether she had heard, of Morongo. Shim ebt, at 43-48.

When asked whether she invested money in Morongo, Dyche testified that she and Jankovic together invested more than \$1,000,000 in 21st Century, which was the same as Morongo. *Id.* at 96-97; see also Dyche's 2/26/09 objection to plaintiffs' demand for interrogatories, response to request # 9 (which indicates that the only ones who transmitted funds to Morongo were the Ans). How much Dyche, herself, invested in 21st Century, and why she invested money in it, when she claimed to have no interest in it, was not revealed at her deposition.

In September 2001, notwithstanding that Morongo had no permit or lease signed with the tribe, Jankovic signed an agreement with Westlake Farms (Westlake agreement), purportedly, on behalf of Morongo, to buy, at a cost of \$7,400,000, 4,000 acre-feet of the State Water Project in the Tulare Lake Basin Water Storage District, allegedly in the area where the power plant was to be built. A \$100,000 Morongo check, dated November 21, 2001, was issued to Westlake Farms. It is unclear whether the Westlake agreement had ever been produced to plaintiffs before it was appended to the motion papers, but it is questionable, since plaintiffs' counsel asserted that, other than some bank records, defendants never produced discovery pertaining to the disbursement of money invested by his clients, including how it was used to further the Morongo project. Kim aff. of

9/29/10, ¶ 34. The \$100,000 was refundable if, among other reasons, the seller caused the transfer not to be completed, or the transfer was not completed within a 120-day period, which period could be extended by Morongo for an additional \$50,000 deposit. The purpose of this agreement, vis-a-vis the Morongo project, is not stated, nor is it stated whether the \$100,000 was ever refunded.

According to the amended complaint, verified by the Ans, they were informed by Dyche, on about November 25, 2001, that the Morongo project was successfully proceeding, and was then twice as valuable as before. Consequently, that month, Mrs. An delivered \$200,000 in cash to Dyche, for another 5,000 Morongo shares for plaintiffs' two children. Allegedly, because the Ans were getting divorced, they each, along with Dyche and Jankovic, then signed separate letter agreements, on November 25, 2001, the contents of which were essentially the same as the May 7, 2001 proposal, except that it split the An's ownership, so that each would have half of their combined interest. Allegedly, Dyche represented that the statements in these letter agreements were consistent with the oral promises. The November 25 documents were silent as to the additional purchase of shares.

The Ans assert that, in early 2002, they spoke to Dyche, who told them that they would get back their principal that summer or, at latest, the following winter. In late 2002, the

Ans became worried, and contacted Dyche, who assured them that the project was proceeding and that they simply had to wait. Over the next few years, Dyche allegedly started to avoid the Ans, never contacted them to update them as to the project's status, and never called a meeting of Morongo's members or managers. The Ans allegedly repeatedly demanded their money, but were told to wait. In the first half of 2004, Mr. An met with Back at the temple, at which time Back allegedly admitted that the Morongo project was a scam.

Meanwhile, Morongo's bank accounts were largely depleted, with \$50,000 going, allegedly unbeknownst to the Ans, to Back, as a finder's fee, even though Dyche could not recall whether it was Back or Lee who introduced her to the Ans. In addition, Back, who had no other income, was paid a monthly salary of \$5,000, which was eventually increased, for his allegedly providing Dyche with information about electric power, and for traveling to Korea to look at equipment for the project, which Korean equipment was admittedly of poor quality, and which he concededly could not buy, since there was no lease of the property from the Morongo tribe. Dyche ebt, at 109, 116. According to Dyche, who admitted that Back had no experience in power plant building, Back was an electrical engineer, had worked for a Korean phone company's power department, and had studied "electric." *Id.* at 106, 111. The source of Dyche's knowledge, as to Back's alleged expertise,

is not revealed, and Back's affidavit has not been provided to the court.

However, plaintiffs have submitted a February 2004 affidavit given by Dyche in an action commenced by her against Back, in which she indicated, essentially, that Back was a ne'er-do-well; that his college degree from South Korea was in English; and that, when he graduated from college, she got him a job in South Korea as a distributor of abrasives, and then in her company, which manufactured bowling balls, neither of which employments went well. Then, Dyche paid to have Back come to this country, in about 1996, and supported him, while he studied computers here for two years. Thereafter, he continued to fail financially. Kim aff. of 9/29/10, ex. 6. Dyche does not refute her February 2004 affidavit in any meaningful, nonconclusory way. Dyche second supp. aff., ¶ 12. Back received almost \$350,000 from the Morongo accounts. Morongo's bank statements also show sums going, among other places, toward travel, hotels, high-end restaurants, clothing stores, Hunter College, a pharmacy, and to Security.

In September 2006, the Ans wrote Dyche and Jankovic, seeking to review Morongo's books and records, concerning the status of any of its alleged projects, but that request was ignored. The Ans claim that, in October 2006, they provided Dyche and Jankovic with a notice of special meeting of Morongo's Board of Managers

regarding, among other things, the Morongo project and Morongo's books and records, including those related to cash flow, but that neither defendant responded. Dyche claims that she never received the notice.

The Instant Action

The Ans commenced this action later in 2006. Shim was added as a defendant in 2009. The amended complaint alleges that Dyche, acting in concert with the other defendants, fabricated the Morongo project, promoted it to induce the Ans to invest, and created Morongo as a vehicle to use the invested funds for improper and unauthorized purposes. Twelve causes of action are asserted, only eleven of which pertain to the moving defendants.

The first cause of action sounds in fraud. Although the subtitle of this cause of action recites that it is asserted against all defendants, except Gateway, there is no allegation against Shim, who moved to this country in 2003 to attend school, when she was about 20 years old. The court assumes that the language "all defendants" in this cause of action, and in causes of action three (conversion) and six (conspiracy to commit fraud) (*see infra*), was an unintentional carryover from the original complaint, which this court has examined in the County Clerk's computerized records in this action. Therefore, these causes of action will not be considered to include Shim.

The first cause of action alleges that Dyche knowingly made numerous false representations, including the oral promises; ~~and~~ that the projections were genuine and accurate; the project was successfully proceeding, even in November 2001, so that the shares were then twice as expensive; that Dyche had considerable expertise with projects of this nature; and that Morongo, Security, Sandtec, and 21st Century were legitimate entities.

The first cause of action also appears to allege claims of fraud in the execution, based on Dyche's alleged intentional misrepresentations as to the meaning of the documents signed by the Ans. See amended complaint, ¶¶ 32, 40, 41, 43, 76 (8).

The second cause of action, which incorporates the allegations of the fraud cause of action, sounds in negligent misrepresentation. The third cause of action, relevant here only to Dyche, sounds in conversion. It is claimed that Morongo was Dyche and Jankovic's alter ego; that it was set up as a means of deceiving the Ans to invest money; that Sandtec, Security, and 21st Century were alter ego corporations used in the deception; that after the Ans sent money to Morongo, Dyche, as well as Jankovic and Back, misappropriated funds for their own unauthorized personal purposes; and that, despite demands for the return of the funds, those demands were ignored, causing plaintiffs to suffer damages.

The fourth cause of action, denominated "Breach of Contract," alleges that Dyche, Jankovic and Morongo "entered into an [unspecified] agreement" with plaintiffs (amended complaint, ¶ 102), failed to carry out the oral promises and the promise regarding the Ans' priority in receiving distributions, and "breached their duty of good faith and fair dealing" (*id.*, ¶ 104). The sixth cause of action alleges that Dyche and other nonmoving defendants conspired to commit the fraud. The seventh through tenth causes of action allege fraudulent conveyances in connection with the apartment in which Dyche and Shim reside.

The eleventh cause of action alleges, among other things, that Shim aided and abetted the codefendants' fraud when, with knowledge that the Morongo project was a fraud, she received a May 2005 check from Sandtec, in the amount of \$10,000, and a \$98,000⁴ wire transfer from Morongo in July 2005, and disbursed significant sums to herself and Dyche within several months thereafter. A review of Shim's bank statements, from August 2005

⁴During discovery, Dyche allegedly never provided plaintiffs with any of Morongo's bank records created after December 2003, but Dyche has provided, on this motion, the savings account records from Bank of America, through March 2004, which show that the account was depleted by December 2003, and the Bank of America checking account statement, through December 2003, which shows an ending balance of about \$1,700. Dyche aff. of 6/10, ex. 5. The account number of the originating bank, which sent the 2005 wire transfer from Morongo's account to Shim, does not correspond to the account numbers of the allegedly sole, essentially depleted, Morongo checking and savings accounts (at Bank of America) testified to by Dyche at her deposition. Compare amended complaint, ex. K, with Dyche aff. of 6/10, ex. 5.

through January 2006, appended to the amended complaint (ex. L), shows that Shim spent sums on herself well in excess of sums in that account, which came from sources other than from the \$98,000 wire transfer, and also issued checks in large amounts to Dyche. In essence, Shim is charged with acting as an intermediary to channel the funds which were wrongfully obtained from plaintiffs.

The twelfth cause of action, which incorporates the previous allegations, including those of the eleventh cause of action, asserts claims of unjust enrichment against, as is relevant here, Gateway, Shim, and Dyche. However, there are no specific allegations against Gateway under this cause of action. In light of the lack of any such allegations against Gateway, and the lack of any apparent relation of Gateway to this cause of action, for purposes of this motion, the court will not consider Gateway to be a target of this cause of action. As to the other moving defendants, it is claimed that the Morongo project was a fraudulent scheme created to induce plaintiffs to invest money and deprive them of their investment; that Dyche and Shim knowingly participated in the fraud to deprive plaintiffs of their investment; that on "information and belief" Shim and Dyche received proceeds, which account for that investment; that the defendants do not intend to refund the plaintiffs' investment; and that if plaintiffs do not get back their \$1,200,000

investment, these defendants will be unjustly enriched. Amended complaint, ¶¶ 155-157.

The Instant Applications

Dyche, Shim, and Gateway now seek an order granting them summary judgment dismissing the complaint.⁵ Plaintiffs oppose the motion and cross-move for an order granting them summary judgment on the ground that they have established fraud.

As to the fraud and the conspiracy to commit fraud causes of action, Dyche claims that the only promises made to the Ans were those contained in the written documents; that she had informed the Ans that the project had risks; and that she never promised the Ans that the project would be completed in a year, and informed them that problems in obtaining the permit or the agreement with the tribe could cause delay, and that projects of this type could take up to 10 years to come to fruition (*but see* Dyche's response to plaintiffs' interrogatory #38, in which Dyche states that in May 2001 she believed that Morongo would begin to make disbursements about two years later; Dyche ebt, at 95, 143, in which she testified that she told the Ans that the project would be completed in six months to a year, but then testified that she told them that the project "might finish very quick").

⁵Since defendants' memorandum of law does not specifically address the dismissal of the second or eleventh causes of action, the court has neither considered nor determined whether defendant is entitled to any relief with respect to those claims.

Dyche denies that she told the Ans that they would get back their principal in a year of final payment (*see also id.*, at 95), and receive monthly income of at least \$100,000 (*but see Dyche ebt*, at 94-95, in which she testified that she told the Ans that there "would" be something like a 100% yearly return on their investment, but then stated that she told them that they "could" get that return yearly).

Dyche asserts that, in any event, the Ans' reliance on any alleged promises was unreasonable, and that they could not rely on promises which related to future events, or which were unsupported by the documents which they signed.

Additionally, Dyche asserts that the fact that Morongo signed the Westlake agreement shows that she was diligently taking steps to bring about the Morongo project. Dyche also claims that the funds expended by Morongo were for legitimate business purposes. In this regard, she provides Jankovic's affidavit, which appends copies of checks from 21st Century, Security and another entity, 21st Century Vapor Water, Inc. (Vapor). Jankovic recites, without further explanation, that these were some of the checks⁶ applied to the Morongo project.

⁶Several of these were checks issued, prior to Morongo's existence, by 21st Century and Vapor to two entities, 21st Century Banning Project Number 1, LLC and 21st Century Banning Project Number 2, LLC. These checks totaled \$250,000. Several of these checks appear to have been endorsed by Jankovic, suggesting that there were projects, other than the Morongo project, ongoing in the Banning vicinity by Jankovic's other

Dyche, who had not provided the affidavit of anyone from the entity which created the projections, denies that the profit projections were fake. Dyche maintains that there is no way to determine whether the project's profit projections were inaccurate, since the project never became operational. As to plaintiffs' reliance on the profit projections, in deciding whether to invest, Dyche urges that plaintiffs have the burden of showing that Dyche knew that the project would be unsuccessful or encounter significant delays. Movants' supporting memo of law, at 12. Dyche, in an effort to excuse the lack of results, points, without elaboration, to delays in getting the permit, and asserts that the tribe's decision to work on the new casino first, coupled with opposition from some tribe members, contributed to a lack of a signed agreement with the tribe. At her deposition Dyche claimed that the tribe, at some point, described variously by her as in 2000, 2001, or 2002, decided to concentrate on the building of the new casino, rather than on the power plant. Dyche ebt, at 73-74.

She now asserts, as she did at her deposition, that, since the Morongo project could not move forward, she and Jankovic explored other opportunities, so that the Ans could thereby benefit. At her deposition, Dyche referred to a Comanche project, an Oklahoma-based power plant project, which she claimed

entities, which may account for the Westlake agreement.

had broken ground, and in which Morongo allegedly had an interest, through its alleged ownership of stock in 21st Century and Security. Dyche ebt, at 135-138, 270, 272-273, 327-325, 345-349. Here, however, she appends the affidavit of one John Jankovic, purportedly the CEO of Premier Power LLC (Premier), which was allegedly formed at some unspecified time in 2009, as a holding company for various ventures. He states in that affidavit that Premier has signed an agreement to develop a power plant project, but that the details are "highly confidential" and can only be revealed with a confidentiality agreement and a protective order. John Jankovic claims that Morongo has become a five percent owner of Premier, and that Dyche is a member of its board. No supporting documents are provided for any of these assertions. Dyche adds that 21st Century owns a 10% stake in Premier, that Jerry Jankovic is its chairman, and that funds sent from Morongo to Security were used to buy shares of 21st Century, "which gives Morongo ... its 5% interest in Premier." Dyche aff. of 11/6/10, ¶ 11.

Accordingly, Dyche asserts that the fraud cause of action must be dismissed, and then argues that since there was no fraud, no conspiracy to commit fraud exists under the sixth cause of action, but that, in any case, there is no substantive tort of conspiracy to commit fraud.

As to the conversion cause (third) of action, Dyche urges that it cannot survive because any such claim must have been brought by the Ans derivatively, rather than in their individual capacities. In addition, Dyche claims that the conversion cause of action is simply a reiteration of the Ans' breach of contract cause of action, and is, accordingly, unsustainable. Dyche maintains, that, in any event, all of the funds expended were for proper business purposes, including the \$660,000 disbursed to Security, which on "information and belief" was spent by Jankovic on Morongo project expenses. Dyche aff. of 6/10, ¶¶ 24-29.

Dyche asserts that the breach of contract cause of action must be dismissed because none of the relevant documents contains any of the alleged promises which plaintiffs claim were breached, which promises one would have expected to have been incorporated into the documents if they were intended to be part of the parties' agreement. Dyche, therefore, urges that the parol evidence rule bars the breach of contract cause of action. Dyche further claims that plaintiffs have provided no evidence that she and Jankovic worked on the Morongo project, other than diligently and in good faith. Finally, as to this cause of action, Dyche asserts that the alleged promise that the Ans would be paid \$100,000 per month indefinitely is barred by General Obligations Law § 5-701 (a) (1).

Dyche, Gateway, and Shim assert that the seventh-tenth causes of action for fraudulent transfer must be dismissed as moot, since another judge has already set aside the transfer of the deed to the apartment from Back to Gateway, by judgment dated May 26, 2009.

As to the twelfth cause of action, which sounds in unjust enrichment, movants urge that this claim cannot be sustained, because the funds invested by the Ans were used for legitimate business purposes.

Plaintiffs, who concede that no independent cause of action for conspiracy to commit fraud exists, otherwise oppose the motion, and cross-move for summary judgment. Their sole argument on their cross motion is limited, in their memorandum of law, to the claim that they are entitled to summary judgment because they have prima facie established the elements of their fraud cause of action. Their cross motion is supported by Mr. An's affidavit, in which he essentially reiterates most of the allegations of the complaint.

In support of their claim that the Morongo project was a scam and that Morongo was created specifically for the purpose of facilitating it, and to funnel money into the individual defendants' pockets or to entities, which they controlled, plaintiffs advise that they have recently discovered evidence, which shows that Morongo funds were used to settle an unrelated

lawsuit by a Thomas Thompson against Jerry and Linda Jankovic, 21st Century, Vapor, and 21st Century Equity Security and Yields, allegedly owned by the Jankovics, and to repay Thompson the \$450,000 he lent the defendants in the matter underlying that action. In that action's complaint, it was alleged that Jankovic, through 21st Century, repaid \$300,000 of the loan in August 2001. The Ans observe that a handwritten notation on Morongo's bank statement shows that, at the end of August 2001, a check (which is evidently now missing) for \$300,000 was made payable to Security, and surmise that this check was in reality used to pay Thompson. More significantly, the Ans submit copies of two Morongo checks signed by Jankovic and Dyche, in April and May 2002, payable to Security, each in the amount of \$100,000. A copy of the first check contains a notation "L + J [presumably, Linda and Jerry] Settlement" and the second recites "L.J. Last Payment." Kim aff. 9/29/10, exs. 4, 5. Dyche does not, in her responding papers, address these notations. On the same date as the date of the first check, and within days of the date of the second check, Security issued checks for \$70,000 and \$100,000 to Thompson. *Id.*, exs. 4, 5. Additionally, the Ans observe that one of the attorneys, claimed by Dyche to have worked on Morongo matters, represented defendants in the Thompson lawsuit, and that his fees were paid by both Security and 21st Century. Thus, plaintiffs urge that the \$660,000 sent from Morongo to Security

was not used for Morongo, and that any amount paid to the attorney was for the Thompson action.

Plaintiffs further assert that movants have failed to prima facie establish their entitlement to summary judgment. Plaintiffs maintain that Dyche has produced no evidence during discovery that the Morongo project was real, and repeatedly failed to comply with discovery requests. In particular, they claim that, in light of Dyche's failure to comply with this court's April 30, 2009 discovery order, Dyche cannot establish her entitlement to summary judgment, and is precluded from offering certain evidence in this case. Specifically, this court ordered Dyche to answer plaintiffs' interrogatory # 8, by detailing the individuals and entities which received funds from Morongo, and the dates upon which they received such funds; interrogatory # 27 (which sought a description of how the funds provided by the Ans were used by Dyche and Morongo), by providing the specific bank records and receipts regarding plaintiffs' wire transfers of money, along with "an affidavit regarding what the funds provided by plaintiffs were used for, if they went into a general fund for the project or if there was other specific use of those funds" (Order transcript [T] 24); and interrogatory # 28, by providing specific information as to the status of the Morongo project, monthly, between January 2001 and December 2001, biannually between January 2003 and December 2006, and between

January 2007 through the present, and, if Dyche lacked information, she was to provide an affidavit so indicating (T 24-25). This court rejected Dyche's counsel's request that plaintiffs simply pose their questions during a subsequent deposition session, after the Ans' counsel indicated that such questioning had been fruitless during past sessions. T 25-27. In addition, Dyche was ordered to provide Morongo's tax returns;⁷ to produce Dyche's tax returns, in camera; to provide all documents as to the Comanche project, but that if Dyche had no information as to this latter item she was to so respond; and to provide Morongo's bank statements for the period after December 31, 2003, to the extent that Dyche could get them by requesting them from the bank.

The April 30, 2009 order precluded Dyche from introducing at trial the foregoing documents not produced within 21 days of the order's date, and recited that, pursuant to CPLR 3126, if Dyche failed to comply with the court's directives, "the issues upon which the orders are relevant and material will be determined against the noncomplying defendant and in accordance with the claims of the demanding plaintiff." T 41. The sole response

⁷In March 2009, Dyche's counsel faxed a response to plaintiffs' discovery demands, which included a demand for Morongo's tax returns. That response recited that the request was irrelevant, but that Morongo reported annually to the Department of Taxation, and was up-to-date on its filings. Kim aff. of 7/21/10, ex. 11, response to request 45.

from Dyche, regarding this order, occurred more than 21 days thereafter, and consisted solely of an unsigned affirmation/affidavit by Dyche to explain an appended chart, which contained broad categories of expenses, such as air fare, hotel, legal, dining, and Jerry Jankovic, with amounts and dates of those expenses. Under "legal," certain attorneys were listed, but otherwise, except to the extent that Jerry Jankovic was listed as a category, no recipients were listed, and specific purposes of the expenditures were not set forth. In light of Dyche's failure to comply with the April 2009 order, plaintiffs assert that, among other things, Dyche cannot rely on Jankovic's affidavit and appended checks to show how the funds provided by the Ans were used.

As to the conversion cause of action, plaintiffs indicate that their position has never been that the defendants mismanaged defaulting defendant Morongo. Rather, they claim that their position has been that Morongo was created to facilitate the fraud, and as such was a participant in converting plaintiffs' property, and was not a victim of defendants' misconduct. Plaintiffs dispute the assertion that the conversion claim should be dismissed as duplicative of the breach of contract claim, since it is predicated on a tort, namely the defendants' fraud.

On the breach of contract cause of action, the Ans now assert that Dyche breached the alleged promises to: repay the

investment in a year; give them a management role in Morongo, as evidenced by, among other things, their failure to call meetings of the managers, and their blocking of plaintiffs' access to information about the status of the Morongo project; complete the Morongo project in a year; and provide them with monthly income of at least \$100,000. Also, observing that every contract has a covenant of good faith and fair dealing, the Ans claim that such covenant was breached, since Dyche and Jankovic acted dishonestly and unfairly toward them, treated Morongo as their "personal piggy bank" (Plaintiffs' memo of law, at 24), and failed to produce any evidence during discovery that they diligently worked on the Morongo project. The Ans add that the promise, that they would have a five percent share in Morongo was illusory, in light of the fact that the entity was a sham. Thus they assert that the branch of the motion, which seeks dismissal of the breach of contract cause of action, must be denied.

The plaintiffs further maintain that the unjust enrichment claim should not be dismissed, because it would be inequitable and unconscionable to permit Shim and Dyche to retain the monies, which were obtained as a result of tortious conduct, and that the issues of whether there was tortious or fraudulent conduct, and whether the money should be returned, are issues to be resolved at trial.

Discussion

Initially, the court finds that Dyche willfully and contumaciously failed to comply with the April 30, 2009 discovery order. The unenlightening, untimely, and unsigned document Dyche provided did not meet her obligations with respect to interrogatories ## 8 and 27, which were designed to overcome her contradictory and nebulous deposition testimony. See CPLR 3133(b) (requires answers to interrogatories to be answered fully and under oath). Nor, did Dyche respond to interrogatory # 28 or to the discovery demands. No affidavit was provided by her, much less within the requisite 21-day period, indicating that she could not obtain, or lacked access to, any of the required information, or that Jankovic refused to assist her in obtaining necessary information. To the contrary, since Dyche obtained Jankovic's affidavit in support of this motion, and continued to be involved with him in other ventures, there does not appear to have been any impediment to her obtaining the required information. Further, Dyche was the treasurer, president, and CEO of Morongo, an entity which she claimed still existed and was pursuing the Morongo and other projects, so, she has access to all of its records, and activities. Accordingly, as indicated in the court's April 30, 2009 order, Dyche is precluded from offering any of the documents ordered to be provided by the terms of that order, including Morongo's tax returns, and any documents

relative to the Comanche project, and the issues upon which the orders are relevant to that order must, therefore, be determined against her and in favor of plaintiffs.

Thus, the court finds, among other things, for the purpose of the instant applications, that Morongo never filed tax returns; that any claimed Comanche project was unrelated to Morongo; that none of the funds, which were spent or authorized to be spent by Dyche, or Morongo, was for any legitimate purpose for that entity; and that, between January 2001 through the present, no steps were taken to further the Morongo project. In this latter regard, the court notes that Dyche had, in a deficient and incomplete January 31, 2008 response to plaintiffs' interrogatory #28, which response antedated the court's April 2009 order, indicated that the status of the Morongo project in January 2001 was "not yet conceived of," even though Dyche, thereafter, testified that a permit application for the Morongo project had allegedly been submitted in early 2000, at about the same time the Morongo tribe allegedly provided Dyche with a copy of the draft contract. Kim aff. of 7/21/10, ex. 6.

The branch of the motion which seeks an order granting Dyche, Shim, and Gateway summary judgment dismissing the seventh through tenth causes of action is granted. The court takes judicial notice of the County Clerk's computerized records, which reveal that, in *Joo v Cho* (Sup Ct, NY County, index #

113591/2005), by judgment, signed on May 26, 2009, and filed the next day, the conveyance from Back to Gateway of the deed for the apartment in which Dyche and Shim reside, was canceled and "declared null and void and of no effect." Accordingly, the seventh through tenth causes of action are dismissed as moot.

The branch of the motion which seeks summary judgment dismissing the fraud cause of action as to Dyche, and plaintiffs' cross motion seeking summary judgment on this cause of action are denied. The requisite elements of a fraud claim are "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996); *Braddock v Braddock*, 60 AD3d 84, 86 (1st Dept 2009); see also *Klembczyk v DiNardo*, 265 AD2d 934, 936 (4th Dept 1999) ("representation of fact, which is either untrue and known to be untrue or recklessly made, and which [was] offered to deceive the other party and to induce [him] to act upon it, causing injury [internal quotation marks and citation omitted]," constitutes fraud). While promises of what will happen in the future are not actionable, where a promise, which is collateral to a contract, is given with the preconceived and unrevealed intention that it would not be performed, such promise can amount to a material

misrepresentation of existing fact. *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 (1986); *Sabo v Delman*, 3 NY2d 155, 160 (1957); *WIT Holding Corp. v Klein*, 282 AD2d 527, 528 (2d Dept 2001). "[A] present intention not to fulfill a promise is generally inferred from surrounding circumstances, since people do not ordinarily acknowledge that they are lying." *Braddock v Braddock*, 60 AD3d at 89.

The issue of whether a party ever intended that his or her promises would be fulfilled is for the trier of fact, as is, usually, whether a party reasonably relied on an alleged misrepresentation. *Id.* However, the issue of reasonable reliance can be summarily disposed of where sophisticated investors fail to take necessary measures "to protect themselves from misrepresentations made during business acquisitions by investigating the details of the transactions and the business they are acquiring." *Global Mins. and Metals Corp. v Holme*, 35 AD3d 93, 100 (1st Dept 2006); *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 496 (1st Dept 2006); see generally *DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154-155 (2010).

In the instant case there are numerous issues of fact warranting the denial of both the application to dismiss the fraud cause of action and plaintiffs' cross motion for summary judgement on that cause of action. These include the level of the plaintiffs' business sophistication, whether their reliance

was reasonable, and whether they should have taken further measures to investigate the proposed project. Further issues exist as to whether a permit application was ever submitted to the State of California, and what Dyche knew about the status of any such application at the time she solicited plaintiffs; whether there was a draft agreement given by the tribe to Dyche; and whether Dyche, before the Ans invested, had knowledge that the tribe had decided to put off the Morongo project, and instead concentrate on the casino, as is suggested by the fact that Dyche took the Ans to see the Mohegan Sun casino. Also, there is a question as to whether plaintiffs were aware that there was neither a permit from the State of California, nor a contract with the Morongo tribe, at the time the venture's promoters, Dyche and her alleged coconspirator, Jankovic, who owed plaintiffs a fiduciary duty (*Roni LLC v Arfa*, 74 AD3d 442, 444 [1st Dept 2010], *affd* _NY3d_, 2010 WL 3703047 [2010] [promoters of a venture, organized as LLC, prior to and following formation of entity, owe fiduciary duty to entity and present and prospective shareholders]), allegedly informed plaintiffs that the Morongo project was to start immediately, and/or right away. Additionally, the evidence in this case, including that arising as a result of Dyche's failure to comply with the April 30, 2009 discovery order, and that demonstrating a knowing diversion of at least some of Morongo's assets by Dyche, and/or with her knowing

assistance, strongly suggests that Dyche made misrepresentations to induce the Ans to invest in Morongo, and that the project was bogus. Additionally, Dyche does not refute the claim that she told Mrs. An, in November 2001, that the project was on track and that Morongo's shares were twice as valuable.

Further, the claim that the fraud cause of action must be dismissed, because the Ans could not have reasonably relied on promises regarding the return of their principal and profits, since the promises were not contained in the agreements, is unavailing, in light of the claims that, from the start, the Morongo project was a sham, and of Dyche's misrepresentations as to the meaning of the relevant documents, and the Ans' asserted lack of an adequate command of the English language (*National Bank of N. Am. v Chu*, 47 NY2d 946 [1979] *revg on dissenting op of Sandler, J.* 64 AD2d 573, 575-577 [1st Dept 1978]; *see generally Sofio v Hughes*, 162 AD2d 518, 520-521 [2d Dept 1990]; *Sterling Natl. Bank & Trust Co. of N. Y. v I.S.A. Merchandising Corp.*, 91 AD2d 571, 572 [1st Dept 1982]). The court further rejects movants' claim that profit projections cannot be actionable (*cf. Kimmell v Schaefer*, 89 NY2d 257 [1996] [chairman and CFO of corporation, which developed limited partnership to provide energy through cogeneration units, was liable to investors for negligent misrepresentation in connection with false profit projections]), particularly in light of the claim that the

Morongo project was bogus.

The branch of the motion which seeks dismissal of the conspiracy to commit fraud cause of action, as to Dyche, is granted, since plaintiffs concede that no independent cause of action for conspiracy exists under New York law. See *Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 (1986); *Cash v Titan Fin. Servs., Inc.*, 58 AD3d 785, 787 (2d Dept 2009). Plaintiffs are of course free to allege and demonstrate, under their first cause of action, that Dyche was part of a conspiracy to commit fraud.

On the breach of contract cause of action, plaintiffs, in their opposing papers, do not dispute Dyche's showing that she never made the Ans any promise that they could run a restaurant in the new casino. In addition, since Morongo never had any profits, it cannot be said that there was a breach of the provisions giving the Ans priority in receiving distributions to the extent of their investment. Also, while plaintiffs now urge that the promise that they would have a management role in Morongo, as opposed to in the casino restaurant, was breached, that claim was not specifically set forth in the amended complaint's fourth cause of action as a basis for their breach of contract claim. The court also notes that the Ans never sought a meeting of the Board of Managers until 2006, by which time the Bank of America accounts were essentially depleted, that the

operating agreement did not set forth when any Board of Manager meetings were to take place, and that it is speculative, under the circumstances presented, that any damages to plaintiffs would have been averted had any meetings been called.

The Ans' claims that Dyche breached oral representations that they would get their \$1,000,000 back within a year and receive, after the completion of the Morongo project, income of at least \$100,000 per month, are without merit. Initially, it should be noted that there is no specific factual assertion that these representations were made when the additional \$200,000 was given on behalf of the shares obtained for the Ans' children. The Ans' claim, that they were promised that, after the project was built, they would indefinitely, over the course of Morongo's existence, receive monthly income of at least \$100,000, is barred by the statute of frauds, since this alleged agreement "[b]y its terms [wa]s not to be performed within one year from the making thereof" General Obligations Law § 5-701 (a) (1); *RTC Props., Inc. v Bio Resources*, 295 AD2d 285 (1st Dept 2002); *George Burke Co. v Intermetro Indus. Corp.*, 268 AD2d 310 (1st Dept 2000). Also, plaintiffs have not specifically disputed that the statute of frauds bars this claim.

As to the alleged guarantee of repayment of the Ans \$1,000,000 investment within a year of final payment, the documentary evidence demonstrates that there was no such

contractual provision. The May 6 and 7, 2001 letters, as well as those of November 25, 2001, only refer to plaintiffs receiving their \$1,000,000 before any other member received a distribution, and the operating agreement clearly reflected that cash flow would be determined annually by the Board of Managers, and that distributions would not necessarily be made in any particular year, depending on cash flow and the need to put money in the reserve fund. It is well-settled that where an agreement is reduced to writing, it presumably constitutes the parties' complete agreement. *Backer v Lewit*, 180 AD2d 134, 137 (1st Dept 1992). In order to introduce parol evidence to vary a written agreement, three conditions must be met. The term to be introduced must be a collateral one, must not contradict the written agreement's express or implied provision, and it must be a term which the "parties would not ordinarily be expected to embody in the writing ... [I]t must not be so clearly connected (internal citation and quotation marks deleted)." *Id.* In the instant case, the alleged promise that the Ans would get back their principal in a year, conflicts with the operating agreement (*Stone v Schulz*, 231 AD2d 707 [2d Dept 1996]), and is of the type one would expect to be contained in the written agreements (*Johnson v Stanfield Capital Partners, LLC*, 68 AD3d 628, 629 [1st Dept 2009]). The court further observes that plaintiffs have not asserted a cause of action for reformation. See *Chimart Assoc. v*

Paul, 66 NY2d 570 (1986).

Regarding the Ans' claim that Dyche breached an oral contract to complete the Morongo project within a year, this must be viewed together with the plaintiffs' other allegations, that Dyche represented that the tribe was meeting soon, and that the project was scheduled to begin "right away." Amended complaint, ¶ 34. A year from "right away" is not a contractual promise that the project would be completed within a year of any particular date. In addition, in their memorandum of law (at 14) plaintiffs assert that defendants "falsely stated that the Morongo Project would be 'fast tracked' and that it may be completed as soon as within a year from investment."

Nonetheless, the May 7 and November 25, 2001 letter agreements signed by Dyche indicate that Morongo proposed to develop and construct the Morongo project. In light of Dyche's failure to comply with the April 2009 discovery order as to interrogatory # 28, which deals with the project's status on certain dates, Dyche has failed to demonstrate that she or any one else diligently and in good faith worked on that project. Although Dyche signed those agreements in her representative capacity, a ground not raised as to this cause of action in movants' memoranda of law, that factor would not warrant dismissal of this cause of action, in light of the allegations of fraud. See generally *Feigen v Advance Capital Mgt. Corp.*, 150

[*41]

AD2d 281, 282 (1st Dept 1989) (alter ego theory inadequate to support claim of breach of contract against individual shareholders and directors, absent allegations of "fraud or other corporate misconduct, or that the individuals in question conducted business in their personal rather than corporate capacity."); cf. *Zissimatos v U.S. Trust Co. of N. Y.*, 10 AD3d 587, 588 (assumed exception to rule that loss of value of shares could only be redressed in a derivative action, was inapplicable, where plaintiff shareholder did not allege that the wrongdoer, who induced plaintiff to form the corporation, formed the corporation as an instrument of wrongdoing), citing *TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335 (1998).

As to the conversion cause of action, the court rejects movants' assertion that the allegations under plaintiffs' breach of contract cause of action are duplicative of their conversion claim. Also, in light of Dyche's failure to comply with this court's discovery order, any claim by Dyche that the sums invested by the Ans were appropriately and legitimately expended on behalf of Morongo is unavailing.

"Conversion is any unauthorized exercise of dominion or control over property by one who is not the owner of the property which interferes with and is in defiance of a superior possessory right of another in the property." *Meese v Miller*, 79 AD2d 237, 242 (4th Dept 1981). A party seeking to establish conversion, is

required to show that it legally owns the property or has the "immediate superior right of possession to a specific identifiable thing" (internal citation and quotation marks omitted). *Id.* Money which is specifically identifiable can be converted, and the use of such money beyond the authority conferred by the owner constitutes a conversion. *Id.* at 243. Nonetheless, where assets are converted from certain entities, such as a limited liability company, the general rule is that a claim for conversion belongs to that entity and must be brought derivatively. *Abrams v Donati*, 66 NY2d 951, 953 (1985); *Wolf v Rand*, 258 AD2d 401, 403 (1st Dept 1999). This rule serves to protect the rights of the entity's creditors, who may have claims superior to those of the innocent shareholder. *Glenn v Hoteltron Sys., Inc.*, 74 NY2d 386, 393 (1989); *Wolf v Rand*, 258 AD2d at 403.

Here, however, plaintiffs urge that since Dyche committed a fraud by having plaintiffs invest in a fake project and by creating a sham entity to facilitate the fraud, the branch of defendants' motion, which seeks an order dismissing the conversion cause of action should be denied. *Cf. Zissimatos v U.S. Trust Co. of New York*, 10 AD3d at 588. In light of the survival of the fraud cause of action, and the absence of any claim that there are other creditors with claims against Morongo (see *Venizelos v Oceania Mar. Agency, Inc.*, 268 AD2d 291, 292

[1st Dept 2000]), the conversion cause of action shall stand.

The branch of the motion, which seeks an order granting Dyche and Shim summary judgment dismissing the twelfth cause of action for unjust enrichment against these defendants, is denied. Unjust enrichment is "the receipt by one party of money or a benefit to which it is not entitled, at the expense of another." *Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 (1st Dept 2010). It requires a plaintiff to set forth that the defendant possessed plaintiff's assets. *Roslyn Union Free School Dist. v Barkan*, 71 AD3d 660 (2d Dept 2010). Unjust enrichment requires the court to inquire "whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (internal citations omitted)." *Paramount Film Distr. Corp. v State of New York*, 30 NY2d 415, 421 (1972), cert denied 414 US829 (1973). "Generally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent (internal citations omitted)." *Id.* No showing of wrongdoing is necessary. *Simonds v Simonds*, 45 NY2d 233, 242 (1978).

Movants' argument that this cause of action must be dismissed because there is no evidence or pleading allegation that funds were spent, other than for legitimate business

purposes, is without merit. In light of Dyche's failure to comply with this court's discovery order, she cannot claim that the funds were appropriately spent. Also, the twelfth cause of action incorporates all of the amended complaint's prior allegations, including, that in 2005, Dyche wired \$98,000⁸ from Morongo to Shim, and that, thereafter, Shim issued checks to herself and Dyche, as is reflected in the copy of Shim's bank statements appended to the complaint, which reveal that the sums of those checks totaled in excess of the amounts in the account derived from sources other than from the \$98,000 wire. No affidavit has been provided by Shim explaining the circumstances surrounding her receipt of the wired funds, her use of those funds, or her issuance of checks to Dyche. To the extent that Dyche baldly and conclusorily claims that she wired the \$98,000 to Shim, so that Shim could hold the funds for her when she traveled to South Korea seeking investors, Dyche is precluded from so asserting with respect to this amount, since she failed to comply with this court's April 30, 2009 order. In view of the foregoing, and plaintiffs' concession that there are triable issues as to whether these defendants engaged in fraud or committed other torts, and whether they should return any sums (plaintiffs' memo of law, at 29), the branch of defendants'

⁸No evidence has been provided by the Ans indicating the source of the \$10,000 Sandtec check given to Shim.

motion, which seeks an order dismissing the twelfth cause of action as to Dyche and Shim, is denied.

Accordingly, it is

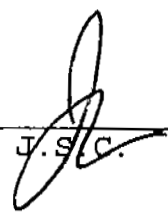
ORDERED that the motion by defendants Sandra Dyche, Min Hye Shim and American Gateway Energy, L.L.C. for summary judgment dismissing the complaint is granted solely to the extent that the sixth cause of action for conspiracy to commit fraud, and the seventh through tenth causes of action for fraudulent conveyances, are dismissed as against Sandra Dyche; the seventh and eighth causes of action are dismissed as against American Gateway Energy, L.L.C.; and the ninth and tenth causes of action are dismissed as against Min Hye Shim; and the motion is otherwise denied; and it is further

ORDERED that the cross motion by plaintiffs for summary judgment on their fraud cause of action is denied; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference on April 28, 2011, at 3:00 p.m., in Part 11, Room 351, 60 Centre Street.

Dated: ~~March~~ *April 5*, 2011

ENTER:



J.S.C.

FILED

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