

**Depaola v 2 Brothers Indus., Inc.**

2011 NY Slip Op 31843(U)

July 6, 2011

Supreme Court, Suffolk County

Docket Number: 0281-2011

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NUMBER: 0281-2011

**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

**Present: HON. EMILY PINES**

J. S. C.

Original Motion Date: 03-31-2011  
 Motion Submit Date: 04-19-2011  
 Motion Sequence No.: 001 MOTD

FINAL  
 NON FINAL

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**DENISE DEPAOLA,****Plaintiff,**

Attorney for Plaintiff  
 Roy A. Klein, Esq.  
 532 Broadhollow Road. Suite 144  
 Melville, New York 11747

**-against-**

**2 BROTHERS INDUSTRIES, INC., Dd/b/a**  
**2 BORTHERS IND., MANUEL MANTEIGA, JASON**  
**MAASS and LEIGHANN MANTEIGA,**

Attorney for Defendants  
 Markotsis & Lieberman, PC  
 115B Broadway, Suite 2  
 Hicksville, New York 11801

**Defendants.**

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**ORDERED**, that the Defendants' motion (motion sequence # 001) to dismiss pursuant to CPLR §3211 (a) (7) is granted in part and denied in part as set forth herein.

**Background**

Plaintiff Denise Depaola, ("Plaintiff") commenced this action against defendants, 2 Brothers Industries, Inc. ("2 Brothers"), Manuel Manteiga, Jason Maass, and Leighann

Manteiga, by filing a Summons and Verified Complaint. The defendants filed a pre-answer motion to dismiss the Verified Complaint, pursuant to CPLR §3211 (a) (1), (3), and (7), on or about March 3, 2011. Subsequently, Plaintiff filed a Verified Amended Complaint, pursuant to CPLR §3025 (a). Defendants state in their Affirmation in Further Support that the Plaintiff's amendments to the Verified Complaint do not materially affect the defendants' prior arguments. Therefore, Defendants' arguments for dismissal of plaintiff's Verified Complaint shall be applied to Plaintiff's Amended Verified Complaint.

Plaintiff Denise Depaola is an individual and successor in interest and assignee of various claims against the Defendants. Defendant 2 Brothers is a New York corporation that performs construction services, with its principal place of business in Hauppauge, New York. Manuel Manteiga and Jason Maass are principals of 2 Brothers and individually named defendants. Leighann Manteiga is the wife of Manuel Manteiga and an individually named defendant.

In this action Plaintiff seeks to recover certain monies furnished to the defendant 2 Brothers, between April 2010 and July 2010. Plaintiff and Defendant Manuel Manteiga commenced a personal relationship in April 2010. Neither Plaintiff nor Defendants dispute that Plaintiff provided a total of \$159,000 to 2 Brothers, between April and July 2010. In April 2010, Plaintiff provided \$20,000 to 2 Brothers, which is evidenced by a promissory note, executed by Manuel Manteiga on behalf of and as president of 2 Brothers, on April 22, 2010. The note indicates that Manuel Manteiga will prepare weekly dinners for the Plaintiff as interest on the note. The note also states that it shall be due and payable on May 21, 2010. Between June 2010 and July 2010 Plaintiff provided additional funds to 2 Brothers in installments of \$50,000, \$64,000 and \$25,000, in order to enable 2 Brothers to procure and perform certain government contracts. These advances are evidenced only by wire transfers to 2 Brother's bank accounts and correspondence between Plaintiff and Manuel Manteiga. The parties have not expressed in writing, the terms of repayment and interest on these particular advances. In October 2010, Plaintiff asked Manuel Manteiga to execute

promissory notes, evidencing the \$50,000, \$64,000, and \$25,000 installments, but he refused. Plaintiff commenced this action after she demanded repayment of the full \$159,000 and Manuel Manteiga again refused.

The Amended Complaint sets forth ten causes of action against 2 Brothers Industries, Inc., Manuel Manteiga and Jason Maass, individually, for breach of contract (first and fourth causes of action), unjust enrichment (second and fifth causes of action), fraud (third and sixth causes of action), an accounting (seventh cause of action), appointment of a receiver (eighth cause of action), breach of fiduciary duty (ninth cause of action), and imposition of a constructive trust (tenth cause of action).

Defendants now move to dismiss the Amended Complaint against all defendants pursuant to CPLR § 3211(a) (1), (3), and (7). Defendants argue they are entitled to dismissal of Plaintiff's Amended Complaint because of documentary evidence, which conclusively disposes of Plaintiff's claims; Plaintiff does not have standing to bring the causes of action in the Amended Complaint; and Plaintiff's Amended Complaint fails to state a cause of action against the defendants.

Plaintiff, in her opposition to defendants' motion to dismiss, requests this Court to convert the Defendants' motion with respect to the first cause of action for breach of contract, into a motion for summary judgment pursuant to CPLR Rule 3211 (c), which authorizes this Court to treat defendant's motion as one for summary judgment upon adequate notice to the parties.

### **Discussion**

It is improper for a court to convert a motion to dismiss to a motion for summary judgment when adequate notice has not been provided to a party to afford an opportunity to

brief the issues and form a record. *Mihlovan v. Grozavu*, 72 N.Y.2d 506, 534 N.Y.S.2d 656 (1988); *See also Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314 (1976).

Defendants have not been provided adequate notice of Plaintiff's request to treat the defendants motion to dismiss as a motion for summary judgment. Accordingly, Plaintiff's request is denied and this Court will apply the applicable standards for motions to dismiss pursuant to CPLR Rules 3211 (a) (1), (3), and (7).

CPLR Rule 3211(a) (1) provides for dismissal of an action based upon documentary evidence. To succeed on a motion to dismiss a complaint pursuant to CPLR Rule 3211 (a) (1), the documentary evidence must "resolve all factual issues as a matter of law and conclusively dispose of the Plaintiffs' claims." *DiGiacomo v. Levine*, 76 A.D.3d 946, 949, 907 N.Y.S.2d 499, 503 (2d Dept. 2010). Judicial records, mortgages, deeds, contracts and "any other papers the contents of which are 'essentially undeniable,' would qualify as documentary evidence." *Fonanetta v. Doe*, 73 A.D.3d 78, 898 N.Y.S.2d 569, (2d Dept. 2010). *See also, Springer v. Amontaser*, 75 A.D.3d 539, 904 N.Y.S.2d 765, (2d Dept. 2010).

The defendants have provided various documents, which they argue conclusively dispose of Plaintiff's claims. These documents include a vehicle registration and title application, a promissory note that evidences Plaintiff's initial \$20,000 advance to 2 Brothers, 2 Brother's bank account records evidencing the transfer of funds from Plaintiff to defendant, correspondence between Plaintiff and Manuel Manteiga, 2 Brothers' bonding documents, and Manuel Manteiga's mortgage ledger.

Although the authenticity of certain documentary evidence may be undeniable, the documentary evidence submitted by defendants does not resolve all factual issues as a matter of law and does not conclusively dispose of the Plaintiff's claims. Accordingly, that branch of Defendants' motion to dismiss pursuant to CPLR Rule 3211 (a) (1) is denied.

CPLR Rule 3211(a) (3) provides for dismissal for lack of standing or capacity. Where standing is put in issue by the defendant, a plaintiff must prove its standing to be entitled to relief. *Wells Fargo Bank v. Mastropaolo*, 42 A.D.3d 239, 837 N.Y.S.2d 247 (2d Dept. 2007).

Defendants claim that the Plaintiff lacks standing to bring the instant action because the monies Plaintiff advanced to 2 Brothers came from the bank accounts of two businesses, FA Services Inc. and Fundadminsitration Inc. Plaintiff is a fifty percent owner of FA Services and an officer and part owner of Fundadminsitration.

Plaintiff has provided sufficient evidence that both businesses have assigned any and all rights to Plaintiff, to recover the monies provided to 2 Brothers. Therefore, Plaintiff has standing to bring the instant action and that branch of defendants' motion to dismiss pursuant to CPLR Rule 3211(a) (3) is denied.

CPLR Rule 3211(a) (7) provides for dismissal for failure to state a cause of action. It is well settled in "reviewing a motion to dismiss under CPLR 3211(a) (7), allegations of the complaint are deemed to be true. The pleading will be deemed to allege whatever may be implied from its statements by reasonable intendment and the court must give the pleader the benefit of all favorable inference that may be drawn from the complaint..." *Dunn v. Gelardi*, 59 A.D.3d 385, 872 N.Y.S.2d 528 (2d Dept. 2009)(internal quotations omitted). *See Also, Peterec-Tolino v. Harap*, 68 A.D.3d 1083, 892 N.Y.S.2d 154 (2d Dept. 2009). When evidentiary material is submitted in support of a motion to dismiss for failure to state a cause of action, the Court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated a cause of action. *Peter F. Gaito Architecture, LLC v. Simone Development Corp.*, 46 A.D.3d 530, 846 N.Y.S.2d 368 (2d Dept. 2007).

Plaintiff's first and fourth causes of action are for breach of contract. It is well settled in a breach of contract claim that plaintiff must allege the formation of a contract,

performance by plaintiff, failure to perform by defendant, and resulting damages to plaintiff. *Furia v. Furia*, 116 A.D.2d 694, 498 N.Y.S.2d 12 (2d 1986). In the Amended Complaint, Plaintiff alleges the existence of a contract, whereby Plaintiff provided 2 Brothers with certain monies and such monies would be repaid to Plaintiff. Plaintiff further alleges that defendants have refused to repay such monies and as a result, Plaintiff has suffered a loss. Plaintiff has properly plead a cause of action for breach of contract. Accordingly, that branch of defendants' motion to dismiss Plaintiff's causes of action for breach of contract for failure to state a cause of action pursuant to CPLR Rule 3211 (a) (7) is denied.

Plaintiff's second and fifth causes of action are for unjust enrichment. A cause of action for unjust enrichment must allege that defendant received money from plaintiff, defendant benefited from receipt of the money, and under principals of equity and good conscience defendant should not be permitted to retain the money. *Paramount Film Distributing Corp v. State*, 30 N.Y.2d 416, 334 N.Y.S.2d 388 (1972). Plaintiff's Amended Complaint does allege that 2 Brothers received a total of \$159,000 from Plaintiff between June 2010 and July 2010. Plaintiff further alleges that such funds were accepted and used by 2 Brothers, and that it was both parties understanding that the funds would be repaid. Plaintiff has alleged facts sufficient for a cause of action for unjust enrichment. Where as in this case, there's a genuine dispute as to the existence of a contract, Plaintiff may proceed upon both theory and is not required to elect her remedy at the pleading stage. *IIG Capitol LLC v Archipelgeo, LLC*, 36AD 3d 401 (1<sup>st</sup> Dept 2007) Accordingly, that branch of Defendants' motion to dismiss Plaintiff's causes of action for unjust enrichment for failure to state a cause of action pursuant to CPLR Rule 3211 (a) (7) is denied.

Plaintiff's third and sixth causes of action are for fraud. A cause of action for fraud must allege a misrepresentation or material omission of a fact, which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance on the misrepresentation or omission by the plaintiff, and injury. *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 836 N.Y.S.2d 509 (2007). A cause of action

alleging fraud does not lie where the only fraud claim related to a breach of contract. *WIT Holding Corp. v. Klein*, 282 A.D.2d 527, 724 N.Y.S.2d 66 (2d 2001). However, a misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud. *Id.* Whether an alleged representation is a statement of fact or opinion is a question of fact, which is impermissible to resolve in a motion to dismiss. *Black v. Chittenden*, 69 N.Y.2d 665, 511 N.Y.S.2d 833 (1986).

Defendants claim that Plaintiff has failed to state a cause of action for fraud because the defendants' promise to Plaintiff that funds would only be used for business purposes, did not amount a representation of a fact. Therefore, defendants argue that the first element of fraud has not been sufficiently alleged to state a cause of action for fraud. Defendants further claim that Plaintiff's cause of action for fraud is merely duplicative of Plaintiff's cause of action for breach of contract and as such cannot stand as an independent cause of action.

Plaintiff's Amended Complaint alleges that Manuel Manteiga's statements about the future use of Plaintiff's funds amounted to a false representation of fact, which was known to be false by defendant, made for the purpose of inducing Plaintiff to rely on the statements, and Plaintiff did justifiably rely on such statements to Plaintiff's detriment. Plaintiff states that the breach of contract claims are rooted in defendants failure and refusal to repay the funds that Plaintiff loaned, while their cause of action for fraud is rooted in defendants representation about how the funds would be used, which induced Plaintiff to provide the funds to 2 Brothers.

Plaintiff has sufficiently alleged a cause of action for fraud. Accordingly, that branch of defendants' motion to dismiss Plaintiff's fraud claims, pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action is denied.

As for the causes of action against Jason Maass individually, it is well settled that officers of a corporation may be held personally liable for the debts of the corporation when

the officers themselves act tortiously or under the doctrine of piercing the corporate veil. *Walkovszky v. Carlton*, 18 N.Y.2d 414, 276 N.Y.S.2d 585 (1966). “Whenever anyone uses control of a corporation to further his own rather than the corporation's business, he will be responsible for the corporation's acts.” *Id.* A plaintiff seeking to “pierce the corporate veil” to impose liability on corporation's owners must demonstrate that a court in equity should intervene because the owners exercised complete domination over corporation in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff. *East Hampton Union Free School District v. Sandpepple Builders, Inc.*, 66 A.D.3d 122, 884 N.Y.S.2d 94 (2d Dept. 2009) Factors to be considered in determining whether corporation's owner has abused the privilege of doing business in the corporate form so as to permit “piercing the corporate veil” and impose personal liability on owner for corporation's obligations include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use. *Id.*; *See also, Ruti v. Knapp*, 193 A.D.2d 662, 598 N.Y.S.2d 50 (2d Dept. 1993) (“The Supreme Court did not err in dismissing the complaint against the individual defendant.”)

Each of Plaintiff's causes of action arose out of the transaction between the Plaintiff, the corporate defendant, and Manuel Manteiga. The Plaintiff concedes that defendant Manuel Manteiga signed the promissory note as president and on behalf of 2 Brothers. The Amended Complaint does not suggest Jason Maass acted tortiously or in any way outside the scope of his authority as an officer and principal of 2 Brothers.

The factual allegations presented in the Amended Complaint are devoid of any showing that would permit the court to disregard the shield of liability, which Defendant Maass is entitled to as an officer of 2 Brothers. Therefore, that branch of the defendants' motion to dismiss Plaintiff's first, second, third, fourth, fifth, sixth and seventh causes of action against defendant Jason Maass, pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action is granted. Plaintiff's seventh cause of action for an accounting of 2

Brothers, eighth cause of action seeks appointment of a receiver, ninth cause of action is for breach of fiduciary duty, and tenth cause of action turn on whether the money Plaintiff provided to 2 Brothers was in fact a capital contribution.

Defendants claim that Plaintiff has failed to allege facts sufficient to give rise to causes of action for accounting, receivership, breach of a fiduciary duty, and imposition of a constructive suit. Defendants argue that Plaintiff merely asserts a bare legal conclusion that the alleged loans were in fact capital contributions to 2 Brothers, creating an equity interest in the company.

Absent expressed agreement of the parties, whether monies advanced are either a loan or a capital contribution is a question of fact based on surrounding circumstances and the conduct of the parties. *38 Town Associates v. Barr*, 225 A.D.2d 613, 639 N.Y.S.2d 442 (2d Dept. 1996). Capital contributions consist of monies provided to a business, which are represented as a capital contribution and intended to be irrevocably risked in the business. *M. & C. Creditors Corp. v. Pratt*, 172 Misc. 695, 17 N.Y.S.2d 240 (Sup 1938), judgment aff'd, 255 A.D. 838, 7 N.Y.S.2d 662 (1st Dep't 1938), appeal granted, 280 N.Y. 850, 19 N.E.2d 685 (1939) and judgment aff'd, 281 N.Y. 804, 24 N.E.2d 482 (1939).

Plaintiff's Amended Complaint only states that the alleged loan was actually a capital contribution. The Plaintiff does not allege any facts pertaining to the conduct of the parties or the surrounding circumstances regarding whether or not the parties intended the alleged loan to be a capital contribution whereby creating an equity interest in 2 Brothers. Further, the Affidavit of Denise Depaola does not suggest any expectation of sharing in 2 Brothers profit or property or that either party intended the alleged loan to create an equity interest in 2 Brothers. The only expectation alleged by the Plaintiff is an expectation of repayment of the alleged loan with interest. The only reasonable inference which may drawn from the foregoing allegations is that the monies provided by Plaintiff constituted a loan with fixed obligation for repayment by 2 Brothers, not a capital contribution giving Plaintiff an equity

interest in 2 Brothers. Therefore, that branch of Defendants' motion to dismiss Plaintiff's seventh, eighth, ninth, and tenth causes of action pursuant to CPLR Rule 3211 (a) (7) for failure to state a cause of action is granted.

This constitutes the *DECISION* and *ORDER* of the Court.

**Dated: July 6, 2011**  
**Riverhead, New York**

  
**EMILY PINES**  
J. S. C.

FINAL

NON FINAL