

Mitzvah Inc. v Powers
2011 NY Slip Op 33931(U)
November 10, 2011
Sup Ct, NY County
Docket Number: 105513/2009
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Index Number : 105513/2009

MITZVAH INC.

vs

POWER, PAULINE

Sequence Number : 001

DISMISS

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

05/12/11

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

11-20, 22-23

24-25

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 11/10/11

JUSTICE SHIRLEY WERNER KORNREICH

[Signature]
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 54

-----x
MITZVAH INC. d/b/a PISA BROTHERS TRAVEL,

Plaintiff,

-against-

PAULINE POWERS, NANCY BROOKES and
ALDER INTERNATIONAL, INC.,

Defendants.

-----x
HON. SHIRLEY WERNER KORNREICH, J.:

Index No.: 105513/2009

DECISION and ORDER

This action arises from the sale of Pisa Brothers Inc. (Pisa), a non-party travel agency, to plaintiff Mitzvah, Inc. (Mitzvah). Prior to the closing of the transaction, defendants Pauline Power and Nancy Brookes, employees of Pisa, resigned and commenced employment with defendant ALDER International, Inc. (ALDER), a competitor. Plaintiff alleges that Power and Brookes engaged in misconduct including the theft of client lists and other confidential information from Pisa, and the use of this proprietary information as part of their employment with ALDER. Defendants now move to dismiss, pursuant to CPLR 3211(a)(7), claiming that plaintiff lacks standing to sue. Plaintiff opposes.

I. Facts

A. Complaint, Zuckerman Affidavit & APA

Pisa operated as a travel agency from 1924 until 2008, when its assets were purchased by Mitzvah. Compl., para. 5. Pisa received both commissions from travel services (such as cruises and other vacations) booked by its employees, and “over-ride” fees when it “[met] or exceed[ed] certain production targets” of travel service providers. *Id* at 11. In mid-2007, Ricci Zukerman,

currently the president of Mitzvah and then the president of WVT Inc. (WVT), entered into negotiations with Pisa. Zukerman Aff., para. 1. On April 1, 2008, Lawrence Delancey, the president and sole shareholder of Pisa, authorized WVT to assume day-to-day management responsibility for Pisa until such time as Zukerman could complete the purchase of Pisa's assets. *Id.* at 2.

In October or November of 2008, Mitzvah, which Zukerman had formed in August 2008, entered into an asset purchase and sale agreement (APA) with Pisa and Delancey, whereby Mitzvah purchased certain assets of Pisa Brothers. Section 1 of the APA provided:

...Seller [Pisa] agrees to sell, convey, assign, transfer and deliver to Buyer [Mitzvah] at the Closing *all of Seller's right, title and interest in and to the following assets* (collectively, but excluding those assets specifically defined as Retained Assets in Section 2 hereof, the "Assets"):

(a) Tenant's interest in a lease...

(b) All office furniture, furnishings, equipment and supplies...

© *All of Seller's right, title to and interest in the names "Pisa Brothers, Inc.," and Pisa Brothers Travel Service*, and federal or state trade names or marks, business logos and designs employed by the Seller in its operation of the Business;

(d) *All customer lists, including names, addresses, and phone numbers;*

(e) *All purchase orders, sales commitments, licenses, permits, agreements, security interests, and post office boxes pertaining to Seller's ordinary operation and Business; and*

(f) *The goodwill of the Business* as a going concern. [emphasis added]

Section 2 specified the Retained Assets as, among other things, "any and all accounts and notes receivable of the Business arising prior to *March 31, 2008*" [emphasis added]. In setting forth the purchase price, the APA specified that the Buyer is "obliged to pay the Seller the value of the assets of the Seller as of *March 31, 2008, ...*" [emphasis added] APA, Sec. 3(b).

Moreover, under Section 4, the Buyer assumed liability for the costs of the operation arising from "activities commencing upon *March 31, 2008*" [emphasis added]. However, Section 4 stated that the Buyer did not assume the liabilities or obligations of the Seller's accounts payable.

In addition, Seller made warranties as to the Business's Assets, Balance Sheet, lack of lawsuits, and material adverse events as of *March 31, 2008*. [emphasis added] *Id.* at 6(e), (h), (n), (o) & (u). Also, Section 6(j) stated that Seller operated the Business in the ordinary course "on or before *April 1, 2008, when Buyer began operating the Business*" [emphasis added]. Seller further agreed to pay any accrued employee vacation pay only up to March 31, 2008. *Id.* at 6(s).

Section 8 provided:

(a) *From April 1, 2008 to the Closing Date, Buyer covenants and agrees it has:*

- (I) conducted the Business only in the ordinary course;
- (ii) maintained all insurance policies...;
- (iii) unless the prior written consent of Seller has been obtained, not paid or agreed to pay any special bonuses or special remuneration to any of its employees ...or increase the salary or wage rate or other remuneration of any of its employees...
- (iv) except as otherwise requested by Seller, used its best efforts to preserve the Business intact, to maintain services of its present employees, and to preserve the goodwill of those having relations with Seller;

* * *

(viii) maintained all services in connection with the Assets as presently maintained until the Closing Date, and until the Closing Date or the earlier Termination of this Agreement, will keep and maintain th assets in the same manner in which they are currently being maintained and not to cause or permit any waste or nuisance to or against the Assets, and *to the maintenance and operation of the Assets between April 1, 2008 and the Closing Date so that the Assets shall be of the same quality and condition on the Closing Date as they were on April 1, 2008;*

* * *

(b) *Buyer has taken possession of the Assets and management of the Business being sold hereunder since April 1, 2008....Responsibility for payment for all services and materials received and accepted by Buyer, if any, after March 31, 2008, shall be borne by Buyer.* Buyer shall have the option to fulfill all commitments as the same exists at March 31, 2008. Accounts receivable for all travel services in the ordinary course of business prior to *March 31, 2008*, whether billed or not, are to be the property of Seller.... [emphasis added].

According to plaintiff, the "principal assets which Pisa had to offer in this deal were its client lists and goodwill." Zukerman Aff. Para. 7. Pisa had developed and maintained these cli-

ent lists since 1924 and had invested a substantial amount of time and money in doing so. *Id.* The lists contained at least 2,750 client names, along with related personal information such as addresses, phone numbers, credit card numbers, and notes on travel history and preferences. *Id.* at 7. This information is in a computerized database as well as associated paper files. *Id.* at 9. Given the importance of maintaining a client list to the success of its business, Pisa had taken all measures to ensure that they remained confidential, and the information contained within them is not publicly available, at least in any consolidated form. Zukerman Aff. Para. 7-8, Compl. Paras. 7-8. Thus, employees were required to maintain the confidentiality of its customer and client lists and information, using “password protection of internal databases,” and use the information solely in the company’s interests. *Id.*

Defendants Power and Brookes had been salaried employees of Pisa for at least five years prior to the events giving rise to this action. *Id.* at 6. On or about June 2, 2008, they both gave notice that they would be ending their employment and entered the employ of ALDER. *Id.* at 12. Zukerman explicitly reminded them, at the time of their leaving the company, that they could not take client files, improperly solicit clients of Pisa or interfere with bookings made in the name of the company. *Id.* at 13.

Nonetheless, plaintiff alleges, Power and Brookes took Pisa’s confidential client lists and files or copies of them. Additionally, upon entering the employ of ALDER, plaintiff contends, they immediately proceeded to, and continue to this day to, exploit the information contained in those files to solicit Pisa’s clients and divert its business to their new employer. *Id.* at 16. Further, defendants allegedly used this information to contact various cruise lines and other businesses and instruct them, at times through the use of forged documents, to transfer Pisa bookings for

clients to ALDER, thereby transferring fees due for those bookings. *Id.* \$2,205,853.27 in bookings were transferred in this manner, depriving plaintiff of \$181,859.09 in commissions and \$46,118.00 in over-ride fees. *Id.* at 15.

Plaintiff alleges that on August 1, 2008, it discovered that defendants “remotely accessed their former email accounts at Pisa and illegally tampered with and altered the status of those accounts and away messages, to direct incoming business emails from Pisa. Pisa clients and customers were advised that Power and Brookes had left the employ of Pisa and were told to contact Power and Brookes regarding travel related business. Pisa clients were provided with the personal phone numbers of Power and Brookes. Thereafter, Power and Brookes, with the knowledge, consent and assistance of ALDER, used the information and contacts improperly solicited. Compl. Paras. 18, 21, 22, 23.

Plaintiff filed this lawsuit on April 29, 2009, alleging: (1) breach of fiduciary duty against Power and Brookes; and (2) aiding and abetting a breach of fiduciary duty against ALDER. It further alleges the following against all defendants : (3) unfair competition; (4) misappropriation of trade secrets; (5) tortious interference with contract; (6) tortious interference with prospective business relationships and economic advantage; (7) conversion; (8) unjust enrichment; (9) computer tampering and trespass to a chattel; (10) an accounting against Power and Brookes; (11) fraud; and (12) punitive damages.

Discussion

On a motion to dismiss, the court is obliged to accept the complaint’s factual allegations as true and to accord the plaintiff the benefit of every possible favorable inference. *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 (1st Dept 2004).

Additionally, in assessing a motion brought pursuant to CPLR 3211, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635-636 (1976). Where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion should be denied unless “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law [citation omitted].” *Goshen v Mutual Life Ins. Co. of N.*, 98 NY2d 314, 326 (2002); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

Defendants move to dismiss the complaint for lack of standing, arguing that Pisa, not plaintiff, has standing to bring this action. They do not argue that Pisa would not have standing to sue. Rather, they argue that the claims are premised on an employer-employee relationship and that Power and Brookes never worked for plaintiff, Mitzvah. Specifically, defendants contend, they were employed by Pisa from 2003 until June 2, 2008, before Mitzvah was even licensed to conduct business in New York. Defendants also allege that Mitzvah is not properly authorized to do business in New York as Pisa Brothers Travel.

Plaintiff, on the other hand, argues that the APA conveyed all of Pisa’s rights, both contract and tort, as of April 1, 2008, citing to *Banque Arabe et Internationale D’Investissement v Maryland National Bank*, 57 F3d 146, 151 (2d Cir 1995). Specifically, plaintiff argues that Section 1 of the APA’s grant of Pisa Brothers’ “right, title and interest in and to” the enumerated Assets conveyed not only the Assets themselves, but also the right to prosecute any tort claims Pisa Brothers might have against any party that relate to those assets. Tr. 21, Pl. Mem. of Law, p. 3. Plaintiff has not directed the court to any provisions of the APA or to any case law to support its broad reading of that provision such that it may state a cause of action based on injuries

suffered by Pisa Brothers. The court finds unpersuasive plaintiff's reliance on *Banque Arabe* for the proposition that such an intent can be read into the wording of this provision.¹

Plaintiff's reliance on Section 8(a) of the APA is equally misplaced. Nothing in this provision constitutes evidence of an explicit intention to convey any tort claims held by Pisa Brothers. It merely makes clear that Mitzvah, in its capacity as manager of the business, promised that it had not acted and would not act in any way such as to diminish the value of the business prior to the Closing Date. There is no indication that defendant authorized plaintiff to bring actions on its behalf in order that it might do so. Moreover the provisions are almost entirely retrospective in nature. They refer to an obligation covering the period between April 1, 2008 and the closing on November 21, 2008. Even if it did authorize plaintiff to bring suits during this period on behalf of Pisa Brothers, it could not convey any such authorization for the period following the closing date.

However, while plaintiff may not have standing to bring claims for torts committed by defendants against Pisa Brothers, plaintiff is certainly entitled to bring claims for torts committed by defendants against it directly. Thus, to the extent that plaintiff has alleged causes of action against defendants for torts committed against it directly, they may survive the motion to dismiss.

1. Unlike the situation here, which involves the sale of assets of a corporation, that case dealt with the issue of whether or not an assignment of rights in a contract also constituted an assignment of rights to tort claims arising out of the same contract—specifically the right to sue for rescission on the ground of fraud. Moreover, the Second Circuit's finding of such an intent to transfer tort claims turned on the fact that the assignment agreement there contained not only a provision assigning all of the assignor's "rights, title and interest in" the participation agreement which formed the basis of plaintiff's contract claim, but also its rights, title and interest in a related loan and its "rights and interest in the transaction described" in the provisions mentioning the participation agreement and the loan. The Second Circuit found that in order to give a distinct meaning to the latter two provisions, the assignor must have been assigning more than just its rights to the contract claims under the participation agreement, and therefore must have intended also to assign tort claims relating to the transaction of which the participation agreement was a part. However, the court did not, as plaintiff claims, state that as a matter of law the provision transferring "all of [the assignor's] rights, title and interest" in the participation agreement transferred all of assignor's tort claims which related to that agreement.

As its first cause of action, plaintiff alleges that defendants Power and Brookes breached their fiduciary duties to Pisa Brothers and Mitzvah. “The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct.” *Rut v Young Adult Institute, Inc.*, 74 AD3d 776, 777 (2d Dept 2010). While Power and Brookes, as employees of Pisa Brothers, certainly would have owed fiduciary duties to that company, plaintiff has not alleged that they were ever employed by Mitzvah or ever entered into any other relationship with Mitzvah that would give rise to any fiduciary duties. Plaintiff has therefore failed to state a cause of action for breach of fiduciary duty.

As a result, plaintiff’s claims for aiding and abetting a breach of fiduciary duty and for an accounting must also be dismissed. A cause of action for aiding and abetting a breach of fiduciary duty requires a prima facie showing of (1) a fiduciary duty owed to plaintiff by another, (2) a breach of that duty, and (3) defendant’s substantial assistance in effecting the breach, and (4) resulting damages. *Stewart Title Ins. Co. v Timoney*, 31 Misc3d 1239(A) (NYSup May 24, 2011) citing *Keystone Int’l v Suzuki*, 57 AD3d 205 (1st Dept 2008). Having failed to show the existence of any fiduciary duty owed by Power or Brookes to it, plaintiff has thus failed to state a prima facie case for aiding and abetting a breach of fiduciary duty against ALDER. Similarly, “the right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest.” *Palazzo v Palazzo*, 121 AD2d 261 (1st Dept 1986). See also, *Akkaya v Prime Time Transp., Inc.*, 45 AD3d 616 (2nd Dept 2007) (“[t]he right to an accounting rests on the existence of a trust or fiduciary relationship regarding the subject

matter of the controversy at issue”). As such, having failed to allege facts sufficient to show the existence of a fiduciary relationship between it and Power and Brookes, plaintiff has failed to state a cause of action for an accounting against them.

To state a cause of action for common-law unfair competition, “the plaintiffs must show that the defendants misappropriated the plaintiffs' labors, skills, expenditures, or good will and displayed some element of bad faith in doing so.” *Abe's Rooms, Inc. v Space Hunters, Inc.*, 38 AD3d 690 (2nd Dept 2007). Plaintiff alleges that defendants misappropriated its labors, skills and expenditures, as manifested in its client lists and files and that in doing so it misappropriated its good will by diverting its customers. It has further alleged that this was done, not through fair competition through the provision of better services at lower prices, but through deceptively misdirecting plaintiffs clients to its new employer and by dishonestly convincing various providers of vacation services to transfer bookings to its new employer. It has thus adequately pled a claim for common-law unfair competition.

“To succeed on a claim for the misappropriation of trade secrets under New York law, a party must demonstrate: (1) that it possessed a trade secret, and (2) that the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means.” *Faiveley Transport Malmo AB v Wabtec Corp.*, 559 F3d 110 (2nd Cir. 2009). A trade secret is “any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” *Ashland Management Inc. v Janien*, 82 NY2d 395 (1993). “Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside of his business; (2) the extent to which it is

known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” *Id.* citing Restatement, Torts, Section 757, comment b.

Plaintiff has properly alleged a cause of action for misappropriation of trade secrets. Given the amount of time and effort plaintiff and its predecessor had invested in compiling the information allegedly misappropriated, the value it had to both plaintiff's and defendants' businesses, the efforts plaintiff took to protect the information, and the difficulty defendants would have faced acquiring and compiling it on their own, the information allegedly misappropriated certainly qualifies as trade secrets. Plaintiff has alleged that this information was in its possession at the time it was taken and that the means by which defendants acquired it was improper and in violation of the company's policies. It has thus adequately pled a cause of action for misappropriation of trade secrets.

“The elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of the third party's breach of that contract, and (4) damages.” *Chung v Wang*, 79 AD3d 693 (2nd Dept 2010). In its complaint, plaintiff alleges that the defendants “intentionally induced and caused Pisa Brother Inc. and Pisa Brother Travel clients and customers in contract in some \$2,205,853.27 worth of contractual bookings to breach those contracts and accordingly Pisa Brothers Travel was damaged in the amount of commissions on those bookings ... and fell short of its production goals which it

would otherwise have entitled them to over-ride fees.” Thus, to the extent that plaintiff refers to contracts between it and customers which defendants have induced the customers to breach, it has adequately pled a cause of action for tortious interference with contract.

“To state a legally cognizable claim for tortious interference with prospective contract rights, the plaintiff must allege with specific factual support that the defendant directly interfered with a third party and that the defendant acted wrongfully, by the use of dishonest, unfair, or improper means, or was motivated solely by a desire to harm the plaintiff.” *Posner v Lewis*, 80 AD3d 308 (1st Dept 2010). This cause of action entails a higher standard for culpable conduct than does tortious interference with contractual relations, such that the alleged interference generally must constitute a crime or an independent tort. *Carvel Corp. v Noonan*, 3 NY3d 182 (2004). Plaintiff has alleged that defendants interfered with prospective business dealings it had with its existing clients. It has further alleged that defendants did so through exploitation of plaintiff’s computer systems and interactions with plaintiff’s clients which were at least dishonest and wrongful, if not independently tortious. It has therefore stated a cause of action for tortious interference with prospective business relations.

“To establish a claim for conversion, a plaintiff must show that he had an immediate superior right of possession to the property and the exercise by defendants of unauthorized dominion over the property in question to the exclusion of plaintiff’s rights.” *Stewart Title Ins. Co.* citing *Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384 (1st Dept 1992). While property generally must be in tangible form to be the subject of a conversion claim, money, if specifically identifiable, may be the subject of a conversion claim as well. *Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883 (1st Dept 1982). However, here

plaintiff never had an immediate right to possession or exercised possession, dominion or control over any specified monies. It merely claims that it was owed monies pursuant to contracts with third parties which, once the bookings were transferred to defendant Altour, were paid to Altour instead. Such a claim does not form the basis for an action for conversion. *Id.*

“To state a cause of action to recover damages for unjust enrichment, a plaintiff must allege that (1) the other party was enriched, (2) at that party's expense and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.” *AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6 (2nd Dept 2008) (internal quotations omitted). Plaintiff has clearly alleged that the defendants were enriched at its expense through conduct which, if not independently tortious, might be sufficiently wrongful to support a claim for unjust enrichment.

“A trespass to a chattel may be committed by intentionally ... using or intermeddling with a chattel in the possession of another [where] the chattel is impaired as to its condition, quality, or value.” *Register.com Inc. v Verio, Inc.* 356 F3d 393 (2nd Cir. 2004). In its complaint, Mitzvah alleges that defendants entered into Pisa Brother Inc.'s and Pisa Brother Travel's “business e-mail applications,” “maliciously [altered] the nature of that system” and “physically interfered with Pisa Brother Inc. and Pisa Brother Travel use of that system, and harmed Pisa Brother Inc. and Pisa Brother Travel ability to use that system to continue to service their clients and customers and maintain and extent their patronage, and accordingly diminished the valued of that system to Pisa Brothers Travel, and caused Pisa Brothers Travel to lose business which they otherwise would have come into possession of through that system, and otherwise harmed the Pisa Brothers Travel's interest in the condition, quality and value of that system.” Compl. Para.

42. Pursuant to the APA, Mitzvah had taken possession of the business's computer system prior to defendants' alleged misconduct. Accordingly, to the extent that defendants did, in fact, intentionally tamper with the system so as to impair its condition, quality or value, plaintiff has stated a cause of action against defendants for trespass to a chattel.

“The elements of a fraud cause of action are that defendant made a material representation of existing fact, that was false and known by the defendant to be false when made, for the purpose of inducing plaintiff's reliance, that plaintiff justifiably relied upon those misrepresentations, and was damaged as a proximate result of such justifiable reliance.” *Shalam v KPMG LLP*, 26 Misc3d 1230(A) (NYSup 2010) citing *Lama Holding Company v Smith Barney Inc.*, 88 NY2d 413 (1st Dept 2009). Plaintiff bases its claim for fraud against defendants on the ground that they “made material misrepresentations of fact to Cruise lines and other providers of vacation services” in order to induce them to cause bookings for Pisa Brothers' clients to be transferred to Altour.” However, plaintiff does not allege that defendants made any misrepresentations to it to induce it to do anything. Plaintiff has thus failed to plead that a fraud was committed by defendants upon it.

“New York does not recognize an independent cause of action for punitive damages. Instead, '[a] demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action.’” *Randi A.J. v Long Island Surgi-Center*, 46 AD3d 74 (2nd Dept 2007). However, where the conduct alleged supports causes of action for intentional torts or other “sufficiently blameworthy” conduct, a demand for punitive damages may be justified. *See id.* Here, plaintiff has alleged facts to support a number of causes of action based on intentional tortious conduct. Hence, while it should not have been pled as an

independent cause of action, plaintiff's demand for punitive damages survives this motion to dismiss.

As a final matter, the court finds defendants' argument for dismissal based on *Bangor Punta Operations, Inc. v Bangor & Arroostook R.R. Co.*, 417 US 703 (1974) unpersuasive. Defendant cites this case for the proposition that "when the terms of an asset purchase agreement are adjusted to account for a supposed reduction in the company's value, the buyer has no standing to bring an after-the-fact suit for conduct it alleges cause the diminution of the purchased assets." Def. Mem. of Law, p. 10. The portion of the decision cited by defendants concerns shareholder suits brought under the Clayton Act, the Securities Act of 1934 and Rule 10b-5, 17 CFR 240.10b-5, not the common law of New York, in which "a shareholder purchases all or substantially all the shares of a corporation from a vendor at a fair price, and then seeks to have the corporation recover against that vendor for prior corporate mismanagement." *Bangor Punta*, at 710. It is therefore inapplicable to this case both because it concerns different governing law and because the plaintiff here is not suing the vendor of shares it purchased but instead is suing former employees of the entity from which it purchased certain assets of the corporation.

Even if the equitable principles discussed in *Bangor Punta* applied here, there is no evidence that Delancey and Zukerman renegotiated the price of the Assets such that it would be inequitable for Mitzvah to recover. First, there is no evidence that the purchase price was ever lowered to account for defendants' alleged misconduct. When it became apparent that, due to the defendants' actions, Mitzvah's revenues were insufficient for it to make a required \$100,000 down payment on the Assets, Delancey agreed to allow Zukerman to divide that amount between

the installment payments called for under the APA and a related promissory note. Klein Aff. Ex.

C. Second, plaintiff has alleged that the damages have continued beyond the date it purchased the Assets and those damages could not have been factored into the original purchase price.

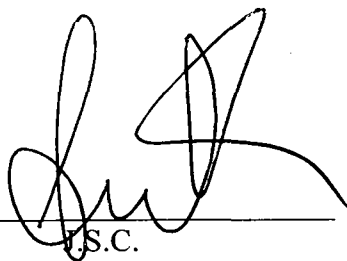
Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted, to the extent that plaintiff's claims for breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, conversion, an accounting, and fraud are dismissed; and it is further

ORDERED that defendants' motion to dismiss is denied, in part, as to the remaining causes of action.

Dated: November 10, 2011

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J.S.C.