

Steiner v Cacciotti

2012 NY Slip Op 33384(U)

March 19, 2012

Supreme Court, New York County

Docket Number: 650101/10

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 39

Index Number : 650101/2010

DAVID S. STEINER,

vs

CACCIOTTI, ANTHONY

Sequence Number : 001

DISMISS ACTION

INDEX NO. 650101/10

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

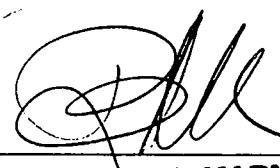
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION

Dated: 3/19/12


BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

-----x

DAVID S. STEINER, individually, and
derivatively on behalf of LOOPED,
L.L.C.,

Plaintiff,

- against-

ANTHONY CACCIOTTI, LEONARD SOLOWAY,
and LOOPED BROADWAY LIMITED LIABILITY
COMPANY,

Defendants.

-----x

BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 650101/10
Mot. Seq. No. 001

This action involves the rights to a dramatic stage play
entitled "Looped" (the "Play") about Tallulah Bankhead, starring
Valerie Harper ("Harper").

Background

The facts alleged herein are taken from the Complaint, unless
otherwise noted.

Plaintiff David S. Steiner ("Steiner") and defendant Anthony
Cacciotti ("Cacciotti") entered into an Operating Agreement (the
"Looped Operating Agreement") on or about June 16, 2008, by which
they formed Looped, L.L.C., a New Jersey Limited Liability Company,
to acquire the rights to and produce the Play.

Both Steiner and Cacciotti were managers of Looped, L.L.C. Steiner held a 50% membership interest in the L.L.C., and Cacciotti originally held a 25% interest, while Harper, Cacciotti's wife, held the remaining 25% interest.¹

On or about July 1, 2008, Cacciotti and Harper assigned their respective membership interests in Looped, L.L.C. to AV Productions, Inc. ("AV") and Steiner and AV executed the First Amendment of Operating Agreement, which designated Steiner and AV as the members of Looped, L.L.C.

Thereafter, East West, LLC, a limited liability company owned 50% by Steiner and 50% by Cacciotti, entered into a Stage Production Rights Agreement (the "Rights Agreement") with the Author of the Play (the "Tallulah Corporation"), dated as of July 3, 2008, which provides, in relevant part, as follows:

1. INITIAL STAGE PRODUCTION RIGHTS: The Author hereby grants to the Producer [East West LLC], and any person or entity controlled by, controlling, or under common control with Producer or either of them, an exclusive license to produce and present the Play on the professional living stage in the United States and Canada (the "Territory") until the Production Date, [August 3, 2009] and if the play is so presented, the license shall

¹ Steiner made capital contributions to Looped, L.L.C. totaling \$75,500.00. Cacciotti was credited with a capital contribution of \$70,500.00, consisting of \$60,500.00 in cash, and \$10,000.00 in exchange for having found the transaction.

continue for so long as the play is presented hereunder without a hiatus of four (4) months or more in which no performances occur unless the Producer exercises its right to reopen the Play pursuant to Article X of the Approved Production Contract of the Dramatists Guild, Inc. now in effect for nonmusical plays . . . The Producer's production rights hereunder shall commence after the close of a production of the Play at the Pasadena Playhouse on August 3, 2009 . . . The Play may be presented in LORT theatres hereunder whether before or after the New York opening, and the Producer may present one or more readings, workshops, or other developmental productions. If the Play shall not be so presented on or before the Production Date, all rights granted hereunder shall automatically terminate and revert to the Author, free from any obligations to the Producer. The Producer shall have the option to extend the Production Date for one year upon payment to the Author of Five Thousand Dollars (\$5,000.00) prior to the original Production Date, which shall be a non-returnable advance payment recoupable from the Royalty hereunder (emphasis supplied).

East West, LLC then caused all rights of the Producer under the Stage Production Rights Agreement to be assigned to Looped, L.L.C..

The Play was produced and presented in various venues in 2008 and the first part of 2009. As a result, both Steiner and Cacciotti allegedly received the return of their initial investments, plus a profit. The last production of the Play, of which Steiner was aware, occurred in or about July 2009.

Steiner claims that, in direct violation of the Looped Operating Agreement, and in violation of his fiduciary duties to

Steiner, Cacciotti failed to extend the Stage Production Rights Agreement for an additional year, to August 3, 2010, and allowed the extension option to expire, even though Looped, L.L.C. allegedly had more than sufficient funds to pay the \$5,000.00 extension fee. Cacciotti allegedly did not consult with Steiner concerning this decision, and Steiner did not agree with the decision.

On or about November 12, 2009, Cacciotti and defendant Leonard Soloway ("Soloway") formed defendant Looped Broadway Limited Liability Company ("Looped Broadway") which acquired the stage production rights to the Play for the purpose of producing and presenting the Play on Broadway.

Steiner further claims that Cacciotti wrongfully caused the tangible assets of Looped, L.L.C., including its equipment, stage properties and other materials associated with the Play, to be conveyed to Looped Broadway without his knowledge or consent and without any compensation to Looped, L.L.C.

Cacciotti and Soloway also commenced offering subscriptions to Looped Broadway to prospective investors pursuant to a Confidential Private Placement Memorandum dated November 15, 2009.

At the time this action was commenced, the Play was in active production, with previews advertising an opening at the Lyceum Theatre on February 19, 2010.²

In the Complaint, plaintiff, individually and derivatively on behalf of Looped, L.L.C. seeks:

(a) to recover damages for misappropriation of corporate opportunity (first count), conversion (second count), breach of contract (third count), breach of fiduciary duty (fourth count), aiding and abetting the breach of fiduciary duty (fifth count), tortious interference with contract (sixth count), and tortious interference with respect to economic advantage (seventh count);

(b) a permanent injunction whereby: (i) a constructive trust is imposed upon any and all profits and things of value earned or derived by any of the defendants in connection with the production of the Play or any rights in the Play; and (ii) all rights to the Play held by defendants Cacciotti, Soloway and Looped Broadway are mandatorily conveyed to Looped, L.L.C. (eighth count);

(c) an accounting (ninth count); and

(d) to recover damages for unjust enrichment (tenth count).

² The Play, which starred Harper, closed on April 11, 2010.

Plaintiff also seeks compensatory and punitive damages and an award of costs, including reasonable attorneys' fees.

Defendants now move for an order pursuant to CPLR 3211 (a) (1), dismissing the Complaint based on documentary evidence and pursuant to CPLR 3211 (a) (7), dismissing the Complaint for failure to state a claim.

Discussion

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. . . . We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211(a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211(a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.

Leon v Martinez, 84 NY2d, 83, 88 (1994) (internal citations and quotation marks omitted). Allegations consisting of bare legal conclusions, with no factual specificity, however, "are insufficient to survive a motion to dismiss." *Godfrey v Spano*, 13 NY3d 358, 373 (2009); see also, *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-34 (1st Dep't 1994).

First Count - Misappropriation of Corporate Opportunity

Under New Jersey law, which this Court must apply with respect to the internal affairs of Looped L.L.C. which was formed under the laws of the State of New Jersey, to prevail on a claim for misappropriation of a corporate opportunity, a plaintiff must prove the following elements:

- (1) that there is presented to a corporate officer a business opportunity;
- (2) that the corporation is financially able to undertake that opportunity;
- (3) that the opportunity is, by its nature, in the line of the corporation's business and is of practical advantage to it;
- (4) that the opportunity is one in which the corporation has an interest or a reasonable expectancy; and
- (5) that by embracing the opportunity, the self-interests of the officer will be brought into conflict with the interests of the corporation.

Allied Management, Inc. v Maybaum, 2006 WL 538757 at *2 (N.J. Super. Ct., App. Div. 2006) (citing *Valle v North Jersey Auto Club*, 141 N.J. Super. 568, 573-74 (App. Div. 1976)).

Defendants argue that this count must be dismissed on the grounds that Looped, L.L.C. possessed no option to extend its license in the Stage Production Rights Agreement and, therefore, had no reasonable expectancy in further productions of the Play.

Specifically, defendants contend that under the clear and explicit terms of the Stage Production Rights Agreement, all rights in the Play reverted to the Author on October 28, 2009, the conclusion of the four-month hiatus period following Looped, L.L.C.'s last production.

Defendants do not dispute that Looped, L.L.C. had the option to extend the Production Date for one year upon payment of \$5,000, but argue that this extension option was only available *before* Looped, L.L.C. first produced and presented the Play, and became unavailable and irrelevant thereafter.

Plaintiff, however, argues that the provision concerning the continuation of the license so long as the Play is continuously produced without a four-month hiatus is completely separate and independent from the provision allowing the option to be extended by payment of \$5,000 prior to August 3, 2009. At the very least, plaintiff argues that the Rights Agreement presents an ambiguity which cannot be resolved on a pre-answer motion to dismiss.

Defendants argue in reply that this constitutes a flawed reading of the option contained in the agreement.

Defendants also argue that the first count must be dismissed on the additional ground that plaintiff's Complaint lacks specific facts to support the allegation that Looped, L.L.C. was capable of pursuing further production. Specifically, defendants argue that plaintiff's suggestion that \$5,000 was available ignores the fact that Looped, L.L.C. would have been required to secure a venue and re-open the Play, costing significantly more than \$5,000, prior to October 28, 2009 in order to avoid expiration of the license.

Plaintiff, however, argues that resumption of the production of the Play was unnecessary; all that was required was payment of the \$5,000, and the Complaint sufficiently alleges that Looped, L.L.C. had those funds.

This Court finds that it is not clear from the Stage Production Rights Agreement whether the Producer still had the option to extend the Production Date for one year upon the payment of \$5000 prior to the original Production Date of August 3, 2009, once the Play had been produced and presented. Since the language is ambiguous, this count cannot be dismissed on that ground.

However, the Court agrees that plaintiff has not sufficiently alleged that the corporation was "financially able to undertake

[the business] opportunity" and thus grants plaintiff leave to replead this cause of action to include these allegations.

Second count - Conversion

Defendants next argue that plaintiff's second count for conversion must be dismissed on the grounds that: (i) documentary evidence demonstrates that Looped, L.L.C. owned no rights in the Play at the time Looped Broadway acquired them from the Author, as discussed above; (ii) the conversion claim fails because New York law does not recognize a cause of action for conversion of intangible rights (see *Ippolito v Lennon*, 150 AD2d 300 (1st Dep't 1989)); and (iii) plaintiff fails to identify any specific personal property converted.

As to defendants' argument relating to intangible rights, plaintiff suggests that New York law has changed and now allows an action for conversion of intangible rights. See, *Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 292-293 (2007), in which the Court of Appeals held that the "tort of conversion must keep pace with the contemporary realities of widespread computer use," and extended conversion to electronic records stored on a computer.

This Court, however, is not persuaded that current New York law supports an action for conversion of intangible property in all circumstances, and finds that the present case is more analogous to *Ippolito v Lennon, supra*, where the Court found that there was no action for conversion of an interest in a concert performance. Moreover, there is no dispute that Looped, L.L.C.'s rights in the Play had reverted to the Author after October 28, 2009, prior to the time Looped Broadway acquired them from the Author. Therefore, this Court grants Cacciotti's motion to dismiss plaintiff's cause of action for conversion as it relates to the intangible rights to the Play.

However, to the extent plaintiff alleges that defendants wrongfully converted the tangible assets of Looped, L.L.C. including the "equipment, stage properties and other materials associated with the Play" (Complaint, ¶ 18), that claim is sustained.

Third Count - breach of contract

In this cause of action, plaintiff alleges that

the actions of Cacciotti in unilaterally determining not to extend the rights of Looped, L.L.C. to the Play, and to allow those rights to expire, and in conveying the tangible assets of Looped, L.L.C. to Looped Broadway, without notice to or the consent of Steiner, constitute a breach of the Operating Agreement and, in particular, a breach of paragraph 4.6 of that Agreement.

Complaint, ¶ 35.

Defendants contend that this count must be dismissed on the grounds that plaintiff is contractually and statutorily precluded from asserting said claim against Cacciotti, based on Section 4.8 of the Operating Agreement which provides as follows:

No Personal Liability. The Managers shall have no personal liability to the LLC, any Member, or any third party, as a result of any act or omission of the Managers under this Agreement or in any manner relating to the LLC. The Members shall have no personal liability to the LLC, any other Member or a third party solely in his capacity as a Member; provided however, each Member shall be liable for such Member's personal acts and omissions which constitute gross negligence or willful misconduct.

See also, NJSA 42:2B-30, which provides that

[a]n operating agreement may provide that a manager who fails to perform in accordance with, or to comply with the terms and conditions of, the operating agreement shall be subject to specified penalties or specified consequences, and at the time or upon the happening of events specified in the operating agreement, a manager shall be subject to specified penalties or specified consequences. Unless otherwise provided in the operating agreement, a manager shall not be personally liable for failure to perform in accordance with, or to comply with the terms and conditions of, the operating agreement or for any other reason unless such failure to perform or to comply or such other reason constitutes gross negligence or willful misconduct by the manager [emphasis supplied]. The operating agreement may, in any event, eliminate or limit the personal liability of the manager for such failure to perform or to comply or for such other reason.

Plaintiff, however, argues that Cacciotti may be held liable since the Complaint specifically alleges "willful misconduct."

Defendants alternatively argue that plaintiff's claim for breach of contract must be dismissed because Cacciotti could not have unilaterally allowed the rights to expire, i.e., he could not have unilaterally re-opened the Play without Steiner's consent as co-manager.

Plaintiff, however, argues that the Complaint sufficiently alleges that Cacciotti breached the covenant of good faith and fair dealing which, under New Jersey law (just as under New York law), is a component of every contract. See *Wade v Kessler Inst.*, 172 N.J. 327, 340 (2002).

It appears to this Court that plaintiff has pled sufficient facts to survive a motion to dismiss its breach of contract claim for failure to state a cause of action. Moreover, dismissal based on documentary evidence is unwarranted because the contract does not "utterly refute[s] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002). Therefore, this Court denies defendants' motion to dismiss this count.

Fourth count - Breach of Fiduciary Duty

Defendants next argue that plaintiff's fourth count against Cacciotti for breach of fiduciary duty must be dismissed because

plaintiff has failed to allege any action by Cacciotti that could be construed as a breach of fiduciary duty with respect to the Play.

Moreover, defendants contend that even if some duty existed on the part of Looped, L.L.C.'s managers to seek an extension of the Rights Agreement, plaintiff has failed to plead why that duty would not inhere equally to Steiner as co-manager (and 50% owner) of Looped, L.L.C.

The Complaint specifically alleges that Cacciotti owed "Looped, L.L.C. and Steiner individually a fiduciary duty not to prefer his own personal interests above those of Looped, L.L.C., and in particular, not to deal with the property of Looped, L.L.C. to the detriment of Looped, L.L.C. and Steiner for his own personal benefit." Complaint, ¶ 38.

Plaintiff also argues that the Complaint alleges that it was Cacciotti whom Steiner expected would exercise the option and that it was Cacciotti who failed to do so without Steiner's knowledge or consent. While both parties had a fiduciary responsibility to the L.L.C., plaintiff claims in the Complaint that it was defendants' actions or lack thereof which constituted a breach. This allegation is sufficient to sustain this cause of action on a motion to dismiss.

Fifth count - aiding and abetting breach of fiduciary duty

Defendants next argue that plaintiff's fifth count against Soloway for aiding and abetting breach of fiduciary duty must be dismissed because plaintiff has failed to plead any action by Soloway that could be construed as aiding and abetting a breach of fiduciary duty, and that there are no facts alleged to establish that Soloway had any knowledge of a breach by Cacciotti.

"A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another; (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Kaufman v Cohen*, 307 AD2d 113, 125 (1st Dep't 2003) (citing, *inter alia*, *S&K Sales Co. v Nike, Inc.*, 816 F2d 843, 847-848 [2nd Cir. 1987]). The Appellate Division held that "there must be an allegation that such defendant had actual knowledge of the breach of duty" and that "[c]onstructive knowledge of the breach of fiduciary duty by another is legally insufficient to impose aiding and abetting liability" *Id.* (citing *Kolbeck v LIT Am., Inc.*, 939 FSupp 240, 246 [SDNY 1996], *affd* 152 F3d 918 [2nd Cir 1998]).

Plaintiff here merely alleges in the Complaint that

42. Soloway, on information and belief, was aware, or should have been aware: (a) that the rights to the Play were previously held by Looped, L.L.C.; (b) that Cacciotti had wrongfully failed to extend those rights and had allowed them to lapse, in violation of his fiduciary duty to Looped, L.L.C. and Steiner; and (c) that Cacciotti had caused the rights to the Play, along with the tangible assets of Looped, L.L.C., to be transferred or assigned to Looped Broadway in further violation of his fiduciary duties to Looped, L.L.C. and Steiner.

43. Soloway substantially assisted Cacciotti in the achievement of said breaches of fiduciary duty by cooperating in and agreeing to: (a) the formation of Looped Broadway; (b) the preparation and dissemination of the Confidential Private Placement Memorandum; and (c) multiple other acts in connection with the acquisition of rights to the Play, the offering of interests in Looped Broadway to investors, and the production of the Play.

Complaint, ¶¶ 42, 43.

Plaintiff argues that this portion of the motion should be denied as premature because it is impossible for Steiner to adduce proof, prior to discovery, as to Soloway's knowledge.

However, even if this Court were inclined to deny the motion to dismiss this count on that ground, plaintiff has not alleged that Soloway in any way provided "substantial assistance" to Cacciotti by affirmatively assisting, helping to conceal or failing to act when required to do so, "thereby enabling the breach to

occur." *Kaufman v Cohen*, *supra* at 126 (citing *Kolbeck v LIT Am., Inc.*, *supra* at 247). In fact, the formation of Looped Broadway occurred after the rights in the Play had reverted to the Author on October 28, 2009.

Accordingly, the fifth count against Soloway is dismissed.

Sixth and seventh counts - Tortious Interference

Defendants next argue that plaintiff's sixth and seventh counts against Soloway for tortious interference with contract and prospective economic advantage, respectively, must be dismissed on the grounds that plaintiff has failed to plead sufficient facts to establish any tortious interference by Soloway.

Plaintiff argues that the Complaint sufficiently alleges that Soloway's actions in cooperating and agreeing to the formation of Looped Broadway, the preparation and dissemination of the Confidential Private Placement Memorandum, and other acts in connection with the acquisition of the rights to the Play, the offering of interest in Looped Broadway to investors, and the production of the Play, induced the breach of Cacciotti's obligations under the Operating Agreement, including the implied covenant of good faith contained therein. Defendant contends that

these activities on the part of Soloway were nothing more than the usual and customary activities of a Broadway producer.

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract and damages resulting therefrom." *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 (1996). Moreover, "a plaintiff must allege that the contract would not have been breached 'but for' the defendant's conduct." *Burrowes v Combs*, 25 AD3d 370, 373 (1st Dep't 2006).

To prevail on a claim for tortious interference with business relations under New York law, a party must allege that "(1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or wrongful means; and (4) the defendant's interference caused injury to the relationship."

Gmurzynska v Hutton, 11 Misc3d 1076(A) at *3, (Sup Ct, NY Co., March 29, 2005) (citing *State Street Bank and Trust Co. v Innervisiones Errazuriz Limitada*, 374 F3d 158, 171 [2nd Cir. 2004] [applying New York law]). The Appellate Division, First Department has held that "'[w]rongful means' includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and

some degree of economic pressure, but more than simple persuasion is required (citation omitted).” *Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 300 (1st Dep’t 1999).

Additionally, “[t]ortious interference with prospective economic relations [or advantage] requires an allegation that plaintiff would have entered into an economic relationship but for the defendant’s wrongful conduct (citations omitted).” *Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266 (1st Dep’t 2002).

In connection with the sixth count, plaintiff asserts that

46. Soloway, on information and belief, was aware, or should have been aware, that: (a) Looped, L.L.C. had exclusive rights to produce and present the Play pursuant to the Stage Production Rights Agreement; and (b) Steiner had the right, pursuant to the Operating Agreement with Cacciotti, to participate equally in all decisions affecting Looped, L.L.C., and to have any and all actions by Looped, L.L.C. taken only with the unanimous consent of both Managers.

47. Soloway wrongfully, intentionally and maliciously interfered with the contractual rights of Looped, L.L.C., and of Steiner by cooperating in and agreeing to: (a) the formation of Looped Broadway; (b) preparation and examination of the Confidential Private Placement Memorandum; and (c) multiple other acts in connection with the acquisition of rights to the Play, the offering of interests in Looped Broadway to investors, and the production of the Play.

Complaint, ¶¶ 46, 47.

In connection with the seventh count for tortious interference with respect to economic advantage, plaintiff alleges that "[t]he rights to produce and present the Play constituted a valuable business opportunity for Looped, L.L.C. and Steiner, and, but for Soloway's interference, Looped, L.L.C. would have produced and presented the Play and would have reaped substantial financial benefits from that production" Complaint, ¶51. Plaintiff also argues that Soloway "wrongfully, maliciously, knowingly and intentionally interfered with the rights of Looped, L.L.C. and Steiner to engage in the production and presentation of the Play, and instead wrongfully arranged for those rights to be vested in Looped Broadway, Complaint, ¶ 52. The actions of Soloway alleged are the same for both counts.

Defendants argue that plaintiff fails to plead any facts demonstrating how any of defendant Soloway's actions could be a "but for" cause of any breach of any contract, or that any contract was breached at all. Specifically, none of Soloway's alleged acts, including the formation of Looped Broadway, happened until November 12, 2009, after Looped, L.L.C.'s license to produce the Play had lapsed. Thus, according to the defendants, none of the alleged acts of Soloway could have possibly induced any breach of the Rights Agreement. Moreover, defendants argue that plaintiff has not properly alleged any breach of the Operating Agreement and none

of Soloway's alleged acts occurred prior to the alleged breach of the Unanimous Consent Provision, which must have occurred prior to the lapsing of Looped L.L.C.'s license on October 28, 2009.

As to the seventh count, defendants also argue that plaintiff alleges no facts demonstrating his expectation of any future business relations or any party with which Looped L.L.C. was negotiating to produce and present the play.

Moreover, defendants point out that none of Soloway's acts in attempting to produce and present the Play constitute "wrongful means" as required.

This Court agrees and finds that plaintiff's allegations in these two counts are not sufficient to defeat the motion to dismiss.

Accordingly, defendants' motion to dismiss plaintiff's tortious interference claims is granted.

Ninth Count - Accounting

Defendants argue that under New York law, an accounting "will be ordered only where there is a fiduciary relationship between the plaintiff and defendant and a charge of wrongdoing on the part of

the defendant." *Brigham v McCabe*, 27 AD2d 100, 105 (3rd Dep't 1966) *aff'd* 20 NY2d 525 (1967). This Court has already sustained some of plaintiff's claims against defendant Cacciotti, including a breach of fiduciary duty claim, so it would be premature to dismiss the claim for an accounting against Cacciotti at this time.

However, there is no fiduciary relationship between plaintiff and either defendant Soloway or Looped Broadway. Plaintiff's allegation that "[t]o the extent Soloway and Looped Broadway now hold some or all of the assets for which an accounting must be rendered, they are necessary parties" (Plaintiff's Mem. in Opp. at 21), is to no avail, since, "[t]he existence of a fiduciary relationship is essential for a cause of action for an accounting" *Waldman v Englishtown Sportswear, Ltd.*, 92 AD2d 833, 835 (1st Dep't 1983).

Tenth Count - Unjust Enrichment

Defendants argue that this claim must fail because the documentary evidence demonstrates that plaintiff had no justifiable interest in any rights to the Play after October 28, 2009, and, therefore, they could not possess any property or asset that rightfully belonged to the plaintiff.

To state a claim for unjust enrichment, "a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor (citations omitted)." *Nakamura v Fuji*, 253 AD2d 387, 390 (1st Dep't 1998). An action to recover for unjust enrichment "rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another." *Edelman v Starwood Group, LLC*, 70 AD3d 246 (1st Dep't 2009), lv den 14 NY3d 706 (2010). "To prevail on a claim of unjust enrichment, a plaintiff must show that the defendant benefitted at the plaintiff's expense and that equity and good conscience require restitution." *Hamlet at Willow Cr. Dev. Co. v Northwest Land Dev. Corp.*, 64 AD3d 85, 115 (2nd Dep't 2009), lv dismiss 13 NY3d 900 (2009).

In the Complaint, plaintiff alleges that all three defendants "have been unjustly enriched, and will further be unjustly enriched, by the receipt of substantial profits and other things of value arising out of production of the Play at the expense of Looped, L.L.C. and Steiner." Complaint, ¶ 63.

Just because the rights to the Play may have reverted back to the Author after October 28, 2009, does not, in and of itself, preclude this cause of action. Plaintiff has sufficiently alleged that Cacciotti, wrongfully, and in breach of his fiduciary duties,

caused the rights to the Play to be lost to Looped, L.L.C. and transferred instead to Looped Broadway, and that defendants' retention of the benefits therefrom is at plaintiff's expense and against equity and good conscience.

Accordingly, this Court will not dismiss this count at this time.

Eighth Count - Injunctive Relief

In this count, plaintiff seeks a constructive trust to be imposed upon the profits and "other things of value" earned by defendants arising out of the Play, and a conveyance to him of all rights to the Play held by defendants. Complaint, ¶ 58.

Defendants' sole argument as to the count for injunctive relief is that it should be dismissed where the substantive causes of action that would otherwise provide a basis for the injunctive award fail as a matter of law. Since several of plaintiff's counts have survived this motion to dismiss, it would be premature to dismiss this count at this time.

Claims against Looped Broadway

Finally, defendants argue that nothing in the Complaint asserts any action on the part of Looped Broadway warranting


liability and, therefore, the only claims asserted against it for injunctive relief, an accounting³ and unjust enrichment should be dismissed. However, the causes of action for injunctive relief and unjust enrichment do have allegations against Looped Broadway for receiving benefits and retaining profits unjustly from the Play. It would be premature to dismiss these claims against Looped Broadway at this stage of the litigation.

Plaintiff has 30 days to amend his Complaint as to count one only. Defendants shall then have 30 days to serve Answers to the remaining counts in the Complaint.

Counsel for all parties shall appear for a preliminary conference in IA Part 39, 60 Centre Street - Room 208 on May 23, 2012 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: March 19, 2012



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

³ The accounting claim has already been dismissed against Looped Broadway.