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

PRESENT: HON. PAUL G. FEINMAN PART 12

Index Number : 651008/2011 E
IBRAGIMOV, ABA
vs
SESSA, LEONARD
Sequence Number : 002
DISMISS ACTION

INDEX NO. 651008/2011E
MOTION DATE
MOTION SEQ. NO. 002
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
THE ANNEXED DECISION AND ORDER.

PC 5/16/202 re Sessa Defendants' counterclaim

Dated: 4/13/2012

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

----------X

ABA IBRAGIMOV, GLATT GOURMET CORP., GLATT GOURMET CUISINE, INC., and FIVE GUYS CATERING, INC.,

Plaintiffs,

- against -

LEONARD SESSA, ROBERT LEONARD SESSA, LEONARDS OF GREAT NECK, S & M CATERING, DA MIKELLE, INC., DA MIKELLE CATERERS, INC., DA MIKELLE CATERERS CORP., ILYA ZAVOLUNOV and MICHAEL ZAVOLUNOV,

Defendants.

----------X

Index Number 651008/2011E
Mot. Seq. Nos. 002 & 003

DECISION AND ORDER

Appearances on the Motion:

For the Plaintiff:
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For the Defendants Leonards of Great Neck, Leonard Sessa, Robert Sessa and S & M Catering:
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By: Kenneth C. Murphy, Esq.
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New York, NY 10176

For the Defendants Da Mikelle Caterers, Ilya Zavolunov and Michael Zavolunov:
Larusso & Conway
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E-filed papers considered in review of these motions:	**E-filing Document Number:**
Sequence Number 002:	
Notice of motion, memorandum of law, Zavolunov affidavit and annexed exhibit 1	30 - 32
Memorandum of law in opposition, A. Ibragimov affidavit and annexed exhibits 1 - 2, and D. Ibragimov affidavit	35 - 41
Reply memorandum of law in support	43
Sequence Number 003:	
Notice of motion, memorandum of law, Murphy affirmation and L. Sessa affidavit	48 - 51
Memorandum of law in opposition, A. Ibragimov affidavit and annexed exhibits 1 - 8	52 - 62
Reply memorandum of law in support	63
Supplemental memorandum of law in opposition, A. Ibragomov affidavit, Stern affirmation and annexed exhibits 1 - 4	64 - 71
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PAUL G. FEINMAN, J.:

The motions filed under sequence numbers 002 and 003 are consolidated for purposes of this decision and order.

Defendants, Ilya Zavolunov, Michael Zavolunov, Da Mikelle, Inc., Da Mikelle Caterers, Inc., and Da Mikelle Caterers Corp. (the "Da Mikelle defendants"), move to dismiss the complaint as against them (motion sequence number 002). Defendants, Leonard Sessa, Robert Leonard Sessa, Leonard's of Great Neck and S & M Catering (the "Sessa defendants"), move to dismiss the complaint as against them (motion sequence 003). Plaintiff opposes both motions. At oral argument on October 12, 2011, the court converted the motions to ones seeking summary judgment pursuant to CPLR 3211 (c), and the parties were given a chance to submit supplemental papers. For the reasons provided below, the defendants are awarded summary judgment in their favor and this action is dismissed in its entirety.

Background

1. Planitiffs' general underlying allegations

Plaintiffs are an individual, Aba Ibragimov ("Aba"), and two related corporations in the business of Kosher catering. The complaint alleges that the Sessa defendants are individuals and corporations that conduct business at a catering hall known as Leonard's of Great Neck,[1] located at 555 Northern Boulevard, Great Neck, New York. The Da Mikelle defendants are individuals and corporations in the business of Glatt Kosher catering with a principal place of business being located at DA Mikelle Caterers Corp., 102-55 Queens Boulevard, Forest Hills, New York.

The "supplemental verified complaint" (Doc. 8, Supp. ver. compl.) describes the history between these parties as follows. In the early 1990's, because Leonard's of Great Neck's "business was moribund and almost non existent [*sic*]," Aba chose to come to its "aid rather than

[1] At times, the complaint seems to refer to Leonard's as "Lenny's Catering" (*see* Doc. 8, Supplemental ver. compl. at ¶ 4).

exploit Lenny's misfortune ...," and "agreed to combine to develop a Glatt Kosher catering service and entered into a implied in fact contract ... and/or implied in fact partnership ... in further of the catering business" (*id.* at ¶¶ 6-7). Pursuant to the alleged contract and/or partnership, Aba was to be the exclusive kosher caterer for Leonard's of Great Neck and Aba would arrange for all of his clients to have their events at Leonard's. This understanding was not put into writing, because the complaint alleges "[a]s men from the old school, their hand shake was as good as gold" (*id.* at ¶ 7).

Pursuant to the purported contract/partnership, "Aba paid Lenny 60% of the revenue received from the clients," and "spent substantial sums of money in their Glatt Kosher business" (*id.* at ¶¶ 15-16). However, elsewhere in the complaint plaintiffs allege that the parties entered into an implied in fact contract to share the revenue from the business "on a 50-50 basis" (*id.* at ¶ 44). The complaint further claims that "[s]ince the inception of the Contract and/or Partnership, Lenny demanded that Aba contribute 50% of the cost to clear the snow from the parking lot at Lenny's catering hall," which "amounted to about $50,000 over ten years," and that "Lenny demanded that Aba give him cash of $600/week, over $31,200/year, to pay for the liability insurance required to conduct the Contract and or/Partnership's business" (*id.* at ¶¶ 22-23). Also, since 2008, the complaint alleges that Aba has "expended $50,000 to advertise the Contract and/or Partnership ...," and "...has incurred $500k invoices to vendors in preparation of catering events to be held at Lenny's in the reasonable expectation that the 20 year old Contract and/or Partnership would continue past 2010 ..." (*id.* at ¶¶ 27-28). It further states that "Aba and Lenny" collected revenues of over $3 million a year, hosting events, on average, five nights per week, that Aba would be paid approximately $63,000.00 per week from Lenny, and Aba received over

$1.2 million per year (*id.* at ¶¶ 19-21).

What is not mentioned in the complaint, but has been confirmed by Aba Ibragimov and his son, Daniel, in their testimony at a hearing on plaintiffs' motion for a preliminary injunction, is that a separate written contract was executed in connection with each event that plaintiffs held at Leonard's of Great Neck. Each of the contracts was entered into between Leonard's, as the "primary caterer," and plaintiffs, as the "rental caterer" (Doc. 55, Sample contract). The contract says nothing about plaintiffs being the exclusive provider of glatt kosher catering services on the premises.

The Ibragimovs also discussed in their testimony a matter alluded to briefly in the complaint – an audit by the Internal Revenue Service of "Aba's and Lenny's business" in 1998 (Doc. 8, Supp. compl. at ¶ 26). At the hearing, Aba Ibragimov testified that from 1991 to 1998, he "did the contract with the, straight with the S & M Caterer, with Leonards' banquet managers, eight years we pay [*sic*] sales tax together" (Transcript at 86). However, as a result of the IRS investigation, in 1998, a decision was made to keep the businesses separate, and, according to Aba, they have remained separate since then (*id.* at 91-92). Aba conducted his business under newly created corporate entity, which he referred to in his testimony as "Glatt Corporation" (*id.* at 19). Every "...five, six years ...," Aba would create a new corporate entity, with only one entity being active at any given time (*id.* at 25). The only corporate entity that is currently active is Five Guys Catering, Inc. (*id.* at 26). Five Guys Catering, Inc. has been the only corporate entity to contract with S & M Catering, Inc. since approximately 2008. None of the defendants are or have been shareholders in any of these corporations, and Aba was not a shareholder or officer of S & M Catering or Leonard's of Great Neck because, in Aba's words, "...it's not my building ..."

and he has "...nothing to do with it ..." (*id.* at 27).

For each event, Leonard's of Great Neck and S & M Catering would provide all of the waiters and all of the employees and management in and around the building, as well as the building space itself (*id.* at 30). Aba would order the food and work in the kitchen provided by Leonard's of Great Neck with his equipment, cooks and chefs, who worked under the supervision of a "mashgiach," the person who supervises the "kashrut" status, that is, compliance with Jewish dietary laws, of a kosher establishment (*id.*). At least after 1998, if Aba had a prospective client interested in using Leonard's of Great Neck's event space, he would contact someone there to check the date for availability. If the requested date was available, Leonard's would reserve it in its books and a written contract was executed between Leonard's and Aba's corporate entity on a standard form rental contract that provided, among other things, the date of the event, the price per person, the minimum guaranteed number of recipients, and the terms governing the relationship between Leonard's of Great Neck and Aba's corporation (*id.* at 83). The contracts were executed by Leonard's banquet managers, and never by one of the individually named defendants (*id.* at 85). Aba's corporation would then execute a separate contract in writing with the client and collect the deposit, which was passed on to Leonard's. Only Aba and the client negotiated the price to be paid per person for the event by the client, with no involvement from the defendants (*id.* at 89). The defendants were not parties to any of the contracts between Aba and the clients, and they were not even given copies of them (*id.* at 86). All of the money for the event was paid directly by the client to Aba, who would later pay Leonard's after an assessment of the final charges was made. According to Aba, the final price per person paid to Leonard's by Aba was generally $8.00 to $10.00 above the price provided in

their original rental contract (*id.* at 90). For years, plaintiffs claim, the arrangement described above was very profitable and, as a result, Leonard's was able to increase the size of its overall business. During this time period, however, it is not disputed that Leonard's had other, non-kosher events of which Aba or his companies had no involvement. Aba only did events during the week but many other large events were held on the weekends (*id.* at 73-74). In addition, the complaint alleges that Aba "spent substantial sums of money in their Glatt Kosher business" during the 20 year relationship (Doc. 8, Supp. compl. at ¶ 16). It further claims that because of the business brought to Lenny by Aba, Lenny was able to "upgrade his business infrastructure both internally and externally and revive it from its condition before the Contract and/or Partnership" (*id.* at ¶ 17).

Toward the end of 2009, the relationship between Aba and Leonard's of Great Neck fell apart. It appears from Aba's testimony that the precipitating incident for this deterioration took place at a December 2009 event catered by Aba. A waitress, who was employed by Leonard's, allegedly spilled something on the jacket of person attending the event, prompting an unfriendly exchange of words. According to Aba, after the aggrieved attendee grabbed the arm of the waitress, Bobby Sessa and Aba were called to the scene. After a shouting match, Bobby allegedly started breaking plates and throwing tables. When Aba attempted to calm Bobby down, he allegedly grabbed Aba by the throat and "choked [him] to death" (*id.* at 39). In response, Aba's son, Daniel, with Aba watching, took a baseball bat and "put it through the window of Leonard's" of Great Neck (*id.* at 71).

The complaint alleges that "[i]n January 2010, the business that Lenny and Aba had started over 20 years earlier, came to an abrupt halt as it was invaded by a third party [the Da

Mikelle "Interferers"] who w[ere] committed to disowning Abe's [*sic*] interests, illegally" (Doc. 8, Supp. compl. at ¶ 10). It also claims that since 2008, the Sessa defendants have "surreptitiously engaged in various tactics to sabotage the Contract and/or Partnership," by allegedly doing the following: "1) instructing their employees to be rude to Jewish guests at events; 2) not allowing Jewish guests to pray in the Lenny's Catering Hall; 3) instructing their employees to spill drinks on Jewish guests at events; 4) removing Mezuzahs on the doors at Lenny's Catering Hall; and 5) calling the police to raid events with false claims of illegal activity" (*id.* at ¶ 31). The complaint further alleges that the Da Mikelle defendants solicited the Sessa defendants "to engage in these tactics in an effort to induce [p]laintiff Aba to abandon the 20 year old Contract and/or Partnership," and "solicited [d]efendant Lenny's Catering Hall to dis-own [*sic*] Aba of his vested interests in the Contract and/or Partnership and replace them with themselves" (*id.* at ¶¶ 32-33). By January of 2010, the Da Mikelle defendants had replaced Aba as the exclusive kosher caterer for events at Lenny's, which plaintiffs claims is shown on Da Mikelle's business card, which is annexed as exhibit 1 to the supplemental complaint. The complaint alleges that Aba's replacement was confirmed in an article that was based on an interview done with the Sessa defendants, which ran on January 8, 2010, in the Bukharian Times. According to Aba's undisputed testimony, he "create[d] this newspaper when [his] synagogue was built" (Transcript at 75). After the "article" was published, the complaint alleges that Bobby Sessa "urged all clients currently booked with Aba to write a letter to Aba and cancel the[ir] event" (Doc. 8, Supp. compl. at at ¶ 38). It claims that at least one of Aba's clients followed Sessa's suggestion and cancelled an event that would have cost $105,000. Finally, the complaint alleges that "[a]s a result of the January 2010 events, Aba was admitted to the hospital" (*id.* at ¶

41).

Based on these allegations, the supplemental verified complaint asserts the following seven causes of action: (1) breach of an implied in fact contract, as against the Sessa defendants; (2) breach of an implied in fact partnership, as against "Lenny's Catering Hall;"[2] (3) tortious interference with a contractual relationship, as against the "Da Mikelle Catering Interferers;" (4) conversion, as against "Lenny's Catering Hall;" (5) unjust enrichment, as against all defendants; (6) prima facie tort, as against all defendants; and (7) deceptive trade practices under New York General Business Law § 350, as against all defendants. The court will discuss the particular allegations made in support of each claim in greater detail below.

2. Prior motion for preliminary injunction

After commencement of this action, plaintiffs moved by order to show cause for a temporary injunction seeking a wide spectrum of relief. In signing the order to show cause on June 3, 2011, the court granted only the following temporary relief: (1) that defendant Robert Leonard Sessa was directed to obey all provisions of the Penal Law and any restrictions regarding his gun permit; (2) all parties and their agents were ordered to preserve all documents relating to, involving, or referencing transfers of cash or other money between the parties; and (3) defendants' accountants were ordered to preserve and not destroy tax documents prepared for defendants to be produced during discovery (Doc. 24, Signed order to show cause). After a hearing on the record at which the court heard testimony from several witnesses, plaintiffs' motion for a preliminary injunction was denied because, among other reasons, plaintiffs had

[2] Although the defendant is referred to as "Lenny's Catering Hall" in the second claim's heading, the allegations related to this claim refer to an implied-in-fact partnership between Aba and "defendant Lenny," and also allege that the "Leonard Defendants" have breached the partnership.

failed to show a likelihood of success on the merits (*Ibragimov v Sessar*, Sup Ct, NY County, June 14, 2011, Feinman, J., index no. 651008/2011E, mot. seq. no. 001).

3. Sessa defendants' answer and counterclaim

Subsequently, on June 27, 2011, the Sessa defendants interposed their verified answer and counterclaim. The answer included seven affirmative defenses, including, among others, the statute of frauds, lack of standing to sue, statute of limitations, laches, and waiver and estoppel (Doc. 42, Ver. answer). The Sessa defendants assert one counterclaim sounding in defamation, based on statements found in plaintiffs' April 15, 2011 complaint suggesting that defendants had engaged in "anti-Semitic conduct," which were allegedly repeated to the New York Post on or about April 24, 2011. On these motions, no party has addressed the viability of the Sessa defendants' counterclaim nor sought relief as to same.

Analysis

1. Conversion of motions to summary judgment under CPLR 3211 (c)

At oral argument on the instant motions, the parties were put on notice that the two pending motions to dismiss would be converted to motions for summary judgment, pursuant to CPLR 3211 (c). The parties were then given an opportunity to make a complete record and to come forward with any evidence that could possibly be considered (*see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; citing CPLR 3211 [c]; *Mihlovan v Grozavu*, 72 NY2d 506 [1988]; Siegel, NY Prac § 270 [4th ed 2007] [the "notice requirement . . . offers the parties an opportunity to submit everything they've got"]).

2. Standing

Defendants argue that plaintiff Glatt Gourmet Cuisine Inc. does not have "standing" to

bring this action against them because that entity was dissolved by proclamation or annulment of authority as a of January 26, 2011, as shown in a print-out from the New York State Department of State, Division of Corporations annexed to their motion papers (Doc. 33, ex. 1, NY DOS entity information). Although acknowledging that Business Corporation Law § 1006 (a) (4) authorizes a dissolved corporation to "sue or be sued in all courts and participate in actions and proceedings," defendants claim that Glatt Gourmet Cuisine Inc. "was in dissolution around the same time that Leonard's terminated the relationship [and a]s such, that particular entity has no standing to bring this action" (Doc. 31, Da Mikelle memo. of law at 9; citing *Moran Enterprises Inc. v Hurst*, 66 AD3d 972 [2d Dept 2009] [dismissing complaint by dissolved corporation seeking to bring legal malpractice action against law firm hired after corporation's dissolution]). Plaintiffs admit that Glatt Gourmet Cuisine, Inc. was dissolved as of January 26, 2011, but argue that it has "standing" to bring this action under BCL § 1006 (d) [*sic*] because the "destruction of Aba's business in January 2010 clearly occurred before the disillusion [*sic*] in 2011" (Doc. 35, Plaintiffs' opp. memo. at 5).

Although the parties have raised this issue in terms of "standing," a dispute over an entity's corporate status relates to legal capacity, not standing (*see Security Pacific National Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006] [objection based on plaintiff's status as a nonexistent corporation is properly understood as questioning legal capacity to sue]). Under BCL § 1006 (b), the dissolution of Glatt Gourmet Cuisine, Inc. would not affect any remedy available to the corporation for any rights that it incurred before such dissolution. Whether or not any such rights were in fact incurred by Glatt Gourmet Cuisine, Inc. prior to its dissolution is a matter that will be addressed later in this decision in determining whether defendants are entitled

to summary judgment. At this stage, the court will presume that Glatt Gourmet Cuisine, Inc. has retained the capacity to commence this action against the defendants (BCL §§ 1005, 1006; *see Schorr v Steiner*, 46 AD3d 435, 436 [1st Dept 2007]; *Tedesco v A.P. Green Indus., Inc.*, 8 NY3d 243, 246-248 [2007]).

3. Motions for summary judgment

A movant seeking summary judgment has the initial burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to eliminate any material issues of fact from the case (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant has made such a showing, the burden shifts to the opposing party who, to defeat the motion, must demonstrate the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). However, if the movant fails to meet its initial burden, the motion will be denied regardless of the sufficiency of the opposing papers (*Winegrad*, 64 NY2d at 853). CPLR 3212 (b) requires any motion for summary judgment to"be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions." The affidavit must be "by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit" (CPLR 3212 [b]). The bare affirmation of a party's attorney who demonstrates no personal knowledge is "without evidentiary value and thus unavailing" (*Zuckerman*, 49 NY2d at 563; *see also Taub v The Art Students League of New York*, 63 AD3d 630, 631 [1st Dept 2009] [a complaint verified by an attorney who does not have personal knowledge of the facts is of no probative value for purposes of summary judgment]). However, the "affidavit or affirmation of an attorney, even if

he [or she] has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form,'e.g., documents, transcripts" (*id.*). In any case, the evidence is to be viewed in the light most favorable to the party opposing the motion (*see Brown v Muniz*, 61 AD3d 526, 531 [1st Dept 2009]).

As an initial matter, plaintiffs argue that the "summary judgment motions are not ripe because of outstanding discovery requests" (Doc. 64, Plaintiffs' supp. memo. at 5). In support, plaintiffs attach deposition notices for Denise Columbo, an executive and employee of S & M Catering, Inc., and Leonard Sessa. Plaintiffs claims that "[d]uring these depositions one of the primary focuses of questioning will be the basis for individual liability of defendants" (*id.* at 7). They explain that "the catering business is cash intensive and defendants will be challenged to produce a deposit slip for cash into a business checking account. It is unlikely they can do this. The cash was taken by the individual defendants and forms the basis for personal liability for failure to adhere to corporate formalities" (*id.*). However, plaintiffs should not be allowed "to use pretrial discovery as a fishing expedition when [they] cannot set forth a reliable factual basis for what amounts to, at best, mere suspicions" (*Chappo & Co., Inc. v ION Geophysical Corp.*, 83 AD3d 499, 500-501 [1st Dept 2011]; quoting *Devore v Pfizer Inc.*, 58 AD3d 138, 144 [1st Dept 2008], *lv denied* 12 NY3d 703 [2009]).

a. First cause of action: Breach of implied in fact contract

The first cause of action alleges that, "[o]n or about 1990, plaintiff Aba and defendant Lenny entered into an implied in fact contract to form a catering business and share the revenue from that business on a 50-50 basis" (Doc. 8, Supp. ver. compl. at ¶ 44). The complaint further

alleges that the contract was confirmed by the parties' conduct over the next 20 years, that plaintiffs have performed all of their duties under the implied in fact contract, and that "[d]efendant Lenny has breached ..." the implied in fact contract by failing to pay Aba since January 2010 for services he performed with a reasonable expectation of payment (*id.* at ¶¶ 45 - 48).

The Sessa defendants have established their prima facie entitlement to dismissal of the first cause of action by submitting a copy of the standard form rental contract admittedly executed by plaintiffs in connection with every event they catered at Leonard's of Great Neck after 1998, which contains no language indicating that Aba or one of his corporate entities was the exclusive caterer of all glatt kosher events at Leonard's. Further, they have submitted the affidavit of Leonard Vito Sessa which says, among other things, that Leonard's "maintains no long-term contractual relationships with ...rental caterers ...," that "[i]t is now and always has been in our sole discretion whether, in fact, we will allow a particular caterer to host an event at Leonard's ...," and "[a]t no point in the history of Leonard's has Leonard's ever entered into a written agreement to exclusively permit one particular rental caterer to be the sole caterer at Leonard's in any capacity" (Doc. 50, Sessa affid. at ¶¶ 10-12).

The burden thus shifts to plaintiffs to offer competent proof raising an issue of fact as to the existence of an enforceable contract that has been breached by the defendants. Plaintiffs fails to identify the specific parties to the alleged contract. The supplemental complaint, Aba's affidavits, and Aba's testimony at the preliminary injunction hearing only refer to an alleged verbal agreement between "Aba and Lenny," secured by a hand shake at an unspecified time, providing that Aba was to be the exclusive kosher caterer. Plaintiffs do not allege that Aba and

Lenny entered this purported agreement on behalf of a particular corporate entity or that the rights and obligations were subsequently assigned to a corporate entity. Thus, even if the court were to accept Aba's claim that he entered into a verbal agreement with Lenny at some point, he has not pointed to admissible evidence tending to prove that either Robert "Bobby" Sessa, Leonard's of Great Neck, or S & M Catering, Inc. were parties to this agreement.

In addition, plaintiffs fail to identify the material terms of the purported contract with sufficient definiteness so as to render them enforceable (*Matter of Express Indus. & Terminal Corp. v New York State Dept. of Trans.*, 93 NY2d 584, 590 [1999]). The supplemental complaint simply alleges that Aba and Lenny entered into an implied in fact contract to form a catering business and share the revenue from that business on a 50-50 basis, yet it also alleges that Aba paid Lenny 60% of the revenue received from the clients (Doc. 8, Supp. compl. at ¶¶ 15, 44). The length of the contract's term is not set forth.

Furthermore, when Daniel Ibraimov was pressed at the preliminary injunction hearing to describe the agreement, he admitted the terms of the written rental contracts were applicable to plaintiffs' catering operation, that he signed these contracts on behalf of Five Guys Catering, Inc., and that he understood the terms of the contract and even claims to have told his father, Aba, that these terms were "all against us" (Transcript at 147). A contract will not be implied in fact where, as here, "there is an express contract covering the subject matter involved" (*Julien J. Studley, Inc. v New York News, Inc.*, 122 AD2d 633, 636 [1st Dept 1986]; quoting *Adams & Co. Real Estate v E. & B. Super Mkts.*, 26 AD2d 365, 366-367 [1st Dept 1966]; quoting *Miller*, 218 N.Y. at 406-407). Plaintiffs do not challenge any material term found in the rental contracts as unenforceable, and because the rental contracts are clear and unambiguous on their face,

"extrinsic and parol evidence is not admissible to create an ambiguity" (*Innophos, Inc. v Rhodia, S.A.*, 38 AD3d 368, 369 [1st Dept 2007]; quoting *Intercontinental Planning v Daystrom, Inc.*, 24 NY2d 372, 379 [1969]; see also *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990]). Furthermore, plaintiffs claim that the rental contracts were "phony" and a "fraud" because some of the terms did not reflect the actual course of dealing between the parties, but parol evidence may not be introduced solely for the purpose of showing that certain provisions of an executed agreement were not to be enforced (*see Cole v Macklowe*, 40 AD3d 396, 397 [1st Dept 2007]; *Bersani v General Acc. Fire & Life Assur. Corp.*, 36 NY2d 457, 461 [1975]).

Furthermore, even if the parol evidence rule could somehow be avoided, the absence of an end date for the alleged oral agreement generally renders it terminable at the will of either party (*see Foster v Kovner*, 44 AD3d 23, 27 [1st Dept 2007]; citing *Shandell v Katz*, 95 AD2d 742, 743 [1st Dept 1983] [partnership at will may be dissolved, without liability for breach of contract, on a "moment's notice"]; *Alnwick v European Micro Holdings, Inc.*, 281 F Supp 2d 629, 644 [ED NY 2003] ["Where ... there is no definite term of duration for the joint venture, it may be terminated at will"]). Thus, there can be no cause of action in contract against the defendants based solely upon the termination of the purported implied contract. Even if the purported contract included a definite term of duration, it would have extended beyond one year, requiring the agreement to be reduced to a writing sufficient to satisfy the statute of frauds (*see* General Obligations Law § 5-701 [a]). Plaintiffs allegation that the implied contract was renewed once a year at the beginning of the year would be insufficient to avoid the statute of frauds.

Plaintiffs fail to offer admissible proof raising a material issue of fact as to the existence

of any enforceable agreement other than the written rental contracts entered into by a corporate entity related to Aba and Leonard's of Great Neck. Furthermore, plaintiffs have not offered competent proof that a specific rental contract has been breached. The only evidence submitted by plaintiffs that relates to a particular event concerns the Takhalov/Slavik event that was held November 14, 2006. Plaintiffs claim that the fact that the rental contract for that event "recorded only 320 guests when in fact 540 guests attended and were paid for ...," which plaintiffs support by submitting a seating chart and guest list for the event, shows that the "rental contracts were for record keeping and are fraudulent" (Doc. 53, A. Ibragimov affid. at ¶ 24). However, by the express and unambiguous terms of the rental contract, 320 represented only the "minimum guaranty" number of guests, and that the final payment would be determined based upon the rental caterer's "final seating arrangements" (Doc. 55, Takhalov/Slavik contract). In any case, plaintiffs do not specifically allege that the Takhalov/Slavik contract has been breached and that, as a result, they have suffered damages. The supplemental complaint also asserts, without elaboration, that "[o]ne event scheduled for March 4, 2010 at a cost of $105,000 was canceled," (Doc. 8, Supp. compl. at ¶ 40), but plaintiffs have no submitted any evidence, documentary or otherwise, in support of this allegation, and they do not specifically allege that this cancellation was the result of defendants' breach of contract.

Accordingly, the Sessa defendants' motion for summary judgment dismissing the first cause of action is granted in its entirety.

b. Second cause of action: Breach of implied in fact partnership

In connection with the second cause of action, the complaint alleges that "Aba and defendant Lenny entered into an implied in fact partnership to form a catering business and share

the revenue from that business on a 50-50 basis" (Doc. 8, Supp. ver. compl. at ¶ 51). It further alleges that "[p]laintiff performed services for defendants pursuant to the partnership ...[and the Sessa d]efendants have breached the partnership by failing ... to pay without justification any remuneration to Aba since January 2010" (*id.* at ¶¶ 53-54).

At the onset, the second cause of action is completely identical to the first cause of action except that the word "partnership" has been substituted for "contract." Furthermore, plaintiffs' own testimony shows that even if a partnership could be implied from the alleged agreement entered between Aba and Lenny in the early 1990's, that partnership was terminated in 1998 after an IRS audit. Aba testified that as a result of the audit, the original arrangement between Aba and Lenny was scrapped and a decision was made to keep the businesses, and their money, separate (Transcript at 91). He also acknowledged that the businesses have been seen separate since then (*id.* at 92).

There is no allegation that a separate legal entity independent of Aba or his corporate entities or the Sessa defendants existed. Plaintiffs are not shareholders, executives or managers in the defendant corporations, and none of the Sessa defendants have an ownership interest in plaintiffs' corporations. Plaintiffs do not allege that profits and losses were shared. While they do claim that revenues were shared between Lenny and Aba, they allege at one place in the supplemental complaint that the distribution was 50-50, and at another place, 60-40. Although the complaint and Aba's affidavits allege that Aba has "invested" and made "contributions" to his business with Lenny, no proof has been offered to show that these payments were actually made, and if so, when and for how much. Instead, plaintiffs rely on the conclusory allegations asserted in the supplemental complaint, which are repeated, almost verbatim, in each of Aba's

affidavits, except the amounts have been increased. While plaintiffs argue that most of these transactions were done in cash, Aba testified that he had "over [a] hundred boxes of all the papers to prove" his claims, he has not bothered to provide anything more than generalized statements as to his contributions towards his business (Transcript at 21). However, "[t]he burden upon a party opposing a motion for summary judgment is not met merely by a repetition or incorporation by reference of the allegations contained in pleadings or bills of particulars, verified or unverified" (*NYP Holdings, Inc. v McClier Corp.*, 83 AD3d 426, 428 [1st Dept 2011]; citing *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 343 [1974]).

Even if plaintiffs had shown sufficient facts from which a partnership could be implied, in absence of a definite term of duration, such partnership or joint venture is at will and could be terminated by either party at any time (*Foster*, 44 AD3d at 27 [*internal citations omitted*]). Thus, plaintiffs would have no claim for breach of an implied in fact partnership against the Sessa defendants. Furthermore, although plaintiffs seek to recover damages in amounts representing "contributions" allegedly made to defendants, they ask the court to order an accounting (*see Raymond v Brimberg*, 99 AD2d 988, 989 [1st Dept 1984] [accounting not ordered where plaintiff had not shown that a demand for an accounting was made to defendants and they refused or failed to comply]).

Accordingly, the Sessa defendants's motion for summary judgment dismissing the second cause of action is granted in its entirety.

c. Third cause of action: Tortious interference with contractual relationship

The third cause of action alleges that the Da Mikelle defendants "intentionally and improperly procured the breach of the contract and/or partnership" that existed "between Aba

and Lenny for a catering business" (Doc. 8, Supp. ver. compl. at ¶¶ 57-59). Elsewhere in the supplemental complaint, plaintiffs allege that the Da Mikelle defendants solicited the Leonard Defendants to "surreptitiously engage[] in various tactics to sabotage the Contract and/or Partnership ..." in "an effort to induce ... Aba to abandon the 20 year old Contract and/or Partnership" (*id.* at ¶¶ 31-32). These efforts were allegedly realized in January 2010 when, according to the complaint, the Da Mikelle defendants "replaced Aba as the exclusive kosher caterer for events at Lenny's Catering" (*id.* at ¶ 34). Attached as exhibit 1 to the supplemental complaint is a "business card confirming Defendant DaMikelle [*sic*] Catering Interferers are the exclusive caterer for Lenny ..." (*id.*).

In opposition to Da Mikelle's motion, plaintiffs submit an affidavit from Aba Ibragimov (Doc. 36, A. Ibragimov affid.). In most of the affidavit, for example, paragraphs 5-16, Ibragimov simply restates verbatim the allegations asserted in the supplemental complaint. He also adds several new fact allegations. For example, Ibragimov alleges that during the 20 year business relationship between himself and "Defendant Leonards, [they] developed a recognizable tradename of 'Aba-Leonard' by which clients interested in catering events would contact us," but "[a]s a result of the January 2010 events, the tradename has been destroyed" (*id.* at ¶¶ 17-18). Ibragimov also claims for the first time that defendant Michael Zavolunov "used his personal check to attempt to buy my business ... for $4,000.00 ...," a copy of which is attached to the affidavit as exhibit 2 to his affidavit (*id.* at ¶ 59). This check, he argues, "is evidence of his personal liability and a piercing of the corporate veil" (*id.* at ¶ 60). The copy of the check submitted by plaintiffs is dated January 28, 2010, and made out to Five Guys Caterers, Inc. (Doc. 38, ex. 2, Check).

Plaintiffs also submit an affidavit from Daniel Ibragimov, "an owner and executive in plaintiff corporations" (Doc. 40, D. Ibragimov affid. at ¶ 1). He claims that in September of 2009, he meet with defendant Ilya Zavolunov who "unabashedly admitted to [him that] he had offered money to defendant Leonard Sessa for my father's business" (*id.* at ¶ 4). Daniel alleges that he had another discussion with Ilya, also in September of 2009, in which "[h]e said he had numerous events and asked if me [*sic*] and Aba would opt not to handle these if he paid us $5,000 for each ..." and also asked Daniel "how much we wanted to give up our business venture with defendant Lenny ..." (*id.* at ¶¶ 8-9). Daniel claims that he accepted Ilya's payment offer and told him that they wanted "$3 million or $1.5 million if we worked together" (*id.* at ¶¶ 8, 10).

Finally, after the parties were put on notice that the instant motions would be converted to motions for summary judgment and leave was granted for the parties to offer additional proof in support of their claims that had not previously been provided, plaintiffs submitted an additional memorandum of law and affidavit from Aba Ibragimov, and an "affidavit" of their attorney, Nelson M. Stern, Esq. Stern's "affidavit," which is really an affirmation as is not sworn to before a notary, says that on January 8, 2010, the Bukharian Times "ran an article based on an interview with [the] Leonards Defendants, that declared the revival of the Leonard palace and the replacement of Aba with Defendants DaMikelle" (Doc. 67, Stern affirm. at ¶ 2). He further states that the Da Mikelle defendants "admitted to knowledge of Aba and Lenny['s] business relationship in an interview by the Bukharian Times in January 2010" (*id.* at ¶ 4). Plaintiffs have not, however, submitted a copy of either of these articles.

The tort of inducement of breach of contract, or tortious interference with contractual relations, "consists of four elements: (1) the existence of a contract between plaintiff and a third

party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]; citing *Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956]; Restatement [Second] of Torts § 766; 4 Lee and Lindahl, Modern Tort Law § 45.02, at 20 [rev ed]). "Tortious interference can take many forms, and the degree of protection upon which a plaintiff can rely 'is defined by the nature of the plaintiff's enforceable legal rights'" (*Steinberg v Schnapp*, 73 AD3d 171, 176 [1st Dept 2010]; quoting *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]). Where plaintiff's contract with a third party was terminable at will, as a general rule, plaintiff must demonstrate that the defendant's "conduct constituted a crime or an independent tort" (*id.* at 176; citing *Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]). "Allegations of mere self-interest or economic motivations will not suffice" (*id.*; citing *Phillips v Carter*, 58 AD3d 528 [1st Dept 2009]). In addition, the plaintiff must show that the contract would not have been breached "but for" the defendant's conduct (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]).

Here, as to the first element, plaintiffs fails to identify any specific rental contract of which Da Mikelle has induced a party to breach. Furthermore, to the extent an overarching verbal agreement existed pursuant to which Aba was to be the exclusive kosher caterer for all events held at Leonard's of Great Neck, because there is no allegation that this exclusive relationship was limited to a specified duration, the agreement would have been terminable at will by any party (*see Foster*, 44 AD3d at 27). As such, the Da Mikelle defendants could only be liable for tortious interference if their conduct constituted a crime or an independent tort, and not mere self-interest or economic motivations (*see Steinberg*, 73 AD3d at 176). Plaintiffs

themselves allege only that "greed" was the only explanation for the Da Mikelle defendants' conduct, which is supported by the evidence and testimony provided by the plaintiffs. The complaint's conclusory and unsupported allegation that the Da Mikelle defendants "illegally" interfered with plaintiffs' contract is not sufficient to avoid summary judgment. Furthermore, even accepting the facts as alleged by plaintiffs, the Da Mikelle defendants did not intentionally induce the breach of plaintiffs' contract because, according to Aba's affidavit, it was the Sessa defendants who solicited the Da Mikelle defendants to be the new kosher caterer at Leonard's of Great Neck.

Accordingly, the Da Mikelle defendants' motion for summary judgment dismissing the third cause of action is granted. The court notes that this cause of action was brought solely against the Da Mikelle defendants and not against the Sessa defendants.

d. Fourth cause of action: Conversion

In connection with the fourth cause of action sounding in conversion, the complaint alleges that "[p]laintiff contributed cash towards the Implied in Fact Contract and/or Partnership that was wrongfully taken by the [Sessa d]efendants" and that "[p]laintiff was damaged" (Doc. 8, Supp. ver. compl. at ¶¶ 62-63).

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]; citing *State of New York v Seventh Regiment Fund*, 98 NY2d 249 [2002]). The two "key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights"

(*id.* at 50 [*internal citations omitted*]). The subject matter of a conversion action "must constitute ... tangible personal property" (*Barrett v Toroyan*, 28 AD3d 331, 333 [1st Dept 2006] [affirming dismissal of conversion claim based on conversion of a partnership opportunity]; citing *Roemer & Featherstonhaugh v Featherstonhaugh*, 267 AD2d 697, 697 [3d Dept 1999], *lv denied* 95 NY2d 758 [2000]). Money may be the subject of conversion only if it is "specifically identifiable and there is an obligation to return it or treat it in a particular manner" (*Hoffman v Unterberg*, 9 AD3d 386, 388 [2d Dept 2004]). Even where possession of the property is initially lawful, a conversion may occur when there is a refusal to return the property after a demand (*id.* at 388).

Here, plaintiffs fail to offer any proof other than the conclusory allegations found in the supplemental complaint and restated, verbatim, in its affidavits, that it actually made "contributions" of cash that have been converted by the Sessa defendants. Although Aba Ibragimov claims in his affidavit that at the beginning of each year, he reviewed the amount of money "invested" in his business at Leonard's at Great Neck, he does not submit any of the records that he reviewed as proof of the "contributions" made towards the alleged partnership. There is nothing in the record showing the specific dates and amounts of these "contributions," who they paid to, or that defendants had an obligation to return the "contributions" or use them in a specific manner (*Hoffman*, 9 AD3d at 388). Furthermore, even assuming that "contributions" were made to the claimed partnership or joint venture, plaintiffs have not shown that a demand was made for the return of these "contributions" and that this demand was rejected (*id.*). To the contrary, Aba's affidavit states that "[b]y early January 2010 ...[he] had invested $1 million in Lenny's business without requesting any recoupment ...," (Doc. 65, A. Ibragimov affid. at ¶ 2).

Accordingly, the branch of the Sessa defendants' motion seeking summary judgment on the fourth cause of action is granted in its entirety.

e. Fifth cause of action: Unjust enrichment

The fifth cause of action alleges that "Aba contributed to the furtherance of the 20 year old catering business that he and Lenny formed ...," that all of the defendants were enriched by plaintiff's efforts, and plaintiff has been denied any remuneration for his efforts (Doc. 8, Supp. ver. compl. at ¶¶ 65-67). In opposition to defendants' motion to dismiss, plaintiffs argued, without further explanation, that "[r]egarding the claim for unjust enrichment, the implied in fact contract and partnership were renewed at the beginning of each year for one year" (Doc. 52, Plaintiffs' opp. memo. at 6). Other than this statement, plaintiffs did not specifically oppose the portion of the motion seeking dismissal of the fifth cause of action.

The existence of a valid and enforceable contract governing a particular subject matter generally precludes recovery in quasi-contract for events arising out of the same subject matter (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Here, plaintiffs do not dispute that a separate rental contract was executed in writing each time plaintiffs catered an event at Leonard's of Great Neck. Thus, because plaintiffs' unjust enrichment claim is based on events arising out of the same subject matter addressed in the rental contracts, they cannot recover under a quasi-contract theory. Furthermore, plaintiffs' conclusory allegations that Aba contributed to the 20 year old catering business and that "[p]laintiff has been damaged," are insufficient to defeat summary judgment (*see Gusinsky v Genger*, 74 AD3d 539, 540 [1st Dept 2010]).

Accordingly, the branches of the two pending motions for summary judgment which seek

dismissal of the fifth cause of action are each granted in their entirety.

f. Sixth cause of action: Prima facie tort

In connection with the sixth cause of action sounding in prima facie tort, the complaint alleges "[o]n or about January 2010, defendants intentionally inflicted harm on the elderly plaintiff Aba by destroying the business he had built for over 20 years ..., [p]laintiff suffered medical trauma as a result of defendants' actions ..., [p]laintiff has suffered special damages ... [and t]here was no excuse or justification for defendants' actions other than greed" (Doc. 8, Supp. ver. compl. at ¶¶ 71-74).

As an initial matter, although a cause of action for a prima facie tort must be brought within one year under the applicable statute of limitations (*see Angel v The Bank of Toyko-Mitsubishi, Ltd.*, 39 AD3d 368, 370 [1st Dept 2007]), defendants waived this defense by not specifically asserting it in their answer or motion to dismiss. The elements of a cause of action in prima facie tort are "(1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful" (*Burns Jackson v Lindner*, 59 NY2d 314, 332 [1983]; citing *ATI, Inc. v Ruder & Finn*, 42 NY2d 454, 458; *Wehringer v Helmsley-Spear, Inc.*, 91 AD2d 585, affd 59 NY2d 688; 2 NY PJI 624). There can be no recovery in prima facie tort unless the sole motivation for defendants' acts was "disinterested malevolence" (*id.* at 333). Here, because plaintiffs only allege that defendants' actions were motivated by "greed," they cannot show that the sole motivation was "disinterested malevolence" (*see Kleinerman v 245 E. 87 Tenants Corp.*, 74 AD3d 448, 449 [1st Dept 2010] [dismissal of prima facie tort claim warranted because plaintiffs themselves had maintained that defendants had "engaged in tortious conduct to extort money from them for purposes of financial

gain," and thus was not motivated by "disinterested malevolence"]).

Accordingly, summary judgment is granted in defendants' favor dismissing the sixth cause of action.

g. Seventh cause of action: Violations of General Business Law § 350

The complaint's seventh and final cause of action alleges that "defendants have engaged in deceptive acts that are misleading in material respects as to the existence of an exclusive kosher caterer for defendant Lenny's catering hall [in that d]efendants have communicated deceptively to the consumer public regarding the catering business that exists between Aba and Lenny" (Doc. 8, Supp. ver. compl. at ¶¶ 77-80).

To successfully assert a claim under General Business Law § 350, "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (*Koch v Acker, Merrall & Condit Co.*, __NY3d __, 2012 NY Slip Op 02254, at *1-2 [March 27, 2012]; quoting *City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]; *also citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324, n 1 [2002]). Deceptive acts or practices may be considered consumer-oriented when they have "a broader impact on consumers at large" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 24-25 [1995]). "Private contract disputes, unique to the parties ...[do] not fall within the ambit of the statute" (*id.* at 25).

Here, plaintiffs do not identify deceptive consumer-oriented conduct, as this is essentially a private contract dispute among the parties on the question of whether plaintiffs had an exclusive right to cater all kosher events ever held at Leonard's of Great Neck. While plaintiffs

point to a business card annexed to the supplemental complaint and an article said to have been published in the Bukharian Times in January of 2010 declaring "the revival of the Leonard palace and the replacement of Aba with Defendants Da Mikelle," (Doc. 8, Supp. compl. at ¶ 37), there are no allegations from which it could be inferred that either of these things were "deceptive" for purposes of General Business Law § 350. Furthermore, the causation element has not been shown because it is defendants' alleged breach of the parties' contract, and not defendants' actions related to the business card and newspaper article, that are claimed to have caused plaintiffs' harm.

Accordingly, the branch of the Da Mikelle defendants' motion seeking summary judgment dismissing the seventh cause of action is granted.

4. Plaintiffs' request for leave to amend

In their supplemental opposition papers, without making a cross motion, plaintiffs seek leave to amend to amend the complaint to "more clearly articulate the claims for a quasi-contract for the exclusive Glatt Kosher catering ship [*sic*] that was performable within one year" (Doc. 64, Supp. opp. memo. at 7-8). Plaintiffs contend that the proposed amendment would "also allege claims for detrimental reliance, quantum meruit, unjust enrichment, breach of contract, and tortious interference with contractual relationship" (*id.* at 8). The proposed amended complaint removes plaintiffs' causes of action for breach of an implied in fact partnership. It would amend the cause of action sounding in unjust enrichment against all defendants to add that the contributions made in furtherance of the business include "investing cash, referring clients with events, and allowing the use of his reputation and good name" (Doc. 71, ex. 4, Proposed am. compl. at ¶ 63). The seventh and eighth causes of action found in the proposed amended

complaint are labeled "unjust enrichment" and "quantum meruit," but they merely allege that defendants "have engaged in deceptive acts" (*id.* at ¶ 82, 84).

Leave to amend a pleading should be freely granted so long as there is no surprise or prejudice to the opposing party (*see* CPLR 3025 [b]; *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]), unless the proposed amendment is "palpably insufficient to state a cause of action or is patently devoid of merit" (*Bishop v Maurer*, 83 AD3d 483, 485 [1st Dept 2011]). The Sessa defendants argue that plaintiffs have failed to file a cross motion for leave to amend the complaint, which would be the second, not the first, amended complaint as plaintiffs have called it. They further contend that based on the facts that have thus far been established, the proposed amendment still fails to state a claim upon which relief could be granted (Doc. 72, Defendants' reply memo. at 11).

Overlooking for a moment plaintiffs' procedural error in failing to formally notice their request for leave to file and serve a second amended complaint, plaintiffs' request for leave to amend the complaint is denied because it is patently devoid of merit. The amendment simply rephrases some of the prior allegations in an attempt to have them conform with the applicable principles of law. However, the additional allegations are purely conclusory and are not supported by additional, material fact allegations. Thus, the defects discussed above that were present in its "supplemental complaint" have not been addressed. Accordingly, plaintiffs' request for leave to amend the pleadings is denied.

5. Sessa defendants' counterclaim

No party has addressed the merits of the Sessa defendants' counterclaim for defamation on this motion. Accordingly, it is severed and continued under this index number, without the

court examining the evidence supporting it. (CPLR 603; *see also*, *Banco Popular North America v Lieberman*, 75 AD3d 460 [1st Dept 2010]). Absent a dispositive motion on the counterclaim, or a discontinuance of the counterclaim, being filed by May 9, 2012, the parties to the counterclaim shall appear for a preliminary conference on May 16, 2012 at 2:15 p.m. in Part 12, 60 Centre Street, room 212, New York, NY 10007.

Accordingly, it is

ORDERED that the defendants' motions to dismiss the complaint, filed under motion sequence numbers 002 and 003, are each granted and the Clerk of Court shall enter judgment dismissing the complaint in its entirety, together with costs and disbursements to defendants as taxed by the Clerk of this Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Sessa defendants' counterclaim for defamation is severed and continued under this index number, without prejudice to Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: April 13, 2012
New York, New York

Paul G. Feinman
J.S.C.

(2012 Pt 12 D&O_651008_2011_002_003_daz(MTD_M4SJ_impliedK_partner)