Peters v Gould
2012 NY Slip Op 33913(U)
January 5, 2012
Supreme Court, New York County
Docket Number: 651505/10
Judge: Barbara R. Kapnick

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

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HALTON ADRIAN PETERS,

Plaintiff,

-against-

HOWARD BACON GOULD, DAVID BAXTER SMITH, WILLIAM TERRANCE CORCORAN and TUNDRA CAPITAL PARTNERS, LLC,

Defendants.

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DECISION/ORDER
Index No. 651505/10
Motion Seq. No. 002

BARBARA R. KAPNICK, J.:

This action arises out of plaintiff's allegation that he was ousted from a partnership that he helped build with the individual defendants. Plaintiff claims he held a 25% ownership stake in the partnership, which was "confiscated" from him by the individual defendants, just as the parties' efforts were about to reap rewards, leaving him with nothing.

Defendants now move, pursuant to CPLR 3211 (a) (7) and 3016, to dismiss the First Amended Verified Complaint (the "Complaint") in its entirety.

Background

Plaintiff Halton Adrian Peters ("Peters"), who holds a Ph.D. in Biological Sciences as well as a J.D. from Stanford University, alleges that, during the summer of 2009, while he was an investment banker in the Power, Energy and Infrastructure Group at Lazard Ltd.

("Lazard"), he and defendant Howard Bacon Gould ("Gould") formed a partnership called West Junction Capital, with the goal of launching a hedge fund that invested solely in clean technology (i.e., environmentally friendly) companies. Peters alleges that in late September 2009, he quit his job at Lazard in order to raise capital and launch and manage the hedge fund.

According to the Complaint, in November 2009, defendant William Terrance Corcoran ("Corcoran") joined West Junction Capital as the portfolio manager. The three partners agreed that they would each own an equal one-third stake in West Junction Capital. In December 2009, the three partners agreed to change the name of West Junction Capital to 90 North Capital. 90 North Capital was allegedly incorporated as a limited liability company in Delaware in March 2010, and became known as 90 North Capital LLC ("90 North Capital" or, the "Firm").

In late February 2010, 90 North Capital obtained office space at 900 Third Avenue in Manhattan by subletting unused space from another investment management firm. The tenant/management firm charged 90 North Capital $4,000 per month for the office space, but the rental agreement stipulated that 90 North Capital would initially pay only $500 per month during its startup phase, with the balance deferred until it was able to launch its hedge fund.

The three partners also created a corporate bank account at JP Morgan Chase under the name 90 North Capital LLC. The account was opened and administered by Peters, and used by the Firm to pay its expenses. The three partners periodically deposited checks of equal amounts into this account in order to fund 90 North Capital's business. During this period of time, Gould had business cards produced, which described Peters as the "Senior Partner" of 90 North Capital, Gould as the "Managing Partner, President" and Corcoran as the "Managing Partner, Portfolio Manager."

Peters alleges that during this time, the Firm marketed itself to banks and investment funds in order to attract investment capital that it could invest in an initial portfolio of stocks and other securities. This "seed capital" could be used to generate management fees which could be used to meet 90 North Capital's initial expenses. Performance fees could be used to compensate its partners for generating investment profits. In numerous marketing materials the three managing partners were portrayed to investors as equal owners of 90 North Capital.

As part of their efforts to secure capital, on March 10, 2010, Peters, Corcoran and Gould met with Patricia Bissett ("Bissett") and two other analysts at Protégé Partners ("Protégé"), a highly respected and prominent investor of start-up capital for hedge

funds. At that meeting, the three partners distributed copies of their management presentation. Protégé contacted the partners later that month and asked them to come back and meet with Protégé's Chief Executive Officer, Jeff Tarrant ("Tarrant").

On March 30, 2010, Peters, Corcoran and Gould met with Tarrant, Bissettt and Protégé's Chief Information Officer, Ted Seides ("Seides"). After that meeting, Protégé sought another meeting and asked for a list of references and contact information so that they could get the due diligence process started.

Defendant David Baxter Smith ("Smith") joined 90 North Capital in April 2010 as the director of research. The three partners agreed that Smith would be an equal partner in 90 North Capital, despite his late arrival to the partnership. Thus, the four partners agreed that they would each own a 25% share of the Firm.

Peters alleges that, throughout the spring and summer of 2010, the four partners of 90 North Capital worked hard to launch their hedge fund. Peters, along with Gould and Corcoran met with dozens of potential investors. Smith concentrated on researching companies involved in clean technology.

According to the Complaint, a due diligence questionnaire ("DDQ") prepared by the partners in June 2010, stated that: "90 North Capital LLC is owned as follows: Terry Corcoran (Managing Partner & Portfolio Manager) 25%; Howard Gould (Managing Partner & President) 25%; Halton Peters (Managing Partner, COO & Senior analyst) 25%; David Smith (Managing Partner & Head of Research) 25%." Further, the partners revised their investor presentations and circulated these materials to dozens of potential investors and contacts between April 2010 and July 2010. These documents all listed the four partners and their positions in 90 North Capital.

Peters further alleges that the partners also held themselves out to the general public as partners. Thus, for example, Gould and Corcoran were interviewed for an article which appeared in the June 30, 2010 issued of "Hedge Fund Alert," which noted that Corcoran was running 90 North Capital with three partners: Howard Gould, Halton Peters and David Smith.

In mid-April 2010, 90 North Capital had its third meeting with Protégé. All four partners were in attendance. The team later received feedback from Protégé that this meeting had not gone well for 90 North Capital largely because of the introduction of Smith as a partner, which left Protégé confused as to what Smith and Corcoran's roles were to be, among other concerns. Nonetheless, at

the end of the meeting, Protégé asked the partners to provide a mock portfolio of stocks that the team would invest in had they $500 million to invest immediately.

Over the next two days, the partners put together a mock portfolio of stocks that they could send to Protégé, which would monitor the portfolio over the next month. Each of the four partners contributed to the portfolio.

On May 24, 2010, all four members of the team met with Protégé. Seides reviewed many of the holdings in the portfolio, known as the "Clean Economy Fund," and the portfolio's performance over the previous month. 90 North Capital's "long/short" portfolio had significantly outperformed the market at large.

Protégé then requested a fifth meeting with the partners. This meeting was to be with CEO Tarrant and Bissett. Tarrant requested that Protégé meet only with Corcoran or with Corcoran and Gould. The meeting was set for July 1, 2010. To prepare for this meeting with Protégé, Corcoran drafted a lengthy "frequently asked questions" memo to present hypothetical questions likely to be asked by Protégé at the meeting, and to come up with strong answers to those questions in advance so that the team would be prepared for the meeting. A conference call was held on the afternoon of

July 4, 2010, during which Peters, Gould and Corcoran spent several hours answering the various questions likely to be posed by Protégé.

Immediately after the call, Corcoran circulated a draft memo, which included the list of possible questions along with model answers derived from the discussion and comments on the conference call earlier that day. Corcoran wrote that, as to a question regarding "ownership structure" the partners agreed that the answer was "all equal owners in the 90 N entity."

The July 6, 2010 meeting was a success. At the conclusion of the meeting, Tarrant said that he would come back to 90 North Capital shortly with the "next steps," and that in the interim, Bissett would visit the 90 North Capital offices and move onto the "due diligence" phase of seeding the Fund.

Protégé met with the firm again on July 12, 2010. This time, Seides and Bissett met with Corcoran and Gould. Protégé began checking the references of all four partners. According to the Complaint, by early August 2010, Protégé had spent at least 20 hours interviewing 90 North Capital references. Those references included a list of 20 persons that the Firm had provided to the Protégé diligence team, along with other names suggested by those

references. The four partners expected Protégé to commit funds to them within days.

Corcoran was on vacation and out of the office from Monday, July 19, 2010 through July 30, 2010. He returned to work on Monday, August 2, 2010. Gould was also on vacation and returned to the office on Tuesday, August 3, 2010. Smith and Peters were working at the 90 North Capital offices during this time.

Peters alleges that, on August 5, 2010, shortly after Gould and Corcoran had returned from two-week vacations, the four partners sat down for lunch. At this lunch, the three others discussed certain personal and professional problems that they had with Peters. According to the Complaint, Smith stated that he thought Peters' background and experience were weak and not suited to working at a hedge fund. Gould, Corcoran and Smith agreed that they could hire a COO with more than ten years of experience, and that it would be less expensive to pay such a COO rather than to have Peters keep his 25% interest in their business.

Peters alleges that his three partners offered him $20,000 for his share in 90 North Capital. Peters refused that offer. At the end of the meeting, the defendants told Peters that he was out of the Firm. Smith told Peters to turn in his building pass and

identification and not to return to the office. Peters responded that he paid for the office and was, therefore, entitled to use it, but Corcoran warned Peters not to come back into the office. Peters then packed his personal belongings and left the building.

Shortly thereafter, the three defendants changed the password on Peters' office voice mail and deleted any reference to Peters from the Firm's marketing materials.

Peters alleges in the Complaint that the defendants continued to use the 90 North Capital business, brand, intellectual property, marketing materials and investor contacts to launch and manage The Clean Economy Fund under the 90 North Capital name, only without including Peters as either a partner or an owner. Peters alleges that when the three individual defendants realized that Peters was intent upon recovering his equity stake in 90 North Capital, defendants formed a new investment vehicle - defendant Tundra Capital Partners LLC ("Tundra") - which is a mere continuation of 90 North Capital but with a different name. According to Peters, defendants formed this entity for the sole purpose of diverting business opportunities, most notably the planned investment by Protégé.

Peters commenced the within action in September 2010. In his 120-page Complaint, Peters alleges the following causes of action: a Declaratory Judgment declaring that Peters is a 25% owner of 90 North Capital, and that The Clean Economy Fund and all resultant investments therein and profits therefrom are a business opportunity created by, and belonging to 90 North Capital (first cause of action); breach of contract as to defendants Gould, Corcoran and Smith (second cause of action); breach of an oral contract as to defendants Gould, Corcoran and Smith (third cause of action); breach of contract with respect to 90 North Capital as to the individual defendants (fourth cause of action); breach of good faith and fair dealing as to the individual defendants (fifth cause of action); unjust enrichment as to the individual defendants (sixth cause of action); conversion as to the individual defendants (seventh cause of action); breach of fiduciary duty as to Gould, Corcoran and Smith (eighth cause of action); aiding and abetting breach of fiduciary duty as to defendants Smith and Gould (ninth cause of action); promissory fraud as to defendant Corcoran (tenth cause of action); fraudulent inducement as to defendant Smith (eleventh cause of action); promissory estoppel as to defendant Gould (twelfth cause of action); promissory estoppel as to all the defendants (thirteenth cause of action); defamation as to defendant Gould (fourteenth cause of action); and imposition of a

constructive trust as to all defendants (fifteenth cause of action).

Defendants move to dismiss on the grounds that: (1) plaintiff has not stated a claim for breach of contract because the parties were only at the preliminary stages of forming a partnership or an LLC, and no written agreement yet existed between the parties; (2) those claims which are derivative of the breach of contract claims, such as declaratory judgment, breach of good faith and fair dealing, conversion, breach of fiduciary duty, aiding and abetting breach of fiduciary duty and promissory fraud must, therefore, also fail; and (3) plaintiff has not stated a claim for unjust enrichment, fraudulent inducement or promissory estoppel.

Discussion

It is well settled that on a motion to dismiss pursuant to CPLR 3212, "the pleading is to be afforded a liberal construction", the facts, as alleged in the complaint accepted as true, and the plaintiff accorded the "benefit of every possible favorable inference" (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]). "Modern pleading rules are 'designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one'" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976], quoting 6 Carmody-Wait 2d, NY Prac, § 38:19).

Defendants move to dismiss the second and third causes of action, which are premised upon breach of a written partnership agreement, and breach of an oral partnership agreement, respectively, on the ground that inasmuch as Peters has pled that the name of the entity was 90 North Capital LLC, he has alleged that it is a limited liability company, and once the parties have adopted the corporate form, "they cease to be partners and have only the rights, duties and obligations of stockholders" (quoting *Weisman v Awnair Corp. of Am.*, 3 NY2d 444, 449 [1957]). Defendants assert that by pleading the formation of an LLC, plaintiff is precluded from pleading the formation of a partnership, because such facts are inconsistent.

As an initial matter, defendants misstate the nature of a limited liability company. "The LLC is considered a 'cross-breeding of the corporate form and the partnership form'" (*Weber v King*, 110 F Supp2d 124, 131 [EDNY 2000], quoting New York Limited Liability Company Law, Practice Commentaries, 1A).

> [T]he LLC shares the feature of limited liability protection for its members with the corporate form. LLCs are similar to the partnership form, however, in that they provide members with a greater degree of operating flexibility than do corporations; members of an LLC are free to directly manage the business, while corporations are managed by their directors.

(110 F Supp 2d at 131).

Peters' allegations that the three individual defendants and he were partners in the process of launching a hedge fund, and had formed a Delaware limited liability company are not factually inconsistent. Further, CPLR 3014 specifically provides that "[c]auses of action or defenses may be stated alternatively or hypothetically." Similarly, CPLR 3017(a) provides that "[r]elief in the alternative or of several different types may be demanded." New York "encourage[s] pleading of claims and remedies in the alternative" (*Volt Sys. Dev. Corp. v Raytheon Co.*, 155 AD2d 309 [1st Dept 1989]). Contrary to defendants' argument, Peters need not choose, at this stage of the litigation, whether to rely upon the existence of a limited liability company or a partnership.

As to defendants' claims that the parties were only at the preliminary stages of forming a partnership and/or limited liability company, whether a partnership exists is a question of fact (*Olson v Smithtown Med. Specialists*, 197 AD2d 564 [2d Dept 1993]). "[T]he factors to be considered are the intent of the parties (express or implied), whether there was joint control and management of the business, whether there was a sharing of the profits as well as a sharing of the losses, and whether there was a combination of property, skill or knowledge" (*Ramirez v Goldberg*, 82 AD2d 850, 852 [2d Dept 1981], citing *Yonofsky v Wernick*, 362 F Supp 1005, 1030-1035 [SDNY 1973]).

New York Partnership Law § 10 (1) defines a partnership simply as "an association of two or more persons to carry on as co-owners of a business for profit . . . " (*see Czernicki v Lawniczak*, 74 AD3d 1121, 1124 [2d Dept 2010]). A fully executed, written agreement is not necessary to form a partnership. An oral agreement to form a partnership creates a partnership at will (*Prince v O'Brien*, 234 AD2d 12 [1st Dept 1996]). Moreover, "[t]he intention to commit an agreement to writing will not prevent contract formation prior to execution" (*Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 297 [1st Dept 2003], citing *T. Moriarty & Son v Case Contr.*, 287 AD2d 390 [1st Dept 2001], *app withdrawn* 98 NY2d 679 [2002]; *Elizabeth St. v 217 Elizabeth St. Corp.*, 276 AD2d 295 [1st Dept 2000]).

In his Complaint, Peters alleges that, over the course of a year, the parties obtained and set up an office which they shared, opened a company bank account to which they all contributed, and which was used to pay their office expenses, created marketing and management materials in which they described themselves as equal partners, distributed these marketing and management materials to dozens of potential investors, divided up the Firm work among themselves, shared joint control over the business, created a website, created and distributed business cards in which they described themselves as members and officers of 90 North Capital,

and agreed both orally, and via emails, that each partner owned 25% of the Firm. These are sufficient allegations to indicate the formation of a partnership. At this stage, on a motion to dismiss, any further determination as to whether the parties' oral agreements, internal memoranda and/or emails conclusively establish the existence of a partnership agreement, written or oral, would be premature.

Defendants next argue that Peters' third cause of action for breach of an oral partnership agreement must be dismissed because, even if an oral partnership existed, it was terminable at will. "[A]n at-will partnership 'may be dissolved at any time by any partner ...' without breaching the partnership agreement (citations omitted)" *220-52 Assoc. v. Edelman,* 24 AD2d 365 (1st Dep't 1997). However, "[o]n dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed" (New York Partnership Law § 61). Here, Peters alleges that defendants simply expelled him and continued the business without any accounting or division of the assets of the partnership.

Further, "where a partnership has for its object the completion of a specified piece of work, or the effecting of a specified result, it will be presumed that the parties intended the relation to continue until the object has been accomplished"

(*Hooker Chems. & Plastics Corp. v International Mins. & Chem Corp.*, 90 AD2d 991, 991 [4th Dept 1982], quoting *Hardin v Robinson*, 178 AD 724, 729 [1st Dept 1916], *affd* 223 NY 651 [1918]; *see also Mendelovitz v Cohen*, 28 Misc3d 1217[A], [Sup Ct, Kings Co 2010]). "Whether the relationship is at will or for a fixed term or until the accomplishment of a particular undertaking is a question of fact ... [and] [i]n the absence of an express term in a contract fixing duration, courts may inquire into the intent of the parties" (*Hooker Chems & Plastics Corp., supra* at 991-992). Peters has alleged that the purpose of the partnership was to form a hedge fund, and that he was expelled on the brink of success of that venture. He has, therefore, adequately pled that the intent of the parties was to continue the relationship at least until the formation of that fund. That part of defendants' motion to dismiss the third cause of action is, therefore, denied.

Defendants next seek to dismiss Peters' fourth cause of action for breach of the 90 North Capital LLC Operating Agreement. Peters alleges in his Complaint that "[i]n forming 90 North Capital LLC, the individual Defendants and Plaintiff entered into a limited liability company operating agreement that provided Plaintiff with 25% ownership of the Firm as well as a role in managing the Firm" (Complaint, ¶ 252). Defendants claim that this allegation is

false, and that since there is no written operating agreement, no limited liability company exists.

New York Limited Liability Company Law provides that "the laws of the jurisdiction under which a foreign limited liability company is formed govern its organization and internal affairs and the liability of its members and managers" (Limited Liability Company Law § 801 [a]). Since 90 North Capital was formed in Delaware, that State's laws regarding limited liability companies control. Under Delaware law, an operating agreement may be written, oral or implied, and all members of the limited liability company are bound thereby:

> "Limited liability company agreement" means any agreement (whether referred to as a limited liability company agreement, operating agreement or otherwise), *written, oral or implied*, of the member or members as to the affairs of a limited liability company and the conduct of its business. A member or manager of a limited liability company or an assignee of a limited liability company interest is bound by the limited liability company agreement whether or not the member or manager or assignee executes the limited liability company agreement.

(6 Delaware Code § 18-101 [7]) (emphasis added).

As to defendants' contention that the parties did not set forth how profits were to be distributed, Peters alleges that the parties agreed that the profits were to be distributed in

accordance with their percentage of ownership in the Firm. If proved at trial, this oral agreement would be binding under Delaware law. In addition, Delaware law also provides, in relevant part, as follows:

> The profits and losses of a limited liability company shall be allocated among the members, and among classes or groups of members, in the manner provided in a limited liability company agreement. If the limited liability company agreement does not so provide, profits and losses shall be allocated on the basis of the agreed value (as stated in the records of the limited liability company) of the contributions made by each member to the extent they have been received by the limited liability company and have not been returned.

(6 Delaware Code § 18-503).

Having pled that the certificate of formation for 90 North Capital was filed with the Secretary of State of Delaware, Peters has sufficiently pled the formation of a Delaware limited liability company. The State of Delaware does not require that any further documents, such as an operating agreement, be filed with the Secretary of State (6 Delaware Code § 18-201 [c]).

Peters' first cause of action for a declaratory judgment is dismissed since it "is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of

action, such as breach of contract." (*Apple Records v Capitol Records*, 137 AD2d 50, 54 [1st Dep't 1988]).

Peters' fifth cause of action, for breach of the duty of good faith and fair dealing, is based upon defendants' expulsion of Peters from the partnership, and is duplicative of his second, third and fourth causes of action for breach of contract in that it is based upon the same facts and seeks the same damages (*Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept], *lv den* 15 NY3d 704 [2010]; *Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440 [1st Dept 2009]). The fifth cause of action is, therefore, also dismissed.

Peters' sixth cause of action for unjust enrichment may stand, as an alternative basis for relief, in the event that it is ultimately determined that there was no partnership and/or limited liability company and no agreement to share in the profits thereof (*see e.g. Foster v Kovner*, 44 AD3d 23, 29 [1st Dep't 2007]).

Peters' seventh cause of action for conversion is based upon his claim that defendants took his 25% equity stake in 90 North Capital. In order to establish a cause of action for conversion, "a plaintiff must show legal ownership or an immediate superior right of possession of a specific identifiable thing and must show

that the defendant[s] exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights" (*Cusack v Amer. Defense Sys.*, 86 AD3d 586, [2d Dept 2011]; *Scott v Fields*, 85 AD3d 756 [2d Dept 2011]). New York generally does not recognize a cause of action for conversion of intangible property (*Sporn v MCA Records*, 58 NY2d 482 [1983]; *Ippolito v Lennon*, 150 AD2d 300 [1st Dept 1989]). While more recently, the Court of Appeals has allowed certain electronic data to be the subject of an action in conversion (*Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283 [2007]), the Court limited its holding to computer documents. Here, Peters alleges only that defendants confiscated his "interest" in the partnership. An "interest" cannot be the subject of a cause of action in conversion. Accordingly, the seventh cause of action is dismissed.

Defendants also move to dismiss Peters' eighth cause of action for breach of fiduciary duty on the grounds that: (1) the claim depends entirely upon Peters' allegation that he and the individual defendants were partners; and (2) that the claim is duplicative of the breach of contract claim. Having determined that Peters has adequately pled the existence of a partnership, defendants' first argument fails. As to defendants' second argument, in his breach of contract claims, Peters seeks recompense for his expulsion from the partnership. In his eighth cause of action, Peters seeks

damages for breach of fiduciary duty in forming Tundra as a vehicle to divert business opportunities away from the partnership. The breach of fiduciary duty claim is, therefore, not duplicative of the breach of contract claim (*c.f., Perl v Smith Barney*, 230 AD2d 664 [1st Dept 1996]).

Plaintiff's ninth cause of action, for aiding and abetting a breach of fiduciary duty, is based upon allegations that Smith and Gould convinced Corcoran to expel Peters from the partnership. This claim is duplicative of the breach of contract claims and is, therefore, dismissed.

Peters' tenth cause of action, for promissory fraud, which is asserted against Corcoran only, alleges that from the beginning, Corcoran was dissatisfied with his share in the Firm and never intended to perform his duties in exchange for a proportional ownership stake in the Firm; rather, his goal was to seize more of the Firm as it became successful. "General allegations that a defendant entered into a contract with the intent not to perform are insufficient to support a fraud claim" (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011]; *see also New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). While a false statement of intention may be sufficient to support an action for fraud (*see e.g. Graubard Mollen Dannett &*

Horowitz v Moskovitz, 86 NY2d 112 [1995]), the statement must be collateral to the contract and involve a separate breach of duty (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, *supra* at 293-294). Here, Peters does not allege any false representations collateral to the contract. This cause of action is, therefore, dismissed.

Peters' eleventh cause of action is for fraudulent inducement as against Smith. In this cause of action, Peters claims that Smith fraudulently induced Peters into admitting Smith into the partnership by stating in an email that he was "extremely excited about this opportunity and what it could be . . . I am very confident this is a strong team of individuals with highly aligned interests. I think our shared enthusiasm around this sector and the specialized nature of the product, coupled with a powerful marketing presentation should clearly differentiate this from the 'me too' funds that almost surely will emerge" (Complaint, ¶ 300). However, at the meeting on August 5, 2010, at which the three individual defendants expelled Peters from the partnership, Smith told Peters that he thought that Peters' background and experience were weak and not suited to working at a hedge fund. (Complaint, ¶ 301).

To adequately plead a cause of action for fraudulent inducement, a plaintiff must allege the basic elements of a claim

of fraud (*see Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269 [2011]), namely, "a material representation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequently sustaining a detriment" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [1st Dept 2005]). Statements of opinion, or future expectations, such as "I think," or "I am very confident" as alleged here, are "little more than expressions of hope and opinion, and related to future expectations, and hence cannot constitute actionable fraud" (*International Fin. Corp. v Carrera Holdings Inc.*, 82 AD3d 641, 642 [1st Dept 2011]). This cause of action is, therefore, also dismissed.

Peters' twelfth cause of action is for promissory estoppel and is asserted only against Gould. In this cause of action, Peters alleges that, in express reliance on Gould's representations that he and Peters would continue to work together as partners to launch the investment firm that became known as 90 North Capital, Peters left his lucrative job at Lazard and devoted himself full-time to working on making 90 North Capital a success (Complaint, ¶ 309). Further, Peters alleges that Gould eliminated a "forced retirement" provision from an original draft partnership provision, which meant that neither he nor Peters could be removed from the partnership by

a super majority of the partners (Complaint, ¶ 310). Peters alleges that, relying on Gould's promises, Peters gave up his salary, benefits and bonuses from October 2009 to the present and spent a considerable amount of his personal funds on 90 North Capital's operations (Complaint, ¶ 313).

Defendants correctly point out that Gould's objection to the forced retirement provisions in the original partnership papers came only after Peters had already left his job at Lazard, and was, therefore, not a precipitating factor in Peter's decision to leave Lazard. Nonetheless, Peters has alleged that at the time he left Lazard, and throughout the year that he worked to set up 90 North Capital's operations, he was repeatedly assured by Gould that they were partners in the business entity that they were establishing. Peters' cause of action for promissory estoppel may thus stand, as an alternative basis for relief, in the event that it is ultimately determined that there was no partnership and/or limited liability company and no agreement to share in the profits thereof (*see e.g. Foster v Kovner*, *supra* at 29-30). Similarly, Peters' thirteenth cause of action for promissory estoppel, as against all of the defendants, may stand as an alternative basis for relief *(id.)*.

Peters' fourteenth cause of action is for defamation and is asserted solely against Gould. Peters alleges that in mid to late

August 2010, after the three individual defendants had expelled him from 90 North Capital, defendant Gould told Ann Davlin, an important businesswoman in the clean technology sector, that Peters had been forced to leave 90 North Capital because he had "'misrepresented' his credentials as well as ability to serve as a clean technology analyst" (Complaint, ¶¶ 222, 326) Further, Gould stated that Peters had led 90 North Capital "astray" from the beginning *(id.)*.

Defendants move to dismiss this cause of action on the grounds that both of these statements constitute non-actionable opinions, and that because the alleged statements were not "slander per se," they require Peters to allege special damages.

The determination as to whether a statement is one of opinion or of fact is to be made by the Court (*Gross v New York Times Co.*, 82 NY2d 146, 153 [1993]). In making that determination, the relevant factors are

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to "'signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact'"

(*id.* at 153, quoting *Steinhilber v Alphonse,* 68 NY2d 283, 292 [1986], quoting *Ollman v Evans,* 750 F.2d 970, 983 [DC Cir 1984], *cert denied* 471 U.S. 1127 [1985]). Words are actionable as slander per se if they impute "fraud, dishonesty, misconduct or unfitness in conducting one's profession" (*Gjonlekaj v Sot,* 308 AD2d 471, 473-74 [2d Dept 2003]; *Grimaldi v Schillaci,* 106 AD2d 728 [3d Dept 1984]).

This Court agrees that Gould's alleged statement that Peters had led 90 North Capital "astray" would generally be regarded as one of opinion, as what is "astray" to one speaker, might be different for another. It is not a statement that is either true or false. However, as to Gould's alleged statement that Peters had "misrepresented his credentials," the common understanding of that phrase would be that Peters had lied about his academic degrees and/or experience in the particular field. This statement would not, under the circumstances, appear to a listener to be communicated solely as an opinion, but rather, as one of fact, and may, therefore, be the subject of a claim for defamation. In addition, inasmuch as the subject matter of the communication specifically relates to Peters' dishonesty in his profession, Gould's statement, if proved, would constitute slander per se. Accordingly, this cause of action may stand.

In his fifteenth cause of action, Peters seeks the imposition of a constructive trust against the defendants with respect to the "'Clean Economy' fund and all similar investment funds launched and managed by Defendants using either Tundra Capital Partners LLC or any other investment management firm" (Complaint, ¶ 334).

Peters has sufficiently alleged the existence of a partnership and/or limited liability company formed for the express purpose of managing a "Clean Economy Fund" and that the defendants formed defendant Tundra for the express purpose of transferring business opportunities belonging to 90 North Capital to an entity in which Peters had no interest. Peters has thus sufficiently alleged a breach of fiduciary duty on the part of defendants by transferring the Firm's business opportunities to another entity without consideration, and has, therefore, sufficiently alleged grounds for the imposition of a constructive trust (*see Schneidman v Tollman*, 190 AD2d 524, 525 [1st Dept 1993]).

Accordingly, based upon the papers submitted and the oral argument held on the record on April 12, 2011, it is

ORDERED that the motion by defendants to dismiss the Complaint is granted only to the extent that the first, fifth, seventh, ninth, tenth and eleventh causes of action are dismissed, and is otherwise denied; and it is further

ORDERED that the remaining causes of action are severed and continued.

Defendants shall serve Answers to the First Amended Verified Complaint within 30 days of notice of the e-filing of this Decision.

Counsel for all parties shall appear for a status conference in IA Part 39, 60 Centre Street - Room 208 on March 14, 2012 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: January 5, 2012

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.