

**Femme Fatale, Inc. v Cleary**

2013 NY Slip Op 31573(U)

July 12, 2013

Supreme Court, New York County

Docket Number: 602092/09

Judge: Barbara R. Kapnick

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

PRESENT: BANBARA R. KAPNICK

PART 39

Index Number : 602092/2009

FEMME FATALE INC.,

INDEX NO. 602092/09

vs

CLEARY, EMMA

MOTION DATE \_\_\_\_\_

Sequence Number : 007

MOTION SEQ. NO. 007

DISMISS ACTION

MOTION CAL. NO. \_\_\_\_\_

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying memorandum decision

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

Dated: 7/12/13

[Signature]

Check one:  FINAL DISPOSITION

[Signature] BANBARA R. KAPNICK J.S.C.

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: IA PART 39**

-----X  
FEMME FATALE, INC., individually and as  
Sole Shareholder of THE MOTT GROUP LTD.  
and FREDERICK LOH and LEWIS BLACK as  
shareholders of FEMME FATALE INC.,

**DECISION/ORDER**  
Index No. 602092/09  
Motion Seq. No. 007

Plaintiffs,

- against -

EMMA CLEARY,

Defendant.

-----X  
**BARBARA R. KAPNICK, J.:**

Before this Court are plaintiff Lewis Black's ("Black") motion  
for summary judgment<sup>1</sup> dismissing all defendant's counterclaims

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<sup>1</sup> Following discovery and filing of the Note of Issue on  
February 4, 2011, Black, on or about April 11, 2011, filed a  
motion to dismiss the counterclaims pursuant to CPLR 3211 (a) (1)  
and (a) (7). Subsequently, Black submitted an affidavit in  
support of his motion, which stated that it was meant to be in  
support of his motion for summary judgment. Cleary did not  
object, and treated the motion as one for summary judgment in  
her opposition and cross-motion papers.

It is permissible for a Court to convert a motion to dismiss  
to one for summary judgment on notice to the parties, where the  
parties have ample evidence to support their contentions (see  
*Four Seasons Hotel v Vinnik*, 127 AD2d 310, 318 [1st Dept 1987]).  
In this case, affidavits, deposition transcripts and other  
matters outside the pleadings were presented to the Court. On  
October 19, 2011, the Court heard oral argument on the motion,  
and it made clear its intention to treat the motion to dismiss as  
a summary judgment motion pursuant to CPLR 3212. The Court found  
that the parties were deliberately charting a course for summary  
judgment (see *Ubaydah v State Farm Mut. Auto. Ins. Co.*, 8 AD3d  
984 [4th Dept 2004]; *Flores v Las Americas Communications*, 218  
AD2d 595 [1st Dept 1995], *lv to app disp in part, den in part* 87  
NY2d 1051 [1996]).

asserted against him, and defendant Emma Cleary's cross-motion, which seeks the denial of plaintiff's motion, and further requests an order holding plaintiffs Frederick Loh ("Loh") and Femme Fatale, Inc. ("Femme Fatale") in default, based on their failure to retain counsel pursuant to this Court's Order dated October 7, 2010.

Black and Loh claim damages on their own behalf, and on behalf of Femme Fatale, a company created by defendant Emma Cleary ("Cleary"), a former model, club promoter and manager of the corporate plaintiff. Cleary incorporated the Company in 2006 to operate an upscale exclusive night club/restaurant. At the time of Femme Fatale's formation, Cleary was the sole owner. Subsequently, Black and Loh became investors and, they allege, also shareholders of the Company.<sup>2</sup> Cleary was ousted as Femme Fatale's managing member on June 19, 2009.

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<sup>2</sup> Cleary insists that Black is not a Femme Fatale shareholder because stock certificates were never issued to him. However, under New York law, the failure to issue a stock certificate is ministerial, and does not vitiate the equity interest created upon the execution of a subscription agreement and payment in full of the subscription price (see e.g. *Van Schaick v Mackin*, 129 App Div 335 [1<sup>st</sup> Dept 1908]; *Stull v Terry & Tench, Inc.*, 81 NYS2d 43 [City Ct, NY Co 1948][one entering into valid stock subscription agreement becomes stockholder with all consequential rights and liabilities]).

Plaintiffs asserted nine causes of action in their Complaint against Cleary for: conversion and misappropriation (first cause of action), breach of fiduciary duties (second cause of action), breach of contract (third cause of action), breach of the implied covenant of good faith and fair dealing (fourth cause of action), fraud and misrepresentation (fifth cause of action), unjust enrichment (sixth cause of action), and "disparagement" (ninth cause of action). Plaintiffs also seek both a preliminary and permanent injunction (seventh cause of action), and the imposition of a constructive trust (eighth cause of action). In her Verified Answer with counterclaims, Cleary interposed eight affirmative defenses and 14 counterclaims against plaintiffs for: fraud and fraudulent inducement (first and second counterclaims), rescission based upon duress (third and eighth counterclaims), rescission based upon unilateral and bilateral mistake and unconscionability (fourth through seventh counterclaims), conversion (ninth counterclaim), breach of fiduciary duty (tenth counterclaim), corporate waste (eleventh counterclaim), unjust enrichment (twelfth counterclaim), defamation (thirteenth counterclaim) and an accounting (fourteenth counterclaim).

### **Background**

On September 8, 2006, Cleary incorporated Femme Fatale via an internet company that specialized in business formation services.

She planned to open a first class lounge and restaurant. Absolutely necessary to the realization of this dream were an actual space and a liquor license. Utilizing Company funds in July 2007, Cleary acquired the leasehold interests of the Mott Group, Ltd. (the "Mott Group"), the former tenant and operator of the Double Happiness Club, located at 173 Mott Street.

The space required extensive and costly renovation. Cleary estimated a budget of \$1.2 million for completion of the renovation project. Loh, a licensed broker-dealer employed in the financial industry, and a friend, offered to provide start-up capital for the renovation work and to find potential investors. From September 2006 until June 2009, Loh, the Company's acting president and board director, invested approximately \$660,000 in Femme Fatale.

In late 2007, Cleary, through her then attorney, Terrence Flynn, Jr., prepared and filed Femme Fatale's application for a retail liquor license with the New York State Liquor Authority ("SLA"), on which Loh appeared solely as a lender. She obtained a temporary permit, but the project was staunchly opposed by the local community board, and upon the advice of her attorney, Cleary withdrew her application. Cleary then contacted the Mott Group to discuss Femme Fatale's purchase of their major asset, their liquor license.

Plaintiffs allege that in December 2007, without their authorization or knowledge, Cleary submitted a second application to the SLA in the name of the Mott Group. She sought a change in the corporate name, and identified herself as the sole shareholder and corporate principal. Following the SLA's approval of the corporate transfer, Cleary became the sole applicant for the liquor license. Sometime in 2008, Femme Fatale ran out of operating capital. At this point, Loh refused to continue funding the project.

On January 25, 2008, Cleary, purportedly acting on behalf of Femme Fatale, and using almost \$400,000 in Company funds, entered into a rider to the prior Asset Purchase Agreement in which the asset purchase transaction was converted into a share acquisition transaction, resulting in the conversion of all shares of the Mott Group into the name of Femme Fatale. Plaintiffs allege that at some point subsequent to the execution of the rider, Cleary transferred those share certificates into her personal name.

In July 2008, Black was introduced to Cleary by a mutual friend, and she approached him about investing in her project. Cleary sent Black a copy of an Offering Plan that was prepared for

potential investors, as well as Femme Fatale's subscription agreement and operating agreement. The Offering Plan included proposed financial models, a description of the business plan, time lines, proposed menus, design concepts, press releases and press coverage, and a model Subscription Agreement for Membership Equity Investment in Femme Fatale (the "Subscription Agreement"). Under the terms of the Offering Plan, "the management of [the night club] and running of day-to-day operations [would] be conducted by Cleary and her management staff." Following receipt of the Offering Plan, and after meeting with Loh, Cleary and Franz Moncada, who had been hired by Cleary to raise venture capital and to oversee and manage investor relations, Black agreed to invest approximately \$200,000. Black alleges that at the time he met with Cleary and the others, he inquired about the ownership of the lease, the acquisition of a liquor license, and the schedule for renovating and completing the club. Black alleges that Cleary never informed him that, despite purchasing the assets of the Mott Group with the funds of Femme Fatale, she had caused the shares of the Mott Group to be issued in her name individually. Black further alleges that Cleary never informed him that she held a liquor license in her own name. Cleary, however, contends that both Loh and Black were aware of this arrangement, and approved of it.

On August 7, 2008, Black executed the Subscription Agreement, which expressly acknowledges that Black's funds were to be accepted as an equity investment in Femme Fatale. Section 1.1 provides that Black subscribes to, and agrees to purchase, subject to an acceptance letter, equity units at \$32,787.89 per equity unit. Under the terms of the Subscription Agreement, Black was given a 10% equity interest in Femme Fatale. As an Investor Member, however, Black had no right to participate in the management of the Company. He also agreed to be bound by the parties' agreement. Black invested an additional \$150,000 pursuant to the terms of an amended Subscription Agreement, dated February 19, 2009. Thereafter, Black invested an additional \$75,000, and received 11.35 shares and a pro rata equity interest of 18.607% in Femme Fatale.

Black and Cleary also executed an Operating Agreement, dated August 7, 2008. The Operating Agreement sets forth the terms of ownership, management for the Company, and transfer of interests in the Company. By its terms, all business of the Company was to be conducted under the name "Comé" or any other name that the members would determine (Operating Agreement, ¶ 3[A]). In the event that any member's ownership of the Company jeopardized either the securing, continuation or renewal of the liquor license for the business, or if the member was not approved by the SLA, the Company

was to purchase that member's interest in proportion to the amount of monies invested in the Company. The parties agreed that Cleary would become the Managing Member of Femme Fatale.

Cleary was to operate the business from her apartment, located at 143 Mulberry Street. She would be entitled to a management fee equal to 5% of gross sales receipts per fiscal year. Pursuant to Section 10 (J) of the Operating Agreement, she could only be removed "(1) by written consent of greater than fifty percent (50%) of the Members for cause if [she] shall have failed and continues to not substantially perform . . . [her] duties for thirty (30) days after a written demand for performance is delivered to [her] on behalf of the Company . . ." or "(2) by written consent of any individual and/or any combination of Members acting as a group or simultaneously for cause if the Managing Member shall have engaged in (i) any egregious misappropriation of funds, properties or assets of the Company . . ." or "(ii) any malicious damage or destruction of any property or assets of the Company, . . ." or "(iii) any intentional act of fraud, malfeasance or willful violation of any . . . law relating to the operation of Com  . . ." Membership interest in the Company was to be evidenced by a certificate of membership issued by the Company (Operating Agreement,   18). Any disputes related to the Operating Agreement were to be arbitrated in New York County (*Id.*,   20). Further, no annual meeting of

Members was required (*Id.*, ¶ 10[F]). Notwithstanding this provision, a meeting of all Members could be called by the Managing Member or "by Members holding an eighty percent (80%) of the Percentage Interests of the Company" (*Id.*). The Operating Agreement also contained a merger clause, which provides that "[t]his Agreement sets forth the entire agreement of the parties hereto with respect to the subject matter hereof. It is the intention of the Members that this Agreement shall be the sole source of agreement of the parties". (*Id.*, ¶ 22[D]).

On February 19, 2009, Black signed an Amendment to the Operating Agreement. The Amendment was referred to as the "New Amendment B," and the original Operating Agreement (dated August 7, 2008) was referred to as the "Original Agreement." The Amendment was to supplant and replace the Black Amendment B dated September 22, 2008. The Amendment provides, in relevant part, as follows:

This New Amendment B, together with the Original Agreement, constitutes the final, complete and exclusive statement of the agreement between the parties pertaining to their subject matter and supercedes any and all prior and contemporaneous understandings or agreements of the parties. All other terms and conditions of the Original Agreement shall remain in full force and effect.

\* \* \*

No supplement, modification or amendment of this New Amendment A [sic] shall be binding unless it is in writing and signed by both parties

(New Amendment B, ¶¶ 4-5).

As compensation for her efforts in running the business, Cleary was given approximately 1,547 shares, which amounted to approximately 25% of all outstanding shares.<sup>3</sup>

The initial opening date for the restaurant-club was in the Fall of 2008. However, the construction phase was marked by significant delays and budget overruns, swelling the budget to \$2.3 million. On September 23, 2008, the New York City Department of Buildings ("DOB") issued a full stop work order, halting construction at the work site. Two months later, DOB rescinded the stop work order. The renovation work, which was originally estimated to take six months, took two years to complete. Cleary notes that there were insufficient funds to complete the renovation, as well as unforeseen structural problems that led to delays.

Black invested an aggregate amount of \$650,000 into Femme Fatale. On February 19, 2009, Black and Cleary, as Managing Member, executed a Management Agreement. The Management Agreement acknowledged the existence and obligations of the prior Operating Agreement. However, the Management Agreement also revised the management voting provisions and created a "Ruling Body" with

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<sup>3</sup>While Cleary claims that Black and Loh are not shareholders or directors, she is also insistent that she alone owns, at a minimum, 30% of Femme Fatale. She does not, however, explain who holds the remaining 70%.

"Executive Members" (*Id.* at 1). The agreement defined Black as a "Selected Investment Member," who together with Cleary would be considered an Executive Member. Each Executive Member (i.e., Cleary and Black) would have one vote and each would hold 50% of "the authorized vote of the Ruling Body."

Allegedly concerned with Cleary's handling of the construction work and budget overruns, Black, Loh and Cleary then executed a Management Oversight Agreement on March 12, 2009. This Agreement prohibited Cleary from making any management decisions without the approval of Black and Loh, and it assigned the day-to-day and Company-related decisions to Loh and Black. By its terms, Cleary was not to receive a salary or any monies from the Company until after the restaurant-lounge opened to the public and began operating. It was to be reviewed "on the 90<sup>th</sup> day following the opening of business of the premises located at 173 Mott Street ... and continue to be reviewed every 90 days there after" until the agreement was terminated. This Agreement also contains a merger clause, which provides that "[t]his Agreement sets forth the entire agreement of the parties hereto with respect to the subject matter hereof. It is the intention of the Executive Members that this Agreement shall be the sole source of agreement of the parties ..."  
(*Id.* at 4).

While Cleary maintains that she was bullied into signing the Management Oversight Agreement, and that she did so without the assistance of an attorney, plaintiffs have submitted a bill from Ravi Sharma, Esq., with entries for the time period of February 27, 2009 and March 17, 2009, which references meetings, correspondence and discussions with Cleary regarding the Management Agreement and the Management Oversight Agreement. Nonetheless, Cleary alleges that Sharma was actually Femme Fatale's counsel.

Black alleges that Cleary refused to comply with the requirements of the Management Oversight Agreement, and refused to answer his inquiries about the business, time table, and funding. She also allegedly disappeared for 30 days during the period that the restaurant was set to open. Loh and Black commenced an internal investigation, and learned that Cleary had allegedly (1) paid herself more than \$100,000 in Company funds; (2) hid the fact that, despite her representation, Femme Fatale did not have a liquor license in its name; (3) failed to maintain corporate records; and (4) "bungled" the construction management.

By June 14, 2009, there were eleven investors and two lenders (Bernard Cleary, Emma's father, and John Yu) who had contributed approximately \$2.3 million to the project. A special shareholders meeting was held on June 19, 2009. At that meeting a vote was taken, and Cleary was ousted from the Company for alleged

misappropriation and embezzlement of Company funds. Despite having received notice of the meeting, Cleary initially waived her right to attend in writing. However, by email dated June 16, 2009, she attempted to revoke the waiver, but was allegedly advised by plaintiffs that the waiver was not revocable after it was signed. Thereafter, she was informed by Loh, as acting president and director of Femme Fatale, in a letter<sup>4</sup> dated June 19, 2009, that her ownership interest was forfeited. She was asked to return Company files and the Mott Group share certificates to the board. However, Cleary argues that the notice of termination letter has no legal effect since Black and Loh are not officers, directors or shareholders of Femme Fatale. In any event, on July 6, 2009, the shareholders of Femme Fatale voted to remove Cleary from the board of directors.

After her termination, Cleary allegedly sought to extort a cash payment for the return of the converted shares in the Mott Group, and in an effort to retaliate, she surrendered to the SLA the liquor license for Femme Fatale that was in her name. Black also alleges that she attempted to frustrate Black and Loh's ability to operate the business. In fact, she contacted the Company's bank and attempted to prevent Black's access to the Company's bank accounts. She also allegedly deleted corporate files and records in Moncada's

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<sup>4</sup>The letter was entitled "Notice of Termination as Officer and Suspension as Director of Femme Fatale, Inc."

e-mail server, and changed the Company's address at the post office, diverting Company mail to her home address.

On July 7, 2009, plaintiffs filed the Complaint in this action. The Complaint alleges that, between September 2006 and June 2009, Cleary engaged in breaches of trust and other actionable conduct, including using the funds of Femme Fatale to acquire shares of the Mott Group. Additionally, the Complaint alleges that Cleary (1) issued corporate credit cards to unaffiliated individuals; (2) converted and embezzled funds for her own personal use, including rent payments and other personal expenses; (3) paid herself an unauthorized and impermissible salary; (4) destroyed corporate files and e-mails; and (5) engaged in gross mismanagement of the Company. The premises were allegedly shuttered in October 2009 pending plaintiffs' application for a liquor license. Cleary has been inundated with demands for payment from creditors to the premises because she signed personal guarantees on most vendor accounts and for the lease.

#### **The Parties' Arguments**

In his motion for summary judgment, Black argues that almost all of Cleary's counterclaims are barred by the agreements that she signed. He contends that their business dispute involves the interpretation of several agreements, and that a contract should be interpreted to give effect to the mutual intent of the parties at

the time of contracting. Cleary argues, however, that the circumstances surrounding the formation of the contested agreements are at the heart of the current dispute. In essence, Cleary's claims are that she was misled into signing the agreements, and did not sign them voluntarily.

### Discussion

#### A. Summary Judgment Standard

In order to sustain a motion for summary judgment, the moving party must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 [1st Dept 2010]). The motion must be supported by an affidavit from a person having knowledge of the facts, by a copy of the pleadings and by other available proof, such as depositions (see *Craft v Whittmarsh*, 83 AD3d 1271, 1273 [3d Dept 2011] [hearsay evidence that is inadmissible at trial is insufficient to defeat summary judgment motion unless accompanied by some additional competent evidence or an excuse for the failure to present proof in admissible form]; see also CPLR 3212 [b]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324). "[M]ere conclusions, expressions

of hope or unsubstantiated allegations or assertions are insufficient" (see *Zuckerman v City of New York*, 49 NY2d 557, 558 [1980]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 348 [1st Dept 1998]).

## **B. Black's Motion for Summary Judgment to Dismiss Counterclaims**

### *Fraud and Fraudulent Inducement*

The first and second counterclaims allege fraud and fraudulent inducement. To state a cause of action for fraud, a plaintiff must allege a "'representation of a material existing fact, falsity, scienter, deception and injury'" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995], quoting *Channel Master Corp. v Aluminium Ltd. Sales Corp.*, 4 NY2d 403, 407 [1958]; *Pope v Saget*, 29 AD3d 437, 441 [1st Dept 2006]), *lv den* 8 NY3d 803 [2007]). Each of these essential elements must be supported by factual allegations sufficient to satisfy CPLR 3016 (b), which requires, in the case of a cause of action based on fraud, that "the circumstances constituting the wrong shall be stated in detail".

The substance of Cleary's counterclaims for fraud and fraudulent inducement is that Black made certain affirmative oral misrepresentations, as well as failed to make certain disclosures to her, which led to her executing the contested agreements. Cleary refers specifically to three representations of material facts as

the basis for her fraud-related claims: (1) Loh and Black's representation that they intended to assume management of the Company only temporarily; (2) their representation that they intended to take action to preserve the value of her interest in the Company and to utilize the most effective method of making the Company operational with a full liquor license; and (3) their representation that they would return to her all of her management interest within six months of March 2009 or when the Company opened for business, whichever came sooner (Verified Answer, ¶ 95). According to Cleary, Black and Loh lacked the intent to comply with these representations when made. Further, she asserts that Black barred her from obtaining counsel to review any of the agreements.

Cleary also argues that the "special facts" doctrine obliged Black to disclose his intent to oust defendant and to seize her equity interests and management rights because he had superior knowledge about his intention to erase Cleary's involvement with the restaurant-lounge.<sup>5</sup>

Black merely argues that these fraud counterclaims are essentially just claims based on allegations giving rise to breach

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<sup>5</sup>The Court notes that the first two counterclaims are for fraud cases and fraudulent inducement, not fraudulent concealment.

of contract causes of action, and that "a contract action cannot be converted to one for fraud merely by alleging that the contracting party did not intend to meet its contractual obligations." *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 614 (1994).

Moreover, the provisions of the contested agreements contradict the oral representations allegedly made by plaintiffs to Cleary, particularly the clause in the Management Oversight Agreement that clearly states that it was to be reviewed on the 90<sup>th</sup> day following the opening of business at the premises located at 173 Mott Street, and that it would continue to be reviewed every 90 days thereafter until the agreement was terminated.

In addition, the two contested agreements do not contain any language related to "reliance," but rather contain merger clauses requiring all modifications to be in writing, and an acknowledgment that the agreements constitute the "final, complete and exclusive statement of the agreement between the parties pertaining to the subject matter and supercede[s] any and all prior and contemporaneous understandings or agreements of the parties." This is a specific disclaimer, and Cleary cannot now claim that she relied on oral representations, which she previously acknowledged would not be relied upon by her. (See *Danann Realty Corp. v Harris*, 5 NY2d 317 [1950]).

In *New York Univ v Continental Ins. Co.*, 87 NY2d at 318, the Court of Appeals stated that “[g]eneral allegations that [a] defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim” of fraud. The focus is on whether the representation is one of present fact or future intent.

In this case, Cleary’s claims of misrepresentations are not misrepresentations of present facts, but rather relate to plaintiff Black’s intentions as to how he would act or perform in the future.

Accordingly, defendant’s first and second counterclaims for fraud and fraudulent inducement are dismissed.

#### *Rescission Based on Duress*

Turning now to the third and eighth counterclaims for rescission based on duress, Cleary claims that her equity interests and management rights were permanently transferred to Black under duress, and, therefore, that the contested agreements should be rescinded.

Black argues that Cleary’s duress claim is insufficient as a matter of law, and that her allegations fail to identify any extraordinary circumstances that would support her application to rescind the subject agreements. Cleary first claims that she was

subjected to a barrage of personal and public attacks and threats. However, no dates or times are provided. In addition, she contends that she was fearful that her dream of opening up the restaurant lounge would not be realized if she failed to sign the contested agreements.

A party seeking to rescind a contract on the basis of duress carries a heavy burden (see *International Halliwell Mines, Ltd. v Continental Copper & Steel Indus., Inc.*, 544 F2d 105, 108 [2d Cir 1976]). It is not sufficient simply to show that one party to a contract was at a decided economic disadvantage (see *Gubitz v Security Mut. Life Ins. Co. of N. Y.*, 262 AD2d 451 [2d Dept 1999]; *Orix Credit Alliance v Hanover*, 182 AD2d 419 [1st Dept 1992] ["financial or business pressure of all kinds, even if exerted in the context of unequal bargaining power, does not constitute economic duress"]). Instead, Cleary must show that she was compelled to agree to the contract's terms by means of a a wrongful threat which precluded the exercise of her free will (see *805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 (1983); *Stewart M. Muller Constr. Co. v New York Tel. Co.*, 40 NY2d 955, 956 [1976]); *Wujin Nanxiashu Secant Factory v T-Well Intern. Corp.*, 14 AD3d 352 [1st Dept 2005]; *Geller v Esikoff*, 165 AD2d 863 [2nd Dept 1990]).

Cleary's counterclaims fail to plausibly allege the existence of either element, or to raise a triable issue of material fact. New York courts have found that "self-imposed, undisclosed and subjective fears do not constitute an act of duress ... cognizable in law" (*Joseph F. Egan, Inc. v City of New York*, 17 NY2d 90, 98 [1966]; see also *Bank Leumi Trust Co. of N.Y. v D'Evori Intl.*, 163 AD2d 26, 31 [1st Dept 1990]). While Cleary alleges that Black threatened to seek a forensic audit of the Company's finances, "the threatened exercise of a legal right does not amount to economic duress" (*Friends Lbr. v Cornell Dev. Corp.*, 243 AD2d 886, 888 [3d Dept 1997]; see also *Bechard v Monty's Bay Recreation, Inc.*, 35 AD3d 1131, 1132 [3d Dept 2006]). Cleary further alleges that, as she asked for additional funds from Black, he demanded that she enter into additional agreements with him, and he began to demand greater control of the Company's management. However, these allegations fall short of alleging a wrongful threat.

Moreover, Cleary's self-serving affidavit dated July 23, 2009, submitted in opposition to plaintiffs' original Order to Show Cause for a temporary restraining order and preliminary injunction, plainly contradicts her deposition testimony, and is thus insufficient to raise a triable issue of fact (*Mayancela v Almat Realty Development, LLC*, 303 AD2d 207, 208 [1st Dept 2003]; *Perez v Bronx Park S. Assoc.*, 285 AD2d 402, 404 [1<sup>st</sup> Dep't 2001], *lv denied* 97 NY2d 610 [2002]). In her affidavit dated July 23, 2009, Cleary

affirms that in "a desperate attempt to open the project, I conceded to the demand to sign a management agreement with Black and Loh, under Black's imminent threat of commencing legal action and initiating a forensic audit which would bring the project to a complete standstill." (*Id.* ¶ 62). However, in her deposition testimony of January 19, 2011, Cleary testified that Black never threatened to withhold additional funds if she did not sign the Management Oversight Agreement. (Tr. 230: 21-26, Jan. 19, 2011)

Further, the facts fail to raise any issue to support Cleary's allegation that she was so "bereft" of her free will that she was forced to sign the contested agreements (see *Benjamin Goldstein Productions, Ltd. v Fish*, 198 AD2D 137, 138 [1st Dept 1993][there must be "a wrongful threat precluding the exercise of free will" to amount to duress]). Moreover, with actual knowledge of the terms of the contested agreements, Cleary accepted and made use of the benefits accruing to her and to Femme Fatale under the agreement, thereby implicitly ratifying the terms of the agreement (see *Weil, Gotshal & Manges LLP v Fashion Boutique of Short Hills*, 56 AD3d 334 [1st Dept 2008]). Since she failed to promptly repudiate the terms of the contested agreements, the third and eight counterclaims for rescission based on duress are dismissed.

### Rescission Based on Mistake

Cleary's fourth, fifth and sixth counterclaims,<sup>6</sup> seeking rescission of the contested agreements based on the doctrines of bilateral or unilateral mistake, are also dismissed. Cleary contends that she entered into the contested agreements eliminating her equity interests and management rights based upon the parties' mutual mistake, and her own unilateral mistake, related to the import and duration of any transfer of her interests and rights to Black.

New York courts will rescind an agreement upon a showing of (1) one party's unilateral mistake resulting in the unjust enrichment of the other party (see *Cox v Lehman Bros., Inc.*, 15 AD3d 239, [1st Dept 2005]), or (2) a bilateral mistake of a material fact, the idea being that "the agreement as expressed, in some material respect, does not represent the 'meeting of the minds' of the parties" (*Matter of Gould v Board of Educ. of the Sewanhaka Cent. High Sch. Dist.*, 81 NY2d 446, 453 [1993]; *Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175, 179 [1st Dept 1998], *lv denied in part, disp in part* 92 NY2d 1000 [1998]). Unilateral mistakes can support a claim for rescission only if the specific mistake was coupled with some type of fraud and inequitable conduct (see e.g. *Brandwein v Provident Mutual Life Ins. Co. of Phila*, 3 NY2d 491, 496 [1957]).

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<sup>6</sup>The fifth and sixth counterclaims are identical.

In this case, the mistake is unidentifiable. Cleary only alleges that she did not understand the future consequences of the agreements. This allegation cannot be described as a mutual or unilateral mistake, and cannot be used to rescind the contested agreements (see e.g. *Lemus v Manhattan Car Wash, Inc.*, 2010 WL 1372705, \*9 [SDNY 2010]). Further, since summary judgment dismissing the fraudulent inducement counterclaim was already granted, Cleary is precluded from asserting a claim based on fraudulently induced unilateral mistake. Accordingly, Cleary's fourth, fifth and sixth counterclaims based on unilateral or bilateral mistake are dismissed.

#### *Rescission Based on Unconscionability*

Next, the Court finds that there are no triable issues of fact raised by defendant's seventh counterclaim for rescission based on unconscionability, which is similar to Cleary's duress claims. Cleary contends that Black engaged in unconscionable behavior when he forced her to sign the Management Agreement and the Management Oversight Agreement after offering her onerous terms, i.e., either sign the agreement or receive no further capital for the Company. In response, Black contends that Cleary offers no evidence that his conduct prior to executing the two agreements was unconscionable.

The use of a theory of unconscionability "provides a defense for a party opposing enforcement of a contract or a cause of action

for rescission of a contract" (*Bevilaque v Ford Motor Co.*, 125 AD2d 516, 519 [2d Dept 1986]). It protects against unfair bargains and unfair practices. In the case of *Williams v Walker-Thomas Furniture Co.*, 350 F2d 445, 449 (DC Cir 1965), the Court wrote: "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." Unconscionability is determined by the circumstances existing when the contract was made, the relative bargain to the parties at the time the contract was made, the relative bargaining power of the parties, and the actual terms of the contract (*Id.* at 449-450).

"Absent some violation of law or transgression of a strong public policy, the parties to a contract are basically free to make whatever agreement they wish, no matter how unwise it might appear to a third party" (*Rowe v Great Atlantic & Pacific Tea Co.*, 46 NY2d 62, 67-68 [1978]).

While the terms of the contract appear to favor Black, they are not so one-sided or unreasonable as to constitute unconscionability (*Blake v Biscardi*, 62 AD2d 975, 976 [2<sup>nd</sup> Dep't 1978]). Accordingly, this counterclaim must also be dismissed.

### *Conversion*

Cleary's ninth counterclaim is for conversion, which is the unauthorized assumption or exercise of control over money or personal property belonging to someone else, which interferes with that other person's right of possession (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). Cleary alleges that Black and Loh have exercised and retained dominion and control over her majority equity interests which rightfully belong to her, but which were diverted by Black and Loh.

Defendant Cleary has alleged an ownership interest in the Company, which was allegedly stripped away from her by the plaintiffs. Since there is a sharp dispute as to who owns what percentage of the shares of *Femme Fatale*, this cause of action should not be dismissed at this time.

### *Breach of Fiduciary Duty*

In her tenth counterclaim, Cleary alleges that if plaintiffs Black and Loh are found to have been legitimately exercising power as the directors and officers of the Company, they have done so in breach of their fiduciary duties to the Company and to her. Black argues that Cleary has failed to state a cognizable claim for breach of fiduciary duty and that she must assert this claim in the form of a derivative action brought in the right of the Company pursuant to BCL § 626.

Under New York law, a "fiduciary duty may be created by the express provisions of a contract, or by factors such as the length of the relationship of the parties, their financial interdependence, and their sharing of confidential and proprietary information" (*ADT Operations v Chase Manhattan Bank*, 173 Misc 2d 959, 963 [Sup Ct, NY Co 1997][citing *Zimmer-Masiello, Inc. v Zimmer, Inc.*, 159 AD2d 363, 365 [1<sup>st</sup> Dep't 1990], *lv dismiss* 76 NY2d 772]). The rule embraces both technical fiduciary relations and those informal relations which exist whenever one person trusts in, and relies upon, another (see e.g. *P. Chimento Co., Inc. v Banco Popular de Puerto Rico*, 208 AD2d 385, 386 [1st Dept 1994]).

Certainly, "[a]n individual shareholder has no right to bring an action in his [or her] own name and in his [or her] own behalf for a wrong committed against a corporation" (*General Motors Acceptance Corp. v Kalkstein*, 101 AD2d 676 [1<sup>st</sup> Dep't 1984]); that is a derivative cause of action belonging to the corporation and not to Cleary individually (see *Elghanian v Harvey*, 249 AD2d 206, 207 [1<sup>st</sup> Dep't 1998]).

As to breach of fiduciary duty by Black to Cleary, "beyond what may be memorialized in writing, a court will look to whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge" (*Wiener v Lazard Freres & Co.*, 241

AD2d 114, 122 [1st Dep't 1998]). Moreover, a defendant and an individual plaintiff, as shareholders in a close corporation, owe fiduciary duties to one another (see *Brunetti v Musallam*, 11 AD3d 280 [1st Dep't 2004]).

Since there is a disputed factual issue over who holds what shares in the Company, it would be inappropriate to dismiss this counterclaim asserted as to plaintiff Black individually on summary judgment.

#### *Corporate Waste*

Cleary asserts in her eleventh counterclaim that Loh and Black have engaged in acts that constitute looting, waste and diversion from the Company of corporate opportunities solely for their benefit and to the detriment of the defendant.

However, diversion of a corporate opportunity gives rise to a derivative action only (see *Higgins v New York Stock Exchange, Inc.*, 10 Misc3d 257, 267 [Sup Ct, NY CO 2005]; see also *Glenn v Hoteltron Systems, Inc.*, 74 NY2d 386 [1989]).

Therefore, the eleventh counterclaim must be dismissed.

### *Unjust Enrichment*

A counterclaim for unjust enrichment is stated where a benefit is bestowed by defendant, and the plaintiffs will obtain such benefit without adequately compensating the defendant (see *Sergeants Benevolent Assn. Annuity Fund v Renck*, 19 AD3d 107, 111 [1st Dept 1998]). However, a claim for unjust enrichment is a quasi-contract claim that can only be invoked in the absence of a valid, enforceable contract (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389 [1987]; *Cornhusker Farms v Hunts Point Coop. Mkt.*, 2 AD3d 201, 206 [1st Dept 2003] ["(A) valid and enforceable written contract precludes recovery on a theory of unjust enrichment"]).

Accordingly, the twelfth counterclaim for unjust enrichment is dismissed because there is an enforceable agreement that governs the rights and obligations of the parties and the terms of the subject matter at issue.

### *Defamation*

The thirteenth counterclaim is for defamation. The elements of a defamation cause of action are a "false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Dillon*

*v City of New York*, 260 AD2d 34, 38 [1st Dept 1999]). Special harm or special damages contemplates "the loss of something having economic or pecuniary value" [internal citations omitted]" (see *Lieberman v Gelstein*, 80 NY2d 429, 434-435 [1992]).

The words alleged to constitute the defamation must be construed in the context of the entire statement "and if not reasonably susceptible of a defamatory meaning, they are not actionable" (*Dillon v City of New York*, 260 AD2d at 38). Defamation per se in this case would require that Cleary prove that Black's statements have hurt her trade, business or profession, or charged her with a serious crime. (See *Yonaty v Mincolla*, 97 AD3d 141, 143-44 [3<sup>rd</sup> Dep't 2012]).

New York courts require that pleadings state (1) the individual who made the alleged defamatory statement; (2) the individuals to whom the alleged defamatory statements were made; (3) the actual words uttered; and the date, time and place of the alleged publication (see e.g. *Vardi v Mutual Life Ins. Co. Of New York*, 136 AD2d 453, 455 [1st Dept 1988]).

Cleary alleges that Black and Loh, jointly and separately, made malicious and intentional statements to the press, to employees and to customers, from March 2009 to the time the Answer was filed on October 6, 2009, regarding her truthfulness and integrity, her

abilities to promote and manage a nightclub or restaurant, and that, as a result, her reputation has been damaged. Specifically, she claims that on June 29, 2009, Black told investors that Cleary was "treating the investors money as [her] own personal piggy bank ... and breaking the law." Next, she alleges that on July 2, 2009, Black was quoted in New York Magazine as stating that Cleary "mismanage[d], misappropriat[ed] funds, and mislead the investors." She also alleges that on June 12, 2009, Loh and Black stated, in company e-mails, that Cleary was "incapable of fund-raising" and that "[they] were responsible for raising \$2 million." Cleary contends that all these statements are false, and that Black made the statements with knowledge of their untruthfulness, and with the intent to cause injury to her professional reputation and abilities.

"[A] qualified privilege arises when a person makes a bona fide communication upon a subject in which he or she has an interest, or a legal, moral, or social duty to speak, and the communication is made to a person having a corresponding interest or duty" [internal quotation marks and citations omitted]" (*Garson v Hendlin*, 141 AD2d 55, 60 [2d Dept 1988], *app den* 74 NY2d 603 [1989]; *see also Byam v Collins*, 111 NY 143 [1888]). Further, "[a]n expression of pure opinion is not actionable. It receives the Federal constitutional protection accorded to the expression of ideas, no matter how vituperative or unreasonable it may be" (*Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]).

At this stage, the Court must consider all reasonable inferences from Cleary's allegations, and if there is any doubt, it must be resolved in her favor. Nonetheless, the Court finds that the statement made on June 12, 2009 about Cleary's fund-raising abilities is privileged because it was made within the common interest that Black shared with other investors in *Femme Fatale*. Moreover, the statement was a statement of opinion (*Jaszai v Christie's*, 279 AD2d 186, 188 [1st Dept 2001][expressions of opinions are cloaked with the privilege of speech afforded by the First Amendment]).

However, the June 29, 2009 statement alleges that Cleary was taking investors' money and breaking the law, which would constitute defamation per se. Similarly, the July 2, 2009 statement reported in *New York Magazine* alleges that she misappropriated funds and misled investors, which could hurt her standing in her profession.

Accordingly, Black's motion for summary judgment dismissing the thirteenth counterclaim for defamation as to the statements of June 29 and July 2, 2009 is denied.

#### *Accounting*

Lastly, as her fourteenth counterclaim, Cleary claims that she is entitled to an accounting from the Company of all expenses and collections for the period from March 2009.

While the potential fiduciary relationship between Black and Cleary could support defendant's claim for an accounting (see *Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 [1<sup>st</sup> Dep't 1997]), to be entitled to an equitable accounting, a party must demonstrate that she has no adequate remedy at law, which defendant has not done in this case (see *Kastle v Steibel*, 120 AD2d 868, 869 [1<sup>st</sup> Dep't 1986]). Moreover, defendant has not alleged that she demanded an accounting nor that plaintiff refused the demand (see *Unitel Telecard Distribution Corp. v Nunez*, 90 AD3d 568, 569 [1<sup>st</sup> Dep't 2011]); *Kaufman v Cohen*, 307 AD2d 113, 123-124 [1<sup>st</sup> Dep't 2003]).

Accordingly, the fourteenth counterclaim is dismissed.

### **C. Defendant's Cross-Motion for a Default Judgment**

Cleary cross-moves for a default judgment against Loh and Femme Fatale on her counterclaims on the ground that they failed to further appear or to retain counsel after this Court granted the motion by Shelowitz & Associates PLLC to be relieved as counsel to plaintiffs Loh and Femme Fatale, by Order dated October 7, 2010.

The cross-motion is denied without prejudice, since defendant has failed to comply with the requirements of CPLR 3215.

### Conclusion

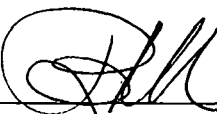
For the above stated reasons, it is hereby

**ORDERED** that plaintiff Lewis Black's motion for summary judgment dismissing defendant Emma Cleary's counterclaims is granted except as to the ninth, tenth and thirteenth counterclaims as specified herein, and defendant's cross-motion for a default judgment is denied without prejudice and it is further

**ORDERED** that counsel are directed to appear for a status conference in IA Part 39, 60 Centre Street, Room 208 on August 14, 2013 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: July 12, 2013

  
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BARBARA R. KAPNICK  
J.S.C.  
**BARBARA R. KAPNICK**  
J.S.C.