SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JUSTICE SHIRLEY WERNER KORNREICH

PRESENT: _____ **PART** 54
Justice

Index Number : 650192/2012
DRAON HEAD, LLC
vs.
ELKMAN, STEVEN M
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE 10/26/12
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 20-25

Answering Affidavits — Exhibits _____ **No(s).** 32-50, 58

Replying Affidavits _____ **No(s).** 52-57

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

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

Dated: 1/22/13

SHIRLEY WERNER KORNREICH J.S.C.
_____, J.S.C.

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

☒ X-MOTION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

DRAGON HEAD, LLC,

Plaintiff,

Index No.: 650192/2012

-against-

DECISION AND ORDER

STEVEN MUNRO ELKMAN, BKC RENAISSANCE, LLC, and DEUTSCHE BANK ALEX. BROWN, A DIVISION OF DEUTSCHE BANK SECURITIES, INC.,

Defendants.

----------X

SHIRLEY WERNER KORNREICH, J.:

In this action, plaintiff, Dragon Head, LLC (Dragon Head), seeks both equitable and money damages for nine causes of action, including breach of contract, as against defendants Steven Munro Elkman (Elkman) and BKC Renaissance LLC (BKCR)(collectively defendants).[1] Defendants move to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and 3211 (a) (7). Dragon Head cross-moves for partial summary judgment on its first and seventh causes of action. As set forth below, this court grants defendants' motion and dismisses the complaint.

I. Background and Procedural History

Barry Kieselstein Cord (Cord), a designer and manufacturer of jewelry and luxury goods, entered into three written agreements with Elkman, a social friend and an investment banker employed at Deutsche Bank. Those agreements form the basis for this lawsuit. Cord verified the complaint as the Managing Member of Dragon Head. In the complaint, Dragon Head alleges that, for valuable consideration, Cord assigned to Dragon Head all his interest in the subject

[1] Defendant Deutsche Bank Alex. Brown, A Division of Deutsche Bank Securities, Inc., was dismissed from this action by a June 14, 2012 order of this court.

agreements and the subject jewelry.

The agreements came about after Cord contacted Elkman by letter dated July 29, 2011. In the letter, Cord explained that he was in an emergency financial situation because he had pawned jewelry of his design in exchange for loans on which he had defaulted or had fallen into arrears. Cord stated that the collateral, the jewelry, was to be sold at auction the following week at a fraction of its value. He proposed that Elkman purchase the pawn tickets and redeem the pledged collateral, which he believed might be valued at more than two million dollars.

The first of the three written agreements between Elkman and Cord is an August 5, 2011 "Purchase and Sale Agreement"(Agreement1). Pursuant to Agreement1, Elkman and Cord agreed that Elkman would pay Cord $25,000 for the rights to Cord's pawn tickets, the secured loans and the pledged collateral, which are all identified in a schedule attached to the agreement. The parties agreed, among other things, that upon redemption of the secured loans and delivery of the pledged collateral to Elkman, Elkman would own the pledged collateral "free and clear of any liens, restrictions or claims of any entity (except as may be imposed in respect of any obligation created by [Elkman] or such successor assign separate and apart from this Agreement and the prior ownership thereof of BC)." Aff. of Elkman in Support of Deutsche Bank's Motion to Dismiss, Exhibit A, § 3 (f).

The second agreement, also dated August 5, 2011, and signed by Elkman and Cord, is identical to Agreement1, except for the purchase price, which is $13,250, instead of $25,000 (Agreement2). The parties signed Agreement2 on September 29, 2011. Both Agreement1 and Agreement2 state that they supercede all prior oral or written agreements between the parties, and both were drawn up with the assistance of counsel.

Elkman redeemed the jewelry for approximately $295,622.70 and, after adding the combined purchase prices under Agreement1 and Agreement2, the total cash cost paid for the jewelry was approximately $333,872.70. All the redemptions and payments were made by Elkman personally and, after BKCR was organized, through BKCR.

The third agreement, and the one that primarily forms the basis for the causes of action set forth in this lawsuit, was entered into by Cord and Elkman on August 23, 2011 (Agreement3). Unlike the other agreements, it was created by the parties without the aid of counsel. The purpose of the third agreement, according to both parties was to "regenerate" the Keiselstein-Cord jewelry brand. The agreement begins: "To whom it may concern." The first sentence states: "I, Barry Cord, have sold redeemable pawn tickets for merchandise belonging to me to Mr. Steven Elkman for the sum of $25,000. This was a distress sale on my part."

The agreement includes the following language:

> The above mentioned merchandise is intended to be reinvested in a new startup company (Newco). The goal is to regenerate the Kieselstein-Cord jewelry brand. In addition, Steven Elkman has brought in and will attempt to bring on board potential/actual additional investors so that Newco can rescue more merchandise in distress to the above effect plus appreciable operating funding.
> It is the intention of Mr. Steven Elkman and Newco to obtain an exclusive right to both manufacture and license Kieselstein-Cord jewelry products. Newco recognizes that Elisabeth A.J. Kieselstein-Cord [Barry's daughter] is the rightful owner of the Kieselstein-Cord marks and intellectual property.
>
> A trust will be formed for Elisabeth Cord where any and all remunerations will flow into. TBD [To Be Decided] will be the administrator of said Elisabeth Cord Trust and accordingly will administer and advise Newco on the use and deployment of the brand marks owned by Elisabeth Cord. For this administration, Barry Cord will receive appropriate executive compensation with the brand holders majority equity interests (90%).
>
> During the course of this engagement, it is understood that should anything happen to Steven Elkman preventing him of carrying the above duties, Barry Cord

> or Elisabeth Cord Trust will have the option to repurchase the above inventory at a 10% premium above the original investment but up to the midpoint between the cost of the goods and wholesale.
>
> Conversely, should anything happen to Barry Cord preventing him of carrying the above duties, Steven Elkman will have the right to sell said merchandise, in the appropriate market place, and redeem his original (and that of other investors) investments, plus at least a 10% premium of the original investment but up to midpoint cost of the goods at wholesale.

Agreement3 at p 1.

In the complaint, verified by Cord, plaintiff alleges that "upon information and belief, BKCR is the new company referenced in the third contract." In his Affidavit in support of defendants' motion, Elkman avers that BKCR was organized on October 6, 2011, and that, after that time, all redemptions of the pawned jewelry were done through BKCR, "to which [he] contributed as a capital contribution the as-yet unredeemed pawn tickets." See Aff. of Elkman, ¶ 13. The managing members of BKCR are Elkman and Angela Ho.

Additionally, there is no proof in any of the materials before the court indicating the creation or management of the Elisabeth Cord Trust. In the complaint, plaintiff alleges that the third agreement intended for a trust to be created for "Barry's daughter (instead, the Plaintiff was formed)." Complaint, ¶ 32 (e).

According to the complaint, subsequent to Agreement3, the parties were unable to agree on "all business issues and needed agreements," and, therefore, the new company was never realized. Plaintiff alleges that the parties to Agreement3 intended to reach agreement in the Fall of 2011 and have the new company funded by Christmas 2011; yet, by Christmas 2011, "having not reached an agreement on all business issues and needed agreements, Barry and Elkman intended and agreed that Barry could conduct international trunk shows in early 2012, as part of a

break up methodology" (Complaint, ¶ 41). Although Elkman and Cord reached an oral agreement for Cord to participate in trade shows, Angela Ho did not agree and, therefore, BKCR "refused to allow Barry to conduct the international trade shows, even at his own expense" (Complaint, ¶ 44). As a result of the corporate structure of BKCR, "[n]o agreement has been or can be reached as to international trunk shows or the break up" (Complaint, ¶ 57). Plaintiff alleges that the "conducting of international trunk shows by Barry is an oral modification of the third contract, or a subsequent oral agreement and is binding upon Elkman [and BKCR]" (Complaint, ¶ 46). Finally, the defendants did not propose a reasonable formula for sharing proceeds from international trade shows, "nor have they taken any steps to achieve the break up" (Complaint, ¶ 45).

Plaintiff alleges in the complaint that Elkman "stated and represented to Barry that Barry or Plaintiff would receive the promised 90% equity in BKCR, but only after the investment by the BKCR members and officers was returned to them, with profit. The amount of profit was unspecified" (Complaint, ¶ 51). In his affidavit, Cord avers that he never agreed to change the terms of "any of the three agreements" (Aff. of Cord, ¶ 15). He avers that his right to repurchase the jewelry arises from Agreement3.

In his affidavit, Elkman avers that, subsequent to the three agreements and the creation of BKCR, Elkman spoke to an attorney and was informed that the concepts set forth in Agreement3 were not legally workable. He states that the ongoing negotiations then disregarded the structure contemplated by Agreement3, and "refocused exclusively on a structure based upon a licensing of the IP and an earn-in of the equity over time as services would be actually performed by [Cord]" (Aff. of Elkman, ¶ 20). Elkman avers that BKCR was attempting to create this licensing

transaction so that it could put Cord's designs back into production. With this goal in mind, on November 16, 2011, a meeting was attended by Elkman, his attorney, Robert E. Michael & Associate PLLC, Cord, his attorney, and Angela Ho. The parties worked on ways to sell the jewelry owned by BKCR either in the United States or abroad. However, no agreements came about. Thus, subsequent to Agreement3, the parties did not produce a licensing agreement, nor did they create an employment agreement for Cord. The only agreement produced by the parties subsequent to Agreement3 was an operating agreement for BKCR.

Plaintiff commenced this action in January 2012, alleging nine causes of action: (1) specific performance; (2) breach of contract; (3) unjust enrichment; (4) for an accounting; (5) conversion; (6) for a permanent or temporary injunction preventing defendants from hiding or selling any of the jewelry, the profits from the jewelry, or the membership in BKCR that would change the vote; (7) to impress a constructive trust; (8) to reform the original two contracts to make them consistent with the third; and (9) for a declaratory judgment to permit plaintiff to conduct international trunk shows, and to permit plaintiff the rights to the remainder of the jewelry and to 90% of the membership units and equity of BKCR. Defendants interposed an answer in March 2012.

In July 2012, defendants filed this motion to dismiss, seeking to dismiss all causes of action set forth in the complaint. Defendants argue that: (1) Agreement3 was an agreement to agree and not a binding contract; (2) Agreement3 could not be enforced, as it contained a mutual mistake in that the promise of future services by Cord was not a valid consideration for a tax-free issuance of equity; (3) the first (specific performance), second (breach of contract), fourth (an accounting) and sixth through eighth causes of action (injunctive relief, constructive trust,

reformation) fail, since Agreement3 is not a binding contract; (4) the third (unjust enrichment) and fifth (conversion) causes of action fail, as they are legal theories that are unavailable as a matter of law; and (5) the ninth cause of action (declaratory judgment) fails, as it simply reiterates the demands made in the first eight causes of action.

In August, 2012, plaintiff filed its opposition to defendants' motion and cross-moved for partial summary judgment, seeking: (1) a judgment on its first cause of action, for specific performance, that would provide plaintiff with the right of repurchase of the jewelry that is the subject of this action; and (2) a judgment on its seventh cause of action, impressing a constructive trust upon Elkman and BKCR, so that the jewelry is not transferred or hidden and plaintiff may repurchase it at the price set forth in Agreement3. The plaintiff asks this court to set this matter down for a hearing on damages, including the repurchase price of the jewelry.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of any legally cognizable cause of action (*Skillgames, L.L.C v Brody*, 1 AD3d 247, 250 [1st Dept 2003]), *citing Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). When contemplating a motion pursuant to CPLR 3211 (a) (7), "a court may freely consider affidavits submitted by plaintiff to remedy any defects in the complaint," *(Amaro*, 60 AD3d at 492). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly

contradicted by documentary evidence are not entitled to such consideration" (*Skillgames*, 1 AD3d at 250, *citing Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 [1st Dept 1994]). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]).

Here, Agreement1 and Agreement2 are patently clear and unambiguous, and the parties do not disagree as to the meaning and purpose of those agreements. Thus, the viability of each of the allegations set forth in the complaint rests on the status of Agreement3. This court must determine whether it is a contract or an agreement to agree, and the parties' intentions as reflected therein.

Defendants argue that Agreement3 was intended as a very rough outline of what they thought a future business entity might look like. It was not intended to be a binding contract that "set out a fixed program" (*see* Aff. of Elkman, ¶ 17). Instead, according to defendants, Agreement3 memorialized the parties' preliminary plans to have Cord's intellectual property (IP), allegedly owned by his daughter, licensed to Newco, a newly formed company, so that Newco would own the previously pawned jewelry and would relaunch Cord's brands. Defendants claim that the document contains many terms suggesting the need for future negotiation.

In opposition, Cord avers that the "repurchase obligation meets all of the requirements for an enforceable agreement" Aff. of Cord, ¶ 18. He states that because the agreement sets the price of repurchase at the midpoint between cost and wholesale, it is of sufficient particularity to

bind the parties and that "Elkman and I agreed that I would have the right of purchase of the jewelry (the third agreement)" (Aff. of Cord, ¶ 5). Cord further avers that he never relinquished his 90% ownership of BKCR and never agreed to change the terms of any of the three agreements.

Contracts must be interpreted based upon the parties' intentions arising from the language of the agreement itself (*Lopez v. Fernandito's Antique*, 305 AD2d 218, 219 [1st Dept 2003]). "[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'" (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Consequently, before a plaintiff may obtain redress for the breach of an agreement, "the promise made must be sufficiently certain so that the parties' intentions are ascertainable" (*Wilson v Ledger*, 97 AD3d 1028, 1029 [3d Dept 2012], citing *Matter of 166 Mamaroneck Ave. Corp. v 151 East Post Road Corp.*, 78 NY2d 88, 91 [1991]). An agreement to agree, in which material terms are left for future negotiation, is unenforceable (*166 Mamaroneck Ave. Corp.*, 78 NY2d at 91).

The question of whether a contract is an agreement to agree rises and falls on whether the document by its language relies upon future negotiations or a "future definitive agreement" for its formation (*see Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010]). In 2009, the New York Court of Appeals rejected the federal type I/type II classifications for determining whether a contract is merely an agreement to agree as too rigid, and held that a determination of whether a subject document is an enforceable contract or an

agreement to agree relies on the question of "whether the agreement contemplated the negotiation of later agreements and if the consummation of those agreements was a precondition to a party's performance" *Amcan Holdings, Inc., 70 AD3d at 427, quoting IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 213 n2 [2009]).

Based upon a review of the language of Agreement3, the Court finds that Agreement3 contains language of intent to agree, rather than actual agreement on essential terms. For example, the second paragraph states that the above mentioned merchandise is "intended to be reinvested," and "[t]he goal is to regenerate the Kieselstein-Cord brand." The third paragraph states: "It is the intention of Mr. Steven Elkman and Newco to obtain . . . ." This language suggests a shared vision for a business enterprise and an accompanying need for future agreement prior to its inception.

The language "TBD will be the administrator . . ." is language that additionally indicates the need for subsequent negotiation to determine the administrator. The fact that Cord's name is inserted further down in the same paragraph as the administrator, reflects the uncertainty of the parties as to the future operations of this entity. That Agreement3 is an agreement to agree is validated by the fact that Agreement3 relies upon a trust that was never created and the creation of "Newco," that seems to exist as "BKCR," but that despite negotiations between the parties, as of yet has failed to produce a licensing agreement or an employment agreement for Cord.

It appears from these circumstances and the language of the document that Agreement3 was not in its final form, but rather, set forth a general framework upon which the parties were hoping to continue future negotiations for the sale of the jewelry. In their submissions, both sides describe the ongoing negotiations concerning the inception of the new company, including

Cord's responsibilities to the new company, based upon these open terms.

Even if this court were to consider Agreement3 to be a binding contract, plaintiff's claims fail. Agreement3, by its own terms, undermines plaintiff's claim to "90% equity" and to repurchase of the subject jewelry. A plain reading of the language of Agreement3 does not reflect the meaning that plaintiff suggests. To claim 90% equity in BKCR, plaintiff relies exclusively on the following paragraph from Agreement3, which contains a condition precedent that was never satisfied:

> A trust will be formed for Elisabeth Cord where any and all remunerations will flow into. TBD will be the administrator of said Elisabeth Cord Trust and accordingly will administer and advise Newco on the use and deployment of the brand marks owned by Elisabeth Cord. For this administration, Barry Cord will receive appropriate executive compensation with the brand holders majority equity interests (90%).

Agreement3, p 1.

This paragraph does not provide plaintiff with the rights he seeks in this lawsuit. According to the language, he does not automatically possess the equity. Instead, the language sets up a condition that must be satisfied before Cord can earn the 90% equity interests. Cord must administer the trust, and administer and advise Newco, in order to receive the "executive compensation." Although it is clear that Cord must administer the trust and the new company to receive the equity and/or executive compensation, the terms of that administration, other than procuring the licensing, are left out of Agreement3. The parties submissions make it clear that the trust was never created, the terms were never agreed upon, and the condition was never satisfied. In fact, in his affidavit, Cord admits that the parties never developed terms for his employment to satisfy this condition. He avers that after the involvement of Angela Ho, "[w]e

could not agree on a license agreement of the IP associated with my name and brand. We could not agree on terms of employment." Aff. of Cord, ¶ 9. In sum, the very purpose of Agreement3, the licensing of Cord jewelry, was never achieved.

Additionally, the language of Agreement3 does not support plaintiff's interpretation that Cord was entitled to repurchase the jewelry in the event the negotiations, and, thereby, the new company, failed. In support of this argument, plaintiff refers only to the following language:

> During the course of this engagement, it is understood that should anything happen to Steven Elkman preventing him of carrying the above duties, Barry Cord or Elisabeth Cord Trust will have the option to repurchase the above inventory at a 10% premium above the original investment but up to the midpoint between the cost of the goods and wholesale.

Agreement3, at p. 1.

This language does not say that if the company fails, Cord has the right to repurchase the subject jewelry. Instead, the language appears to be saying that if something should happen to Elkman himself, then Cord has the option to repurchase. In fact, the paragraph subsequent to this one provides a similar right to Elkman:

> Conversely, should anything happen to Barry Cord preventing him of carrying the above duties, Steven Elkman will have the right to sell said merchandise, in the appropriate market place, and redeem his original (and that of other investors) investments, plus at least a 10% of the original investment but up to midpoint cost of the goods at wholesale.

Agreement3, at p. 1.

On its face, these two paragraphs together reflect the parties' intention to provide recourse in the event either one of these men is incapacitated or otherwise unable, because something happened to him, to carry out his duties. This meaning is buttressed by the end of the letter which provides for the executor of Cord's estate. Moreover, if Cord's interpretation were correct,

Cord's and Elkman's rights to the jewelry would arise at the same time and the result would be an impossibility -- Cord would have the right to repurchase and Elkman would have the right to sell in the appropriate marketplace. It is, therefore, unknowable what terms the parties intended for the break-up of the company, in the event that it should fail. Nonetheless, that is not what is patently intended by this paragraph.

For these reasons, each of the nine causes of action, grounded upon Agreement3 and Cord's purported right to repurchase the jewelry in accordance therewith, fails.

In its first cause of action, plaintiff alleges a right to specific performance. To obtain specific performance of an agreement, the agreement must be sufficiently specific so that the parties' intentions are ascertainable *(Joseph Martin, Jr. Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]). Because Agreement3 is not a binding contract, the remedy of specific performance is unavailable to the plaintiff. Further, Agreement3 contains no "sufficiently specific" terms setting forth Cord's rights to equity or repurchase of the jewelry as they are set forth in the complaint.

The second cause of action seeks damages for breach of contract, because BKCR, Elkman and Deutsche Bank offered for sale, sold and continue to sell fine jewelry at "inappropriately low prices" and that this violates plaintiff's right to repurchase under Agreement3. The elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage (*US Bank N.A. v Lieberman*, 98 AD3d 422, 423 [1st Dept 2012]). As the court has held above, Agreement3 is not a binding contract, but an agreement to agree. Consequently, this cause of action fails.

In its third cause of action, plaintiff alleges unjust enrichment. Specifically, plaintiff alleges that, because defendants did not permit Cord to participate in international trade shows, and refused to issue 90% equity to plaintiff, they have been unjustly enriched. In order to make out a claim for unjust enrichment, a plaintiff must establish that it "conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff" (*Nakamura v Fuji*, 253 AD2d 387, 390 [1st Dept 1998]). This doctrine may only be invoked in the absence of an actual agreement between the parties. A party "may not recover in . . . unjust enrichment where the parties have entered into a contract that governs the subject matter" *(Pappas v Tzolis*, ___ NY3d ___, 2012 WL 5906685, *1, 2012 NY LEXIS 3527, quoting *Cox v NAP Constr. Co, Inc.*, 10 NY3d 592, 607 [2008]). The transfer of the jewelry from Cord to Elkman was governed by two contracts between the parties: Agreement1 and Agreement2. According to those agreements, Elkman provided Cord with an agreed-upon compensation. For this reason, the court dismisses the third cause of action.

In its fourth cause of action, plaintiff alleges that defendants, the managing members of BKCR, and the attorney for BKCR, had a fiduciary duty to plaintiff as a result of its 90% equity interest in BKCR. According to plaintiff, these parties, therefore, should be directed to account for the fine jewelry and proceeds of any sales.

"The elements of a cause of action to recover damages for breach of fiduciary duty are: (1) the existence of a fiduciary relationship; (2) misconduct by the defendant; and (3) damages directly caused by the defendant's misconduct" (*Baumann v Hanover Community Bank*, 100 AD3d 814, 817 [2d Dept 2012]). In order to constitute a "fiduciary relationship," the relationship must be such that "one of them [was] under a duty to act for or to give advice for the

benefit of another upon matters within the scope of the relation" (*id.*). Here, there is no proof of a fiduciary relationship between Elkman and Cord. The two entered into two contracts for the transfer of property with the assistance of counsel. The property was transferred for an agreed-upon consideration. Agreement3 reflects the shared vision of Elkman and Cord for a future business entity. The fact that the two were friends did not define the agreements. Nor did Elkman's role as a financial adviser define the relationship, since Cord was not his client. This was an arms-length business deal between the two men. No fiduciary duty existed, and the fourth cause of action is dismissed.

In its fifth cause of action, plaintiff alleges that defendants converted the jewelry and plaintiff's 90% equity of BKCR. 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" (*Pappas,* 2012 WL 5906685, at *1*). Because Cord transferred his interest in the jewelry to Elkman for an agreed-upon consideration, there could be no interference with his property rights. Plaintiff's conversion claim is simply a restating of its breach of contract claim and, therefore, is dismissed.

In its sixth cause of action, plaintiff seeks injunctive relief, preventing defendants from hiding or transferring the jewelry or interfering in any way with plaintiff's rights to distributions from BKCR. A preliminary injunction may issue only if the moving party can demonstrate: (1) the likelihood of success on the merits; (2) irreparable injury if the preliminary injunction is not granted; and (3) a balancing of the equities in its favor *(Doe v Axelrod*, 73 NY2d 748, 750 [1988]). Here, the court has already denied a preliminary injunction and now denies the permanent injunction. Plaintiff has failed to establish his right to the jewelry or distributions

from BKCR.

In its seventh cause of action, plaintiff asks the court to impress a constructive trust for its benefit. The elements of such a claim include: (1) a fiduciary or confidential relationship; (2) a promise, (3) a transfer in reliance upon the promise; and (4) unjust enrichment (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]). This claim is insufficient as a matter of law because plaintiff can neither establish a fiduciary relationship nor unjust enrichment. Cord transferred his interest in the jewelry to Elkman for an agreed-upon consideration. Additionally, plaintiff is unable to establish the existence of a fiduciary relationship between Cord and Elkman or that Elkman or BKCR were unjustly enriched by the transaction. This claim is dismissed.

In its eighth cause of action, plaintiff asks the court to reform Agreement1 and Agreement2 so that they are consistent with Agreement3, all oral agreements,[2] and plaintiff's right to obtain possession of the jewelry and 90% equity of BKCR.

As courts are loath to re-write parties' agreements, a claim for reformation of a contract in order to be successful must articulate mutual mistake or defendant's fraud *(Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77 [1970]). Here, plaintiff asks the Court to reform Agreements1 and 2, yet has not alleged or offered evidence of mutual mistake or fraud with respect to the formation of either contract. The court, therefore, dismisses this cause of action.

In its ninth cause of action, plaintiff seeks a declaratory judgment that would permit plaintiff to conduct international trade show sales of the jewelry. However, the court finds that plaintiff has no basis for a declaratory judgment against defendants, since the second cause of

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[2] Plaintiff alleges an oral agreement in the complaint, but does not elaborate on the issue.

action for breach of contract affords plaintiff an adequate remedy (*see Artech Info. Sys. v Tee*, 280 AD2d 117, 125 [1st Dept 2001]). That the breach of contract action was does not change this result.

Based upon the above, plaintiff's cross motion for partial summary judgment is denied as moot. Accordingly, it is

ORDERED that defendants Steven Munro Elkman and BKC Renaissance, LLC's motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that Plaintiff Dragon Head, LLC's cross-motion for partial summary judgment is denied.

Dated: January 22, 2013

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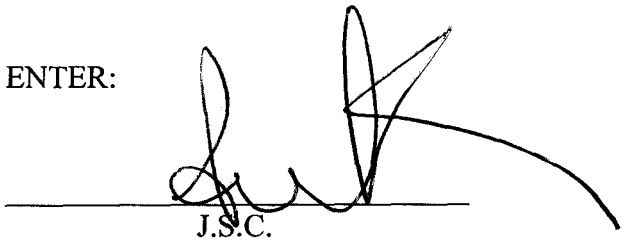

J.S.C.