Yaary v Silverman
2013 NY Slip Op 33488(U)
November 9, 2013
Supreme Court, New York County
Docket Number: 100264/12
Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ORNA YAARY,

Plaintiff,

- against -

JOHN SILVERMAN,

Defendant.

INDEX NO. 100264/12

MOTION SEQ. 001

The following papers were read on this motion by defendant to dismiss pursuant to CPLR 3211(a)(7).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ Yes ☒ No

This action sounds in, *inter alia*, quantum meruit, unjust enrichment, specific performance, fraud, breach of fiduciary duty, and money had and received regarding unpaid decorating and renovation services allegedly provided by Orna Yaary (plaintiff), for John Silverman (defendant) when they were in a committed relationship. Before the Court is a pre-answer motion brought by the defendant, pursuant to CPLR 3211(a)(7), for an order dismissing the complaint on the ground that it fails to state a cause of action. Plaintiff is in opposition to the motion, and discovery has not commenced.

In the instant complaint plaintiff, an interior designer, alleges, *inter alia*, that she and the defendant were in a committed relationship since 2005; that, in or around 2006, based upon defendant's assurance that she would be compensated for the work she performed, she began performing extensive design services in his vacation home, located at 6 Judson Lane, Campbell Hall, New York (the Vacation Home); that these services continued until September 2009, when

she was diagnosed with Morgellons Disease, an auto-immune disorder, which affected her ability to continue providing these services; that the renovation of the Vacation Home was placed on hold, until January 2010, when, despite her medical condition, the defendant insisted that she provide services relating to the renovations of an art studio above the garage; that she worked through her illness; and, within a few days after she completed her work, defendant terminated their relationship, and refused to compensate her for any of her services. She maintains that she provide approximately $1 million in services and personally incurred approximately $100,000 in expenses. Additionally, plaintiff asserts that the parties had a separate agreement regarding a painting, which she allegedly found at an antique show in the Spring of 2009, priced at $5,000, which she believed could be worth upwards of $500,000. The parties purportedly agreed that defendant would purchase the painting, that the painting would be authenticated and appraised, and if the painting was valued at an amount higher than the purchase price, the painting would be sold and the proceeds split equally (the Artwork Agreement). They allegedly also agreed that if the painting was appraised lower than the purchase price, then the painting would be hung in the Vacation Home (*id.*). She avers that the painting has not been authenticated and appraised, and its true value remains unknown.

Plaintiff brought this action, alleging the following causes of action: quantum meruit (first); unjust enrichment (second); specific performance and breach of the Artwork Agreement (third and fourth, respectively); fraud (fifth); breach of fiduciary duty (sixth); and money had and received (seventh). Defendant now moves, pursuant to CPLR 3211(a)(7), for an order dismissing the complaint for failure to state a cause of action.

STANDARD

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152

[2002]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp*, 96 NY2d at 414). Affidavits and other evidence submitted by plaintiffs may be considered for the limited purpose of remedying any defects in the complaint, thus preserving inartfully pleaded, but potentially meritorious, claims (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635-636 [1976]).

Upon a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino,* 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). "[W]e look to the substance [of the pleading] rather than to the form (*id.* at 64). In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*see Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.,* 262 AD2d 188 [1st Dept 1999]).

DISCUSSION

Defendant initially argues that plaintiff's quasi-contract claims, sounding in implied contract, unjust enrichment and money had and received, should be dismissed. He relies on *Morone v Morone* (50 NY2d 481 [1980]) (the Morone Case), which held that compensation may not be sought between unmarried persons living together for the rendition and acceptance of personal services. Defendant essentially argues that, pursuant to the Morone Case, it would be unreasonable to infer an agreement to compensate the plaintiff for the interior design services

she rendered, when the parties' committed relationship, as alleged by the plaintiff, would make it "natural that the services were rendered gratuitously" (*Morone*, 50 NY2d at 488). He alternatively contends that the aforementioned claims are barred by the statute of frauds.

As noted by defendant, in the Morone Case, the court held that an implied contract will not be implied for the rendition and acceptance of personal services between unmarried cohabitants, "when the relationship of the parties makes it natural that the services were rendered gratuitously" (*id.*). "As a matter of human experience, personal services will frequently be rendered by two people living together because they value each other's company or because they find it a convenient or rewarding thing to do" (*id.*). It has been further held that a valid claim for quantum meruit may be sustained where the unmarried individuals are involved in a romantic relationship, but maintain separate residence (*Moors v Hall*, 143 AD2d 336 [2d Dept 1988]). Here, while plaintiff alleges that the parties were in "a committed relationship," and that, during that time they "spent most weekends and holidays at the [Vacation Home] along with much of the summer months, she denies that they resided together (Complaint at ¶¶ 2, 9). The record discloses the parties' conflicting positions and documentation as to whether the parties cohabitated or whether separate residences were maintained when the purported agreement was made, which raise an issue of fact, an issue which should not be decided on this motion to dismiss.

The Court notes that the general presumption against compensation for personal services was also applied to "unmarried persons whose actions flow out of mutual friendship and reciprocal regard" (*Trimmer v Van Bomel*, 107 Misc 2d 201, 206 [Sup Ct, NY County 1980]; *see also Tompkins v Jackson*, 22 Misc 3d 1128 [A] *13, 2009 NY Slip Op 50319 [Sup Ct, NY County 2009]), whose services included, *inter alia*, devoting time and attention to the other party, acting as a companion, and performing household duties (*see Trimmer*, 107 Misc 2d at 206; *see also Tompkins*, 22 Misc 3d 1128 [A] at *13). However, it was further held that

"services rendered by one paramour for the other which are non-sexual in nature and do not arise directly from such a relationship, may be deemed separable, and form the basis for compensation" (*Tompkins v Jackson*, 22 Misc 3d 1128 [A] at 13, citing *Matter of Gordon*, 8 NY2d 71 [1960]; *see also Trimmer v Van Bomel*, 107 Misc 2d 201).

Plaintiff alleges that, in relation to the extensive renovations undertaken at the Vacation Home, her professional interior design services included, *inter alia*, designing a general color scheme and picking out the paint colors for each part of the Vacation Home; developing artistic and design plans for various rooms, including, *inter alia*, the kitchen, family room, game room, gym, backyard pool and surrounding area; redesigning the lighting scheme on the main floor and the bedrooms; drafting furniture layout design plans, meeting with contractors and architects; monitoring the implementation of the artistic and design plans; shopping for and purchasing hardware, furniture, fixtures, flooring, and antiques; and performing tasks ordinarily provided by an expert design painter, consisting of instructing the workers as to the process required to achieve an aged aesthetic to the interior walls, and mixing the paint and glaze (Complaint ¶¶16, 25, 29, & 42). In liberally construing the complaint, the description of the professional interior design services, as alleged, may be considered distinguishable from those personal services rendered gratuitously by two people living together (the Morone Case) or without expectation of compensation by unmarried persons "whose actions flow out of mutual friendship" (*Trimmer v Van Bomel*, 107 Misc 2d at 206; *Tompkins v Jackson*, 22 Misc 3d 1128[A]). Thus, at this juncture, prior to discovery, plaintiff's quasi-contract claims are not barred by the case law regarding implied agreements for compensation between unmarried persons.

Defendant alternatively argues that these claims are barred by the statute of frauds, because the plaintiff seeks payment for the performance of interior decorating services that occurred over a 4 1/2 year period. The statute of frauds provides that "an agreement is void if it

is not in writing and 'subscribed by the party to be charged therewith' when the agreement 'by its terms is not to be performed within one year from the making thereof'" (*Sheehy v Clifford Chance Rogers & Wells, LLP*, 3 NY3d 554, 559-560 [2004]; General Obligations Law § 5-701[a][1]). "Courts have generally been reluctant to place too broad an interpretation to this provision, limiting it to agreements which only by their very terms have absolutely no possibility of being performed within the year" (*Festa v Gilston*, 183 AD2d 525, 526 [1st Dept 1992]). "Thus, 'whenever an agreement has been found to be susceptible of fulfillment within that time, in whatever manner and however impractical, [the Court of Appeals] has held the one-year provision of the Statute to be inapplicable, a writing unnecessary and the agreement not barred" (*id.*, quoting *D & N Boening, Inc. v Kirsch Beverages, Inc.*, 63 NY2d 449, 455 [1984]).

Here, plaintiff does not allege any breach of contract claims, but rather asserts claims for quantum meruit and unjust enrichment to recover damages only for the reasonable value of services and actual expenditures made by her in reliance on defendant's purported promises that he would compensate her for the professional services, which she provided at his request. "A cause of action under a quasi contract theory 'only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment'" (*Heller v Kurz*, 228 AD2d 263, 264 [1st Dept 1996], quoting *Clark-Fitzpatrick, Inc v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). The statute of frauds is not an automatic bar to a cause of action for quantum meruit and unjust enrichment (*Farash v Sykes Datatronics*, 59 NY2d 500 [1983]; *RTC Props. v Bio Resources,* 295 AD2d 285, 286 [1st Dept], *lv dismissed* 99 NY2d 531 [2002]), particularly where, as here, plaintiff purportedly performed services for which she may be equitably entitled to compensation, and further seeks to recover her related out-of-pocket expenses (*Farash v Sykes Datatronics, Inc.*, 59 NY2d 500 [1983]; *RTC Props. v Bio Resources,* 295 AD2d at 286).

Defendant also claims that the unjust enrichment claim fails to state a cause of action,

arguing that plaintiff's interior design services were rendered for the parties' mutual benefit, and thus he was not unjustly enriched. To state a claim for unjust enrichment, plaintiff must show that the defendant was enriched, at plaintiff's expense, and "that 'it is against equity and good conscience to permit [the defendant] to retain what is sought to be recovered'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011], quoting *Citibank N.A. v Walker*, 12 AD3d 480, 481 [2d Dept 2004]). As noted by defendant, where it is demonstrated that the parties mutually benefit from the plaintiff's acts or services, it will generally be determined that the defendant was not unjustly enriched (*Tompkins*, 22 Misc 3d 1128 [A] at *15). The cases, he relies on, however, are inapplicable at this juncture, since such determination was made after the completion of discovery and an application for summary judgment (*Tompkins*, 22 Misc 3d 1128 [A]; *Mente v Wenzel*, 178 AD2d 705 [3d Dept 1991]), or after trial (*Marini v Lombardo*, 79 AD3d 932 [2d Dept 2010], *lv denied* 17 NY3d 705 [2011]; *CDR Creances S.A. v Euro-American Lodging Corp.*, 40 AD3d 421 [1st Dept 2007]; *Kunkel v Kunkel*, 32 Misc 3d 1203[A], 2011 NY Slip Op 51161 [Sup Ct, Nassau County 2011]).

Thus, contrary to defendant's argument, plaintiff's allegations as to the nature of their relationship and the time she spent in the Vacation Home are, of themselves, insufficient to establish that the parties mutually benefitted from the plaintiff's interior design services. Defendant's argument instead raises questions of fact as to whether plaintiff benefitted from the services she provided and whether defendant was unjustly enriched by these services. Therefore, in liberally construing the complaint, plaintiff sufficiently alleges that she provided interior design services in the Vacation Home for defendant, from which he has benefitted and from which he has not compensated her. "Since plaintiff need only allege the necessary elements of the claim, and not provide evidentiary support at this point", this cause of action will not be dismissed at this pleading stage (*Korff v Corbett*, 18 AD3d 248, 251 [1st Dept 2005]). In view of the foregoing, that branch of defendant's motion for dismissal of the first and second

causes of action for quantum meruit and unjust enrichment, respectively, are denied.

Defendant seeks dismissal of plaintiff's breach of contract claims relating to the painting, i.e., the third and fourth causes of actions, specific performance, and breach of the Artwork Agreement, respectively, claiming that they are barred by the statute of frauds. He argues that the alleged agreement is one for a finder's fee, which must be in writing pursuant to GOL § 5-701(a)(1). Plaintiff disputes the defendant's characterization of the alleged agreement, claiming it is instead one for a joint venture, to which the statute of frauds does not apply. In reply, the defendant argues that the complaint does not allege a breach of a joint venture agreement as to the painting, nor does the purported agreement include a sharing in the losses, an essential element of such an agreement.

In determining whether plaintiff's complaint sufficiently sets forth an oral agreement for a joint venture, the court looks for the indicia of the existence of a joint venture, which consists of "acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses" (*Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 298 [1st Dept 2003]). "Indispensable to the creation of a joint venture is a sharing in the profits and losses of the business" (*Williams v Forbes*, 175 AD2d 125, 126 [2d Dept 1991]).

Here, plaintiff alleges that she found a painting, priced at $5,000, which based upon her expertise she believed could be worth upward of $500,000 (complaint at ¶ 50); that the parties agreed that defendant would pay the $5,000 purchase price, but that they would own the Painting jointly in equal parts (*id.* at ¶ 52), and have the painting authenticated and appraised (*id.* at ¶ 53); and that they further agreed that if the painting was valued at an amount higher than the price paid, the parties would sell the painting and split the proceeds equally. Alternatively, she asserts that if the painting was not appraised at a value in excess of $5,000,

the parties agreed that they would hang the painting in the Vacation Home (*id.* at ¶ 54). Additionally, the parties acknowledged that plaintiff's contribution was her artistic expertise in locating the painting and providing an onsite valuation (*id.* at 55). In liberally construing the complaint, it adequately sets forth the requisite elements of a joint venture, including the equal division of the profits if the painting is sold, or, the joint ownership of the painting in the event of a loss in its value.

As argued by plaintiff, "[t]he statute of frauds is inapplicable to an agreement to create a joint venture or partnership because an oral agreement for an indefinite period creates a partnership or joint venture at will" (*Moses v Savedoff*, 96 AD3d 466, 469 [1st Dept 2012]). "Additionally, the parties' alleged agreement to share in the profits . . . when reasonably interpreted, could have been performed within one year" (*id.*). In view of the foregoing, defendant's statute of frauds argument with respect to the purported agreement has no merit.

Defendant's argument for dismissal of the third cause of action seeking specific performance of the Artwork Agreement also has no merit. In the complaint, plaintiff requests an order or judgment requiring defendant to fully perform his obligations under the Artwork Agreement directing defendant: (a) to hire a mutually agreeable professional to authenticate and appraise the painting; and (b) if the appraisal results in a valuation in excess of $5,000.00, defendant shall sell the painting and split the proceeds equally with plaintiff (Complaint at ¶ 79). As noted by defendant, "[i]n general, specific performance will not be ordered where money damages 'would be adequate to protect the expectation interest of the injured party'" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 [2001], quoting Restatement [Second] of Contracts § 359 [1]). "Specific performance is a proper remedy, however, where 'the subject matter of the particular contract is unique and has no established market value'" (*id.*, quoting *Van Wagner Adv. Corp. v S & M Enters.*, 67 NY2d 186, 193 [1986]). It is within the trial court's discretion to determine whether or not to award specific performance (*id.*).

Here, plaintiff alleges that the painting has not been authenticated and appraised by a professional as required by the Artwork Agreement, and she seeks defendant's performance of the aforementioned obligations, without which she cannot ascertain the value of the painting. Thus, at this juncture, since it appears that it would be difficult for plaintiff to prove damages with reasonable certainty without specific performance of the contract, the issue of whether money damages would adequately compensate plaintiff is a matter not to be resolved on a motion to dismiss. In view of the foregoing, that branch of defendant's motion to dismiss the third and fourth causes of action for specific performance and breach of the Artwork Agreement, respectively, is denied.

Defendant also seeks to dismiss plaintiff's fifth and sixth causes of action sounding in fraud and breach of fiduciary duty, arguing that, to the extent that plaintiff's quasi-contract claims are unenforceable pursuant to the statute of frauds, plaintiff cannot use the same unenforceable promises as the basis for these tort claims. He further maintains that these actions are merely duplicative of the alleged promise to compensate plaintiff for her services, and thus should be dismissed.

As noted by defendant, when an alleged agreement is void by reason of the statute of frauds, a plaintiff cannot use the same alleged promise as a basis for a cause of action sounding in tort (*Nelson Bagel Bakery Co. v Moshcorn Realty Corp.*, 289 AD2d 69 [1st Dept 2001]; *Wings Assoc. v Warnaco*, 269 AD2d 183 [1st Dept 2000], *lv denied* 95 NY2d 759 [2000]). Here, as previously determined, plaintiff's quasi-contract claims are not barred by the statute of frauds.

Further, in support of his argument claiming duplicative claims, defendant relies on cases where the court found that plaintiff's cause of action for fraud or breach of fiduciary duty was essentially mere restatements of his or her breach of contract claim *(Pollak v Moore*, 85 AD3d 578 [1st Dept 2011]; *Krantz v Chateau Stores of Canada*, 256 AD2d 186 [1st Dept 1998];

Caniglia v Chicago Tribune-N.Y. News Syndicate, 204 AD2d 233 [1st Dept 1994]), and/or dismissed these claims on the ground that a contract action could not be converted to one for fraud merely by alleging that the contracting party did not intend to meet its contractual obligations required under the parties' express agreement (*Edelman v Emigrant Bank Fine Art Fin.*, LLC, 89 AD3d 632 [1st Dept 2011]; *Golub Assoc. v Lincolnshire Mgt.*, 1 AD3d 237 [1st Dept 2003]; *Celle v Barclays Bank P.L.C.*, 48 AD3d 301 [1st Dept 2008]; *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603 [1994]). These cases are inapplicable to the instant action, in that plaintiff has not alleged a breach of contract claim or the existence of an express agreement between the parties, and these cases do not preclude the assertion of fraud and breach of fiduciary duty claim where quasi-contract claims based on quantum meruit and unjust enrichment have been raised.

However, plaintiff fails to state a claim in fraud. To properly plead a fraud claim, a plaintiff must allege "'the making of a material misrepresentation, known to be false, made with the intention of inducing reliance on the part of the victim, on which the victim does in fact rely and, as a result of which, he sustains damages'" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 9 [1st Dept 1999], quoting *Ippolito v Lennon*, 150 AD2d 300, 303 [1st Dept 1989]). Plaintiff alleges that defendant requested that she perform the interior design services with respect to the art studio at the Vacation Home, assuring her that she would have use of the art studio upon completion, and that she would be fairly compensated for the services rendered. She further avers that defendant intended plaintiff to rely on these assurances, knowing that they were false when made. However, she fails to claim any specific damages or losses directly arising from the defendant's alleged conduct (*Northern Stamping, Inc. v Monomoy Capital Partners, L.P.*, 107 AD3d 427 [1st Dept 2013]). Thus, the plaintiff's fifth cause of action in fraud is dismissed.

To state a claim for breach of fiduciary duty, the plaintiff must allege the existence of a

fiduciary relationship, defendant's misconduct and damages directly resulting from such misconduct (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807 [2d Dept 2011]). A cause of action sounding in breach of fiduciary duty must be pleaded with particularity (*id.*; CPLR 3016[b]). "A fiduciary relationship arises 'between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 561 [2009], citing *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). "The existence of a fiduciary relationship or special circumstances giving rise to a fiduciary duty is an essential element" for a breach of fiduciary duty cause of action (*Raske v Next Management, LLC*, 40 Misc3d 1240[A] *8, 2013 NY Slip Op 51514[U] [Sup Ct, NY County 2013]) (citations omitted); *Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989]). "Such a relationship, necessarily fact specific, and is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*EBC I, Inc.*, 5 NY3d at 19, citing *Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 162 [1998]).

In liberally construing the complaint, plaintiff states a breach of fiduciary duty claim, in that she alleges that defendant owed her a fiduciary duty, that, using his close personal relationship with plaintiff, defendant induced her to perform extensive interior design services, that his refusal to compensate her for the reasonable value of her professional services constituted a breach of his fiduciary duty to her, and that she suffered damages in an amount of no less than $1,100,000.00. As such, this cause of action will not be dismissed.

However, that branch of this claim which seeks punitive damages is dismissed. "Punitive damages are available in a tort action [based on breach of a fiduciary duty] where the wrongdoing is intentional or deliberate, presents circumstances of aggravation or outrage, evinces a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton" (*Bishop v 59 W. 12th St. Condominium*, 66 AD3d 401, 402

[1st Dept 2009]; *see also Don Buchwald & Assoc. v Rich*, 281 AD2d 329, [1st Dept 2001]). A public wrong is not required when seeking punitive damages in a breach of fiduciary duty claim (*Kleinerman v 245 E. 87 Tenants Corp.*, 105 AD3d 492 [1st Dept 2013]).

In support of her request for punitive damages, plaintiff relies on "the trust that the defendant knew the plaintiff placed in him based upon their multi-year intimate relationship; and defendant's willingness to violate that trust, especially when plaintiff was most financially and emotionally vulnerable due to her contracting a debilitating disease" (complaint, ¶ 97); she contends that defendant's aforementioned conduct was gross, wanton and involved high moral culpability, and thus entitles her to punitive damages. Defendant's alleged conduct, while potentially insensitive, does not rise to the level required for an award of punitive damages. Thus, that branch of the defendant's motion for dismissal of the sixth cause of action for breach of fiduciary duty is granted only as to that portion seeking an award of punitive damages.

The seventh cause of action purports to assert a claim for money had and received. The elements of a claim for money had and received are: "(1) defendant received money belonging to plaintiff; (2) defendant benefitted from the receipt of the money; and (3) under principles of good conscience, defendant should not be allowed to retained the money" (*Fesseha v TD Waterhouse Inv. Servs.*, 193 Misc 2d 253, 260 [Sup Ct, NY County 2002], *affd* 305 AD2d 268 [1st Dept 2003]; *see also Parsa v State of New York*, 64 NY2d 143 [1984]). The gravamen of this claim is plaintiff's unreimbursed expenditures in excess of $100,000 that she sustained during her services. This claim is subject to dismissal since plaintiff fails to allege that defendant possesses any money that belongs to her (*Goldfine v Sichenzia*, 73 AD3d 854 [2d Dept 2010]).

CONCLUSION

Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent of dismissing the second,

fifth, and seventh causes of action and the portion of the sixth cause of action seeking punitive damages is also dismissed; and it is further,

ORDERED that the defendant is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it is further,

ORDERED that the defendant is directed to serve a copy of this Order with Notice of Entry upon the plaintiff; and it is further,

ORDERED that the parties are directed to appear for a Preliminary Conference at 11:00 a.m. on December 11, 2013, at 60 Centre Street, Room 341, Part 7.

This constitutes the Decision and Order of the Court.

Dated: 11/19/13 **Enter:**

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**