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At an IAS Term, Commercial Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of July, 2014.

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

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HELEN WEBSTER,

Plaintiff,

- against -

Index No. 502940/12

ROCHELLE SHERMAN, ISRAEL SHERMAN, GARDEN CARE CENTER, INC., BENJAMIN LANDA, and TENZER AND LUNIN LLP,

Defendants.

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The following papers numbered 1 to 8 read herein:	Papers Numbered
Notice of Motion and Affirmation/ Supplemental Affirmation	1-2, 7 3-4,
Opposing Affirmations	5-6
Sur-Reply Affirmation in Opp. to Defendants' Motion	8

Upon the foregoing papers, defendants Rochelle Sherman, Israel Sherman, Benjamin Landa (Landa) and Garden Care Center, Inc. (Garden Care) (collectively defendants) move for an order, pursuant to CPLR 3211 (a) (1), (5) and (7) dismissing plaintiff Helen Webster's complaint on the ground that defenses are founded upon documentary evidence; the claims are barred by reason of the statute of limitations and judicial estoppel; and that the claims fail to state a cause of action. Plaintiff moves for an order seeking to disqualify defendants'

counsel the firm of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara and Einiger, LLP.

Background

The record reveals that in June 1995, defendants Israel and Rochelle Sherman desired to purchase a 25 percent interest in the Franklin Park Nursing Home but lacked the finances to do so. Thus, they entered into an agreement with plaintiff whereby she would loan the Shermans up to $750,000 and Rochelle Sherman would sell half of her interest as a contract vendee to plaintiff and half to Naomi Sherman, who was acting as Israel Sherman's designee. On or about June 11, 1996, $640,438 was paid by plaintiff to the Sherman defendants. Pursuant to a 1995 agreement entered into between plaintiff and Ms. Sherman, plaintiff was to receive 12.5 percent of the total profit of the facility which would be known as Garden Care Center, Inc. In 1997, plaintiff and several of the Garden Care partners purchased the real estate corporation which owned the land and building on which the Garden Care Corporation was operating. Plaintiff had held a 25 percent interest and was paid a 25 percent share of all the profits made by the real estate corporation until 2008.

In 1997, Garden Care applied for its operating certificate with the New York State Department of Health and on January 21, 1998, the Public Health Council approved the application for Garden Care to become the operator of the former Franklin Park Nursing Home. In a March 17, 1998, document entitled "Shareholders' Agreement and Irrevocable Proxy, all of the Garden Care Shareholders consented to a sale by Rochelle Sherman of a 12.5 percent interest in Garden Care to plaintiff. The document provided that the transfer

was subject to the approval of the Public Health Council but also provided that regulatory approval for the transfer would not be sought and that the transfer would not occur until after an operating certificate had been issued to the Corporation for the nursing home facility.

On July 18, 2001, the law offices of Tenzer & Lunin prepared and filed with the NYS Department of Health, a Certificate of Need application seeking approval for the transfer of the 25 shares of stock from Rochelle Sherman to plaintiff. On March 25, 2003, Rochelle Sherman sent a letter to plaintiff which stated in pertinent part:

> "pursuant to your exercise of the option previously granted to you, and subject to the receipt of necessary regulatory and lender approvals, I agree to sell you 25 shares of the common stock of Garden Care Center, Inc., (the 'Shares'). The consideration for the sale to you of the Shares shall be my tax cost basis for the shares at the time of the transfer. . . ."

In addition, an escrow letter agreement was prepared that authorized Tenzer & Lunin to hold the ownership and transfer of documents which were to be released after a closing which was contingent on a "non-contingent approval of the Public Health Council of the New York State Department of Health."

On September 11 and 18, 2003, Tenzer & Lunin submitted letters to the NYSDOH explaining the transaction and stated that "subject to the receipt of necessary regulatory approvals the parties will close on the sale of the stock." On November 19, 2003, the NYS Public Health Council approved the application for approval of the stock transfer. Plaintiff contends that this approval was supposed to trigger the release of the ownership and transfer documents and the defendants were required to contact the Metropolitan Area/Regional Office of the New York State Office of Health Systems (NYSOHS) in order to "complete

the requirements for certification approval." However, it appears that this contact did not occur. On or about December 5, 2005, the Director of the Information and Technology Service Group of the New York State Department of Labor wrote to Tenzer & Lunin seeking proof that the NYSOHS had been contacted in a timely manner. In a January 11, 2006, letter to the NYS Department of Health, Tenzer & Lunin represented that the transfer of the shares had not occurred because the consent of the other shareholders and the "operator's lender" had not been received.

It appears that from 1996 through 2007 the Sherman's paid plaintiff her proportional share of the profits from Garden Care and Franklin Realty Corp. However, at some point in 2009, as a result of a Rabbinical Court restraining order, the Sherman's were restrained from releasing any money from Garden Care. This restraining order was lifted in 2012 but plaintiff claims that defendants have not released her 12.5 percent share of the Garden Care profits for 2008, 2009, 2010 or 2011.

Plaintiff commenced an action alleging breach of contract and conversion claims as against the Sherman defendants; a cause of action alleging tortious interference with contract and breach of fiduciary duty as against defendant Benjamin Landa and a malpractice/breach of fiduciary duty against Tenzer & Lunin LLP. The Shermans, Landa and Garden Care Center move for an order, pursuant to CPLR 3211 (a) (1), (5) and (7) dismissing the complaint on the ground that defenses are founded upon documentary evidence; the claims are barred by reason of the statute of limitations and judicial estoppel; and that the claims fail to state a cause of action. Defendant Tenzer & Lunin also moved pursuant to the same

statute for the same relief.[1] Finally, plaintiff moved for an order seeking to disqualify defendants' counsel, the law firm of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara and Einiger, LLP (the Abrams firm).

The January 9, 2014 order of this court disqualifying the Abrams firm is hereby recalled and vacated. This decision and order supersedes the January 9, 2014 order.

Plaintiff's Motion to Disqualify

Plaintiff moves for an order disqualifying the Abrams firm from further appearing in this action as counsel for defendants Sherman, Landa and Garden Care. She contends that the Abrams firm previously acted as her counsel in connection with the transfer and therefore should not be permitted to represent any defendant in this matter. In support of this position she submits various documents which she alleges supports this proposition. First she submits, as Exhibit A, an invoice from the Abrams firm to her for the period of August 1, 2000 through February 1, 2002 which states that it is in reference to Garden Care transfers. Next she points to Exhibit B, an August 1, 2002 bill from the Abrams firm to her which includes a notation stating "Meeting: Marx (Garden Care Transfers)." Exhibit C is correspondence from the Abrams firm to plaintiff, also dated August 1, 2002, indicating that they had prepared a new Schedule 19 for her related to the Certificate of Need Application. Exhibit D is a January 23, 2003 letter from the Abrams firm to plaintiff in connection with an application made to Commerce Bank to purchase Avalon Gardens. The next documents

[1] The court notes that on February 10, 2014, Tenzer & Lunin withdrew its motion to dismiss plaintiff's amended complaint and agreed to accept service of plaintiff's second amended complaint. The court allowed Tenzer & Lunin to move to dismiss the second amended complaint after it is served upon Tenzer & Lunin.

submitted as Exhibit E relate to correspondence from the Abrams firm to plaintiff connected to the creation of a family trust for plaintiff. Exhibit F is a fax from the Abrams firm to Yehuda Glatzer confirming that plaintiff received $489,600 in connection with Garden Care's Realty since October 2004 and that they were trying to find out how much she received in connection with its operation. Finally, as Exhibit F plaintiff submits a copy of a so ordered stipulation of settlement, signed by a member of the Abrams firm representing Landa, which states that "the original Application Number 12244-C to the Department of Health regarding Garden Care Center LLC was regular in all respects."

Based upon all of these documents plaintiff contends that the Abrams firm represented her in the Garden Care transaction and that its attorneys have personal knowledge that there was a deal between the Shermans and plaintiff and that she received distributions as a shareholder for many years. Thus, plaintiff argues that the Abrams firm should be disqualified due to a conflict of interest to prevent the disclosure of confidential information obtained during its representation of her in the Garden Care matter.

In opposition, the Abrams firm argues that plaintiff has failed to meet her burden of establishing that she had a previous attorney-client relationship with the firm in any matter substantially related to this action and, thus, disqualification is not necessary as there is no conflict of interest. The Abrams firm points out that the matters that plaintiff contends create a conflict of interest were handled by Mark Zafrin who was a member of the firm from March 2002 to July 2010. They contend that before he joined the Abrams firm Zafrin had prepared documents to be submitted to NYSDOH relating to the transfer of stock in Garden

Care to plaintiff and had billed the Shermans for this time. However, the Abrams firm contends that Israel Sherman informed Zafrin that this work had already been performed by Tenzer & Lunin and they would not pay for the same work twice, so plaintiff was billed. The Abrams firm points out that the bill is for work performed from August 1, 2000 through February 1, 2002 which was before Mr. Zafrin even joined the Abrams firm. They state that the firm agreed to take over this old receivable, but, was in fact, never paid for it as plaintiff contended that it was the Sherman's responsibility.

Next, the Abrams firm argues that the Exhibit B invoice from it to Webster relates to a transaction involving Willoughby Rehabilitation and Nursing Center and has nothing to do with Garden Care and that the Garden Care Transfers notation was a typographical error. With respect to Exhibit C, the Abrams firm contends that Mr. Zafrin prepared many form documents for submission to NYSDOH related to various nursing home transactions but the letter does not specify which one this relates to, however, they point out that it refers to plaintiff as being a member of "the limited liability company" and Garden Care is a corporation. Moreover they point out that plaintiff alleges in her complaint that when Garden Care applied for its operating certificate in 1997 (five years earlier than this 2002 form) it did not include her and most importantly, that whatever entity it was, the Abrams firm represented the entity and not plaintiff.

The Abrams firm points out that Exhibit D relates to the purchase of Avalon Gardens and has nothing to do with the transaction at issue. Exhibit E is an invoice related to work performed related to generating forms in conjunction with the creation of a family limited

partnership for plaintiff and had nothing to do with the Garden Care transaction. Moreover, they point out that Mr. Zafrin, who handled this for plaintiff, is no longer a part of the firm. As to Exhibit F, the Abrams firm states that it did not represent plaintiff in connection with the subject matter of the fax but rather was representing Garden Care. Finally, as to Exhibit G, the Abrams firm points out that the stipulation of settlement in another matter is not a basis for disqualifying it. They point out that plaintiff was represented by two other, different law firms in the matter that was the subject of the stipulation and that the language related to Garden Care was put in at the insistence of plaintiff, and her then attorneys, to protect her interest in another action she had pending related to the Glatzer matter. Finally, the Abrams firm points to the Tenzer & Lunin motion to dismiss in which they submit documentary evidence demonstrating that plaintiff was represented by Cohen, Estis & Associates, LLP in connection with the Garden Care transaction.

Rule 1.9 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0), entitled "Duties to Former Clients," provides as follows:

> "(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

In addressing a disqualification motion, courts consider this Rule of Professional Conduct as guidance in rendering their determination (*see Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 130-131 [1996], *rearg denied* 89 NY2d 917 [1996]). "The disqualification of an attorney is a matter that rests within the sound discretion of the court"

(*Columbus Constr. Co., Inc. v Petrillo Bldrs. Supply Corp.*, 20 AD3d 383, 383 [2005]; *see also Albert Jacobs, LLP v Parker*, 94 AD3d 919, 919 [2012]; *Mondello v Mondello*, 118 AD2d 549, 550 [1986]). A party seeking disqualification of its adversary's counsel based on such counsel's purported prior representation of that party must establish: "(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse" (*Tekni-Plex, Inc.*, 89 NY2d at 131; *see also* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9 [a]; *Falk v Chittenden*, 11 NY3d 73, 78 [2008]; *Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 636 [1998]; *Matter of Town of Oyster Bay v 55 Motor Ave. Co., LLC*, 109 AD3d 549, 550 [2013]; *Gabel v Gabel*, 101 AD3d 676, 676 [2012]; *Scopin v Goolsby*, 88 AD3d 782, 784 [2011]; *Calandriello v Calandriello*, 32 AD3d 450, 451 [2006]; *Columbus Constr. Co., Inc.*, 20 AD3d at 383). A moving party who establishes these three elements creates an irrebuttable presumption of disqualification (*see Falk*, 11 NY3d at 78; *Tekni-Plex, Inc.*, 89 NY2d at 132). If established, the irrebuttable presumption is imposed in order to "free the former client from any apprehension that matters disclosed to an attorney will subsequently be used against it in related litigation" and to avoid 'the appearance of impropriety' on the part of the attorney or the law firm" (*Solow v Grace & Co.*, 83 NY2d 303, 309 [1994]).

In deciding whether a conflict of interest requiring disqualification exists, the court must consider whether the lawyer or law firm that previously represented the party or entity

which is seeking to disqualify that attorney, obtained, in the course of that representation, confidential information which would be disclosed or could be used against the former client in the current litigation (*see Cardinale v Golinello*, 43 NY2d 288, 296 [1977]; *Columbus Constr. Co., Inc.*, 20 AD3d at 384; *Sirianni v Tomlinson*, 133 AD2d 391, 392 [1987], *appeal dismissed* 74 NY2d 792 [1989]). It is not essential, however, that the prior client establish that confidential information will necessarily be disclosed in the course of the litigation (*see Narel Apparel v American Utex Intl.*, 92 AD2d 913, 914 [1983]). "A reasonable probability of disclosure [is] sufficient" (*id.* [internal quotation marks omitted]). Courts will infer the "reasonable probability of disclosure of confidences" from the particular nature of the past and present representations at issue (*Forbush v Forbush*, 107 AD2d 375, 379-380 [1985]).

An attorney will be disqualified where the party seeking disqualification establishes either a substantial relationship between the issues in the litigation and the subject matter of the prior representation, or where the party's former counsel had access to confidential material substantially related to the litigation (*see Credit Index v RiskWise Intl.*, 296 AD2d 318, 318 [2002]; *Forest Park Assoc. Ltd. Partnership v Kraus*, 175 AD2d 60, 61-62 [1991]; *Saftler v Government Empls. Ins. Co.*, 95 AD2d 54, 57 [1983]). "'[D]oubts as to the existence of a conflict of interest must be resolved in favor of disqualification'" (*Justinian Capital SPC v WestLB AG, N.Y. Branch*, 90 AD3d 585, 585 [2011], *quoting Rose Ocko Found. v Liebovitz*, 155 AD2d 426, 428 [1989]; *see also Sperr v Gordon L. Seaman, Inc.*, 284 AD2d 449, 450 [2001]; *Heelan*, 143 AD2d at 883).

As there are "significant competing interests inherent in attorney disqualification cases," the Court of Appeals has advised against "mechanical application of blanket rules," in favor of a "careful appraisal of the interests involved" (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d at 131, 132). Thus, "'[a] party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted'" (*Matter of Dream Weaver Realty, Inc. [Poritzky—DeName]*, 70 AD3d 941, 943 [2010], *quoting Aryeh v Aryeh*, 14 AD3d 634, 634 [2005]; *see Goldman v Goldman*, 66 AD3d 641 [2009]).

At the outset, the court notes that it finds that Exhibits B, C, D, and E all involve matters that are not substantially related to the subject matter of the instant litigation. As to Exhibit F, the fax to Glatzer, the court finds that nothing in this document establishes the existence of an attorney-client relationship between plaintiff and the Abrams firm.

As to the first element of the existence of an attorney-client relationship, with regard to Exhibit G, the Abrams firm points out that this April 14, 2008 stipulation of settlement involving the Willoughby Rehabilitation Center, was a case in which the Abrams firm represented the plaintiffs in that matter who were suing Webster, who was the defendant in that matter and that she was in fact represented in that matter by other attorneys. Thus, there was no attorney client relationship between plaintiff and the Abrams firm in that matter to support a disqualification in this matter.

The court now turns to Exhibit A, the bill for services rendered to plaintiff from August 2000 to February 2002, by attorney Mark Zafrin, for services he provided related to

"Garden Care transfers" before he joined the Abrams firm in March 2002. It is undisputed that Zafrin left the Abrams firm as of 2010. However, plaintiff argues that this document establishes that there was an attorney client relationship between her and Zafrin related to the Garden Care matter.

In opposition, defendants argue that this entire case is based upon the option agreement that was entered into in 1995 and point out that it specifically states that plaintiff was represented by the law firm of Frenkel & Hershkowitz. Thus, they contend, plaintiff did not even have an attorney-client relationship with Zafrin related to the option agreement, let alone the Abrams firm. Further they point out that whatever work Zafrin may have performed related to Garden Care was done between August 2000 and February 2002 prior to his joining the firm and that they had only agreed to take over his receivables. They argue that a law firm that becomes a collection agent and takes an assignment of a receivable of an attorney that did work for someone prior to joining the instant law firm, does not result in the new law firm becoming the law firm in connection with the matters covered in the receivable. Defendants further explain that this bill was originally sent to the Sherman's who refused to pay it, contending that they had already paid Tenzer & Lunin for this work. They further contend that plaintiff actually never paid the bill either. Additionally, defendants point out that plaintiff was represented by Cohen & Estis in the Garden Care matter during the time that Zafrin was employed by the Abrams firms and they further point out that Zafrin had already left the firm at the time that the instant litigation was commenced.

It is well settled that "[d]isqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter" (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131-132 [1996] *quoting Solow v W.R. Grace & Co.*, 83 NY2d 303, 309-310 [1994] ; *S&S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]). In that respect, "'[a] party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted'" (*Gabel v Gabel*, 101 AD3d 676, 677 [2012] quoting *Matter of Dream Weaver Realty, Inc. [Poritzky—DeName]*, 70 AD3d 941, 943 [2010]; *Aryeh v Aryeh*, 14 AD3d 634, 634 [2005]; *see Goldman v Goldman*, 66 AD3d 641 [2009]).

In *Solow v W.R. Grace & Co.* (83 NY2d at 313), the Court of Appeals held, that where the attorneys who personally handled the prior representation have left the firm sought to be disqualified, the presumption of disqualification may be rebutted "by facts establishing that the firm's remaining attorneys possess no confidences or secrets of the former client" (*St. Barnabas Hosp. v N.Y. City Health & Hosps. Corp.*, 7 AD3d 83, 90 [2004] citing *Solow v W.R. Grace & Co.*, 83 NY2d at 313 [1994]; *cf. Kassis v Teacher's Ins. & Annuity Assn.*, 93 NY2d 611, 617 [1999] [even where the attorney who personally handled a prior related matter for the movant is currently associated with the firm sought to be disqualified, "the presumption that the entirety of the attorney's current firm must be disqualified may be rebutted"]).

A movant is not required to actually spell out the claimed secrets and confidences in order to prevail, however at a minimum she must provide the motion court with information sufficient to determine whether there exists a reasonable probability that DR 5-108 (A) (2) would be violated (*see Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 638 [1998]). Here, plaintiff has not alleged any confidences that will be revealed, rather she merely contends that the Abrams firm, through Zafrin, represented her in the Garden Care matter. She argues that what appears to be occurring here is that the Abrams firm has personal knowledge regarding the deal between the Shermans and plaintiff. The court finds that plaintiff has failed to demonstrate DR 5-108 (A) (2) has or will be violated. The court notes that any knowledge the Abrams firm has on this issue could have been obtained through its representation of the Shermans, Garden Care and Landa regarding this issue as well as other similar nursing home ownership arrangements between these parties. Accordingly, the court is satisfied that the Abrams firm has rebutted the presumption that the firm should be disqualified.

Therefore, the motion by plaintiff to disqualify the Abrams firm is denied. And the court will now address the other pending motion.

Defendants' Motion to Dismiss

Defendants Rochelle and Israel Sherman, Landa, and Garden Care move for an order, pursuant to CPLR 3211 (a) (1), (5) and (7) dismissing the complaint on the ground that defenses are founded upon documentary evidence; the claims are barred by reason of the statute of limitations and judicial estoppel; and that the claims fail to state a cause of action.

When a party moves to dismiss a complaint pursuant to CPLR 3211 (a) (7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (*Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 682 [2012] quoting *Sokol v Leader*, 74 AD3d 1180, 1180–1181 [2010]; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokol,* 74 AD3d at 1181 [internal quotation marks omitted]; *see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]). "'Whether a plaintiff can ultimately establish its allegations is not part of the calculus'" (*Sokol,* 74 AD3d at 1181, *quoting EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). In addition, when deciding a motion to dismiss under CPLR 3211 (a) (7), the court may consider documents referenced in or attached to the complaint (*see Manchester Equip. Co. v Panasonic Indus. Co.*, 141 AD2d 616 [1988], *lv denied* 73 NY2d 703 [1988]).

"A motion to dismiss pursuant to CPLR 3211 (a) (1) 'may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law'" (*Faith Assembly v Titledge of N.Y. Abstract, LLC*, 106 AD3d 47, 57-58 [2013] quoting *Cervini v Zanoni*, 95 AD3d 919, 920-921 [2012]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2006]).

Finally, "[t]o dismiss a complaint pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Singh v Edelstein*, 103 AD3d 873, 874 [2013], citing *DeStaso v Condon Resnick, LLP*, 90 AD3d 809, 812 [2011]). The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether the action was commenced within the applicable limitations period (*see Williams v New York City Health & Hosps. Corp.*, 84 AD3d 1358, 1359 [2011]).

Breach of Contract

Defendants argue that the breach of contract claim must be dismissed as plaintiff fails to plead a cause of action inasmuch as the contract that she alleges was breached is incomplete and unenforceable. Defendants point out that the only agreement referenced in the amended complaint is a document entitled "Option Agreement" which purports to be an agreement by Rochelle Sherman to sell to plaintiff and Naomi Sherman, Rochelle's interest in a nursing home. Defendants point out that said document is undated, the dates of the referenced contract of sale are incomplete, the date for the closing is blank and that the notice provision is blank. Defendants further note that the purchase price is also missing. Additionally, defendants maintain that plaintiff's allegation that the Sherman's breached the contract by failing to pay plaintiff her share of Garden Care's profits since 2007 does not support this claim because the agreement was for the sale of Rochelle's shareholder interest

and not to distribute Garden Care profits. Additionally, defendants argue that Israel Sherman was not even a party to the agreement and thus cannot be sued for breach of said agreement.

Next, defendants argue that plaintiff is estopped from attempting to enforce the agreement because it is inconsistent with the position that she has taken in prior legal proceedings. Specifically, defendants point to an April 2008, Stipulation of Settlement, so ordered by Justice Leonard B. Austin, in a prior, separate action which addressed numerous issues between plaintiff and defendant Landa, and pursuant to which, plaintiff acknowledged that she was not a Garden Care shareholder and did not have a pending agreement with Rochelle Sherman. Defendants further point to plaintiff's deposition testimony in another case *Glatzer v Webster, et al.* (Kings County, Index No. 3905/06) in which plaintiff testified that Israel Sherman did not own shares or any ownership interest in Garden Care and that Rochelle Sherman was not holding any interest in Garden Care in her name for plaintiff's benefit. Inasmuch as plaintiff's breach of contract is at odds with the provision of the Stipulation of Settlement and her deposition testimony, defendants maintain that she should be estopped from asserting this breach of contract claim.

Finally, defendants argue that the statute of limitations which is six years for a breach of contract claim, bars this claim as well. They argue that according to the amended complaint plaintiff was entitled to ownership of Rochelle's shares as of November 19, 2003 but did not commence the action until September 21, 2012, thus rendering the action untimely.

In opposition, plaintiff maintains that she has sufficiently plead a breach of contract claim. Her complaint alleges that "by failing to pay plaintiff her share of the Garden Care Center, Inc.'s profits since 2007 or colluding with the other defendants to prevent such payment, defendants Rochelle Sherman and Israel Sherman have breached their contract with plaintiff." She argues that the agreement between the parties was definitive and points out that the agreement obligated Rochelle Sherman to transfer a specific equity interest. Additionally, she notes that the interest and share price are referenced in her pleadings and in the shareholder consent to the agreement which was executed by Rochelle Sherman and which plaintiff appended as Exhibit B to the amended complaint and also in the letter sent to the Department of Health which she attached as Exhibit C to the complaint.

Next, plaintiff argues that the doctrine of judicial estoppel is inapplicable to her case arguing that defendants' assertion that plaintiff took sworn positions that contradict her claims about the Sherman's obligation to transfer the shares and profits to her is incorrect. First, she points out that the language contained in a 2007 stipulation of settlement which states "[i]n the event that Helen Webster reaches an agreement with Rochelle Sherman to purchase an interest in Garden care LLC" is not an active denial of the existence of such an agreement, but rather is an artfully worded condition precedent for other obligations to consummate such an agreement in the stipulation that neither confirm nor denies the existence of a prior agreement. Next plaintiff refutes defendants' claim that plaintiff's deposition testimony in *Glatzer v Webster,* demonstrates that she admits that Mr. Sherman did not own shares in Garden Care, nor was he bound by any agreement to sell such share

and that she denied that Rochelle Sherman was holding an interest in Garden Care for her benefit. Plaintiff argues that this testimony was given in 2009, a point in time which she claims she was under the belief that a transfer of the shares had occurred, and at which point she claims she was unaware of defendants' failure to procure approval of the transfer of shares from the NYSDOH.

As to the statute of limitations argument plaintiff argues that her complaint asserts a breach of contract claim for a breach of defendants' obligation to remit profits under the terms of the contract which they did until 2009. At that time they stopped paying plaintiff, citing a Rabbinical Court restraining order which was not lifted until April 2012, thus she claims that it was not until 2012 when defendants refused to remit to her the profits due for 2008, 2009, 2010 and 2011, that this obligation was breached.

It is well-established that in order to give rise to a binding and enforceable contract, there be "an objective meeting of the minds," and "a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999], *rearg denied* 93 NY2d 1042 [1999]; *see also Mills*, 103 AD3d 1041, 1047 [2013]; *Robison v Sweeney*, 301 AD2d 815, 817 [2003]). In this regard, it is beyond cavil that "not all terms of a contract need be fixed with absolute certainty" (*Matter of Express Indus.*, 93 NY2d at 590). "[A]t some point virtually every agreement can be said to have a degree of indefiniteness," but "parties . . . should be held to their promises" to avoid defeating the reasonable expectations of the parties (*Cobble Hill Nursing Home v Henry &*

Warren Corp., 74 NY2d 475, 483 [1989], *rearg denied* 75 NY2d 863 [1990], *cert denied* 498 US 816 [1990]). The relevant factors in determining whether an agreement is binding is the language of the agreement, the existence of open material terms, whether there has been partial performance, and the necessity of putting the agreement in a more final form (*see FCOF UB Sec. LLC v MorEquity, LLC*, 663 F Supp 2d 224, 228-229 [SD NY 2009]; *Teachers Ins. & Annuity Assn. of Am. v Tribune Co.*, 670 F Supp 491, 497-499 [SD NY 1987]). Importantly, "the existence of a contract may be established through the conduct of the parties recognizing the contract" (*Apex Oil Co. v Vanguard Oil & Serv. Co.*, 760 F2d 417, 422 [2d Cir 1985]).

Here, the court finds that the plaintiff has plead a cause of action for breach of contract and that the documentary evidence fails to demonstrate that the agreement entered into between plaintiff and Rochelle Sherman was not an enforceable agreement. In fact the undisputed conduct of the Shermans in paying plaintiff a proportional share of the profits from Garden Care up until 2009 and then refusing to do so thereafter establishes that there was an agreement and a meeting of the minds sufficient to state a cause of action alleging the existence of an enforceable contract and its subsequent breach. Additionally, the court does not find that either the wording of the stipulation of settlement, nor plaintiff's testimony in the Glatzer matter, estops her from asserting her breach of contract claim in the present action. Finally, the court finds that this claim is not barred by the statute of limitations inasmuch as plaintiff continued to receive her share of the profits in accordance with the terms of the agreement until 2009, at which point the Rabbinical Court restraining order was

imposed and was not lifted until 2012, it was at that point in time that defendants refused to pay plaintiff her share of the Garden Care profits owed to her for 2008, 2009, 2010, and 2011; thus, it is at that point that she contends that the breach occurred. Accordingly, that branch of defendants' motion seeking dismissal of the breach of contract claim is denied.

Conversion

Next, defendants argue that the conversion action must be dismissed inasmuch as it does not assert a separate claim but, rather, is predicated on the breach of contract. They also argue that the percentage of profits that plaintiff alleges she is entitled to that was converted was not an identifiable sum. Further, they point out that plaintiff failed to plead that she ever made a demand to the Shermans to turn over any profits that she was entitled to but that they retained such amount instead. Defendants argue that this failure also requires dismissal of the conversion claim.

In opposition, plaintiff argues that she has plead a breach of a duty of care distinct from defendants' contractual obligations sufficient to state an independent conversion claim inasmuch as she plead that defendants falsely represented to the NYSDOH that the transfer of shares had not occurred because the consent of the other shareholders had not been received. Next plaintiff states that the 12.5 percent stake in profits retained by defendants is sufficient to state an identifiable sum to support a conversion claim. Finally plaintiff argues that there is no demand necessary for converted property that a defendant unlawfully retains.

Conversion takes place when a defendant intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*see Colavito v Organ Donor Network*, 8 NY3d 43, 49-50 [2006]). The two key elements of conversion are (1) plaintiff's possessory right or interest in the property, and (2) defendant's dominion over the property or interference with it, in derogation of Plaintiff's rights. For statute of limitations purposes, an action for conversion is subject to a three-year limitation period (*see Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Texas*, 87 NY2d 36, 44 [1995], citing CPLR 214 [3]). Accrual runs from the date the conversion takes place. Additionally, the court notes that "[p]roof of a demand for the return of the subject property 'is an essential ingredient in a conversion action'" (*Cash v Titan Fin. Servs., Inc.*, 58 AD3d 785, 789 [2009] quoting *Tache-Haddad Enters. v Melohn*, 224 AD2d 213 [1996]; *see Apex Ribbon Co. v Knitwear Supplies*, 22 AD2d 766, 767 [1964]).

Importantly, it is settled law that "[a] claim of conversion cannot be predicated on a mere breach of contract," and, here, there are no independent facts alleged of a separate taking (apart from the alleged breach of contract), which could give rise to tort liability (*see Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320, 320 [2008]; *see also Tornheim v Blue & White Food Prods. Corp.*, 56 AD3d 761, 761 [2008]; *Hochman v LaRea*, 14 AD3d 653, 655 [2005]; *Hassett Belfer Senior Hous. v Town of N. Hempstead*, 270 AD2d 306, 307 [2000]; *MBL Life Assur. Corp. v 555 Realty Co.*, 240 AD2d 375, 376 [1997]). Therefore, since plaintiff's conversion claim is merely a restatement of her breach of contract claim, its dismissal is mandated (*see* CPLR 3211 [a] [7]; *Tornheim*, 56 AD3d at 761; *Interstate*

Adjusters v First Fid. Bank, N.J., 251 AD2d 232, 234 [1998]; *MBL Life Assur.*, 240 AD2d at 376).

Tortious Interference with Contract

Defendants argue that plaintiff's claim alleging tortious interference with contract as alleged against defendants Benjamin Landa and Israel Sherman must be dismissed because it fails to state a cause of action. Specifically, they maintain that since the contract in question is an agreement pursuant to which Rochelle was to sell her interest in the Franklin Park nursing home and since the agreement was not binding or enforceable because its terms were not complete then there was no enforceable agreement that Israel Sherman or Landa could have tortiously interfered with. Moreover, they argue that since the agreement related to Rochelle selling her equity interest in the nursing home and not to pay profits to plaintiff in Garden Care, then Rochelle's alleged failure to pay profits cannot constitute a breach of contract and thus, even if Israel Sherman or Landa somehow caused Rochelle not to pay Garden Care profits to plaintiff this would not constitute intentional interference with the contract. Next, defendants argue that plaintiff is estopped from this assertion inasmuch as she has stipulated that she has no agreement to purchase an interest in Garden Care and is thus estopped from asserting the existence of such agreement and thus cannot allege that Israel and Landa tortiously interfered with it. Finally, defendants assert that part of this claim is barred by the statute of limitations which provides that such claim must be commenced within three years. Defendants maintain that plaintiff's claim for damages related to Israel Sherman's tortious interference with her alleged right to receive profits due for 2008 and

Landa's alleged interference with her rights for 2008 and 2009 are barred as she commenced this action against Israel Sherman on September 21, 2012 and against Landa on February 6, 2013.

In opposition, plaintiff argues that she has plead the essential elements of contract formation, thus her tortious interference with contract claim must survive.

To state a claim for tortious interference with contract, a plaintiff must allege (1) the existence of a valid contract between the plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procurement of the third-party's breach of the contract; (4) the procurement was without justification; (5) actual breach of the contract; and (6) damages (*see Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996]).

With regard to plaintiff's cause of action alleging tortious interference with contract by Landa and Sherman, the court finds that plaintiff has alleged the existence of a valid contract that these defendants were aware of. Additionally she has alleged that both Landa and Israel Sherman intentionally procured Rochelle Sherman's breach of the contract without justification and has set forth the damages she claims she has sustained as a result of said breach, namely the profits she alleges were due to her from 2008 through 2011. Accordingly, the court finds that plaintiff has plead a tortious interference of contract claim as against Landa and Sherman.

Breach of Fiduciary Duty

Defendants argue that plaintiff's claim alleging a breach of fiduciary duty by Landa must be dismissed as there was no fiduciary duty owed by Landa to her. "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" (*Faith Assembly v Titledge of N.Y. Abstract, LLC*, 106 AD3d 47, 61-62 [2013]; *Armentano v Paraco Gas Corp.*, 90 AD3d 683, 684 [2011]; *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2010]; *Fitzpatrick House III, LLC v Neighborhood Youth & Family Servs.*, 55 AD3d 664 [2008]; *Kurtzman v Bergstol*, 40 AD3d 588, 590 [2007]). Defendants point out that while corporate officers do owe a fiduciary duty to their shareholders, plaintiff through her own admissions establishes that she is not a Garden Care shareholder.

In opposition, plaintiff points to case law that establishes that "a fiduciary relationship arises where 'one party's superior position or superior access to confidential information is so great as virtually to require the other party to repose trust and confidence in the first party,' and the defendant was 'under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'" (*Anwar v Fairfield Greenwhich Ltd.*, 728 F Supp 2d 372, 415 [2010]). Plaintiff argues that Landa, as President of Garden Care, had superior access to confidential information and had in fact made representations to plaintiff that he was under a duty to obtain approval for the transfer of the shares from the Public Health Council. Plaintiff points out that she has plead that Landa, in a sworn statement contained in a March 17, 1998 document entitled "Shareholder's Agreement and Irrevocable

Proxy" consented to the sale to of Rochelle Sherman's interest to plaintiff, subject to the approval of the Public Health Council which Landa, in a further sworn statement stated that he was duly authorized to subscribe and submit said application. This document was appended to plaintiff's complaint as Exhibit C. Based upon the foregoing, the court finds that plaintiff has adequately plead a cause of action alleging a breach of fiduciary duty by Landa in relation to obtaining the necessary approval related to the transfer of the Garden Care shares to plaintiff.

Conclusion

Plaintiff's motion to disqualify the Abrams firm from representing the defendants is denied. Those branches of defendants' motion seeking to dismiss plaintiff's causes of action alleging a breach of contract and tortious interference with contract are denied as is that branch seeking to dismiss plaintiff's claim alleging a breach of fiduciary duty by defendant Landa. That branch seeking to dismiss the conversion claim is granted.

The foregoing constitutes the decision and order of this court.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT