Castellotti v Free
2014 NY Slip Op 31798(U)
July 10, 2014
Supreme Court, New York County
Docket Number: 158162/2012
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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PETER CASTELLOTTI,

Plaintiff,

- v -

LISA FREE

Defendant.

---X

Index No. 158162/2012

DECISION and ORDER

Mot. Seq. 02

HON. EILEEN A. RAKOWER, J.S.C.

This is an action for breach of contract, accounting, fraud, breach of fiduciary duty, breach of covenant of good faith and fair dealing, unjust enrichment and conversion based on, *inter alia*, an alleged oral contract between plaintiff, Peter Castellotti ("Plaintiff"), and his sister, defendant Lisa Free ("Defendant"), to transfer assets and shareholder interests in a closely-held pizzeria business to Plaintiff, following Plaintiff's divorce. Plaintiff claims that the subject assets and interests (collectively, the "Assets") previously belonged to the siblings' now-deceased mother, Madeline Castellotti ("Madeline"). Plaintiff further claims that, prior to Madeline's passing, Madeline excised Plaintiff from her will and made Defendant the sole beneficiary, ostensibly to prevent Plaintiff's then-wife, Rea Castellotti ("Rea"), from accessing the Assets through divorce proceedings which were pending between Plaintiff and Rea at the time.

Plaintiff also claims that, "subsequent to the passing of" their mother, Plaintiff and Defendant entered into an oral agreement (the "Agreement"), whereby Defendant allegedly agreed to name Plaintiff as the beneficiary of her life insurance policy, to provide Plaintiff with an income until his divorce, and to formally transfer fifty percent of the Assets to Plaintiff upon his divorce, in exchange for Plaintiff's promise to use his share of Madeline's life insurance proceeds to pay her estate taxes. Plaintiff, who is now divorced, claims to have performed under the purported oral

Agreement, and that Defendant failed to formally transfer fifty percent of the Assets as allegedly required.

Defendant now moves for an Order, pursuant to CPLR §§ 3211(a)(5) and/or (a)(7), dismissing Plaintiff's complaint on the basis of judicial estoppel, collateral estoppel, res judicata or the statute of frauds, as well as other equitable doctrines, and for failure to state a claim upon which relief may be granted.

Plaintiff opposes.

CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> > (5) the cause of action may not be maintained because of . . . collateral estoppel . . . res judicata, . . . or statute of frauds;
> >
> > (7) the pleading fails to state a cause of action.

Collateral estoppel, or issue preclusion, "precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . , whether or not the tribunals or causes of action are the same." (*Ryan v. New York Tel. Co.*, 62 NY2d 494, 500 [1984]).

New York's Statute of Frauds requires a writing to enforce certain agreements. (Gen. Oblig. Law § 5-701). Such agreements include, agreements which are not to be completed before the end of a lifetime, promises to answer for the debt of another, and contracts to name another as the beneficiary of a life insurance policy. (Gen. Oblig. Law §§ 5-701[a][1], [2], [9]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR § 3211[a][7]).

Plaintiff's complaint asserts two causes of action for breach of contract based on the Agreement. "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dept. 2009]).

Plaintiff's complaint alleges,

> Pursuant to their mother's last will and testament, Defendant received ownership of Madeline Castellotti's assets including but not limited to, (i) 100% of Whole Pies, Inc.; (ii) 51% of PMPL, LTD; (iii) sole ownership of their mother's residence located at 943 West Fingerboard Road, Staten Island, New York; and (iv) 100% of Madeline Castellotti's Bank Accounts (items 10(i)-(iv) hereafter collectively referred to as the "The Assets").

Plaintiff's complaint further alleges,

> In 2004, both prior to and again subsequent to the passing of, Plaintiff and Defendant entered into an oral agreement (hereafter referred to as, "The Agreement") whereby Plaintiff agreed to use his share of Madeline Castellotti's life insurance proceeds (hereafter referred to as the "Life Insurance Proceeds") to pay her estate taxes, and in return: (i) upon the finality of Plaintiff's divorce, plaintiff would receive from the Defendant fifty percent (50%) of everything given to the Defendant by their mother via her mother's Will (i.e. fifty percent of The Assets); (ii) prior to the finality of the Plaintiff's divorce, Defendant would give the Plaintiff half of all of the income and proceeds generated from The Assets; and (iii) Plaintiff was to be named as the sole beneficiary on Defendant's life insurance policy whereby said insurance coverage would not be less than $5,000,000.00 and would be in existence up until the date of the physical transfer of The Assets.

Plaintiff's complaint asserts, "On or about February of 2005, pursuant to The Agreement, Plaintiff did in fact cause the Life Insurance Proceeds to be paid for Madeline Castellotti's estate taxes."

Plaintiff's complaint further asserts:

> In furtherance of The Agreement, on or about February of 2005, at the sole cost and expense of the Plaintiff, Defendant did procure a $5,000,000.00 life insurance policy naming the Plaintiff as the sole beneficiary. However, on or about May of 2012, Defendant refused to sign the required renewal documents and said policy has since lapsed.

Plaintiff's complaint also alleges, "Additionally, in furtherance of The Agreement, Defendant did revise her Last Will and Testament to provide that Plaintiff would receive 50% of Whole Pies, Inc in the event of Defendants death." Plaintiff's complaint further alleges, "Plaintiff's divorce was finalized on or about November 18, 2008," and asserts, "Despite the fact Plaintiff complied with the terms of The Agreement, Defendant still has not formally transferred any of the aforementioned assets to the Plaintiff, nor has Defendant provided the Plaintiff with fifty-percent of the income generated by The Assets."

Initially, Defendant argues that the doctrines of collateral and judicial estoppel bar Plaintiff's claims for breach of contract and accounting. "Collateral estoppel preserves party and judicial resources by preventing relitigation of matters that have already been resolved. Further, it prevents inconsistent results. Collateral estoppel can be asserted in a new case by a nonparty to the original proceeding." (*Feinberg v. Boros*, 99 A.D.3d 219, 226 [1st Dep't 2012] [citations omitted]). "The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action." (*Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 456 [1985]).

"The doctrine of judicial estoppel or the doctrine of inconsistent positions 'precludes a party who assumed a certain position in a prior legal proceeding *and who secured a judgment in his or her favor* from assuming a contrary position in

another action simply because his or her interests have changed'" (*Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168, 176 [1st Dep't 1998] [emphasis in the original]).

Defendant argues that Plaintiff's claims for breach of contract are based on the alleged oral Agreement to obtain an ownership interest in the Assets and to become a shareholder in Whole Pies and Aim to Please. Defendant argues that Plaintiff is estopped from asserting any ownership interest in the Assets, including Whole Pies and Aim to Please, because Plaintiff testified in a prior proceeding—the divorce proceeding between Plaintiff and Rea Castellotti—that he had no such interest. Defendant argues that Plaintiff also filed a "net worth statement" to this effect, in connection the prior matrimonial action.

Defendant contends that Plaintiff's current position *vis-a-vis* the Assets contradicts Plaintiff's previous position in the matrimonial action, and further contends that Plaintiff benefitted from its position in the prior proceeding since Plaintiff's ex-wife did not receive an equitable distribution from the Assets. Defendant argues that the doctrines of judicial estoppel and collateral estoppel therefore preclude Plaintiff's breach of contract claims.

Defendant further argues that Plaintiff's claims for an accounting of Whole Pies and Aim to Please also stem from Plaintiff's purported interest in the Assets. As a result, Defendant contends, the doctrines of judicial and collateral estoppel preclude these claims as well.

Plaintiff, in turn, argues that he had not yet acquired an ownership interest in the Assets when he gave the testimony in question. Plaintiff argues that, in the matrimonial action, he testified to not possessing any *actual* interest in the Assets, and that he was not required to disclose any *contingent* interest in the Assets at that time. Plaintiff argues that this position is consistent with his current claims. Plaintiff further argues that the prior proceeding adjudicated his marital status, which is not the subject of the instant complaint. Plaintiff argues that his so-called contingent interest in the Assets was neither raised nor litigated in that proceeding.

Here, accepting Plaintiff's allegations as true and construing all facts in favor of the non-moving party, Defendant fails to meet its burden of demonstrating that the identity of the issues in the present litigation and the prior determination, for purposes of a motion to dismiss at the pleadings stage.

[* 6]

Defendant also argues that Plaintiff's complaint fails to state a cause of action for breach of contract because the alleged oral Agreement does not comply with the Statute of Frauds.

New York's Statute of Frauds provides, in relevant part:

> (a) Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> > (1) By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime;
> >
> > (2) Is a special promise to answer for the debt, default or miscarriage of another person;
> >
> > (9) Is a contract to assign or an assignment, with or without consideration to the promisor, of a life or health or accident insurance policy, or a promise, with or without consideration to the promisor, to name a beneficiary of any such policy.

(Gen. Oblig. Law §§ 5-701[a][1], [2], [9]).

Under New York's Statute of Frauds, a contract which is a "special promise to answer for the debt of another" is void unless there is a writing. (Gen. Oblig. Law § 5-701[a][2]). "However, under a long-standing exception to the statute, the promise need not be in writing if it is (1) supported by new consideration moving to the promisor and beneficial to him, and (2) the promisor has become in the intention of the parties a principal debtor primarily liable." (*Carey & Assoc. v. Ernst*, 27 A.D.3d 261, 263 [1st Dep't 2006] [citing *Martin Roofing, Inc. v. Goldstein*, 60 N.Y.2d 262, 265 [1983]).

"Courts have generally required that the new consideration be both tangible and directly beneficial to the promisor in order to satisfy this exception." (*Carey & Assoc. v. Ernst*, 27 A.D.3d 261, 263 [1st Dep't 2006]).

In order to determine whether the promisor has become in the intention of the parties a principal debtor primarily liable, "[t]he true test of the validity of a new oral promise should be: Is the new promisor a surety? If, as between the promisor and the original debtor, the promisor is bound to pay, the debt is his own and not within the statute. 'Contrariwise if as between them the original debtor still ought to pay, the debt cannot be the promisor's own and he is undertaking to answer for the debt of another.'" (*Bulkley v. Shaw*, 289 N.Y. 133, 138-39 [1942] [quoting 2 Williston on Contracts (1936) § 475]).

Here, Plaintiff's complaint alleges that Plaintiff promised to use his share of Madeline's life insurance proceeds to pay her estate taxes, in exchange for new consideration directly beneficial to the promisor, namely, Defendant's promise to transfer fifty-percent of the Assets to Plaintiff upon his divorce. Plaintiff's complaint further alleges that Plaintiff paid these estate taxes, even though Defendant is the sole beneficiary of Madeline's will.

Accepting Plaintiff's allegations as true, Plaintiff's complaint does not seek to enforce Plaintiff's alleged oral promise to pay Madeline's estate taxes. Rather, Plaintiff's complaint asserts this promise as consideration for Defendant's purported verbal Agreement to transfer fifty-percent of the Assets to Plaintiff. Accordingly, accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, Plaintiff's alleged promise to pay Madeline's estate taxes arguably constitutes valid consideration, even though an action on this promise is likely barred under the Statute of Frauds. (*Fafoutis v. Lyons*, 149 A.D.2d 565 [2d Dep't 1989]).

Additionally, whether the proceeds of a life insurance policy are subject to estate taxes depends on whether the policy in question is part of the taxable estate. "The rationale is obvious; recipients of assets which create a tax ordinarily bear the tax burden. Recipients of assets that are not taxable should not share in the tax burden." (*In re Estate of Darrow*, 120 Misc. 2d 924, 933 [Sur. Ct. 1983]).

Here, Plaintiff's complaint does not plead whether Plaintiff is the sole beneficiary of Madeline's life insurance policy, nor does the complaint plead whether the proceeds from this policy are part of the taxable estate. However, insofar as Defendant would otherwise bear the tax burden of Madeline's estate, the life insurance policy's liability for apportionment goes to the amount, as opposed to adequacy, of the consideration alleged.

Furthermore, accepting Plaintiff's allegation that Plaintiff and Defendant entered into the Agreement "subsequent to the passing of" Madeline as true, and drawing all inferences in favor of the non-moving party, the Agreement, as alleged, is not barred as an agreement which by its terms is not to be performed within a lifetime.

Nevertheless, even assuming that the Agreement is supported by sufficient consideration, and even accepting Plaintiff's allegation that Plaintiff and Defendant entered into the Agreement "subsequent to the passing of" Madeline as true, the Agreement, as alleged, contains a provision which requires Defendant to name Plaintiff as the beneficiary of a life insurance policy (the "Life Insurance Provision").

"As a general rule, if part of an entire contract is void under the Statute of Frauds, the whole contract is void. However, where an oral agreement is a severable one, i.e., susceptible of division and apportionment, having two or more parts not necessarily dependent upon each other, that part which, if standing alone, is not required to be in writing, may be enforced, provided such apportionment of the agreement may be accomplished without doing violence to its terms or making a new contract for the parties." (*Apostolos v. R.D.T. Brokerage Corp.*, 159 A.D.2d 62, 65-66 [1st Dep't 1990] [citations omitted]).

The Life Insurance Provision at issue provides, "Plaintiff was to be named as the sole beneficiary on Defendant's life insurance policy whereby said insurance coverage would not be less than $5,000,000.00 and would be in existence up until the date of the physical transfer of The Assets." Accordingly, this part of the Agreement is void.

Defendant argues that the whole Agreement is void under the Statute of Frauds because the purported Agreement contains a material term that requires

Defendant to name Plaintiff as the beneficiary of her life insurance policy (the "Life Insurance Provision").

Plaintiff, in turn, argues that Life Insurance Provision is severable from the rest of the Agreement, and does not render the entire Agreement unenforceable. Plaintiff also argues that Plaintiff has performed under the Agreement and that Defendant has partially performed under the Agreement. Plaintiff contends that such performance obviates any requirement for a writing under the Statute of Frauds.

Here, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the whole Agreement is void under the Statute of Frauds because the Life Insurance Provision is not severable from the rest of the Agreement. The provision itself states that the subject life insurance policy "would be in existence up until the date of the physical transfer of the Assets." Thus, the Life Insurance Provision, by its terms, necessarily depends on the other parts of the Agreement. Indeed, this provision serves as collateral, and provides additional security for the performance of Defendant's principal obligation to "physically transfer" the Assets at issue to Plaintiff upon his divorce. Plaintiff's complaint also fails to allege any separate consideration for this portion of the Agreement. Accordingly, even assuming that the provisions of the Agreement other than the Life Insurance Provision fall outside the Statute of Frauds, enforcing those parts of the Agreement cannot be accomplished without doing violence to the Agreement's terms or making a new contract for the parties.

As for Plaintiff's argument that Defendant's alleged partial performance removes the Agreement from the Statute of Frauds, "the law simply does not provide for or permit a part performance exception for oral contracts other than those to which General Obligations Law § 5-703 [which deals with real estate transactions] applies." (*Gural v. Drasner*, 114 A.D.3d 25, 32 [1st Dep't 2013]). Thus, even accepting Plaintiff's allegations that Defendant partially performed the Agreement as true, Plaintiff's argument that such partial performance renders the Agreement enforceable is unavailing.

Even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, therefore, the alleged Agreement is void under the Statute of Frauds, and the four corners of Plaintiff's complaint fail to allege a valid and enforceable contract sufficient to support Plaintiff's breach of contract claims.

As for Plaintiff's third and fourth causes of action, "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." (*Palazzo v. Palazzo*, 121 A.D.2d 261, 265 [1st Dep't 1986]).

"A fiduciary relationship exists 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." (*HF Mgmt. Servs., LLC v. Pistone*, 34 A.D.3d 82, 84 ([1st Dep't 2006] [citations and quotations omitted]).

Here, even accepting Plaintiff's allegations as true, Plaintiff's complaint fails to plead the requisite confidential or fiduciary relationship for purposes of an accounting. Plaintiff's complaint does not plead that Plaintiff is a shareholder or employee of Whole Pies or Aim to Please, the entities for which Plaintiff now seeks an accounting. Nor does Plaintiff's complaint plead an enforceable Agreement to become a shareholder of these entities. Accordingly, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint do not adequately support Plaintiff's claims for an accounting.

Moreover, to the extent that Plaintiff's complaint asserts damages to Whole Pies resulting from Defendant's alleged misconduct, "allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually. A complaint the allegations of which confuse a shareholder's derivative and individual rights will, therefore, be dismissed." (*Abrams v. Donati*, 66 N.Y.2d 951, 953 [1985]). Accordingly, even if Plaintiff has a shareholder interest in Whole Pies, the complaint pleads a wrong to the corporation only, for which Plaintiff may not sue individually.

Similarly, with respect to Plaintiff's sixth and seventh causes of action, the elements of a cause of action for breach of fiduciary duty include (1) the existence of a fiduciary relationship; (2) misconduct; and (3) damages caused by the misconduct. (*Armentano v. Paraco Gas Corp.*, 90 AD3d 683, 935 NYS2d 304 [2nd

Dept 2011]). A cause of action sounding in breach of fiduciary duty must be pleaded with particularity. (CPLR 3016[b]).

Plaintiff's complaint alleges, "As the operating shareholder of Whole Pies, Inc, the Defendant owes the Plaintiff, a rightful shareholder of Whole Pies, Inc, a fiduciary duty of care and loyalty." Plaintiff's complaint further asserts "Upon information and belief, Defendant had used the funds belonging to Whole Pies, Inc. for her own personal purposes" and "Defendant breached her fiduciary duty owed to the Plaintiff by using Whole Pies, Inc. funds and accounts for personal purposes."

As discussed above, Plaintiff's complaint fails to plead a fiduciary relationship between Plaintiff and Defendant. Accordingly, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint do not plead with particularity facts sufficient to support a cause of action for breach of fiduciary duty.

As for Plaintiff's fifth cause of action, "[t]he elements of a cause of action sounding in fraud are material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation and damages." (*Orchid Constr. Corp., v. Gottbetter*, 89 AD3d 708, 932 NYS2d 1000 [2d Dep't 2011]).

CPLR § 3016 requires particularity in the pleading of a fraud cause of action. Additionally, "[t]he courts of this State have consistently held . . . that a cause of action for fraud does not arise when the only alleged fraud relates to a breach of contract," (*Metropolitan Transp. Authority v. Triumph Advertising Productions, Inc.*, 116 A.D.2d 526, 527 [1st Dep't 1986]), and "[a] mere misrepresentation of an intent to perform under the contract is insufficient to sustain a cause of action to recover damages for fraud." (*Gorman v. Fowkes*, 97 A.D.3d 726, 727 [2d Dep't 2012]).

Here, Plaintiff's complaint alleges that Defendant knowingly made false representations that:

> [I]n return for the Plaintiff agreeing to use his share of the Life Insurance Proceeds for Madeline Castellotti's estate taxes, Defendant stated that she will: (i) upon the finality

> of Plaintiff's divorce, plaintiff would receive from the Defendant fifty percent (50%) of everything given to the Defendant by their mother via her mother's Will (i.e. fifty percent of The Assets); (ii) prior to the finality of the Plaintiff's divorce, Defendant would give the Plaintiff half of all of the income and proceeds generated from The Assets; and (iii) Plaintiff was to be named as the sole beneficiary on Defendant's life insurance policy whereby said insurance coverage would not be less than $5,000,000.00 and would be in existence up until the date of the physical transfer of The Assets. (referred to collectively herein as "The Defendant's Representations").

Plaintiff's complaint further alleges that Defendant intended to induce Plaintiff to rely upon said representations, that Plaintiff justifiably relied thereon, and that Plaintiff suffered damages as a result. Accordingly, even accepting these allegations as true, the allegations contained in the four corners of Plaintiff's complaint do not plead with particularity facts sufficient to support a cause of action for fraud that is distinct from Plaintiff's breach of contract claim.

Moreover, "Plaintiff cannot avoid the statute of frauds by calling the breach of contract claim a fraud claim." (*Massey v Byrne*, 112 A.D.3d 532, 534 [1st Dep't 2013).

As for Plaintiff's eighth cause of action for breach of the covenant of good faith and fair dealing, "There can be no claim of breach of the implied covenant of good faith and fair dealing without a contract." (*Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 A.D.3d 463, 463 [1st Dep't 2012]).

Here, Plaintiff's complaint fails to plead a valid contract from which such a duty would arise. Rather, Plaintiff's complaint alleges, "As a shareholder of Whole Pies, Inc, the defendant owed the plaintiff a duty to act in good faith and deal fairly with regards to all of its conduct and activities pertaining to Whole Pies, Inc." and asserts, "Defendant breached their duty of good faith and fair dealing owed to the Plaintiff by using Whole Pies, Inc. the funds for her own personal purposes." Accordingly, even accepting Plaintiff's allegations as true and drawing all inferences

in favor of the non-moving party, Plaintiff's complaint is insufficient to support Plaintiff's claim for breach of the duty of good faith and fair dealing.

As for Plaintiff's ninth cause of action, to prevail on a claim for unjust enrichment, the "plaintiff must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dep't 2011]).

Plaintiff's complaint alleges, "Upon information and belief, Defendant used the funds belonging to Whole Pies, Inc and Aim to Please Inc for her own personal purposes", that, "Said use of funds for Defendant's personal purposes resulted in Defendant becoming unjustly enriched at the expense of the Plaintiff", and that, "As a result of the foregoing, the Plaintiff suffered significant damages in an exact amount to be determined at trial but in no event less than Twenty Million ($20,000,000.00) Dollars."

"The statute of frauds is not an automatic bar to a cause of action for unjust enrichment." (*RTC Props. v. Bio Res., Ltd.*, 295 A.D.2d 285, 286 [1st Dep't 2002]). However, where the claim for damages for unjust enrichment is indistinguishable from the breach of contract claim, dismissal is warranted. (*Andrews v. Cerberus Partners*, 707 N.Y.S.2d 85 [1st Dep't 2000]; *Fallon v. McKeon*, 230 A.D.2d 629 [1st Dep't 1996).

Here, Plaintiff's purported interest in Whole Pies and Aim to Please stems from an alleged oral agreement which is unenforceable under the Statute of Frauds. Additionally, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint fail to allege damages distinguishable from its breach of contract claim. Accordingly, dismissal is warranted[1].

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[1] Plaintiff's complaint does not allege any unjust enrichment relating to Plaintiff's purported payment of Madeline's estate taxes. Plaintiff's complaint also fails to allege the manner in which Madeline's life insurance proceeds passed. Additionally, the amount of estate taxes allegedly paid is neither stated nor explained. Thus, to the extent that Defendant, as the sole beneficiary of Madeline's estate, may have been unjustly enriched by Plaintiff's purported payment of Madeline's estate taxes, Plaintiff does not assert this cause of action in the four corners of the instant complaint.

Finally, as for Plaintiff's tenth cause of action, a "conversion occurs when a party, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. 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." (*Lynch v City of New York*, 108 A.D.3d 94, 101 [1st Dep't 2013]).

"A cause of action for conversion cannot be predicated on a mere breach of contract." (*Fesseha v. TD Waterhouse Investor Servs.*, 305 A.D.2d 268, 269 [1st Dep't 2003])

"Upon information and belief, Defendant used the funds belonging to Whole Pies, Inc and Aim to Please Inc for her own personal purposes" "Defendant did not possess legal ownership of said funds and no right, legal or otherwise, to use said funds for her own personal purposes." "Defendant's use of said funds for her personal purposes was an unauthorized dominion over said funds to the exclusion of Plaintiff's rights and, as such, constituted conversion of said funds."

Here, even accepting Plaintiff's allegations as true, Plaintiff's cause of action for conversion "merely restates the cause of action for breach of contract and alleges no independent facts sufficient to give rise to tort liability." (*Yeterian v. Heather Mills N. V., Inc.*, 583 N.Y.S.2d 439, 440 [1st Dep't 1992]).

Wherefore, it is hereby

ORDERED that

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: July 10 2014

EILEEN A. RAKOWER, J.S.C.