

**Art & Fashion Group Corp. v Cyclops Prod., Inc.**

2015 NY Slip Op 30878(U)

May 21, 2015

Sup Ct, New York County

Docket Number: 650364/2011

Judge: O. Peter Sherwood

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**ART AND FASHION GROUP CORPORATION  
and PIER 59 STUDIOS L.P.,**

**Plaintiffs,**

**-against-**

**CYCLOPS PRODUCTION, INC.,  
CYCLOPS, LLC, ALBERT WATSON,  
ELIZABETH WATSON and  
MICHAEL JURKOVAC,**

**Defendants,**

**-against-**

**FEDERICO PIGNATELLI,**

**Counterclaim-Defendant.**

-----X  
**O. PETER SHERWOOD, J.:**

**I. OVERVIEW**

In this straightforward case, defendants filed an amended answer which includes 66 affirmative defenses and 11 counterclaims. Plaintiffs and counterclaim defendants (“movants”) respond with this motion to dismiss (1) the amended answer as against individual counterclaim defendant Fredrico Pignatelli; (2) counterclaims 1-2, 4-8, and 11 as against all counterclaim defendants; and (3) 58 affirmative defenses. At oral argument on the motion, this court dismissed 55 of the 66 affirmative defenses and confirmed those rulings in a short form order (*see* NYSCEF Doc No. 92). This Decision and Order relates to the counterclaims.

This is an action sounding in breach of contract, unjust enrichment, fraudulent misrepresentation, conversion and property damage stemming from an alleged joint venture between, plaintiffs, Art and Fashion Group Corporation (AFG) and Pier 59 Studios L.P. (Pier 59) and defendants Cyclops Production, Inc. (CPI), Cyclops, LLC (CL), Albert Watson, Elizabeth Watson, and Michael Jurkovic. The parties allegedly formed a New York limited liability company titled 359 Productions LLC (359 Productions) to operate the joint venture, the purpose of which was to

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produce non-union advertising campaigns, photo shoots and video advertising campaigns. The parties agreed to share expenses, profits, and losses equally. The parties also discussed other joint ventures, but it is unclear which, if any, were consummated.

## II. BACKGROUND

As this is a motion to dismiss, the facts are taken from the answer and counterclaim and are assumed to be true for purposes of the motion (*see Monroe v Monroe*, 50 NY 2d 481, 484 [1980]).

Pignatelli, or an entity he controls, is the principal of plaintiff AFG and controls that entity. He, or an entity he controls, is also the general partner of, and controls, plaintiff Pier 59. Defendant CPI is a television commercial and music video production company.

In or around November, 2009, CPI was looking for new office space. CPI discussed possible business ventures with AFG and Pignatelli. The 359 Productions venture was to be a non-union video production company, operated on a 50/50 basis by CPI and APG. In November, 2009, "as an inducement to continue discussions" of the venture, CPI was allowed to move its operations into plaintiffs' premises rent-free. Two other ventures were discussed, but it is unclear whether any agreements were reached.

On May 13, 2010, Pignatelli informed Jurkovic that he was not going to move forward with 359 Productions. CPI then removed its offices from plaintiffs' premises. By the time CPI moved out, plaintiffs had "engaged in numerous predatory business practices which essentially gutted CPI and severely weakened, if not destroyed, CPI's business operations," including:

- i. Charging CPI rent for the use of plaintiffs' premises, despite plaintiffs' and [Pignatelli]'s representations to the contrary;
- ii. Inducing CPI's employees to work on projects for the sole and exclusive benefit of plaintiffs and [Pignatelli] to the exclusion of CPI's business operations;
- iii. Inducing CPI's talent and clients into entering into agreements with plaintiffs;
- iv. Failing to build office space for [Fashion Trust, a proposed entity];
- v. Hiring away CPI's employees;
- vi. Seizing and taking sole possession of all books and records related to the proposed 359 [Productions] projects and denying CPI access to the same;
- vii. Forcing CPI out of plaintiffs' premises after plaintiffs' and [Pignatelli] had effectively gutted CPI of employees and clients;
- viii. Failing to build a certified soundstage and casting facilities; and
- ix. Failing to expand and/or build out plaintiffs' existing digital capture, video

equipment rental facility, green-screen soundstage, and post facility for purposes of making the proposed 350 [Productions] venture competitive with other comparable companies

(Amended Answer with Counterclaims, ¶ 97).

On or about February 11, 2011, plaintiffs commenced this civil action seeking to recover \$380,000.00 in costs and expenses incurred as a result of the joint venture, together with interest, costs, including attorneys' fees, and disbursements upon theories of breach of contract, unjust enrichment, fraudulent misrepresentation, and conversion and property damage. In a Decision and Order dated February 24, 2012, this court granted defendants' motion to dismiss the complaint to the extent of dismissing the fraud cause of action and dismissing the entire complaint as against defendants Cyclops, Albert Watson, Elizabeth Watson and Jurkovic. By decision dated August 28, 2014, the Appellate Division, First Department, affirmed dismissal of the fraud cause of action, denial of the motion to dismiss the breach of the joint venture agreement and unjust enrichment causes of action, and dismissal of the complaint as against Cyclops. The Appellate Division also modified the Decision and Order to reinstate the breach of the joint venture agreement and unjust enrichment claims as against the individual defendants and to dismiss the claim for conversion (*see Art & Fashion Group. v Cyclops Productions, Inc.*, 120 AD3d 436 [1<sup>st</sup> Dept 2014]).

On October 22, 2014, defendants filed their answer, joined Pignatelli as a counterclaim defendant and asserted counterclaims against plaintiffs and Pignatelli for:

1. Raiding and Unfair Competition
2. Tortious Interference with a Prospective Business Advantage
3. Breach of Contract (related to 359 Productions)
4. Breach of Contract (related to Fashion Trust)
5. Fraudulent Inducement and Misrepresentation (related to use of the defendants' premises)
6. Fraudulent Inducement and Misrepresentation (related to building office space for Fashion Trust)
7. Unjust Enrichment
8. Tortious Interference with a Contract (regarding hiring away employees)
9. Accounting
10. Breach of Fiduciary Duty (breaches of duties of good faith and loyalty by charging defendants rent, hiring away employees, promoting their own companies to the detriment of defendants, and diverting business)
11. Abuse of Process and Harassment (for bringing this action).

Now, plaintiffs and Pignatelli move to dismiss all except the third (breach of contract), ninth (accounting), and tenth (breach of fiduciary duty) counterclaims; and all counterclaims as to Pignatelli.

### III. STANDARD

On a motion to dismiss a claim pursuant to CPLR 3211 (a)(7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see, Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]).

To survive a motion to dismiss, a pleading must allege more than a conclusory recitation of the elements of a cause of action -- it must actually allege facts that, if true, would support a claim for relief (*see, e.g., Maas v Cornell Univ.*, 94 NY2d 87, 91-92 [1999]). Liberal construction of pleadings "cannot be used as a substitute for matters of substance . . . nor may conclusory statements of law be utilized to supply material facts by inference" (*Didier v Macfadden Publs.*, 299 NY 49, 53 [1949]).

### IV. DISCUSSION

#### A. The Counterclaims

##### 1. Counterclaim 1- Raiding and Unfair Competition

"The inducement of an at-will employee to join a competitor is not actionable, unless

dishonest means are employed, or the solicitation is part of a scheme designed solely to produce damage” (*ENV Services, Inc. v Alesia*, 10 Misc 3d 1054(A) [Sup Ct, Nassau County 2005] citing *Headquarters Buick–Nissan, Inc. v Michael Oldsmobile*, 149 AD2d 302 [1st Dept 1989]).

Movants argue that insofar as this counterclaim alleges raiding, it fails because defendants have not alleged that dishonest means were used or that the solicitation of defendants’ employees was solely to produce damage (Memo at 5). Defendants point to their allegations that:

“[u]tilizing wrongful means, plaintiffs and [Pignatelli] intentionally, maliciously, and without justification interfered with defendant CPI’s prospective business relationships with its employees and clients . . . . Through the aforesaid actions of plaintiffs and [Pignatelli], defendant CPI’s ability to retain employees improperly solicited by plaintiffs and its ability to secure business were irreparably damaged”

(Opp Memo at 20, Amended Answer at ¶ 104). These statements are merely a conclusory recitation of elements of the cause of action. There are no specific factual allegations to support the claim. While defendants allege movants “used dishonest and unfair means to gut and severely weaken, if not destroy, CPI’s business operations . . . [and] gained access to confidential and proprietary trade secret information belonging to CPI, including but not limited to information about CPI’s clients, employees, preferences and the internal structure and operations of CPI’s business,” they fail to allege any particular bad conduct or any specific information obtained by movants (Amended Answer at ¶ 98).

As far as the counterclaim alleges that plaintiffs “engaged in predatory business practices” (*id.* at ¶97), defendants allege that movants (1) charged CPI rent despite Pignatelli’s promise not to; (2) got defendants’ employees to work on movants’ projects rather than defendants’; (3) got defendants’ clients to sign with movants; (4) failed to build office space for Fashion Trust; (5) hired away CPI’s employees; (6) took the joint venture’s records; (7) evicted CPI from movants’ premises; and (8) failed to build facilities (*id.*). Items 1, 4, 6, 7, and 8 appear to allege breach of contract, not any predatory business practice. For example, defendants do not explain how it is “predatory” to fail to provide rent-free office space to a competitor. The remaining allegations, 2, 3, and 5, lack specific allegations of bad acts which, if proven, would support the claim for relief. These vague and conclusory statements are simply insufficient to survive this motion to dismiss.

## 2. Counterclaim 2 - Tortious Interference with a Prospective Business Advantage

Interference with a business relationship claim, where there is no contract, is actionable if unlawful means are used, or (under the theory of prima facie tort), if lawful means are used to inflict intentional harm, resulting in damage, without either excuse or justification (*see Sommer v Kaufman*, 59 AD2d 843, 843-44 [1st Dept 1977]). Defendants allege that “[u]tilizing wrongful means, plaintiffs and [Pignatelli] intentionally, maliciously and without justification interfered with defendant CPI’s prospective business relationships with its employees and clients” (Amended Answer, ¶ 104). The counterclaim does not specify any particular employees or clients.

Wrongful means includes physical violence, threats, fraud, misrepresentation, civil suits and criminal prosecutions, and extreme and unfair economic pressure (72 N.Y. Jur. 2d Interference ¶ 42). Simple persuasion is insufficient (*id.*). The allegations in paragraphs 103 and 104 of the amended answer are merely conclusory statements, and do not allege any particular wrongful means. Defendants also point to paragraphs 97, 98, and 117. The allegations in paragraph 97, discussed in Section IV (A)(1) above, allege breach of contract. A failure to provide rent-free office space does not constitute “wrongful means.” The remaining allegations, 2, 3, and 5, are vague, and lack specific allegations of bad acts which, if proven, would support the claim. Paragraph 98 alleges, in conclusory fashion, that movants “used dishonest and unfair means.” Paragraph 117 alleges breach of a contract. Such vague and conclusory statements are insufficient to sustain a tortious interference claim against a motion to dismiss.

## 3. Counterclaim 4 - Breach of Contract regarding Fashion Trust

Counterclaim Four alleges that the parties entered into a contract under which plaintiffs would make an investment in Fashion Trust, “an all-access social network intended for content creation, content distribution and creative networking to the world of fashion,” owned by CPI (Amended Answer, ¶ 122). Movants point out that defendants, elsewhere in the Amended Answer, concede that “discussions concerning [Fashion Trust] were preliminary, non-binding and did not give rise to any liability” (Amended Answer, ¶ 90, cited by Memo at 9). Movants therefore argue that, since there was no contract, the claim for breach of contract regarding Fashion Trust must fail.

Defendants respond that they are allowed to make inconsistent claims, and that they only allege the breach of contract claim regarding Fashion Trust “[t]o the extent it is determined that any

contractual relationship existed between any of the [movants] and any of the defendants” (Amended Answer, ¶ 121, cited in Opp Memo at 9). CPLR 3104 provides that “[c]auses of action or defenses may be stated alternatively or hypothetically.” While defendants allege elsewhere in the amended answer that there was no contract related to Fashion Trust, the rules of pleading permit an inconsistent and admittedly hypothetical claim. The case cited by movants states that a pleading with inconsistent, or hypothetical, causes of action “will be sustained as long as the facts alleged do not necessarily preclude liability” (*BBIG Realty Corp. v Ginsberg*, 111 AD2d 91, 92-93 [1st Dept 1985]). The existence of a contract is a conclusion of law. Defendants do allege the alternative position that there was a valid contract related to Fashion Trust (Amended Answer, ¶ 134). Accordingly, this claim will survive the motion to dismiss.

#### **4. Counterclaims 5 and 6 - Fraudulent Inducement and Misrepresentation**

Counterclaim Five relates to the free use of plaintiffs’ property by defendants, and is alleged “to the extent it is determined that any contractual relationship existed” between movants and defendants (Amended Answer, ¶ 132). Defendants allege that movants promised “defendants would be able to move their business operations and personnel into plaintiffs’ premises and operate their business operations out of plaintiffs’ premises rent free . . . in exchange for entering into the 359 Contract and the [Fashion Trust] Contract ( Amended Complaint, ¶ 133). Defendants claim that after the parties agreed to the contracts, the movants charged defendants rent and then forced them to move out (*id.* at 135).

Counterclaim Six relates to movants’ promise to build office space for defendants at movants’ premises, and is alleged “to the extent it is determined that any contractual relationship existed” between movants and defendants (Amended Answer, § 141). Defendants characterize the promise to build office space for Fashion Trust as “part of [movants’] investment in [Fashion Trust] in exchange for a 33% ownership interest in” that entity (Amended Answer, ¶ 142). Defendants claim the movants never intended to build the office space (*id.* at 144).

Movants argue that these claims are essentially duplicative of the claims for breach of contract (Memo at 10). Defendants contend that these claims are not duplicative because there was no valid underlying contract, and also argue that, even if there were a contract, “a contractual

promise made with the undisclosed intention not to perform it constitutes fraud” (Opp Memo at 10, quoting *Sabo v Delman*, 3 NY2d 155, 162 [1957]).

As each of these claims is alleged “to the extent [a] contractual relationship existed,” defendants’ first argument fails. A fraud claim is redundant and should be dismissed when it only restates a breach of contract claim, or alleges as the fraud that the defendant did not intend to perform under the contract (*Gordon v. Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept, 1988]; *Trusthouse Forte Management Inc. v Garden City Hotel*, 106 AD2d 271 [1st Dept, 1984]). That is precisely what defendants allege in their counterclaims (*see* Amended Answer, ¶ 144). A misrepresentation about a party’s intention to perform under the contract is not collateral to the contract, and does not involve the breach of a separate duty (*First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291-92 [1st Dept 1999]).

Defendants rely on *Sabo v Delman*, but that case is distinguishable, as that plaintiff did not assert breach of contract. He sought to rescind the contract based on the fraudulent inducement (*id.* at 159). Defendants also depend on an unreported New York County Supreme Court decision, *Gotham Boxing Inc. v Finkel*, 18 Misc 3d 1114A (Sup Ct NY Cnty 2008); 856 NYS2d 498, 2008 NY Misc LEXIS 32, for the proposition that a fraudulent misrepresentation capable of supporting a claim can be “virtually identical to the promise contained in the contract as long as it is made at a different time and place”. That case, however, noted the line drawn by appellate courts upholding fraud claims in which there was a related breach of contract claim but dismissing fraud claims where the fraud claims were merely duplicative of a breach of contract claim or based merely on future expectation” (*id.* at \*9). Defendants’ counterclaim falls into the latter category.

These claims must be dismissed as duplicative of the breach of contract claims.

##### **5. Counterclaim 7 - Unjust Enrichment**

“Unjust enrichment is a quasi contract theory of recovery, and is an obligation imposed by

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<sup>1</sup> The court in *Gotham Boxing Inc.* also acknowledged that: “[t]he First Department has also dismissed fraud claims based on *future expectation*, where they were based merely on a vague allegation that the defendant never intended to comply with a particular contract.” (2008 Misc LEXIS 32\* 24-25).

equity to prevent injustice, in the absence of an actual agreement between the parties concerned” (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1<sup>st</sup> Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege “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.*, 86 AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

In the Seventh Counterclaim, defendants allege that, “[a]s a result of the foregoing, [referring to the previous allegations of the amended answer] [movants] have been unjustly enriched at [defendants’] expense and [defendants] are entitled to compensation for the services CPI provided to [movants]” (Amended Answer, ¶ 150). Movants argue that defendants fail to allege any benefit conferred on the movants by the defendants (Memo at 12). In response, defendants point to three allegations: paragraph 114, stating that, pursuant to the 359 Productions contract, CPI solicited projects which would have occurred at plaintiffs’ premises; paragraph 115, alleging that CPI performed pursuant to the 359 Productions contract; and paragraph 125, alleging that, pursuant to the Fashion Trust contract, CPI solicited its clients to use defendants’ premises. These allegations claim that defendants performed pursuant to a contract. Defendants argue these claims are in the alternative, that if there is determined to be no contract, then defendants claim movants were unjustly enriched by defendants’ solicitation of clients to work at movants’ premises. However, defendants fail to allege any particular benefit to the movants, as it is not alleged that any projects were actually done at movants’ premises or that any other benefits accrued to movants, and defendants cite no law suggesting this is sufficient benefit to satisfy the requirement. Accordingly, the Seventh Counterclaim will be dismissed.

#### **6. Counterclaim 8 - Tortious Interference with a Contract**

In Counterclaim Eight, defendants allege that movants

“knowingly, intentionally, deliberately, unjustifiably, wrongfully, tortiously, and with the intent to interfere with CPI’s rights in CPUI’s employee relationships, and in order to benefit from said interference, wrongfully induced, enticed, procured, and caused CPI’s employees to fail to perform and comply, and/or caused CPI’s employees to continue to fail to perform and comply, with their employment responsibilities to CPI”

(Amended Answer, ¶ 156). To prove a claim for tortious interference with a contract, the claimant must show: (1) the existence of a valid contract; (2) movants' knowledge of the contract; (3) movants' intentional procurement of the third-party's breach without justification; (4) actual breach of the contract; and (5) damages caused by breach of the contract (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]); *Kronos, Inc. v AVX Corp.*, 81 NY2d 90 [1993]).

Movants argue that, while this claim is based on alleged interference in defendants' relationships with some of their employees, it fails because defendants had no contracts with their employees (Memo at 9-10). Defendants argue that at-will employment can be protected from tortious interference (Opp Memo at 25), relying on *NBT Bancorp Inc. v Fleet/Norstar Fin. Group, Inc.* (87 NY2d 614 [1996]). In *NBT Bancorp*, the plaintiffs and defendants each attempted a merger with a bank. NBT had a merger agreement with the bank, subject to the approval of NBT's stockholders. The agreement failed, and NBT sued its competitor, Norstar (*id.* at 617). NBT's claims for tortious interference with contractual relations were dismissed on a motion to dismiss and the claim for tortious interference with prospective contractual relations was dismissed on summary judgment (*id.*). The Court of Appeals affirmed both dismissals (*id.*). Defendants rely on statements by the Court of Appeals which they assert support sustaining a claim for tortious interference when the interference alleged is with "prospective contract rights," if the claimant can "show more culpable conduct" by the interfering party (*id.* at 621, cited in Opp Memo at 25). Defendants interpret this to mean their counterclaim for tortious interference with a contract merely receives less deference because the contract rights were "prospective" (Opp Memo at 25, quoting *NBT Bancorp Inc.*, 87 NY2d at 621).

As defendants acknowledge, they had no contracts with their employees. The counterclaim for tortious interference with a contract cannot stand since there were no contracts (*see Miller v Mount Sinai Med. Ctr.*, 288 AD2d 72 [1st Dept 2001]). Insofar as the counterclaim could be considered as a counterclaim for tortious interference with a prospective contract, the defendants must allege that movants used "wrongful means," such as "fraudulent representations," "threats," or "violation of a duty of fidelity owed to the [defendants] by the [movants]" (*Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 194 [1980]). While defendants have alleged, in conclusory fashion, that movants "wrongfully induced CPI's employees . . . to become associated

with” the movants, defendants allege no facts to support this conclusion (Amended Answer at ¶ 158). Accordingly this claim shall be dismissed.<sup>2</sup>

#### 7. Counterclaim 11 - Abuse of Process and Harassment

Defendants claim that movants have engaged in abuse of process and harassment by bringing this lawsuit (Amended Answer at ¶ 183). There are three essential elements to an abuse of process tort claim: “(1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective” (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). Bringing a civil action, alone, does not constitute abuse of process (*id.*). The “gist of the action for abuse of process . . . is the improper use of process after it is issued” (*id.*, internal quotations omitted). A “malicious motive” alone is insufficient (*id.*, citing *Hauser v Bartow*, 273 NY 370, 374 [1937]). However, the Court of Appeals has left open the possibility that this is not a “strict and limiting definition” (*Parkin v Cornell Univ., Inc.*, 78 NY2d 523, 530 [1991]).

Defendants argue that this action was brought with an improper purpose, namely, “to extort money from the individual defendants Albert and Elizabeth Watson,” who are “the only defendants with purportedly ‘deep pockets’ ” (Opp Memo at 27-28). To have an improper purpose, however, requires “something more than a proper use from a bad motive.” It requires “some collateral objective, outside the scope of the operation of the process employed” (*Hauser*, 273 NY at 373-74). The Watsons are defendants in this action. The fact that defendants to an action spend money to defend themselves, or may have to pay a judgment, does not make suing them a diversion of process from its lawful purpose, regardless of whether “a malicious impulse may simultaneously have been satisfied” (*Andesco, Inc. v Page*, 137 AD2d 349, 357 [1st Dept 1988]). Defendants have not alleged the use of process in a ‘perverted manner’. Therefore, the Eleventh Counterclaim must also be dismissed.

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<sup>2</sup> In a letter submission made after oral argument, defendants cite the “seminal case of *Gibbs v Breed Abbot & Morgan*, 227 AD2d 180 (1<sup>st</sup> Dept 2000) [as a case] directly on point.” This case has no bearing on the tortious interference issue as it concerned departing law firm partners who, in breach of their fiduciary duty to the firm, purloined confidential firm information about associates and other staff for use in evaluating them for hire at the new firm (*see id* at 188).

## B. Claims Against Pignatelli

Defendants allege various actions were taken by “plaintiffs and Counterclaimant Defendant [Pignatelli].” Defendants also allege that Pignatelli “personally dominated all of the plaintiffs and used his domination of these entities in his dealings with the [d]efendants,” in seeking to pierce the corporate veil and hold Pignatelli liable. Movants argue that all claims against Pignatelli should be dismissed, as the allegations against him are based solely on a veil-piercing theory, and defendants have made no specific allegations of domination and control.

To pierce the corporate veil, defendants must show that: (1) Pignatelli exercised complete domination of plaintiffs; and (2) that this domination was used to commit a fraud or a wrong against defendants, which resulted in defendants’ injury (*see Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]). “The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene” (*id.* at 142).

Defendants have apparently abandoned their veil-piercing theory. Any claim regarding Pignatelli related to veil-piercing will be dismissed, as defendants failed to allege facts supporting the claim. Defendants argue instead, that the counterclaims against Pignatelli are in his personal capacity. Defendants rely heavily on the decision of the Appellate Division in this action. There the First Department reinstated certain claims against the individual defendants, as the complaint included allegations that “*all of the defendants, both corporate and individual, entered into the joint venture agreement and were unjustly enriched*” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436 [1st Dept 2014][emphasis in original]). Defendants point to a variety of allegations made about the actions of plaintiffs and Pignatelli, together (see list in Opp Memo at 16-18). While defendants do not specify when Pignatelli was acting personally, or acting for plaintiffs, giving the counterclaims the most liberal construction, the defendants have made sufficient allegations against Pignatelli, personally, to survive a motion to dismiss.

**V. CONCLUSION**

For the reasons set forth above, it is hereby

**ORDERED** that the motion of plaintiffs and counterclaim defendants to dismiss counterclaims 1, 2, 4, 5, 6, 7, 8 and 11 is **GRANTED** in part and **DENIED** in part and the First (Unfair Competition), Second (Tortious Interference with Prospective Business Advantage), Fifth (Fraudulent Inducement), Sixth (Misrepresentation), Seventh (Unjust Enrichment), Eighth (Tortious Interference with Contract), and Eleventh (Abuse of Process) counterclaims are **DISMISSED** as to all plaintiffs and counterclaim defendant; and it is further

**ORDERED** that the corporate veil-piercing claim against Frederico Pignatelli is **DISMISSED**; and it is further

**ORDERED** that all counsel for the respective parties shall appear for a status conference on Tuesday, June 23, 2015 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

**DATED: May 21, 2015**

**ENTER,**

  
**O. PETER SHERWOOD**  
**J.S.C.**

5/21/15