Model Serv., LLC v MC2 Models Mgt., LLC
2015 NY Slip Op 32454(U)
September 18, 2015
Supreme Court, New York County
Docket Number: 160519/13
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN Justice PART 63

Index Number : 160519/2013
MODEL SERVICE LLC
vs.
MC2 MODELS MANAGEMENT, LLC
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE 9/25/15
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

This constitutes the decision and order of the Court.

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

Dated: 9/18/15

_____, J.S.C.
HON. ELLEN M. COIN

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 63

MODEL SERVICE, LLC, d/b/a MSA MODELS,

Plaintiff,

- against -

MC2 MODELS MANAGEMENT, LLC, and JENNIFER CARYN HYMAN,

Defendants.

Index No.: 160519/13

DECISION/ORDER

COIN, ELLEN, J.:

In this action, plaintiff Model Service, LLC, d/b/a MSA Models (MSA), a model management company, alleges breach of contract claims against defendant MC2 Models Management, LLC (MC2), a competing modeling agency, and defendant Jennifer Caryn Hyman (Hyman), a model formerly represented by plaintiff.[1] In her answer, Hyman asserted, as affirmative defenses, breach of contract (fourth) and the "doctrine of unconscionability" (fifth); and asserted five counterclaims, for breach of contract, breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, unjust enrichment, and sexual harassment/hostile work environment. Plaintiff now moves, pursuant to CPLR 3211 (a) (7) and 3211 (b), to dismiss Hyman's counterclaims and her fourth and fifth affirmative defenses.

[1]By prior order of this court, plaintiff was granted partial summary judgment as to liability on its first cause of action for breach of contract against MC2; two additional causes of action for breach of contract remain, one against MC2, and one against Hyman.

BACKGROUND

Plaintiff MSA is a New York company, with its principal place of business in midtown Manhattan, which provides management services to fashion and fit models in the New York City area. Complaint (Cplt.), ¶ 6; Ex. 1 to Chattoraj's Affirmation in Support of Plaintiff's Motion (Chattoraj Aff.). Defendant MC2 is a Florida company, with an office in lower Manhattan, which also provides management services to models in the New York City area. Cplt., ¶ 7; Answer (Ans.), ¶ 7, Ex. 2 to Chattoraj Aff. Defendant Hyman is a model who engaged MSA to provide modeling management services to her. Cplt., ¶¶ 40, 44; Ans., ¶ 44.

It is undisputed that on July 5, 2011, Hyman entered into a two-year management contract with MSA. Cplt., ¶¶ 40-41; Ans., ¶¶ 40-41; *see* Management Agreement (Agreement), Ex. D to Cplt. The Agreement provided that MSA would provide exclusive management services in the area of "fit modeling,"[2] and non-exclusive management services in other areas, including fashion and lifestyle modeling, and all media and on camera work, such as live guest appearances, video, voiceovers and film. Cplt., ¶ 44; Ans., ¶ 44; Agreement, ¶ 1, Ex. D to Cplt. By its terms, the Agreement would be automatically renewed for successive one-year

[2]A "fit model" is one who "works with a fashion designer or clothing manufacturer to check the fit, drape and visual appearance of a design on a 'real' human being, effectively acting as a live mannequin. Unlike fashion modeling, fit modeling is a specialized skill because of the need for the model to communicate aspects of fit and drape to the designer or manufacturer." Cplt., ¶ 15; Ans., ¶ 15.

terms, unless either party gave written notice to the other at least 30 days prior to the end of the initial two-year term, or 30 days prior to any additional term, of the intent to terminate the Agreement. *Id.*, ¶ 8. It is undisputed that on or about July 23, 2012, prior to the end of the Agreement's two-year term, Hyman informed MSA that she was terminating her contract with MSA, effective "immediately" (Cplt., ¶ 59; Ans. ¶ 59), and, as of July 24, 2012, Hyman was represented by MC2. Counterclaim, ¶ 53, Ex. 2 to Chattoraj Aff.

In this action MSA claims that after MSA terminated the employment of Anthony Higgins (Higgins) in April 2012, Higgins worked with MC2 to "poach" models who had existing, exclusive management contracts with MSA. Cplt., ¶¶ 1, 54. In or around December 2012, after MSA learned that one such MSA model terminated his contract with MSA to go to work with MC2, a dispute arose between MSA and MC2. *Id.*, ¶¶ 16-19. To resolve this dispute, MSA and MC2 entered into an agreement releasing the model from his contract with MSA, and providing that MC2 would make certain payments to MSA and would not represent any other MSA model while that model had an exclusive contract with MSA, except that MC2 could represent such model with respect to any non-exclusive area. Cplt., ¶ 25, 26, 27, 29; Ans., ¶ 25; *see* Release Agreement, ¶¶ 2, 5, Ex. B to Cplt.

MSA alleges that MC2 failed to make payments and continued

to seek to represent MSA's models, in violation of the release agreement. Cplt., ¶¶ 32, 33. MSA alleges that MC2 materially breached the release agreement by, in particular, representing Hyman after she terminated her contract with MSA on or about July 23, 2012, and by representing another model, Tricia Campbell, after she terminated her contract with MSA on September 27, 2013. Cplt., ¶¶ 33, 59, 83-86. As against Hyman, MSA alleges that by unilaterally terminating the Agreement before the end of its term, Hyman materially breached the Agreement. MSA also alleges that to the extent that Hyman claims that MSA breached the Agreement, she failed to comply with the required notice provision in the Agreement. *Id.*, ¶¶ 63-66.

In her counterclaim, Hyman alleges that she was already an established model when she first signed a contract with MSA, and that she decided to work with MSA solely in order to work with Higgins, with whom she had a prior successful working relationship. Counterclaim, ¶¶ 2-4. She also alleges that she signed the Agreement in July 2011 only after she was harassed to sign it, and that MSA withheld a paycheck to induce her to sign. *Id.*, ¶¶ 7-8. Although she asserts that she was "urged to sign without the benefit of her own counsel" (*id.*, ¶ 7), she also asserts that she signed the contract despite her attorney and her husband encouraging her not to sign it. Ans., ¶ 43. After Higgins was terminated, she alleges, she was "incredibly upset"

[* 6]

and informed MSA that she would not be happy working with anyone else. Counterclaim, ¶¶ 12-13. According to Hyman, as a result of Higgins' termination, she lost about $20,000 in print income, and the potential for more, when MSA removed her portfolio from its print website. *Id.*, ¶¶ 14-18.

Hyman contends that MSA, by removing her portfolio from its print website, "effectively terminated" the Agreement. *Id.*, ¶¶ 15, 17-19. Hyman also claims that MSA breached the Agreement by failing to properly bill clients, and failing to properly book jobs and maintain a schedule for her. *Id.*, ¶¶ 62-65. She alleges that MSA employees made "significant billing errors" (*id.*, ¶¶ 27, 40-41), including "20 billing mistakes in the 14 months leading up to Hyman's departure" (*id.*, ¶ 36), totaling "thousands of dollars, which would likely have gone unaccounted for had Hyman not brought it" to MSA's attention. *Id.*, ¶ 37. Hyman alleges that she gave timely, written notice to MSA of these billing errors, some of which have not been resolved. *Id.*, ¶¶ 27, 38-41. Hyman further alleges that MSA employees made errors in booking and scheduling work, generating complaints from clients (*id.*, ¶¶ 30-34), and which caused her to lose a fee in one instance and to fear that she would lose a client. *Id.*, ¶¶ 34-35. She contends that MSA's alleged breaches of the Agreement, as well as the unconscionability of the contract, excused her from further performance of the Agreement. Ans., ¶¶

114, 115.

In addition, Hyman alleges that after Higgins left MSA, she was required to report to Liz Pinto (Pinto), who, Hyman claims, "made a sexual pass" at her in or around August 2010. Hyman also claims that Pinto sexually harassed her in May 2012, by conveying to another employee a request that Hyman have her measurements checked, which Hyman did not do; and in late June 2012, by inviting her to a cocktail party MSA was giving for some of its models, and, when Hyman could not make the date, telling Hyman she would reschedule it to ensure that she could attend. Counterclaim, ¶¶ 48-50. Hyman claims that she subsequently lost a booking, and believed that Pinto was trying to hurt her professionally. *Id.*, ¶ 51-52. In or around July 2012, Hyman contacted Higgins at MC2 to represent her, because she was afraid of losing her biggest client. *Id.*, ¶ 53. Hyman then terminated her contract with MSA and, as of July 24, 2012, was represented by MC2. *Id.*, ¶ 53. Hyman also alleges that on July 26, 2012, MSA stopped sending her any bookings, "thereby ending any attempt to correspond with her." *Id.*, ¶ 42.

DISCUSSION

It is well settled that on a motion to dismiss a complaint or counterclaim pursuant to CPLR 3211 (a) (7), the pleadings are to be afforded a liberal construction. *See* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 (1994). 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." *Leon*, 84 NY2d at 87-88 (1994); *see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011); *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002). The court further may consider a plaintiff's opposing affidavits to remedy pleading defects. *See Nonnon v City of New York*, 9 NY3d 825, 827 (2007); *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 (2005); *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 (1976).

While the pleading standard is a liberal one, however, "'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence' are not presumed to be true and accorded every favorable inference." *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999)(citation omitted), *affd* 94 NY2d 659 (2000); *see Erich Fuchs Enters. v American Civ. Liberties Union Found., Inc.*, 95 AD3d 558, 558 (1st Dept 2012); *Tal v Malekan*, 305 AD2d 281, 281 (1st Dept 2003). Conclusory assertions of wrongdoing with no factual specificity are insufficient to survive a motion to dismiss. *See Godfrey v Spano*, 13 NY3d 358, 373 (2009); *Scarfone v Village of Ossining*, 23 AD3d 540, 541 (2d Dept 2005); *Vanscoy v Namic USA Corp.*, 234

AD2d 680, 681-682 (3d Dept 1996).

On a CPLR 3211 (b) motion, which permits a party to move to dismiss one or more defenses "on the ground that a defense is not stated or has no merit," "the court should apply the same standard as it applies to motions to dismiss pursuant to CPLR 3211 (a) (7), and the factual assertions will be accepted as true." *Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 748-749 (2d Dept 2010) (internal citations omitted); *see 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541-542 (1st Dept 2011); *Greco v Christoffersen*, 70 AD3d 769, 771 (2d Dept 2010). While the plaintiff on a CPLR 3211 (b) motion has the "burden of demonstrating that the defenses are without merit as a matter law" (*Tenore v Kantrowitz, Goldhamer & Graifman, P.C.*, 76 AD3d 556, 557-558 [2d Dept 2010]; *see 534 E. 11th St. Hous. Dev. Fund Corp.*, 90 AD3d at 541-542; *Greco*, 70 AD3d at 771), "where affirmative defenses 'merely plead conclusions of law without any supporting facts,' the affirmative defenses should be dismissed." *Bank of Am., N.A.*, 78 AD3d at 748-749, quoting *Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 (2d Dept 2008).

FIRST COUNTERCLAIM - BREACH OF CONTRACT

The essential elements of a cause of action for breach of contract are "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that

contract, and resulting damages." *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 (2d Dept 2010); *see Dee v Rakower*, 112 AD3d 204, 208-209 (2d Dept 2013); *McGhee v Odell*, 96 AD3d 449, 450-451 (1st Dept 2012). Further, "[i]n order to state a cause of action to recover damages for a breach of contract, the plaintiff's allegations must identify the provisions of the contract that were breached." *Barker v Time Warner Cable, Inc.*, 83 AD3d 750, 751 (2d Dept 2011); *see 767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 75 (1st Dept 2004) (failure to identify any portion of the lease allegedly breached was fatal to cause of action for breach of contract); *see also Woodhill Elec. v Jeffrey Beamish, Inc.*, 73 AD3d 1421, 1422 (3d Dept 2010); *Sklover & Donath, LLC v Eber-Schmid*, 71 AD3d 497, 498 (1st Dept 2010).

As alleged in the counterclaim, the basis of Hyman's breach of contract claim is that MSA failed to properly bill clients on her behalf, failed to properly book numerous jobs for her, failed to maintain a proper schedule for her and her clients, and dropped her from the print portion of MSA's business. Counterclaim, ¶¶ 62-65. Plaintiff moves to dismiss Hyman's breach of contract claim on the grounds that Hyman has failed to identify any provision of the Agreement that was breached by MSA, and that none of Hyman's complaints about billing and booking errors, or about the management of her career, otherwise constitutes a breach of any term of the Agreement. The

Agreement, plaintiff asserts, does not require it to maintain a particular schedule for Hyman or to include her on its print website, and it otherwise does not limit its discretion to determine how to market her services. Plaintiff also contends that the alleged billing errors lack specificity, and that, in any event, the alleged booking and billing errors are no more than de minimis breaches.

In opposition to plaintiff's motion, Hyman does not identify any contract provision governing booking or scheduling of jobs or maintaining her on the print website, but she argues that she adequately pled a breach of contract claim based on MSA's billing errors and her notice to MSA of such errors; and she identifies paragraph 3 of the Agreement as the basis for her breach of contract claim. *See* Memorandum of Law in Opposition to Plaintiff's Motion to Dismiss (Memo in Opp.), at 3-5.

Paragraph 3 of the Agreement provides, in part:

> "Model hereby assigns to MSA the proceeds of all assignments performed by Model, against which MSA has advanced payment to Model. If, in accordance with MSA's voucher system, MSA does not receive payment from a client that employs Model within six (6) months of Model's completion of an assignment, Model will, upon request, promptly reimburse MSA for the sums advanced to Model by MSA in connection with such assignment. Monies owed to Model from clients . . . will be paid to Model after payment is received from MSA. MSA will take all reasonable steps to collect the amounts due from clients for Model's services, and Model agrees that any claim against a client for monies owed for those

> services will belong to MSA, which shall remit to Model the net due to Model after deductions of MSA's entitlements . . . and MSA's collection costs . . . . The risk of non-collection of fees and expenses due Model from clients . . . shall be borne entirely by Model."

It is unclear what part of this provision Hyman claims was breached. She does not allege that she was not advanced payments by MSA; she does not allege that MSA did not receive payment from a client of Hyman's within six months of completion of an assignment or that, if it did not, Hyman "promptly" reimbursed MSA for sums advanced; and she does not allege that she was not paid by MSA after it received payment from clients. She alleges only that as a result of MSA's billing errors, she was not paid in full, and that MSA's "failure to remit timely payment, or payment at all in some instances" is a breach of the Agreement. Memo in Opp., at 3. To the extent that Hyman's claim is that MSA breached the Agreement by failing to take "all reasonable steps to collect" amounts due, and even assuming arguendo that such failure could constitute a breach of the Agreement, Hyman makes no factual allegations that MSA did or did not take reasonable steps to collect amounts due, and she does not argue that such failure would be a material breach of the Agreement or that she provided notice of such an alleged breach.

Similarly, to the extent that any late payments or incomplete payments could be considered breaches, Hyman does not

allege facts to show that they were "material breaches," or that she gave notice of any material breaches as required by the Agreement. Paragraph 12 of the Agreement provides:

> "No breach of this Agreement by MSA shall be considered material unless within ten (10) days after Model acquires knowledge thereof of facts sufficient to put Model upon notice of any such breach, Model serves written notice thereof upon MSA and MSA fails to cure such breach within thirty (30) days thereof."

Hyman alleges that she gave such notice, in particular on January 29, 2012. Counterclaim, ¶¶ 27, 39; Hyman Affidavit in Opposition to Plaintiff's Motion (Hyman Aff.), ¶ 7. A series of emails submitted by Hyman in support of her claim that she provided the required notice, dated June 13 and 14, 2011, indicate that she questioned payment of two vouchers, and that MSA responded and attempted to resolve the matter, but a dispute over a $2.00 messenger fee remained. *See* Emails (marked Ex. L), Ex. A to Hyman Aff. An email dated January 29, 2012, indicates that for numerous assignments from April 2011 to December 2011, she was missing some portion of payment, mostly travel expenses that were not paid. Hyman does not allege that MSA did not respond to this email, or which, if any, of the missing payments were not resolved. *See* Email, dated January 29, 2012, Ex. A to Hyman Aff. Hyman also submits an email dated September 19, 2012, after she terminated her contract with MSA, listing unpaid vouchers from July 2012. *See* Email, dated September 19, 2012,

Ex. A to Hyman Aff. Hyman does not allege facts to show when she knew about these errors, that she sent notice within ten days of learning about them, or what errors, if any, MSA did not cure. Nor do the allegations support finding that these alleged inaccuracies were material breaches under paragraph 3 of the Agreement.

Hyman thus has not adequately pled a breach of contract claim, and the first counterclaim is dismissed.

SECOND COUNTERCLAIM - BREACH OF FIDUCIARY DUTY

To establish a claim for breach of fiduciary duty, a party must first establish the existence of a fiduciary relationship, and show misconduct constituting a breach of the fiduciary duty, and damages directly caused by the misconduct. *See Varveris v Zacharakos*, 110 AD3d 1059, 1059 (2d Dept 2013); *Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 (1st Dept 2011); *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807 (2d Dept 2011). "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.'" *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005), quoting Restatement [Second] of Torts § 874, Comment *a*); *see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 561 (2009). "The core of a fiduciary relationship is 'a higher level of trust than normally present in the marketplace

between those involved in arm's length business transactions.'" *Faith Assembly v Titledge of N.Y. Abstract, LLC*, 106 AD3d 47, 62 (2d Dept 2013), quoting *EBC I, Inc.*, 5 NY3d at 19; *see Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 593 (2012); *SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 355 (1st Dept 2004); *V. Ponte & Sons, Inc. v American Fibers Intl.*, 222 AD2d 271, 272 (1st Dept 1995).

Thus, "[a]bsent extraordinary circumstances, conventional business relationships, that are the result of arms-length transactions, do not create a relationship of confidence or trust sufficient to find the existence of a fiduciary duty." *Wilhelmina Artist Mgt., LLC v Knowles*, 8 Misc 3d 1012(A), 801 NYS2d 782, 2005 NY Slip Op 51060(U), *8 (Sup Ct, NY County 2005); *see AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 21-22 (2d Dept 2008) (need to show "special circumstances" that would create fiduciary relationship); *V. Ponte & Sons, Inc.*, 222 AD2d at 272 (same). Generally, when parties have entered into a contract, unless a party can show a separate duty, "independent of the mere contract obligation,'" no fiduciary relationship is established. *Savage Records Group, N.V. v Jones*, 247 AD2d 274, 274-275 (1st Dept 1998) (citation omitted); *see Silvester v Time Warner, Inc.*, 1 Misc 3d 250, 257 (Sup Ct, NY County 2003), *affd* 14 AD3d 430 (1st Dept 2005). Further, "[a] cause of action for breach of fiduciary duty which is merely duplicative of a breach

of contract claim cannot stand." *William Kaufman Org., Ltd. v Graham & James LLP*, 269 AD2d 171, 173 (1st Dept 2000); *see Hylan Elec. Contr., Inc. v MasTec N. Am., Inc.*, 74 AD3d 1148, 1150 (2d Dept 2010); *Morgenroth v Toll Bros., Inc.*, 60 AD3d 596, 597 (1st Dept 2009).

Hyman engaged MSA to represent her with respect to obtaining modeling work in exchange for a commission. This is an ordinary business relationship, and Hyman alleges no special or extraordinary circumstances giving rise to a fiduciary relationship. *See Raske v Next Mgt., LLC*, 40 Misc 3d 1240(A), 977 NYS2d 669, 2013 NY Slip Op 51514(U), *9 (Sup Ct, NY County 2013). "Courts have held repeatedly that the relationship between professional models and modeling agencies do not give rise to any fiduciary obligation on the part of the modeling agency." *Id.*, citing *Wilhelmina Artist Mgt. LLC*, 8 Misc 3d 1012(A); *Dove v L'Agence, Inc.*, 250 AD2d 435, 435 (1st Dept 1998) (agreement to solicit modeling jobs in return for a commission did not create a fiduciary relationship); *Bezuszka v L.A. Models, Inc.*, 2006 WL 770526, *17, 2006 US Dist LEXIS 13620 (SD NY 2006) (dismissing models' claim for an accounting of modeling agencies' financial affairs, finding no fiduciary relationship, noting "we know of [no] case law suggesting that modeling agencies are fiduciaries for their models").

Nor has Hyman alleged any duty owed by MSA that was

independent of and separate from the Agreement. Her breach of fiduciary duty claim rests on allegations that defendants, by booking other models for jobs with her clients, by failing to make payments owed to her from jobs she worked, and by making disparaging remarks about her to clients and others, failed to properly perform its management responsibilities under the Agreement. Counterclaim, ¶¶ 68-72.

The same allegations "are either expressly raised in plaintiff's breach of contract claim or encompassed within the contractual relationship by the requirement implicit in all contracts of fair dealings and good faith." *Brooks v Key Trust Co. Natl. Assn.*, 26 AD3d 628, 630 (3d Dept 2006); *see also Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 302 (1st Dept 2008) (breach of fiduciary duty dismissed where agreement "'cover[s] the precise subject matter of the alleged fiduciary duty'" [citation omitted]). As such, plaintiff's claim "fails to allege conduct by [MSA] in breach of a duty other than, and independent of, that contractually established between the parties and is thus duplicative." *Kaminsky v FSP Inc.*, 5 AD3d 251, 252 (1st Dept 2004); *see Brooks*, 26 AD3d at 630; *cf. EBC I, Inc.*, 5 NY3d at 20 (complaint must set forth "allegations that, apart from the terms of the contract, the [parties] created a relationship of higher trust than would arise from the underwriting agreement alone"). Plaintiff also alleges no "damages directly caused by" any

misconduct other than defendants' alleged breach of contract. *See Palmetto Partners, L.P.*, 83 AD3d at 807 (2d Dept 2011) (cause of action for breach of fiduciary duty requires damages directly caused by alleged misconduct); *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 (2d Dept 2010) (same).

Moreover, the Agreement expressly provides that "nothing herein shall create a . . . fiduciary . . . relationship" between MSA and Hyman. Agreement, Ex. D to Cplt., ¶ 6. As courts have found, such "contractual disclaimers of fiduciary duty are effective in New York." *Seippel v Jenkins & Gilchrist, P.C.*, 341 F Supp 2d 363, 381-382 (SD NY 2004). "Accordingly, where the parties' agreement specifically disclaims a fiduciary relationship, no defense of, or claim for, breach of fiduciary duty will lie." *JPMorgan Chase Bank, N.A. v Controladora Comercial Mexicana S.A.B. De C.V.*, 29 Misc 3d 1227(A), 920 NYS2d 241, 2010 NY Slip Op 52066(U), *11 (Sup Ct, NY County 2010), citing *CIBC Bank & Trust Co. (Cayman) Ltd. v Credit Lyonnais*, 270 AD2d 138, 139 (1st Dept 2000) (plaintiff's breach of fiduciary duty claim "flatly contradicted' by the parties' contracts in which they represented that they had not acted as "financial advisor or fiduciary"); *AJW Partners, LLC v Cyberlux Corp.*, 21 Misc 3d 1109(A), 873 NYS2d 231, 2008 NY Slip Op 52020(U), *3 (Sup Ct, NY County 2008) (dismissing breach of fiduciary duty counterclaim "in light of the plain contractual language

disavowing a fiduciary relationship"); *see also LBBW Luxemburg S.A. v Wells Fargo Sec., LLC*, 10 F Supp 3d 504, 523 (SD NY 2014). "The agreement's designation of plaintiff as defendant's attorney-in-fact does not alter the conclusion that the agreement may not be construed to create a fiduciary relationship. The power of attorney accorded plaintiff under the agreement is expressly coupled with an interest and where that is the case, i.e., where the recipient of the power is acting in his own interest as well as that of the grantor, no fiduciary duty arises." *330 Acquisition Co., LLC v Regency Sav. Bank, F.S.B.*, 306 AD2d 154, 155 (1st Dept 2003) (citation omitted); *see Wilhelmina Artist Mgt., LLC*, 8 Misc 3d 1012(A).

The second counterclaim against MSA for breach of fiduciary duty, therefore, cannot be sustained.

THIRD COUNTERCLAIM - BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

In New York, "[i]mplied in every contract is a covenant of good faith and fair dealing, which is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." *Jaffe v Paramount Communications, Inc.*, 222 AD2d 17, 22 (1st Dept 1996) (internal citation omitted); *see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 (1995). However, a claim for breach of the implied covenant of

good faith and fair dealing will be dismissed as duplicative where it "arises from the same facts and seeks the same damages as a breach of contract claim." *Mill Fin., LLC v Gillett*, 122 AD3d 98, 104 (1st Dept 2014); *see Netologic, Inc. v Goldman Sachs Group, Inc.*, 110 AD3d 433, 433-434 (1st Dept 2013); *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 (1st Dept 2010).

Hyman's counterclaim for breach of the implied covenant of good faith and fair dealing is based on her allegation that MSA "acted in bad faith and dealt unfairly with Hyman . . . in its performance of the management agreement." Counterclaim, ¶ 75. This counterclaim "cannot be maintained because it is premised on the same conduct that underlies the breach of contract cause of action and is 'intrinsically tied to the damages allegedly resulting from a breach of the contract.'" *MBIA Ins. Corp. v Lynch*, 81 AD3d 419, 419-420 (1st Dept 2011), citing *Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 (1st Dept 2004), citing *Canstar v Jones Constr. Co.*, 212 AD2d 452, 453 (1st Dept 1995). "A claim for breach of the implied covenant of good faith and fair dealing cannot substitute for an unsustainable breach of contract claim." *Skillgames, LLC v Brody*, 1 AD3d 247, 252 (1st Dept 2003), citing *Triton Partners LLC v Prudential Securities, Inc.*, 301 AD2d 411, 411 (1st Dept 2003).

FOURTH COUNTERCLAIM - UNJUST ENRICHMENT

"The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement." *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 (2005) (citation omitted). "[U]njust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." *Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 (2012) (citations omitted).

"Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded." *IDT Corp v Morgan Stanley Dean Witter & Co*, 12 NY3d 132, 142 (2009), citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987); *see Corsello*, 18 NY3d at 790; *MMA Meadows at Green Tree, LLC v Millrun Apts., LLC*, 130 AD3d 529 (1st Dept July 21, 2015). Here, it is undisputed that there was a valid and enforceable contract between MSA and Hyman, and, as Hyman's unjust enrichment claim "is 'indistinguishable from the breach of contract claim'" (*Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295, 296 [1st Dept 2004] [citation omitted]), the fourth counterclaim is dismissed.

Hyman's conclusory assertion that "there are several issues which may not be addressed by the Agreement," such as her claim that MSA breached a fiduciary duty (Memo in Opp., at 7), lacks merit.

FIFTH COUNTERCLAIM - SEXUAL HARASSMENT/HOSTILE WORK ENVIRONMENT

In her counterclaim based on sex discrimination, Hyman alleges that she was subjected to "several unwelcomed sexual advances" from Pinto, which created a hostile work environment, and that she lost work to other models as a result of refusing the advances. Counterclaim, ¶¶ 82-84. More specifically, she alleges that, "shortly after" a shoot on August 26, 2010, Pinto, then Director of Fit at MSA, "made a sexual pass at Hyman, which Hyman rebuffed, while Hyman was naked in the dressing room." *Id.*, ¶ 45. According to Hyman, after that incident, for the next two years, she avoided Pinto "at all costs." *Id.*, ¶ 46.

She alleges that another incident occurred in May 2012, after Higgins was dismissed and Pinto was promoted to Head of the Fit Division at MSA, when Hyman received an email from Margeaux Elkrief stating that "Susan [Levine, MSA's CEO]/Liz would love to set up an appointment to make sure your measurements are up to date." *Id.*, ¶ 48; Email dated May 29, 2012, Ex. F to Counterclaim. Plaintiff alleges that the previous Head, Higgins, had never made such a request, which requires a model to be measured in her underwear, and that it was unnecessary. Counterclaim, ¶ 48. Hyman responded to Elkrief that she would

check the numbers herself, instead of having them taken by someone else, and then advised Elkrief what the measurements were. Email dated May 30, 2012, Ex. F to Counterclaim.

Hyman alleges that a third incident occurred in June 2012, when Pinto invited her to a cocktail party. Counterclaim, ¶ 50. In an email addressed to Hyman and another model, Pinto wrote that MSA was "planning a plus size/men mixer for our fit divisions" and wanted to make sure that "our two most important plus models" could attend. Email dated June 26, 2012, Ex. G to Counterclaim. After Hyman informed Pinto that she could not attend because she would be away visiting family, Pinto responded that they would have to find an alternate date because "[i]t can't happen without you." Counterclaim, ¶ 50; Email dated June 26, 2012, Ex. G to Counterclaim.

As plaintiff correctly notes, Hyman does not identify any statutory basis for her sex discrimination claim. Such claims, generally, may be brought under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*) (Title VII), the New York State Human Rights Law (Executive Law § 296 *et seq.*) (NYSHRL), and the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] § 8-101 *et seq.*) (NYCHRL), all of which prohibit discrimination in the terms, conditions and privileges of employment based on sex or gender.

Hyman, in opposition, does not address the statutory basis

for her claim except to argue that the NYCHRL permits employment discrimination claims by independent contractors (*see* Administrative Code § 8-102 [15]), apparently conceding that the other statutes do not. She contends that therefore she has "standing" to bring a discrimination claim against MSA. *See* Memo in Opp., at 7-8. Hyman otherwise does not offer any legal authority to support the adequacy of her allegations, under the NYCHRL or any other law, or even oppose this branch of the motion. In the absence of any opposition or legal basis for her claim, the fifth counterclaim for sexual harassment/hostile work environment should be dismissed.

In any event, under either the NYSHRL or the more liberal NYCHRL, Hyman's allegations are insufficient to sustain a claim for employment discrimination. Likewise, to the extent that she asserts a Title VII claim, even if it were not barred by her failure to show that she timely filed a complaint with the Equal Employment Opportunity Commission (*see Joseph v Price Costco*, 100 Fed Appx 857 [2d Cir 2004][filing claim with EEOC is a precondition to bringing Title VII action which can be waived by court or parties]), it also cannot survive.

At the outset, actions to recover damages for alleged employment discrimination under the NYSHRL and the NYCHRL are subject to a three-year statute of limitations. *See* CPLR 214 (2); Administrative Code § 8-502 (d); *Koerner v State of New*

York, Pilgrim Psych. Ctr., 62 NY2d 442, 446 (1984); *Kent v Papert Cos.*, 309 AD2d 234, 240 (1st Dept 2003); *Milani v International Bus. Machs. Corp.*, 322 F Supp 2d 434, 451 (SD NY 2004), *affd* 137 Fed Appx 430 (2d Cir 2005). The instant action was commenced in November 2013, and Hyman's counterclaim was asserted in January 2014. Hyman's claim that she was subjected to sexual harassment and a hostile work environment is based on three alleged incidents, in August 2010, May 2012, and June 2012.

Hyman first alleges that, in August 2010, Pinto made "a sexual pass" at her. Not only does Hyman allege no facts to support this vague assertion, the alleged incident falls outside the statute of limitations, although plaintiff did not move on this basis. As Hyman also alleged, there were no other incidents until May 2012. The continuing violation doctrine, therefore, does not apply to render the 2010 allegation timely. *See National R.R. Passenger Corp. v Morgan*, 536 US 101, 113 (2002) (the continuing violation exception does not extend to "discrete discriminatory acts" that occur outside the limitations period, "even when they are related to acts alleged in timely filed charges"); *Williams v New York City Hous. Auth.*, 61 AD3d 66, 80-81 (1st Dept 2009) (where pre-limitations period conduct was not joined to actionable conduct within the limitations period, the continuing violation doctrine does not apply).

Thus, the only timely allegations of sexual harassment are

that Hyman received a request, not directly from Pinto, that Hyman make an appointment to have her measurements checked, which Hyman declined to do; and that Pinto invited her, along with another female model, to a party for a group of MSA's models, and, when Hyman could not make it, Pinto wanted to reschedule it to ensure that Hyman could attend, which apparently did not occur. Under any view of the allegations, including the allegation of an unspecified "sexual pass," even when considered in a light most favorable to her, Hyman's claims that she was subjected to "a pattern of harassment" and "several unwelcomed sexual advances," are completely unsupported by the factual allegations, and she fails to state a claim for sexual harassment or hostile work environment, even under the NYCHRL. Hyman alleges no facts to show that the alleged incidents were gender-based, other than her apparent belief that they were, but even if they were, the alleged conduct, at most, "could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences." *Williams*, 61 AD3d at 80.

FOURTH AFFIRMATIVE DEFENSE - BREACH OF CONTRACT

For reasons discussed above, with respect to the first counterclaim, the fourth affirmative defense is dismissed.

FIFTH AFFIRMATIVE DEFENSE - UNCONSCIONABLE CONTRACT

"[A]n an unconscionable contract is generally defined 'as

one which is so grossly unreasonable as to be [unenforceable according to its literal terms] because of an absence of meaningful choice on the part of one of the parties ['procedural unconscionability'] together with contract terms which are unreasonably favorable to the other party ['substantive unconscionability']." *Lawrence v Miller*, 11 NY3d 588, 595 (2008), quoting *King v Fox*, 7 NY3d 181, 191 (2006), and citing *Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10-11 (1988). "A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made." *Gillman*, 73 NY2d at 10. Claims of procedural unconscionability in the contract formation process "are judged by whether the party seeking to enforce the contract has used high pressure tactics or deceptive language in the contract and whether there is inequality of bargaining power between the parties." *Sablosky v Edward S. Gordon Co., Inc.*, 73 NY2d 133, 139 (1989) (citations omitted); *see Dabriel, Inc. v First Paradise Theaters Corp.*, 99 AD3d 517, 520-521 (1st Dept 2012).

Hyman does not argue that the Agreement was either substantively or procedurally unconscionable, or even oppose this branch of MSA's motion, and the fifth affirmative defense is dismissed.

Accordingly, it is

ORDERED that the motion of plaintiff Model Service, LLC d/b/a MSA Models pursuant to CPLR 3211 (a) (7) and 3212 (b) to dismiss defendant Jennifer Caryn Hyman's counterclaims and the fourth and fifth affirmative defenses is granted in its entirety, and the counterclaims and the fourth and fifth affirmative defenses are dismissed.

Dated: September 18, 2015

ENTER:

HON. ELLEN M. COIN, A.J.S.C.