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ORIGINAL

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x TRIAL/IAS PART: 14

DE WELL CONTAINER SHIPPING CORP.,

Plaintiff,

Index No: 12955-11
Motion Seq. Nos. 3 and 4
Submission Date: 7/17/15

-against-

MINGWEI GUO, HONG GUO, JACKSON TSAI, ROSE PANZARELLA, DE WELL LOGISTICS USA, INC., and DW LOGISTICS SOLUTIONS, INC.,

Defendants.

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MINGWEI GUO, HONG GUO, JACKSON TSAI, and ROSE MARIE PANZARELLA,

Third-Party Plaintiffs,

-against-

SHANGHAI DE WELL CONTAINER SHIPPING CORP., SHI YANG, CHANG WOO KIM and FANG CHENG,

Third-Party Defendants.

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The following papers have been read on these motions:

Notice of Motion.....x
Affidavit in Support and Exhibits.....x
Memorandum of Law in Support.....x
Notice of Cross Motion, Affirmation in Support/Opposition and Exhibits.....x
Memorandum of Law in Support/Opposition.....x
Reply Memorandum of Law in Further Support/Opposition.....x
Reply Memorandum of Law in Further Support of Cross Motion.....x

This matter is before the court on 1) the motion filed by Plaintiff De Well Container Shipping Corp. ("De Well" or "Plaintiff") and Third-Party Defendants Shanghai De Well Container Shipping Corp., Shi Yang, Chang Woo Kim, and Fang Cheng on January 17, 2012, and 2) the cross motion filed by Defendants Mingwei Guo, Hong Guo, Jackson Tsai, Rose Panzarella, De Well Logistics USA, Inc. and DW Logistics Solutions, Inc. ("Defendants") and Third-Party Plaintiffs Mingwei Guo, Hong Guo, Rose Panzarella and Jackson Tsai, which were initially submitted on January 29, 2013. In its prior decision dated March 13, 2013, the Court granted the motion by Defendants/Third-Party Plaintiffs to enforce the settlement agreement (motion sequence number 5) based on the Court's determination that the document executed by the parties on May 16, 2012 constituted a binding settlement agreement. In light of that determination, the Court denied, as moot, motion sequence numbers 3 and 4. Thereafter, by decision dated March 18, 2015 ("Appellate Decision"), the Appellate Division, Second Department ruled that the Court erred in granting the motion to enforce the alleged written stipulation of settlement against the Plaintiff and the Third-Party Defendants. *See De Well Container Shipping Corp. v. Guo*, 126 A.D.3d 846 (2d Dept. 2015). Following the issuance of the Appellate Decision, the Court conducted a conference with counsel regarding the motions in this action and the related action ("Related Action") titled *De Well Container Shipping Corp. v. Shanghai De Well Container Shipping Corp.*, Index Number 15941-11 and those motions were submitted on July 17, 2015. For the reasons set forth below, the Court 1) denies the motion of Plaintiff/ Third-Party Defendants; and 2) grants the cross motion of Defendants/Third-Party Plaintiffs.

BACKGROUND

A. Relief Sought

Plaintiff and Third-Party Defendants move for an Order, pursuant to CPLR §§ 3211(a)(1), (5) and (7), dismissing the third (breach of contract), fourth (promissory estoppel), fifth (breach of the implied covenant of good faith and fair dealing), sixth (negligent misrepresentation), eighth (promissory estoppel), ninth (constructive discharge), tenth (slander and defamation), eleventh (tortious interference with business opportunity), twelfth (civil conspiracy), and thirteenth (declaratory judgment) causes of action in Defendants' Counterclaim

and Amended Third-Party Complaint dated December 14, 2011 (Ex. A to Cohen Aff. in Supp./Opp.). [1]

Defendants and Third-Party Plaintiffs move for leave to serve and file a Second Amended Third-Party Complaint. Defendants and Third-Party Plaintiffs have provided a copy of a document titled "Defendants' First Amended Answer to the Amended Complaint and First Amended Verified Counterclaim" and "Second Amended Verified Third-Party Complaint" (Ex. B to Cohen Aff. in Supp./Opp.) dated February 24, 2012. Counsel for Defendants and Third-Party Plaintiffs explains that:

> In the interest of simplicity and to reduce the number of separate pleadings, Defendants/Third-Party Plaintiffs previously combined all of its pleadings into one document, the "Answer To The Verified Complaint, Counterclaims, and Verified Third-Party Complaint [underlining in original]," dated October 26, 2011, which is the subject of Plaintiff/Third-Party Defendants' motion for partial dismissal. Accordingly, the Amended Pleading, attached as Exhibit B, also combines all of Defendants/Third-Party Plaintiffs['] proposed pleading into a single document. Defendants/Third-Party Plaintiffs respectfully request that the Amended Pleadings supersede, in their entirety, the prior pleadings.
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> Cohen Aff. in Supp./Opp. at ¶ 9.

B. The Parties' Background

The parties' background is outlined in detail in a prior decision ("Prior Decision") of the Court dated January 13, 2012 in which the Court granted the prior motion ("Prior Motion") by Plaintiff seeking injunctive relief. The Court incorporates the Prior Decision by reference as if set forth in full herein.

As noted in the Prior Decision, the Amended Complaint describes this action as follows:

> This is an action by a New York corporation to redress a pattern of severe and continuing misconduct and breaches of fiduciary duty by former and current directors, officers, and employees of [Plaintiff] that has severely damaged the financial stability and corporate good will of [Plaintiff] and, if allowed to continue, threatens the corporation's survival.
>
> More specifically, this case involves Defendants' gross mismanagement, fraudulent conduct, unauthorized and illegal corporate actions, improper use of corporate funds, and ongoing plan to divert business from Plaintiff to two new corporations, each of which was established by Defendant Hong Guo during the time that she

[1] Plaintiff refers to the "Amended Counterclaim," but the December 24, 2011 pleading is titled "Answer to the Amended Complaint, Counterclaim and Amended Third-Party Complaint" (Cohen Aff. in Supp./Opp. at n. 1).

> served as the President of [Plaintiff], and each of which is 100% owned by her. Documentary evidence obtained by Plaintiff leaves no question of Ms. Guo's intention to divert [Plaintiff's] business to her newly-created companies, and of her use of [Plaintiff's] resources, employees, and assets to build those companies. It is equally indisputable that each of the Defendants herein knew of and participated in, and supported Ms. Guo's plan at every opportunity.
>
> Amended Compl. at ¶¶ 1 and 2

The Amended Complaint contains eighteen (18) causes of action. Those causes of action are: 1) a request for a declaratory judgment, as to all Defendants, with respect to the validity of certain resolutions adopted at a Special Meeting convened on September 6, 2011 and the resulting authority of certain individuals vis a vis Plaintiff, 2) conversion, as to Defendants Hong (Kim) Guo (Ms. Guo"), Jackson Thai ("Thai") and Mingwei (Peter) Guo ("Mr. Guo"), related to their refusal to return control of corporate assets to the Corporation, 3) conversion, as to Defendants Ms. Guo, Tsai and Rose Panzarella ("Panzarella"), related to their theft/destruction of bank records, 4) conversion, as to Defendant Tsai, based on his misappropriation of corporate funds for writing checks from Plaintiff to himself totaling over $40,000, 5) a violation of New York Business Corporations Law § 720, as to Defendants Mr. and Mrs. Guo, for improperly conveying Plaintiff's assets to Defendants, 6) trademark infringement, against all Defendants, for infringing Plaintiff's De Well Marks by incorporating a competing company intended to offer identical services under the trade name DW Logistics Solutions, Inc. and/or De Well Logistics USA, Inc., 7) unfair competition and misappropriation, against all Defendants, based on Defendants' use of "DW" and/or "De Well" in connection with services they have offered, in a manner designed to deceive the public and misappropriate Plaintiff's intellectual property, reputation and good will, 8) a violation of New York General Business Law § 133, against all Defendants, based on Defendants' use of Plaintiff's symbol with the intent to deceive or mislead the public, 9) a violation of New York General Business Law § 349, against all Defendants, based on Defendants' conduct which includes materially misleading conduct and actions targeted at consumers, 10) State Law Trademark Dilution, as to all Defendants, based on their use of Plaintiff's marks which is likely to dilute Plaintiff's trademarks and service marks, 11) injury to business reputation, against all Defendants, 12) breach of fiduciary duty as to Ms. Guo by, *inter alia*, her use of Plaintiff's funds and facilities to form a competing business, 13) breach of fiduciary duty as to Mr. Guo by, *inter alia*, his use of Plaintiff's funds and facilities to form a competing business, 14) breach of fiduciary duty by Panzarella by, *inter alia*, engaging

in conduct that facilitated the formation, licensing and operation of the unauthorized De Well entities and concealing that conduct from Plaintiff, 15) breach of fiduciary duty by Tsai by, *inter alia*, engaging in conduct that facilitated the formation, licensing and operation of the unauthorized De Well entities and concealing that conduct from Plaintiff, 16) aiding and abetting breach of fiduciary duty by Panzarella by providing Ms. Guo with substantial assistance in her acts of breaching her fiduciary duties to Plaintiff, 17) aiding and abetting breach of fiduciary duty by Tsai by providing Ms. Guo with substantial assistance in her acts of breaching her fiduciary duties to Plaintiff, and 18) civil conspiracy against all Defendants who allegedly participated in a "common plan to enrich themselves at the expense of [Plaintiff]" (Am. Compl. at ¶ 165).

In the Prior Decision, the Court granted Plaintiff's Prior Motion in its entirety based on the Court's conclusion that Plaintiff had demonstrated a likelihood of success on the merits of its trademark claim by providing substantial evidence that the De Well NY Marks are entitled to trademark protection, Defendants' use of the De Well Marks is junior to Plaintiff's use of those Marks, and the Marks at issue are likely to be confused, given the a) inherent distinctiveness and awareness in the marketplace of the De Well Marks, b) the substantial similarity of Defendants' Marks and the De Well Marks, and c) the fact that the parties provide identical services and clearly compete with each other. The Court also noted that Plaintiff provided substantial evidence of Defendants' bad faith in adopting the competing Marks, as evidenced by the emails demonstrating Defendants' intention to use a mark likely to cause confusion with the De Well Marks, to communicate to Plaintiff's customers that Defendants are affiliated with De Well NY and its affiliated companies, and to hide their actions from Plaintiff. The Court also determined that Plaintiff had established irreparable harm by demonstrating that, without the requested injunctive relief, it would lose control over the reputation of its trademark pending trial, because loss of control over one's reputation is neither calculable nor precisely compensable. Finally, the Court held that a balancing of the equities clearly favored Plaintiff, in light of the evidence before the Court of an apparently secretive and well-organized plan by Defendants to open a business that competes with Plaintiff, in part by the seemingly improper use of the De Well Mark.

In the Prior Decision, the Court directed that Defendants Mingwei Guo, Hong Guo, Jackson Tsai, Rose Panzarella, De Well Logistics USA, Inc. and DW Logistics Solutions, Inc., their officers, agents, servants, employees and attorneys, and all those persons acting in concert

with them, pending disposition of this action, were immediately enjoined from 1) using on or in connection with any goods or services, including for the importation, sale, offering for sale, distribution, advertising, promotion, labeling or packaging of any goods or services, or using for any commercial purpose whatsoever, including listings in directories and other trade publications, any trademark, service mark, name, word, symbol or device that includes the term "DE WELL" or "DW," or any colorable imitation, variation or derivation thereof, or any mark that is likely to be confused with any mark owned or used by Plaintiff; 2) representing by any means whatsoever, whether directly or indirectly, that any services or goods sold, offered for sale, advertised, promoted or provided by Defendants are associated or affiliated with, sponsored, endorsed or authorized by, or connected to Plaintiff; 3) committing any further acts of trademark infringement, unfair competition, deceptive trade practices or false advertising with respect to any product or service of Plaintiff; and 4) causing, engaging or permitting any individual or entity to perform any of the aforementioned acts.

In support of their Counterclaims and Amended Third-Party Complaint (Ex. A to Cohen Aff. in Supp./App.), Defendants/Third-Party Plaintiffs provide allegations regarding *inter alia* 1) the formation of Shanghai De Well Container Transport Corp. ("Shanghai De Well"), 2) the formation of Plaintiff De Well, 3) De Well's Early Years (1996-2005) and its cost, insurance and freight ("CIF") Business, 4) De Well's Later Years (2005-2010) and its freight on board ("FOB") Business, 5) De Well Container Shipping Inc. ("De Well LA") competing with De Well beginning in 2005, 6) De Well Group LLC ("De Well Group") competing with De Well beginning in 2009, 7) Shanghai De Well's audit of De Well in 2010, 8) Shangahi De Well's failure to account to De Well beginning in 2011, 9) Shanghai De Well's takeover of De Well in 2011, 10) Defendant Panzarella's forced resignation from De Well, and 11) the grounds for the dissolution of De Well pursuant to Business Corporation Law § 1104-a including but not limited to the conduct of De Well and its directors and officers in freezing Mingwei (Peter) Guo and Hong (Kim) Guo from the business affairs of De Well and diverting De Well's corporate assets for non-corporate purposes.

Defendants/Third-Party Plaintiffs assert thirteen (13) causes of action in their Amended Third-Party Complaint: 1) breach of fiduciary duty, by Peter Guo against Shanghai De Well, Time Yang and Chang Woo Kim, 2) aiding and abetting breach of fiduciary duty, by Peter Guo against Fran Cheng, 3) breach of contract, by Peter and Kim Guo, against Shanghai De Well and Time Yang, 4) promissory estoppel, by Peter and Kim Guo against Shanghai De Well and Time

Yang, 5) breach of the implied covenant of good faith and fair dealing, by Peter Guo against Shanghai De Well and Time Yang, 6) negligent misrepresentation, by Peter and Kim Guo against Shanghai De Well and Time Yang, 7) a request for an accounting, by Peter Guo against Shanghai De Well, Time Yang and Chang Woo Kim, 8) promissory estoppel, by Kim Guo, Jackson Tsai and Rose Marie Panzarella against De Well, Shanghai De Well and Time Yang, 9) constructive discharge, by Kim Guo against De Well and Time Yang, 10) slander and defamation, by Kim Guo and Rose Marie Panzarella against Time Yang and Fran Cheng, 11) tortious interference with business opportunity, by Kim Guo, Jackson Tsai and Rose Marie Panzarella against Shanghai De Well, Time Yang and Fran Cheng, 12) civil conspiracy, by Peter Guo, Kim Guo, Jackson Tsai and Rose Marie Panzarella against Shanghai De Well, Time Yang and Fran Cheng, and 13) a request for a declaratory judgment declaring that Plaintiffs and Third-Party Defendants' actions, including their alleged diversion of De Well assets and removal of Peter Guo from De Well's board of directors, are in derogation of Third-Party Plaintiffs' rights.

In their proposed First Amended Verified Counterclaim/Second Amended Verified Third-Party Complaint ("Proposed Pleading"), Defendants/Third-Party Plaintiffs assert eleven (11) causes of action: 1) breach of contract, by Peter and Kim Guo against Shanghai De Well and Time Yang, 2) breach of the implied covenant of good faith and fair dealing, by Peter and Kim Guo against Shanghai De Well and Time Yang, 3) fraud, by Peter and Kim Guo against Shanghai De Well, Time Yang and Fran Cheng, 4) conspiracy to commit fraud, by Peter and Kim Guo against Shanghai De Well, Time Yang and Fran Cheng, 5) Negligent Misrepresentation, by Peter and Kim Guo against Shanghai De Well, Time Yang and Fran Cheng, 6) breach of fiduciary duty, by Peter Guo against Shanghai De Well, Time Yang and Chang Woo Kim, 7) aiding and abetting breach of fiduciary duty, by Peter Guo against Fran Cheng, 8) promissory estoppel, by Peter and Kim Guo against De Well, Shanghai De Well and Time Yang, 9) a request for an accounting by Peter and Kim Guo against De Well, Shanghai De Well, Time Yang and Chang Woo Kim, 10) quantum meruit, by Kim Guo against De Well, Shanghai De Well and Time Yang, and 11) unjust enrichment, by Peter and Kim Guo against De Well, Shanghai De Well, Time Yang and Fran Cheng.

In support of Plaintiff/Third-Party Defendants' motion to dismiss, counsel for Plaintiff/Third-Party Defendants ("Plaintiff's Counsel") provides copies of 1) a New York Department of State filing receipt reflecting Plaintiff's incorporation (Ex. A to Goodhouse Aff. in Supp.), 2) De Well Shanghai's share certificate, signed by Mr. Yang in his former capacity as

secretary of Plaintiff and by Ms. Guo in her former capacity as president of Plaintiff (*id.* at Ex. B), 3) Plaintiff's bylaws (*id.* at Ex. C), and 4) an email message sent by Ms. Guo to Mr. Yang on September 8, 2011 containing the heading "Resignation Letter" (*id.* at Ex. D).

C. The Parties' Positions

In his Affirmation in Support of the Cross Motion, counsel for Defendants/Third-Party Plaintiffs ("Defendants' Counsel") affirms that, in the Proposed Pleading (Ex. B to Cohen Aff. in Supp./Opp.), Defendants/Third-Party Plaintiffs 1) have withdrawn, without prejudice, former Counts Eight, Nine, Ten, Eleven and Thirteen of their initial Third Party Complaint (Ex. A to Cohen Aff. in Supp./Opp.); and 2) have withdrawn, without prejudice, all of the claims previously asserted by both Jackson Tsai and Rose Marie Panzarella against Plaintiff/ Third-Party Defendants. Defendants/Third-Party Plaintiffs submit that, in light of the liberal amendment standard and because Plaintiff will not be prejudiced by the proposed amendment, the Court should permit the amendment. Defendants/Third-Party Plaintiffs submit, further, that the causes of action in the Proposed Pleading are meritorious.

Plaintiff opposes the cross motion to amend submitting that Defendants have not provided a basis on which they should be permitted to alter/omit facts or change legal theories. Plaintiff submits, further, that the proposed amended causes of action are insufficient. Plaintiff submits *inter alia* that 1) Defendants' contract claim (proposed first cause of action, prior third cause of action) fails because the alleged contract, which was not reduced to writing, could not be performed within one year and is unenforceable under the statute of frauds, and Defendants have impermissibly omitted certain facts, and changed others, in an effort to proceed on a joint venture theory that would take the alleged agreement out of the statute of frauds; 2) Defendants' new joint venture theory fails because the alleged oral agreement between Guo and Yang was to form a corporation, not a joint venture; 3) Defendants have not pled the requisite elements of a joint venture; 4) Defendants' allegation that the agreement was breached 9 years after the parties formed a corporation, when Yang began to establish other business interests in the United States, belies Defendants' contention that the parties "created an at-will business arrangement which allowed either party to walk away at any point" (*see* Ds' Memo. of Law in supp. at p. 9); 5) Defendants' claims for breach of the implied covenant of good faith and fair dealing (proposed second cause of action, prior fifth cause of action) and promissory estoppel (proposed eighth cause of action, prior fourth cause of action) are derivative of the deficient breach of contract claim and, therefore, should be dismissed; 6) the negligent misrepresentation claim

(proposed and prior sixth cause of action) is based on statements of future intent, relating to a plan to engage in corporate restructuring, that cannot support a misrepresentation claim; 7) the proposed claims for fraud (proposed third cause of action) and conspiracy to commit fraud (proposed fourth cause of action) are not viable, in part because the alleged misrepresentations are not statements of fact, or a concrete promise of future action; 8) the proposed fraud claim based on statements regarding the KGMG audit is frivolous because there is inadequate specificity regarding the alleged fraud and because Defendants cannot realistically assert that the purpose of the audit was other than to obtain financial information about the company, or review its accounting status; and 9) the Court should deny leave to include the quantum meruit claim (proposed tenth cause of action) and unjust enrichment claim (proposed eleventh cause of action) because a) Ms. Guo has failed to allege the reasonable value of her services rendered; b) in light of the fact that Ms. Guo was a paid employee of De Well, her complaint that she should have been paid more cannot serve as the basis of a quantum meruit claim; and c) Defendants may not use the equitable claim of unjust enrichment to avoid the statute of frauds.

In response, Defendants dispute Plaintiff's contention that Defendants have changed the underlying legal theories of their pleadings. Rather, Defendants contend, they have been able to review their own records and other information to "plead more concisely and definitively" (Cohen Reply Memo. of Law in Further Supp. at p. 2). Defendants submit that it has always been their contention that Peter Guo and Time Yang, through Shanghai De Well, entered into a joint venture to form a freight-forwarding business in the United States.

Defendants submit that the Proposed Pleading is meritorious, contending *inter alia* that 1) the breach of contract and related claims are not barred by the statute of frauds because a) a contract that is terminable at will does not implicate the statute of frauds; b) a joint venture agreement is not subject to the statute of frauds; and c) the agreement at issue could have been performed within a year; 2) Peter Guo and Kim Guo have stated a cause of action for promissory estoppel against Shanghai De Well and Time Yang based on their promises to Peter Guo in connection with the De Well business, including the promises that Peter Guo and Kim Guo would be the exclusive processors for Shanghai De Well's freight business in the United States, on which Peter Guo and Kim Guo relied to their detriment when they took affirmative steps to form and operate De Well, including Peter Guo's financial investment; 3) Defendants have stated a cause of action for breach of the implied covenant of good faith and fair dealing through their allegations that Shanghai De Well and Time Yang violated that covenant by, *inter alia*,

diverting business that was exclusively De Well's to other De Well entities owned by Shanghai De Well and/or Time Yang; 4) Defendants have stated a cause of action for negligent misrepresentation based on their allegation that Time Yang and Fran Cheng falsely represented to Peter Guo and Kim Guo that they agreed to the formation of a De Well holding company that would include Peter Guo and maintain and protect his equal interest, with the intent that Peter Guo and Kim Guo would rely on those representations, thereby concealing Time Yang and Fran Cheng's diversion of business from De Well for their personal financial gain; and 5) Defendants have stated a cause of action for civil conspiracy, and the fraud and negligent misrepresentation causes of action serve as the actionable tort underlying the civil conspiracy claim.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), 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. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

A motion to dismiss a cause of action pursuant to CPLR § 3211(a)(1) may be granted only if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d at 957, citing *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945 (2d Dept. 2014), quoting *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63 (2012).

B. Applicable Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in good conscience should be paid to the plaintiff. *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012), *rearg. den.*, 19 N.Y.3d 937 (2012), citing *Mandarin Trading Ltd. v.*

Wildenstein, 16 N.Y.3d 173, 182 (2011), quoting *Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y.2d 415, 421 (1972), *reh. den.*, 31 N.Y.2d 709 (1972), *cert. den.*, 414 U.S. 829 (1973). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d 58 (1st Dept. 2001).

Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995). The implied covenant of good faith and fair dealing embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Moran v. Erik*, 11 N.Y.3d 452, 456 (2008), citing *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002), quoting *Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (additional citations omitted). The implied covenant of good faith and fair dealing will not impose an obligation that would be inconsistent with the terms of the contract. *Adams v. Washington Group*, LLC, 42 A.D.3d 475, 476 (2d Dept. 2007), citing, *inter alia*, *Horn v. New York Times*, 100 N.Y.2d 85, 93 (2003). A cause of action to recover damages for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract. *Deer Park Enterprises, LLC v. Ail Systems, Inc.*, 57 A.D.3d 711, 712 (2d Dept. 2008), quoting *Canstar v. Jones Constr. Co.*, 212 A.D.2d 452, 453 (1st Dept. 1995).

The elements of a cause of action based on promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise. *Schwartz v. Miltz*, 77 A.D.3d 723, 724 (2d Dept. 2010), *lv. app. den.*, 16 N.y.3d 701 (2011), citing *Agress v. Clarkstown Cent. School Dist.*, 69 A.D.3d 769, 771 (2d Dept. 2010), quoting *Williams v. Eason*, 49 A.D.3d 866, 868 (2d Dept. 2008).

To establish a *prima facie* case for fraud, plaintiff must allege that 1) defendant made a representation as to a material fact; 2) such representation was false; 3) defendant intended to deceive plaintiff; 4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and 5) as a result of such reliance plaintiff sustained pecuniary loss. *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 488 (2007).

The elements of a claim for breach of fiduciary duty are: (1) existence of a fiduciary relationship, (2) misconduct, and (3) damages directly caused by the wrongdoer's misconduct.

Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services, 55 A.D.3d 664 (2d Dept. 2008); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007). Corporate directors and officers assume a fiduciary role in relation to the corporate entity and the shareholders. *Tornick v. Dinex Furniture Industries, Inc.*, 148 A.D.2d 602, 603 (2d Dept. 1989).

With respect to any causes of action dependent upon a fiduciary relationship, an informal fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another, and may be found to exist, in appropriate circumstances, between close friends or where the confidence is based upon prior business dealings. *Apple Records v. Capitol Records*, 137 A.D.2d 50, 57 (1st Dept 1988). The "'exact limits' of such relationship are impossible of statement," *Penato v. George*, 52 A.D.2d 939, 942 (2d Dept. 1976), *app. dism.* 42 N.Y.2d 908 (1977), and are "fact specific," *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 115 (1st Dept. 1998).

A cause of action for aiding and abetting a breach of fiduciary duty requires a showing of a fiduciary duty owed to plaintiff by another, a breach of that duty, defendant's substantial assistance in effecting the breach, together with resulting damages. *Keystone Int'l v. Suzuki*, 57 A.D.3d 205, 208 (1st Dept. 2008). Although a plaintiff is not required to allege that the aider and abettor had an intent to harm, there must be an allegation that the defendant had actual knowledge of the breach of duty. *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dept. 2003). Constructive knowledge of the breach of fiduciary duty by another is legally insufficient to impose aiding and abetting liability. *Id.*

The right to an accounting is premised on 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 an accounting has an interest. *Dee v. Rakower*, 112 A.D.3d 204, 214 (2d Dept. 2013), citing *Lawrence v. Kennedy*, 95 A.D.3d 955, 958 (2d Dept. 2012), quoting *Palazzo v. Palazzo*, 121 A.D.2d 261, 265 (1st Dept. 1986).

A claim for negligent misrepresentation requires the plaintiff to demonstrate 1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff, 2) that the information was incorrect; and 3) reasonable reliance on the information. *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148 (2007), *rearg. den.*, 8 N.Y.3d 939 (2007). Liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent

misrepresentation is justified. *Greenberg, Trager & Herbst, LLP v. HSBC Bank USA*, 17 N.Y.3d 565, 578 (2011), quoting *Kimmell v. Schaefer*, 89 N.Y.2d 257, 263 (1996).

There is no independent tort of civil conspiracy recognized in New York and such a claim may only be alleged to connect the actions of separate defendants with an actionable injury and to show these acts flowed from a common scheme or plan. *Schlotthauer v. Sanders*, 153 A.D.2d 729, 731 (2d Dept. 1989), *lv. app. den.*, 75 N.Y.2d 704 (1990), citing *SRW Associates v. Bellport Beach Property Owners*, 129 A.D.2d 328 (2d Dept. 1987). To properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement. *Faulkner v. City of Yonkers*, 105 A.D.3d 899, 900 (2d Dept. 2012), quoting *Perez v. Lopez*, 97 A.D.3d 558, 560 (2d Dept. 2012).

C. Joint Venture

The essential elements of a joint venture are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking (*i.e.*, a combination of property, financial resources, effort, skill or knowledge), some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses. *Commander Terminals Holdings, LLC v. Poznanski*, 84 A.D.3d 1005, 1009 (2d Dept. 2011), citing *Kaufman v. Torkan*, 51 A.D.3d 977, 979 (2d Dept. 2008), quoting *Tilden of N.J. v. Regency Leasing Sys.*, 230 A.D.2d 784, 785-786 (2d Dept. 1996) (internal quotation marks and citation omitted).

In *Mendelovitz v. Cohen*, 66 A.D.3d 849 (2d Dept. 2009), the Second Department affirmed the trial court's denial of defendants' motion for summary judgment. In so holding, the Second Department concluded that the trial court properly decided that, accepting the plaintiff's version of the nature and terms of the transaction between the parties, the plaintiff might be able to establish at trial the essential elements of a joint venture by showing 1) an agreement manifesting the parties' intent to be associated as joint venturers, 2) a contribution by the joint venturers to the undertaking, 3) some degree of joint proprietorship and control over the enterprise, and 4) an understanding with regard to the sharing of profits and losses. *Id.* at 850.

D. Relevant Statute of Frauds Principles

Under General Obligations Law ("GOL") § 5-701(a), an agreement is void if, by its terms, it "is not to be performed within one year from the making thereof" unless it "or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith.

Foster v. Kovner, 44 A.D.3d 23, 26 (1st Dept. 2007), quoting GOL § 5-701(a) and citing *Cron v. Hargro Fabrics*, 91 N.Y.2d 362 (1998). The statute encompasses only those agreements which, by their terms, have absolutely no possibility in fact and law of full performance within one year. *Foster v. Kovner*, 44 A.D.3d at 26, quoting *D & N Boening v. Kirsch*, 63 N.Y.2d 449, 454 (1984). It matters not that completion of performance within one year may be unlikely or improbable. *Foster v. Kovner*, 44 A.D.3d at 26.

An oral agreement may be sufficient to create a joint venture relationship and the statute of frauds is generally inapplicable thereto. *Mendelovitz v. Cohen*, 66 A.D.3d at 850, citing, *inter alia*, *Foster v. Kovner*, 44 A.D.3d 23 (1st Dept. 2007). The statute of frauds is inapplicable to an agreement to create a joint venture or partnership because an oral agreement for an indefinite period creates a partnership or joint venture at will. *Moses v. Savedoff*, 96 A.D.3d 466, 469 (1st Dept. 2012), citing *Foster v. Kovner*, *supra*, and *Prince v. O'Brien*, 234 A.D.2d 12 (1st Dept. 1996).

E. Leave to Amend

Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. *Aurora Loan Services, LLC v. Thomas*, 70 A.D.3d 986, 987 (2d Dept. 2010), citing CPLR § 3025(b); *Lucido v. Mancuso*, 49 A.D.3d 220, 222 (2d Dept. 2008).

F. Application of these Principles to the Instant Action

The Court grants the cross motion of Defendants/Third Party Plaintiffs and deems the Proposed Pleading (Ex. B to Cohen Aff. in Supp./Opp.) filed and served, and denies the motion to dismiss by Plaintiff/Third-Party Defendants. In consideration of the liberal amendment principles, and based on the Court's conclusion that the causes of action in the Proposed Pleading are meritorious, the Court will permit the amendment. The Court cannot rule, at this juncture, that the breach of contract and related claims are barred by the statute of limitations, both because Plaintiff has not established that the alleged agreement could not be performed within a year, and because Defendants have alleged facts supporting the existence of a joint venture to which the statute of frauds is inapplicable.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on October 1, 2015 at 9:30 a.m.

ENTER

DATED: Mineola, NY
September 9, 2015

HON. TIMOTHY S. DRISCOLL

J.S.C.