

Elia v Perla
2015 NY Slip Op 32713(U)
September 21, 2015
Supreme Court, Nassau County
Docket Number: 603535-13
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
SAMIR ELIA a/k/a SAMYR ELIA,

Plaintiff,

-against-

**DANIEL PERLA, TEAM SOHO, LLC, and
DANIEL PERLA ASSOCIATES, L.P.,**

Defendants.
-----x

**TRIAL/IAS PART: 14
NASSAU COUNTY**

**Index No: 603535-13
Motion Seq. No. 2
Submission Date: 8/6/15**

Papers Read on this Motion:

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Memorandum of Law in Support.....x**
- Affidavits in Opposition and Exhibits.....x**
- Memorandum of Law in Opposition.....x**
- Affirmation in Further Support and Exhibits.....x**
- Reply Memorandum of Law in Support.....x**

This matter is before the court on the motion filed by Defendants Daniel Perla (“Perla”), Team Soho, LLC (“Soho”) and Daniel Perla Associates, L.P. (“Associates”) (“Defendants”) on June 1, 2015 and submitted on August 6, 2015. For the reasons set forth below, the Court

1) grants the motion to dismiss the second, sixth, seventh, eighth, ninth and tenth causes of action; 2) and reserves decision on the motion as it relates to the first, third, fourth and fifth causes of action and will permit Plaintiff to supplement his papers regarding a) the applicability of General Obligations Law § 17-101, specifically to address the issue of whether Plaintiff is able to provide adequate evidence of a writing acknowledging the debt under the meaning of General Obligations Law § 17-101 to entitle Plaintiff to the benefit provided by that statute with regard to the timeliness of Plaintiff’s claims, and b) the \$35,000 check dated July 9, 2008 payable to Jonathan Elia which, Plaintiff contends, was a partial payment of the debt that tolled the statute

of limitations. The Court directs Plaintiff to provide his supplementary papers on or before October 20, 2015 and directs Defendants to provide their responsive papers on or before November 13, 2015. The case will appear on the Court's conference calendar on November 16, 2015 at 9:30 a.m. and the Court directs counsel for the parties to appear before the Court on November 16, 2015 at 9:30 a.m. for a conference. The Court will not conduct oral argument on the motion.

BACKGROUND

A. Relief Sought

Defendants move, pursuant to CPLR §§ 3211(a)(5) and (7), for an Order dismissing the Amended Verified Complaint ("Amended Complaint").

Plaintiff Samir Elia a/k/a Samyr Elia ("Samir" or "Plaintiff") opposes the motion.

B. The Parties' History

The Amended Complaint (Ex. A to Gruber Aff. in Supp.) describes the nature of this action as follows:

This action arises from the contractual breaches, misappropriation, deception, dissipation, diversion, waste, conversion and breaches of fiduciary duty and of Defendants' other obligations including those of good faith and fair dealing, by the Defendants' receipt of more than one million dollars of loan proceeds from Plaintiff and retained by all three of the Defendants, and the Defendants' failure and refusal to return the Plaintiff's loan principal and the accumulated interest earned on it, to the Plaintiff, as agreed.

Am. Comp. at ¶ 1.

Plaintiff alleges that, for a period of time up through December 6, 2007, Plaintiff loaned sums to Defendant totaling \$1,024,997.18 ("Loan"). The total Loan amount consists of sums that Plaintiff loaned directly to Defendants as well as additional sums that Plaintiff earned on his loans through various investments made by Defendants. Those earnings were automatically rolled over, and added to the sums loaned to Defendants, as part of the Loan, as agreed, and Plaintiff periodically paid substantial additional funds to Defendants. The last of the sums that Plaintiff loaned to Defendants was \$100,000, paid on December 6, 2007 by two checks each in the sum of \$50,000. All of Plaintiff's dealings with Defendants were through Plaintiff's brother

Yehezkel Elia a/k/a Hezie Elia ("Hezie"), on Plaintiff's behalf.

Plaintiff sets forth the terms agreed to by the parties with respect to the Loans (Am. Comp. at ¶ 9). Plaintiff also alleges that, at various times, through and including July 31, 2008, Defendants provided oral and written Loan Summaries and/or Statements and/or investment confirmation reports to Plaintiff which confirmed the period increases in the Loan by the rollover of Plaintiff's earnings into the Loan and/or by the additional sums that Plaintiff received from Defendants. Defendants also advised Plaintiff of loans and investments that Defendants made with the sums provided by Plaintiff. Plaintiff provides descriptions of certain of the written Summaries, Reports or Statements that he received from Defendants in 2006-2008 (*see* Am. Comp. at ¶ 10).

Plaintiff alleges that he received not only income and profit rollover acknowledgments from Defendants for sums earned by Plaintiff, which were automatically rolled into the Loan, but also received a \$35,000 loan repayment distribution from Defendants on July 9, 2008 towards repayment of the Loan. With the exception of that payment, Defendants have not repaid Plaintiff either the principal, interest or profits due to Plaintiff. In addition, despite Plaintiff's repeated requests, Defendants have not provided Plaintiff with Reports and Accountings since July 31, 2008.

The Amended Complaint contains ten (10) causes of action: 1) against all Defendants for breach of contract and a request for damages in the amount of \$1,024,997.18, together with interest on that sum at 12% per annum from December 6, 2007 to date of payment, less a \$35,000 credit for the July 9, 2008 payment, 2) against all Defendants for being faithless servants based on the allegation that Defendants were required to protect the funds borrowed from Plaintiff and failed to do so and should therefore forfeit all of the compensation that they received from the income earned by the funds borrowed from Plaintiff, 3) against all Defendants for conversion of the Loan and the assets and investments earned by Defendants with Plaintiff's funds, for which Plaintiff seeks compensatory and punitive damages, 4) against all Defendants for money had and received for which Plaintiff seeks compensatory and punitive damages, 5) against all Defendants under the theory of unjust enrichment for which Plaintiff seeks compensatory and punitive damages, 6) against all Defendants for breach of fiduciary duty on the theory that Defendants entered into a business relationship with Plaintiff and breached the trust

created by that relationship for which Plaintiff seeks compensatory and punitive damages, 7) for specific performance of the parties' agreements which includes the allegation that Plaintiff does not have an adequate remedy at law, 8) against all Defendants for an accounting which includes the allegation that "[t]he very nature of the agreements, terms and conditions require a duty to account" (Am. Comp. at ¶ 69), 9) a request for the imposition of a constructive trust based on Defendants' alleged failure to advise Plaintiff where the Loan funds have been placed, or to return those funds to Plaintiff, and 10) a request for attorney's fees which includes the allegation that, because Plaintiff is entitled to punitive damages, he is also entitled to attorney's fees in the amount of \$50,000.

In support of the motion now before the Court, counsel for Defendants ("Defendants' Counsel") affirms that Plaintiff initiated this action by the filing of a Summons with Notice on November 28, 2013 (Ex. B to Gruber Aff. in Supp.) which was never served. Plaintiff electronically filed his initial complaint on January 16, 2014 and Defendants moved to dismiss the initial complaint. That motion was rendered moot by Plaintiff's service of the Amended Complaint and, accordingly, Defendants withdrew their prior motion to dismiss. Defendants dispute the allegations in the Amended Complaint and submit that all of the causes of action in the Amended Complaint "suffer from pleading defects which require dismissal of the Complaint" (Gruber Aff. in Supp. at ¶ 15), including but not limited to 1) the failure to give notice as to when any of the loans, other than the final two loans, were advanced by Plaintiff, and 2) the fact that the Summons with Notice was filed more than six (6) years after most of the loans were made resulting in those claims being barred by the statute of limitations.

In opposition, Hezie, the brother of Plaintiff, affirms the truth of the allegations in the Amended Complaint. Hezie provides copies of the two checks in the sum of \$50,000, dated December 6, 2007 (Ex. B to Hezie Aff. in Opp.) representing the last sum that Plaintiff loaned to Defendants. With respect to the periodic investment/loan reports to which the Amended Complaint refers, Hezie affirms that "[b]y way of example, included as part of Exhibit "A" annexed hereto is the October 15, 2007, letter and enclosures from [Perla] and [Soho] to [Plaintiff] regarding Defendants' Green Street Investment..." (Hezie Aff. in Opp. at ¶ 17). Exhibit A, however, consists solely of a copy of the Amended Complaint and does not contain any correspondence or enclosures. Hezie affirms that, as asserted in the Amended Complaint,

Plaintiff received not only reinvestment credits but also an actual distribution towards repayment of those loans on July 9, 2008. Hezie affirms that, in reviewing records, it was noted that the July 9, 2008 repayment from Defendants was in the amount of \$35,000, not \$10,000 as asserted in the initial complaint, and was paid by Perla to Jonathan Elia, Hezie's son. Hezie provides a copy of the \$35,000 check dated July 9, 2008 payable to Jonathan Elia (Ex. C to Hezie Aff. in Opp.). Hezie affirms the truth of the allegation in the Amended Complaint that, with the exception of the \$35,000 payment, Defendants have not repaid Plaintiff his loans or the interest thereon.

In further opposition to the motion, counsel for Plaintiff ("Plaintiff's Counsel") provides the following time line of the allegations in the Amended Complaint: 1) December 6, 2007 was the date of the last of a series of payments or credits that comprised the Loan; 2) July 9, 2008 was the date of the \$35,000 loan repayment from Defendants; 3) July 31, 2008 was the date of the last written loan Report/Accounting from Defendants (Am. Comp. at ¶ 10(e)); 4) August 2008 was the date of Plaintiff's first demand for repayment of the entire loan (Am. Comp. at ¶ 15); 5) December 31, 2008 was the date on which Plaintiff's demand required payment from Defendants (Am. Comp. at ¶ 15); and 6) November 28, 2013 is the date on which Plaintiff filed his Summons with Notice.

In reply, Defendants note that Plaintiff has submitted an affidavit of Hezie, Plaintiff's brother, but has not provided his own affidavit in opposition to the motion. Defendants submit that Hezie's affidavit does not demonstrate that he has personal knowledge of the relevant facts, or explain Plaintiff's failure to provide an affidavit. Counsel for Defendants affirms that Hezie is a convicted felon as a result of his 2008 conviction for income tax evasion and conspiracy to defraud and was subsequently sentenced and imprisoned from 2008-2011, as reflected by the documentation provided (Ex. A to Grossman Reply Aff.). Thus, Hezie was incarcerated at the time that, he asserts, he was demanding repayment from Defendants in August 2008 and otherwise handling Plaintiff's transactions with Defendants. Defendants submit that it is "beyond incredible" (Grossman Reply Aff. at ¶6(e)) that Hezie had direct personal involvement or knowledge of the facts surrounding the alleged Loan from 2008-2011. Defendants also note that, although Hezie makes reference in his affidavit to letters or exhibits annexed as Exhibit A, no such documents are contained in Exhibit A.

C. The Parties' Positions

Defendants submit that where, as here, the nature of the action is for payment of sums of money allegedly owed pursuant to loans and investments that are payable on demand, the statute of limitations begins to run from the date of the execution of the demand note/instrument. Defendants contend that, although the Amended Complaint fails to provide notice of the actual date that Plaintiff advanced any loans, other than the two checks issued on December 6, 2007, it is clear from the allegations that there were multiple loans over a period of time, that the loans were payable, on demand, with three months notice, and that most of the loans were made in 2006 and prior to October 2007. Thus, as the Summons with Notice was not filed until November 28, 2013, all of the alleged demand loans, other than the \$100,000 allegedly advanced on December 6, 2007, are barred by the statute of limitations. Accordingly, the first cause of action alleging breach of contract, and the other causes of action arising from those prior loans, including the fourth, fifth, seventh and ninth causes of action, are barred by the statute of limitations. Defendants submit that Plaintiff is on notice of the statute of limitations issues in light of Defendants' prior motion to dismiss the initial complaint. Defendants contend that Plaintiff's failure to set forth the dates of the various loan advances in the Amended Complaint is proof that all, or substantially all, of Plaintiff's claims are time-barred and should be dismissed. Moreover, Plaintiff's allegation that Defendants sent loan summaries/statements/investment confirmation reports confirming periodic increases in the Loan, of which Defendants have provided no written proof, is not competent evidence of a new or continuing contract that would take the action out of the statute of limitations.

Defendants submit further that 1) Plaintiff fails to provide sufficient particularity with respect to the causes of action for breach of fiduciary duty; 2) with respect to the second cause of action for faithless servant, Plaintiff fails to set forth an agency relationship or that Defendants owed Plaintiff a duty of fidelity as a principal; 3) the eighth cause of action, for an accounting, is legally insufficient both because Plaintiff has not sufficiently alleged the existence of a fiduciary duty and because Plaintiff has failed, as required, to allege that it made a demand on Defendants for an accounting, and has failed to specify the Defendant(s) on which that demand was made; 4) the ninth cause of action, seeking the imposition of a constructive trust, is legally insufficient because Plaintiff has not pleaded the required elements, including the existence of a confidential

or fiduciary relationship; 5) dismissal of the seventh cause of action, for specific performance, is appropriate, in part because, as evidenced by Plaintiff's demands for money damages as to many of the other causes of action, Plaintiff has an adequate remedy at law in the form of money damages; and 6) the Court should dismiss the tenth cause of action, seeking attorney's fees, because Plaintiff has not identified any contract or statute that would entitle him to attorney's fees.

Plaintiff opposes the motion submitting that, as Defendants were not obligated to return any portion of the Loan to Plaintiff until after at least a three month demand by Plaintiff for repayment, the sums loaned by Plaintiff were not due until December 31, 2008. Plaintiff submits that Defendants' motion fails to take into account CPLR § 206(a)(2) which provides in pertinent part, that "where there is a deposit of money to be repaid only upon a special demand,... the time within which the action must be commenced shall be computed from the demand for repayment or return." As the earliest date that Plaintiff could have made a viable repayment demand was December 6, 2007, for repayment March 6, 2008 (three months later), the six year statute of limitations did not run until March 6, 2014. Plaintiff also argues that the commencement of the statute of limitations period was tolled and extended by either written acknowledgment of the obligation pursuant to General Obligations Law ("GOL") ¶ 17-101, by a partial payment or by misleading representations, all of which occurred in this action as a result of 1) Defendants' last report to Plaintiff on July 31, 2008, 2) Defendants' partial payment to Plaintiff on July 9, 2008 and reports prepared, maintained and sometimes sent by Defendants to Plaintiff, and 3) Defendants' alleged misrepresentations to Plaintiff regarding their intentions, as evidenced by their failure to provide Plaintiff with the requested reports and accounting. Plaintiff also argues that the sums due from Defendants to Plaintiff were converted to a demand note effective December 31, 2008 as a result of Plaintiff's August 2008 demand that Defendants make repayment on that date.

Plaintiff submits further, *inter alia*, that 1) Plaintiff has adequately pleaded the second cause of action, based on the faithless servant doctrine, by alleging that Defendants assumed a confidential and fiduciary obligation to protect Plaintiff's funds, agreed to keep Plaintiff apprised of the status of the funds on a regular basis, and Defendants misappropriated the Loan funds; 2) Plaintiff has adequately pleaded the sixth cause of action, alleging breach of fiduciary duty, by

alleging that Defendants assumed a “confidential and fiduciary obligation to protect Plaintiff’s funds” (P’s Memo. of Law in Opp. at p. 19, quoting Am. Comp. at ¶ 9(b)), agreed to keep Plaintiff apprised of the status of those funds, were compensated for their efforts and breached that duty when, following Plaintiff’s demand for repayment on August 2008, Defendants failed to repay Plaintiff by December 31, 2008; 3) Plaintiff has adequately pleaded the seventh cause of action, for specific performance, by alleging that Defendants failed to honor their agreements, misled and deceived Plaintiff and have refused to account for the Loan funds; 4) Plaintiff has adequately pleaded the eighth cause of action, for an accounting, in part because “[t]he very nature of the agreements, terms and conditions require a duty to account” (P’s Memo. of Law in Opp. at p. 22), Plaintiff has demanded that Defendants comply with their obligations and accounting, and Defendants have refused to do so; 5) Plaintiff has adequately pleaded the ninth cause of action, for the imposition of a constructive trust, by alleging that Defendants were unjustly enriched by their receipt and retention of funds properly belonging to Plaintiff and that a constructive trust should be imposed in light of Defendants’ failure to account for the funds or return the funds to Plaintiff as required; and 6) Plaintiff has adequately pleaded the tenth cause of action, for legal fees, in light of Plaintiff’s request for punitive damages in the second through sixth causes of action and case law supporting an award of legal fees where there are “fraudulent circumstances dictating unusual legal expenditures” (P’s Memo. of Law in Opp. at p. 26, quoting *City of Buffalo v. J.W. Clement Co., Inc.*, 28 N.Y.2d 241 (1971)).

In reply, Defendants submit that 1) although Plaintiff has made reference to numerous writings from Defendants allegedly acknowledging a debt after November 2007, Plaintiff has failed to present any such writings to the Court; 2) Plaintiff has failed to come forward with an affidavit from someone with personal knowledge of the specifics of the alleged Loan; and 3) Plaintiff has failed to specify whether the monies at issue were demand loans, loans of some other type or a series of investments, and has failed to allege precise dates when the sums were advanced to Defendants, other than alleging that the advances happened no later than by October 15, 2007, other than the two final loan checks dated December 6, 2007, totaling \$100,000. Under these circumstances, Defendants submit, it is clear that there were multiple loans over a period of time which is supported by Plaintiff’s allegation that “the last of the sums loaned by Plaintiff to Defendants was \$100,000” (Am. Comp. at ¶ 7). Defendants also contend

that there is no affidavit or documentary evidence to support Plaintiff's contention that the sums owed were converted to a demand note effective December 31, 2008, based on an August 2008 demand. Even assuming that the statutory period runs from December 31, 2008, the three year statutory period would have lapsed December 31, 2011 and the causes of action in the complaint would be time-barred. Defendants also concede that a partial payment of a debt may toll the statute of limitations but submit that Plaintiff has not demonstrated that the payment on which Plaintiff relies, specifically the payment of \$35,000 on July 9, 2008 by a check payable to Jonathan Elia, Hezie's son, relates to the alleged Loan to Plaintiff. Jonathan Elia, the payee of that check, has failed to provide an affidavit with respect to that check.

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).

On a motion pursuant to CPLR § 3211(a)(5) to dismiss a complaint as barred by the applicable statute of limitations, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired. *Beroza v. Sallah Law Firm, P.C.*, 126 A.D.3d 742 (2d Dept. 2015), quoting *Kitty Jie Yuan v. 2368 W. 12th St., LLC*, 119 A.D.3d 674 (2d Dept. 2014). The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable. *Beroza v. Sallah Law Firm, P.C.*, 126 A.D.3d at 742 citing, *inter alia*, *Kitty Jie Yuan v. 2368 W. 12th St., LLC*, 119 A.D.3d at 674.

B. Relevant 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). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d

802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages).

To establish a breach of fiduciary duty, the plaintiff must show the existence of a fiduciary relationship, misconduct that induced the plaintiff to engage in the transaction in question, and damages directly caused by that misconduct. *Barrett v. Freifeld*, 64 A.D.3d 736, 739 (2d Dept. 2009) citing *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007); *Ozelkan v. Tyree Bros. Envtl. Servs., Inc.*, 29 A.D.3d 877, 879 (2d Dept. 2006). A conventional business relationship, without more, is insufficient to create a fiduciary relationship. Rather, a plaintiff must show special circumstances that transformed the parties' business relationship to a fiduciary one. *Legend Autorama, Ltd. v. Audi of America, Inc.*, 100 A.D.3d 714, 717 (2d Dept. 2012) citing, *inter alia*, *AHA Sales, Inc. v. Creative Bath Prods., Inc.*, 58 A.D.3d 6, 9 (2d Dept. 2008).

CPLR § 3016(b) provides that where a cause of action is based upon misrepresentation, fraud, breach of trust, and certain other claims the circumstances constituting the wrong shall be stated in detail. The purpose of this pleading requirement is to inform a defendant of the incidents which form the basis of the action. *Pludeman v. Northern Leasing Systems*, 10 N.Y.3d 486, 491 (2008). A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR § 3016(b). *Deblinger v. Sani-Pine Products Co., Inc.*, 107 A.D.3d 659, 660 (2d Dept. 2013), quoting *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 808 (2d Dept. 2011).

A conversion takes place when defendant, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. *Colavito v. Organ Donor Network*, 8 N.Y.3d 43, 49-50 (2006). The two key elements of conversion are 1) plaintiff's possessory right or interest in the property, and 2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights. *Id* at 50.

It is well settled that one who owes a duty of fidelity to a principal and who is faithless in the performance of his or her services is generally not entitled to recover compensation, whether commissions or salary. *Royal Carbo Corp. v. Flameguard, Inc.*, 229 A.D.2d 430 (2d Dept. 1996) citing, *inter alia*, *Feiger v. Iral Jewelry*, 41 N.Y.2d 928, 929 (1977).

The determination of whether to grant or deny the equitable remedy of specific performance lies within the discretion of the court and the right to such relief is not automatic. *Marinoff v. Natty Realty Corp.*, 34 A.D.3d 765, 767 (2d Dept. 2006), *app. den.*, 8 N.Y.3d 811 (2007), citing *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 415 (2001) and *McGinnis v. Cowhey*, 24 A.D.3d 629 (2d Dept. 2005). A court may deny specific performance where the grant of such remedy would result in reasonable hardship or injustice. *Marinoff v. Natty Realty Corp.*, 34 A.D.3d at 767, quoting *McGinnis v. Cowhey*, 24 A.D.3d at 629. In general, specific performance will not be ordered where money damages would be adequate to protect the expectation interest of the injury party. *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d at 415, quoting Restatement (Second) of Contracts § 359(1).

The elements of a claim for money had and received are 1) the defendant received money belonging to the plaintiff; 2) the defendant benefitted from receipt of the money; and 3) under principles of equity and good conscience, the defendant should not be permitted to keep the money. *Matter of Estate of Witbeck*, 245 A.D.2d 848 (3rd Dept. 1997), quoting 22A N.Y. Jur. 2d Contracts, § 520 at 244.

The four elements of a constructive trust are: 1) a confidential or fiduciary relation, 2) a promise, 3) a transfer in reliance thereon, and 4) unjust enrichment. *Sharp v. Komalski*, 40 N.Y.2d 119, 121 (1976); *Church of God Pentecostal Fountain of Love, MI v. Iglesia De Dios Pentecostal, MI*, 27 A.D.3d 685 (2d Dept. 2006). These elements, however, serve only as a guideline and a constructive trust may still be imposed even if all four elements are not established. *Henning v. Henning*, 103 A.D.3d 778, 780 (2d Dept. 2013). As an equitable remedy, a constructive trust should not be imposed unless it is demonstrated that a legal remedy is inadequate. *Bertoni v. Catucci*, 117 A.D.2d 892, 895 (3d Dept. 1986).

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).

C. Relevant Statute of Limitations Principles

The statute of limitations for conversion is three years, which accrues on the date that the conversion occurs. *See G. Graham Davidson, Jr. v. Fasanella*, 269 A.D.2d 351, 352 (2d Dept. 2000).

Pursuant to CPLR § 213(2), the statute of limitations for breach of contract is 6 years. In New York, a breach of contract cause of action accrues at the time of the breach. *Ely-Cruikshank Co., Inc. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993), citing *Edlux Constr. Corp. v. State of New York*, 252 App. Div. 373, 374 (3d Dept. 1937), *aff'd* 277 N.Y. 635 (1938); *Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 550 (1979).

Pursuant to CPLR § 213(2), the statute of limitations on causes of action based on advances payable on demand begins to run on the date that the obligations were created. *Vitale v. Giaimo*, 103 A.D.3d 835 (2d Dept. 2013). In *Grant v. Marshall*, 307 A.D.2d 274 (2d Dept. 2003), *lv. app. den.*, 1 N.Y.3d 505 (2004), the Second Department addressed the timeliness of an action commenced on February 9, 1999 to recover on a demand note executed by the defendant on October 13, 1989. *Id.* The Second Department affirmed the trial court's judgment in favor of plaintiff holding that, while the cause of action to recover on the note accrued on the date that the defendant signed the demand note, the action was not barred by the six-year statute of limitations because the defendant's partial payment on the note made in May 1995 started the statute of limitations running anew. *Id.* citing, *inter alia*, CPLR § 213; *Morris Demolition Co. v. Board of Educ. of City of N.Y.*, 40 N.Y.2d 516, 421 (1976).

General Obligations Law § 17-101 provides as follows:

An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property. This section does not alter the effect of a payment of principal or interest.

GOL § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt. *Mosab Construction Corp. v. Prospect Park Yeshiva, Inc.*, 124 A.D.3d 732, 733 (2d Dept. 2015), quoting *Lynford v. Williams*, 34 A.D.3d 761, 762 (2d Dept. 2006). To constitute an acknowledgment of a debt, a writing must recognize

an existing debt and contain nothing inconsistent with an intention on the part of the debtor to pay it. *Mosab Construction Corp. v. Prospect Park Yeshiva, Inc.*, 124 A.D.3d at 733, quoting *Knoll v. Datek Sec. Corp.*, 2 A.D.3d 594, 595 (2d Dept. 2003). In *Mosab Construction Corp. v. Prospect Park Yeshiva, Inc.*, the plaintiff's opposition papers did not include any writing purporting to be a written acknowledgment of the debt by the defendants. The trial court allowed the plaintiff to submit, at oral argument on the motion, a writing purporting to be such an acknowledgment. 124 A.D.3d at 734. The Second Department concluded that the writing submitted by the plaintiff neither acknowledged a debt owed to plaintiff nor reflected that defendants intended to pay the plaintiff and, accordingly, held that the trial court had properly determined that the writing did not constitute an acknowledgment under GOL § 17-101 so as to restart the statute of limitations period. 124 A.D.3d at 734.

Where a plaintiff is seeking monetary, as opposed to equitable, relief, the three-year statute of limitations of CPLR § 214(3) applies to a cause of action alleging unjust enrichment. *Ingrami v. Rovner*, 45 A.D.3d 806, 808 (2d Dept. 2007), citing *Lambert v. Sklar*, 30 A.D.3d 564 (2d Dept. 2006). The statute of limitations on an unjust enrichment claim begins to run upon the occurrence of the wrongful act giving rise to the duty of restitution. *Ingrami v. Rovner*, 45 A.D.3d at 808.

D. Attorney's Fees

In New York, an attorney's fee is merely an incident of litigation and is not recoverable absent a specific contractual provision or statutory authority. *IG Second Generation Partners, LP v. Kaygreen Realty Co.*, 114 A.D.3d 641, 643 (2d Dept. 2014), citing *214 Wall St. Assoc., LLC v. Medical Arts-Huntington Realty*, 99 A.D.3d 988, 990 (2d Dept. 2012), quoting *Levine v. Infidelity, Inc.*, 2 A.D.3d 691, 692 (2d Dept. 2003), *lv. app. disp.*, 3 N.Y.3d 656 (2004).

E. Application of these Principles to the Instant Action

The Court 1) dismisses the second cause of action, based on a violation of the faithless servant doctrine, based on the Court's conclusion that this cause of action is not viable because Plaintiff has not alleged the existence of a principal/agency or employer/employee relationship; 2) dismisses the sixth cause of action, alleging breach of fiduciary duty, the eighth cause of action, a request for an accounting, and the ninth cause of action, a request for the imposition of a constructive trust, based on the Court's conclusion that Plaintiff has not sufficiently alleged the

existence of a fiduciary relationship between the parties who were in a conventional business relationship; 3) dismisses the seventh cause of action, seeking specific performance, based on the Court's conclusion that Plaintiff has an adequate remedy at law in the form of money damages and 4) dismisses the tenth cause of action, a request for attorney's fees, because Plaintiff has not pleaded a contractual or statutory basis for such an award.

Plaintiff submits that he has established the applicability of General Obligations Law § 17-101 but has not produced any writing acknowledging a debt. Plaintiff also submits that he has established a partial payment, specifically a \$35,000 check payable to Jonathan Elia, but has not provided competent evidence that this check related to the Loan. Under these circumstances, the Court reserves decision on the motion as it relates to the first, third, fourth and fifth causes of action and will permit Plaintiff to supplement his papers to address 1) the applicability of General Obligations Law § 17-101, specifically to address the issue of whether Plaintiff is able to provide adequate evidence of a writing acknowledging the debt under the meaning of General Obligations Law § 17-101 to entitle Plaintiff to the benefit provided by that statute as it relates to the timeliness of Plaintiff's claims and 2) the \$35,000 check dated July 9, 2008 payable to Jonathan Elia which, Plaintiff contends, was a partial payment of the debt that tolled the statute of limitations. The Court directs Plaintiff to provide his supplementary papers on or before October 20, 2015 and directs Defendants to provide their responsive papers on or before November 13, 2015. The case will appear on the Court's conference calendar on November 16, 2015 at 9:30 a.m. and the Court directs counsel for the parties to appear before the Court on November 16, 2015 at 9:30 a.m. for a conference. The Court will not conduct oral argument on the motion.

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 November 16, 2015 at 9:30 a.m.

ENTER

DATED: Mineola, NY

September 21, 2015



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

OCT 07 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE