

Creative Fin. Group, Inc. v Calvary Pentecostal Church, Inc.

2016 NY Slip Op 32259(U)

November 2, 2016

Supreme Court, New York County

Docket Number: 653857/2013

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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CREATIVE FINANCIAL GROUP, INC., a Florida Corporation,

Plaintiff,

-against-

Index No. 653857/2013

CALVARY PENTECOSTAL CHURCH, INC.,
a/k/a, CALVARY CATHEDRAL OF PRAISE, a
New York Religious Not-For-Profit Corporation,

DECISION & ORDER

Defendant.

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SHIRLEY WERNER KORNREICH, J.

Motion Sequences 005 and 006 are consolidated for disposition.

Defendant Calvary Pentecostal Calvary, Inc. (Calvary), moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff, Creative Financial Group, Inc. (Creative), and for summary judgment on its counterclaims. Creative opposes. Creative moves for summary judgment on its compliant and to dismiss Calvary’s counterclaims. Calvary opposes.

The complaint contains a single cause of action, breach of Creative’s contract with Calvary (Creative Contract).¹ Calvary’s counterclaims, numbered here as in its amended answer, are: 1) fraud, 2) constructive fraud, and 3) tortious interference with contract. Dkt 270.² The parties submitted a joint stipulation of facts (Stipulation). Dkt 216.

For the reasons that follow, Calvary’s motion to dismiss the complaint is granted,

¹ The Creative Contract is entitled “Mortgage Loan Origination Agreement/Mortgage Brokerage Business Contract/Finders [sic] Fee Agreement/Fee Agreement.”

² References to “Dkt” followed by a number refer to documents filed in the New York State Courts Electronic Filing System.

Creative's motion for judgment on the complaint is denied, and the motions on the counterclaims are granted in part and denied in part.

I. Factual Background

In 2010, Bibi Yassin, the principal and sole officer of Creative, entered into an oral agreement with non-party David Dallenbach, to work together on church funding projects arising from written agreements entered into by Yassin, Dallenbach or their respective companies. Stipulation, ¶ 4. Dallenbach's company was CND Holdings, LLC (CND). Calvary was not a party to the contract.

In 2011, Calvary was having difficulty paying bonds it had issued in 2004, and sought refinancing to reduce its monthly payments. Stipulation, ¶2. It had received default notices from Reliance Trust, dated January 18 and July 20, 2011, stating that it was in arrears on payments to its bondholders. Dallenbach Examination before trial (EBT),³ Dkt 177, Exs D-3 & D-4 thereto.⁴ According to the July 20 notice, the arrears were over \$400,000, with total principal and interest due of approximately \$9.7 million. *Id.*, Ex D-4. Dallenbach testified that he learned that Reliance Trust was preparing to foreclose on Calvary's property when he was approached by the executive vice-president of AG Financial, Joshua Bartlotti. Dallenbach EBT, pp 9-10. AG Financial owned 100 percent of Foundation Capital Resources (Foundation, referred to by the parties as FCR), and Foundation held five or six million dollars of Calvary's bonds. *Id.* Bartlotti told Dallenbach that Foundation would make a loan to Calvary and asked if

³ References to transcripts of examinations before trial will be denoted by the witness's name followed by EBT and page numbers.

⁴ Creative submitted as one document the EBT transcripts for each witness, with all exhibits used during the deposition annexed thereto. References to such exhibits will be noted reference to the witness' EBT, followed by an exhibit number. Plaintiff's and defendant's exhibits will be denoted by "P" or "D," respectively.

he would help put the deal together. *Id.* In early July 2011, Dallenbach phoned Yassin because Osbourne Ross, Calvary's Associate Pastor and Comptroller, had said that she had obtained Calvary's bond financing in 2004. 4/28/14 Yassin Affidavit (Yassin Moving Aff, Dkt 193), ¶6.

On July 25, 2011, Calvary entered into a loan consulting agreement with CND, Dallenbach's company (CND Contract), for the purpose of refinancing its debt with a loan in the principal amount of not less than \$9,700,000 nor more than \$10 million. Stipulation, ¶3; Dkt 217.⁵ CND's commission for obtaining the loan was to be 1% of the gross loan proceeds, payable at closing. *Id.* Paragraph 4 of the CND Contract provided that the fee would be earned when CND produced a commercial bank or lender willing to make the loan, delivered a commitment to Calvary, ***and the loan closed on the terms stated in the commitment.*** *Id.* Dallenbach confirmed at his deposition that he was to be compensated by Foundation only if the loan closed. Dallenbach EBT, p 12.

Calvary granted CND the exclusive right for nine months, i.e., until April 25, 2012, to assist in obtaining a commercial loan. CND Contract, ¶1. CND also agreed to provide general strategic and financial advice and to negotiate the loan terms. *Id.* In August 2011, ***Dallenbach*** asked Yassin to work jointly with him to obtain financing for Calvary, and she agreed. Yassin Moving Aff, ¶7; 3/15/16 Dallenbach Affidavit (Dallenbach Aff, Dkt 199), ¶¶ 9 & 10.

On August 16, 2011, Foundation sent a commitment letter to Calvary. Calvary was not happy with the terms, particularly Special Condition (d), which stated that Ross would replace the Senior Pastor, Reverend Dr. Marcus Patrick Roberts, within 24 months (Pastoral Clause). Dallenbach EBT, pp 42-43 & Ex D-5 [p 130]. Also, there was an onerous pre-payment penalty. Dallenbach EBT, pp 45-46 & Ex D-5 [p 128].

⁵ CND's Contract is entitled "Loan Consulting Agreement."

Dallenbach testified that the commitment was revised on September 12, through *his* efforts with Foundation, to change the Pastoral Clause and to extend the expiration date from August 31 to September 30, 2011. *Id.*, and Dallenbach EBT, pp 42-46 & Exs D-5 & D-7 [pp 138-143]. This is confirmed by an email chain between Bartlotti of Foundation and Dallenbach. Dkt 269. In the September 12 version, Calvary was to provide a detailed strategy for a complete transition to a new Senior Pastor, without naming Ross as the replacement for Roberts, “within the next 36 months (prior to closing),” failing which the interest rate would increase .05% (Revised Pastoral Clause). Dallenbach EBT, Ex D-7 [p 143]. The Revised Pastoral Clause also mandated that any new pastoral candidate had to be reviewed by Foundation. *Id.* The prepayment penalty was eliminated. *Id.*, p 140.

There was a third revision to the commitment on September 26, 2011, changing only the expiration date of the commitment to October 7. Stipulation, ¶¶ 7 & 9; Dkt 198. According to the affidavits of Yassin and Dallenbach, they jointly obtained this final September 26 version, although Dallenbach places the date of receipt as October 6, 2011. 3/15/16 Dallenbach Affidavit [Dkt 199], ¶12; 3/15/16 Yassin Affidavit [Dkt 193], ¶13. There is more than one September 26 version in the record.⁶ In all versions, Foundation agreed to provide a loan in the amount of

⁶ The other September 26 version had an expiration date of September 30, 2011, but it was signed by Calvary on October 6, and is not signed by Foundation. Dkt 195; Stipulation, ¶¶ 9 & 10. Foundation did sign the September 26 version with the October 7 expiration date. Dkt 198. Both are missing a page. Dkt 195 & 198. Creative’s notice to admit identified the commitment it obtained as the one with the September 30 expiration date. Yassin EBT, Ex D-18, ¶3, Ex B thereto. Yassin’s moving affidavit stated that the commitment she presented to Calvary’s Board on October 6 was the version with the September 30 expiration date. Yassin Moving Aff, ¶14. Yassin’s reply affidavit stated that she accidentally attached the version that expired September 30 to her moving affidavit, which is consistent with her deposition testimony, but contradicts the notice to admit. Dkt 197, ¶3; Yassin EBT, Dkt 174, pp 30-31, and Ex D-6; Yassin EBT, Ex D-18, ¶3, Ex B.

\$9,960,000, secured by Calvary's two parcels of Brooklyn real estate, with a rising interest rate starting at 6.875%, thirty-year amortization and a balloon in year twenty, resulting in first-year monthly payments of \$65,430.11. Compare Dallenbach EBT, Exs D-5 & D-7 & Dkts 195 & 198.

On September 13 or sometime thereafter, Pastor Roberts asked Yassin to get involved because Calvary was having a problem with Dallenbach. Roberts EBT, Dkt 175, pp 25-26 & 30-31; Yassin EBT, Dkt 174, pp 19, 20-22, 30-31, 36-7 & 79-82. Roberts did this because Dallenbach was annoyed when he asked for further revisions, and Dallenbach did not speak nicely to him, did not want to do anything further, and said that Calvary should just sign the commitment. *Id.* Roberts, at the time, did not know that Yassin already was involved. 5/27/14 Roberts Affidavit (Roberts' Opposing Aff), Dkt 265, ¶¶ 15-17. Yassin testified that Roberts did not like Dallenbach's "pushy salesman" attitude and felt that Ross and Dallenbach were working together to oust him. Yassin EBT, p 84.

Yassin's affidavit avers:

I advised Roberts that I had previously worked with Dallenbach on other mortgage loan transactions, and that I was confident that *we would be able to work jointly* in order *to achieve the new mortgage loan terms either from the present lender* who had issued the initial commitment (Foundation Capital Resources) *or* that if that was not successful, I would locate *another mortgage lender* who would be willing to provide the required financing ... on terms and conditions that would be acceptable to Pastor Roberts. [emphasis supplied]

Yassin Moving Aff, ¶9. Roberts' averred that Yassin did not tell him that she was working with Dallenbach, or that she would be working with Foundation on behalf of Calvary. 5/27/14 Roberts Opposing Aff, Dkt 265, ¶ 15-¶17.

Yassin said that during her initial conversation with Roberts, they discussed the CND Contract and Roberts said that he didn't want to pay fees to both of them. Yassin EBT, p 49. She says she assured him that he wouldn't have to pay both, but not that he wouldn't have to pay either of them. *Id.* The affidavits of Yassin and Dallenbach aver that *they* agreed that if Creative entered into a separate agreement with Calvary, Dallenbach would not pursue a fee under the CND Contract, but would instead share Creative's fee. Dallenbach Aff, ¶¶ 10 & 11; Yassin Moving Aff, ¶7. Yassin places the date of this agreement *with Dallenbach* as "around August 2011"; Dallenbach did not supply a date. *Id.* Roberts denies knowing of their agreement. Roberts Moving Aff, ¶15.

Yassin admitted at her deposition that the Creative Contract was effective and she was "engaged" on September 29. Yassin EBT, Dkt 174, pp 25 & 128-129. The Creative Contract was signed by Calvary on September 29 and by Yassin on September 30. Dkt 222.

The only commitment that Creative allegedly obtained was the September 26 version of the Foundation commitment that changed the expiration date. Although Yassin takes credit for eliminating the provision requiring Roberts to be replaced by Ross, her assertion is conclusively contradicted by documentary evidence and Yassin's admissions:

Q. . . . Going from 1 percent to 2 percent. Your contract substituted for David Dallenbach's contract, did that change in any way that you were working together?

A. . . . Well, yes, it changed -- it also changed prior to engagement, approximately *a week and a half to two weeks prior when I got into the picture when Pastor Roberts asked me to get into the picture. Dallenbach had presented obviously the commitment from Foundation Capital Resources where he had to resign and based on my correspondence, my initiatives to revise the terms. So, the commitment that I obtained was acceptable to the borrower and that's why.*

Q. . . . Which commitment are we talking about?

A. . . . There is only one commitment, the

commitment that I obtained which is the September 26th, 2011 commitment.

Q. . . . Right, okay....

A. . . . One and a half to two weeks *prior* to engagement. That is my true involvement that I was active with Dallenbach and Pastor Roberts.

Q. . . . When you say your true involvement, what does that mean exactly?

A. . . . The start. That's just the way I speak. But it is, the start of my involvement was about one and a half to two weeks and that is when I started doing everything that I needed to do or that was discussed and agreed upon with Pastor Roberts.

Q. . . . So that was like a major contribution you're saying that you made at that point?

A. . . . Absolutely. Pastor Roberts called me two weeks, approximately two weeks before engagement, he was very concerned that his organization was being halted [sic] from him by Osbourn [sic] Ross. When he got on the phone with me the first thing he said to me is that I was out of the country, then I came back and -- ...

A. . . . Pastor Roberts was out of the country. And he was given, I'm assuming the initial commitment showing that he had to resign as founder, CEO and senior pastor of an organization that he built. And even got into tears on that conversation with me about what Ross Osbourn [sic] was doing to his organization.

Q. . . . What did he say Ross was doing with his organization?

A. . . . Trying to take it away from him pretty much.

Q. . . . So that was a pretty good chunk of involvement that you had in that whole month?

A. . . . Coupled with other things like my communication with Dallenbach and initiating the fact that we have to remove Osbourn [sic] Ross from the commitment itself.

[emphasis supplied] Yassin EBT, Dkt 174, pp 79-82.

However, Yassin admitted she was not part of the September 12 revision that already had eliminated the Pastoral Clause requiring Ross to replace Roberts, as well as the prepayment penalty. Yassin EBT, p 31. She expressly testified that her work began after the September 12 revision. Yassin EBT, pp 19, 20-22, 30-31, 36-37 & 79-82. Specifically, she testified, variously, that her work for Calvary began one-and-a-half to two weeks before September 27, or her engagement by Calvary on September 29. Yassin EBT, pp 19 & 79. This would place her involvement no earlier than September 13, two weeks before September 27. Her testimony that the change from the Pastoral Clause to the Revised Pastoral Clause took place in connection with the September 26 revision is flatly contradicted by documentary evidence. Compare August 16 and September 12 versions, Dallenbach EBT, Dkt 177, Exs D-5 & D-7 [pp 126 & 138] and Yassin EBT, pp 87-89 & 100. Yassin cannot create an issue of fact by contradicting her own deposition testimony⁷ or documentary evidence.

On September 27, 2011, the day after the final version of the Foundation commitment, Yassin sent an email to Pastor Roberts late in the afternoon stating that she would be working with Dallenbach (Teaser Email). Yassin EBT, Ex D-1. The Teaser Email identified Yassin as the Finance Broker and Managing Partner of Creative. In the Teaser Email, Yassin wrote:

Our Joint efforts with CND Financial/David Dallenbach is [sic] dedicated to securing the best finance options available on the market to your church....

As such we do offer bank finance to churches, some of our programs as outlined below, contains [sic] low closing cost and quick closing as they are straight loans with banks.

⁷ *Harty v Lenci*, 294 AD2d 296 (1st Dept 2002) (question of fact cannot be created by contradicting one's prior sworn statements); *Phillips v Bronx Lebanon Hospital*, 268 AD2d 318 (1st Dept 2000) (no issue of fact created by affidavits of plaintiff and her relatives that contradicted plaintiff's deposition testimony); *Kistoov v City of NY*, 195 AD2d 403 (1st Dept 1993) (error to rely on plaintiff's affidavit that contradicted her prior deposition testimony).

We Offer:

5/25 - (fixed for 5 years & optionally adjustable after 5 years; and amortized over a 25 year period) with a [sic] estimated interest rate of 4.5% - 5% (with this option your payments should be around \$48,000-\$50,000)

10/25 - (fixed for 10 years & optionally adjustable after 10 years; and amortized over a 25 year period) with a [sic] estimated interest rate of 5% - 6%

Loans are also available with a 30 fixed and amortized for 30 years with approximately 6% -7% APR

ALL CFG [Creative Financial Group] loans are standard with No Pre-Payment Penalties and No Balloon Payments

We do hope one of these three options will be of interest to you.

Id.

The Teaser Email was incorporated into the minutes of a meeting of Calvary's Board that took place on September 27, 2011. Roberts EBT, Dkt 175, Ex P-4. The minutes reflect that the Board reviewed Foundation's September 26 revised commitment. *Id.* Motions were made for the Board to accept the commitment and to present the Board's resolution to the congregation. *Id.* In the ensuing discussion, the Board agreed that the Revised Pastoral Clause should be eliminated because it violated Calvary's Constitution and by-laws.⁸ *Id.* Roberts stated that a Senior Pastor could only be replaced due to resignation or when a "moral charge" was made against him. *Id.* In addition, the minutes reflect that Dallenbach refused to seek a lower interest rate. *Id.* The Board concluded that they should ask for an extension from Foundation for further

⁸ The minutes reflect that the Board was not happy with having the lender approve the new pastor, which was a condition in the Revised Pastoral Clause, but not the original Pastoral Clause in the August 16 version. This makes clear that the September 26 revision of the commitment, except for the extension to October 7, had already been obtained by Dallenbach's company.

review of the commitment before signing it. *Id.* The Board adopted a resolution authorizing Roberts and Ross to negotiate Foundation's commitment and to obtain the loan on terms and conditions they deemed appropriate. Yassin EBT, Ex D-13.⁹

Roberts then brought up Yassin and asked the Secretary to read the Teaser Email to the Board. *Id.* The Board agreed to explore the options in the Teaser Email with Yassin. *Id.* Remarkably, Yassin testified that because Calvary was in default, it did not qualify for those options, which were bank loans. Yassin EBT, Dkt 174, pp 10 & 13-15. She said that she never tells a client in default that they will qualify for bank financing, and that the options in the Teaser Email were for "phase two of the financing." *Id.* Yassin did not remember whether she ever put in writing the requirements for qualifying for bank financing, but said that she discussed it with Roberts as part of phase two. *Id.* However, the Teaser Email did not mention phase two or that Calvary did not qualify for the bank loans offered.¹⁰

Two days later, on October 29, 2011, Calvary signed a contract with Creative (Creative Contract). Dkt 222. The Contract said that Calvary was employing Creative "to obtain a

⁹ The Resolution said:

BE IT RESOLVED, that Borrower [Calvary] is authorized to obtain a loan from Foundation Capital Resources ("Lender"), ***pursuant to the terms and conditions as the officers hereinafter authorized shall deem proper*** and as further set forth in the Resolution, Application, Mortgage or Deed of Trust, and Real Estate Note, in the principal sum of \$9,960,000.00, plus associated costs, fees, interests and other charges and sums that may become due in connection with the loan documents evidencing such credit; and

RESOLVED FURTHER that Marcus Roberts, as Senior Pastor/President, and Osbourne Ross, as Associate Pastor/Vice President of Borrower (or other persons if so stated in constitution and bylaws) are ***authorized to negotiate the loan*** authorized herein and to execute all documents as may be required [emphasis added]

¹⁰ Creative points to documents that allegedly demonstrate that Calvary was aware that it did not qualify for bank financing. Creative Memorandum of Law in Opposition to Calvary's Motion, Dkt 259, p 11. However, the evidence referred to reflects only that Calvary knew it was having financial difficulties. *Id.*, & documents referred to therein.

mortgage loan or bond issue loan commitment,” and that Creative would use its best efforts to obtain it. *Id.* The term “Commitment” was defined as “a written or oral Commitment *received* by [Creative], unless otherwise agreed in writing between [Creative and Calvary].” *Id.*, [emphasis added]. Calvary agreed in Paragraph I to pay a broker’s fee of 2% of the gross amount of the loan commitment *Creative obtained* and actual costs incurred by Creative in connection with the loan. *Id.* Paragraph II provided that Calvary would pay a \$5,000 non-refundable application fee. *Id.* Paragraph VI stated that Creative could not “guarantee acceptance into any particular loan program or promise that any specific loan terms or conditions will be obtained.” *Id.* Creative’s fee was payable “from the proceeds of the loan or bond issue at closing.” *Id.*, ¶X.

The same paragraph further provided that:

Upon obtaining a commitment, Borrower [Calvary] agrees, if Borrower applies with any other finance company, closing a loan or bond issue with [Creative’s] proposed Underwriter, Lender, or Investor for a period of 36 months, from the effective date of this Agreement, Borrower agrees to pay all fees as described in “paragraph I.” [emphasis added]

Id., ¶VI. The Creative Contract provided that it was entitled to recover attorneys’ fees incurred in any action “arising out of” it, and that Florida law “shall apply to any interpretation or litigation arising under this contract.” *Id.*, ¶XIV. Yassin admits that Calvary mailed her the contract with a check for the \$5,000 fee. Yassin Moving Aff, ¶11.

There was a Board meeting of Calvary on September 29, 2011. The minutes reflect that Roberts said that Calvary’s lawyer had written to Dallenbach requesting further revisions to the Revised Pastoral Clause stating: 1) that Foundation’s consent to the new pastoral candidate would not be unreasonably withheld; and 2) that Foundation’s review would not conflict with the laws of New York State or Calvary’s Constitution or By-laws. Dkt 263. According to the

minutes, Dallenbach did not respond to the request to negotiate further revisions. *Id.* A motion was made and approved that:

In the interest of the Church, we need to go with Creative Financial Group Inc. because their programs seemed more profitable for the Church and their interest rate makes the loan affordable for Calvary.

Id.

Yassin attempts to place the date of the Creative Contract as beginning in the “middle of September” because Pastor Roberts told her to go ahead and start working on the transaction.

Yassin EBT, pp 128-129. But, she admitted that her offer had to be approved by the Board. *Id.*

In any event, the “middle of September” would be after the September 12 revision.

The record establishes that Dallenbach arranged to have the September 26 revision of the Foundation commitment extended to October 7, 2001. On October 3, Dallenbach emailed Yassin that he had spoken to Foundation and Roberts had “signed this agreement and never called me.” Dallenbach EBT, Ex D-12. Yassin testified that the agreement Dallenbach referred to was the Creative Contract. Yassin EBT, p 101. Yassin asked Dallenbach, “are they going to extend the offer thru this week? Please let me know, I have to book my flight to NY.”

Dallenbach EBT, Ex D-12. Dallenbach responded on October 4, “I will follow up again this morning. I think I can get them to do it.” *Id.* When Dallenbach was questioned about this correspondence, he said that he was trying not to lose the Foundation commitment due to the expiration date, and he would have “done this regardless.” Dallenbach EBT, pp 57-58. Yassin admitted at her deposition that she did not communicate with Foundation because she and Dallenbach had agreed that only he would. Yassin EBT, Dkt 174, p 35; see also Dallenbach Aff, Dkt 199, ¶9.

There is no evidence that Yassin did anything to extend the Foundation commitment. Yassin admitted that the extension was “per Dallenbach’s request.” Yassin EBT, pp 117-120. She admitted that she needed Dallenbach to extend it. *Id.* Nevertheless, she tries to take credit by stating that the extension was the result of their “joint efforts.” *Id.* According to Yassin, at one point Dallenbach was the broker and she was working with him, and at another she was the broker and Dallenbach was working with her. Yassin EBT, p 83. The lender and loan terms never changed.

On October 4, 2016, Pastor Roberts sent Dallenbach an email stating that Calvary would no longer be pursuing the Foundation loan. Yassin EBT, Ex D-14. Yassin said that she and Roberts discussed sending the letter because he did not want Yassin to present the Foundation commitment to Calvary and then have to pay Dallenbach. Yassin EBT, p 86. Yassin said, “this is his way of covering that fact that he will not have to pay Dallenbach because a commitment is only valid once accepted by a borrower.” Yassin EBT, p 87. On October 5, 2011, through Dallenbach’s efforts, Foundation sent a letter to Roberts approving an extension of the deadline to accept the commitment from September 30 to October 7.¹¹ Yassin EBT, Ex D-19.

Yassin testified that the purpose of extending the Foundation commitment was for her to present it to Calvary at its October 6 Board meeting. Yassin EBT, pp 126-127. Yassin flew from Florida to New York, at Calvary’s expense, to attend it. Yassin Moving Aff, ¶14. Yassin says that Roberts invited her; he says she asked to come. *Id.* & Roberts Aff, ¶19. The minutes reflect that the agenda was “Proposal of New Loan Offer based on telephone conversations,

¹¹ The approval speaks of an extension of the commitment in the letter dated August 16, 2011. However, the original version of the commitment, as well as the two subsequent versions were on a letter dated August 16, 2011. In the subsequent versions, the version dates appear below August 16, 2011, i.e., the final version is on a letter dated August 16, 2011, under which it says that it was revised September 12 and 26.

email exchanges and Term Sheet.” Dkt 272. At the meeting, Yassin presented Calvary with a document entitled “Loan Program Offer.” Yassin EBT, p 38 & Ex D-7. The Loan Program Offer did not contain the name of a lender, but had terms more favorable than the Foundation commitment. Yassin EBT, Ex D-7.¹² One of the terms was a verified six-month payment history. *Id.*

According to the minutes of the October 6 meeting, Yassin initially said that she had three options, but presented only two. 10/6/11 Minutes, Dkt 272.¹³ She presented the Loan Program Offer and the September 26 version of the Foundation commitment, and then advised the Board to accept the Foundation commitment because the Loan Program Offer would take too long and would expose Calvary to the risk of foreclosure. The minutes recite that the Board was surprised that the Foundation commitment was the second option because it was not mentioned in prior communications and the purpose of the meeting was to get a better loan offer from Creative as reflected in Yassin’s emails. *Id.* Roberts testified that instead of the options in the Teaser Email, Yassin presented the Foundation commitment and “told us we had to sign it

¹² The loan offered was in the principal amount of \$10,500,000, secured by a first mortgage on Calvary’s real property, amortized over thirty years “5/10/15/20 years fixed,” with payments starting at \$52,617.83, an interest rate of 5.5-6.5%, and no balloon payment. Yassin EBT, Ex D-7.

¹³ The minutes were taken by Judith James, who was the Board’s Secretary from 2004 to 2007, and acted as such on October 6 to substitute for the Board’s Secretary who could not attend. Judith James Affidavit, Dkt 273. Ms. James averred that the duties of the Secretary include taking and maintaining minutes of Board meetings, that in the regular course of business Calvary stores such minutes on a computer, that the October 6 minutes accurately reflect what transpired during the meeting. *Id.* She avers that that it was the regular practice of Calvary to prepare minutes of Board meetings on the day of the meeting or as soon as practicable thereafter, and that the minutes of this meeting were put on the computer either October 6 or 7. *Id.* This is sufficient to establish that the minutes are a business record of Calvary. CPLR 4518. She further swore that the redactions in the efiled copy reflect discussions with Calvary’s attorney. Dkt 273. In addition, there is no evidence that the minutes inaccurately reflect what transpired.

because the deadline was just one day.” Roberts EBT, pp 59-60. Ross’s testimony agreed with Roberts’ synopsis. Ross EBT, pp 94-100. Yassin told the Board that by accepting Foundation’s commitment, Calvary would be able to satisfy Reliance Trust and, with six months of on time payments, Foundation’s loan could be restructured through Creative. Dkt 272. The Board decided to sign the Foundation commitment, which was expiring the following day. *Id.*

There is no evidence that Calvary agreed that the Creative Contract would supersede the CND Contract with respect to the fee owed for the Foundation commitment. Yassin avers that Dallenbach advised her that he had entered into the CND Contract, and said that if Yassin entered into a separate agreement with Calvary, he would not pursue his fee and would instead share her fee. Yassin Moving Aff, ¶6. Dallenbach’s affidavit avers that “Bibi Yassin and I agreed” that Yassin’s agreement with Calvary “would supersede” the CND Agreement and that they would share the fee under Yassin’s contract. Dallenbach Aff, ¶11. Dallenbach did not say that Calvary agreed to that or that Yassin provided Calvary with any consideration not already provided by CND. He said that he did not recall discussing Yassin with Dr. Roberts, who had contacted Yassin independently. Dallenbach EBT, Dkt 177, p 38. Creative’s bill of particulars states that Calvary was made aware that once Creative took the lead, the Creative Contract would supersede Dallenbach’s contract, and Dallenbach would share Creative’s fee. Dkt 15, ¶8 [also submitted as Yassin EBT, Ex D-2]. The bill of particulars is not verified and is not evidence. Yassin admitted that there was no written disclosure to Calvary of her fee sharing agreement with Dallenbach. Yassin EBT, p 91. Yassin said that Calvary was informed of their fee sharing in the Teaser Email because it said that they were working jointly and the industry practice is for brokers working together to share a fee. Yassin EBT, pp 93-95. She also said that the fee sharing was “discussed” at the October 6 Board meeting, and with Roberts and his daughter in

mid-September 2011. *Id.* She did not say that Calvary agreed that it would pay her fee instead of Dallenbach's for the Foundation commitment. Instead, the record demonstrates that Calvary hired Creative because it wanted Yassin to obtain better terms. Yassin does not deny that.

According to Dallenbach, the Creative Contract was part of a two-step plan. He said the Foundation loan commitment was ready to go and Calvary needed to refinance quickly. Dallenbach EBT, pp 38-39. Therefore, he agreed with Yassin to use the Foundation commitment to get Calvary out of foreclosure, establish a good payment history, and then have Yassin refinance with a second loan, before the 36 months in the Revised Pastoral Clause expired, so that Roberts could remain Senior Pastor:

... Bibi was to be the secondary funding not the primary funding. The primary funding was to be FCR, get out of foreclosure, make your payments. Bibi comes in round two, puts them in round two that is reasonable. That was strategic, doesn't have any crazy conditions. Dr. Roberts contacted her directly because of this letter and started negotiating with her independent of me....

There was a loan commitment on the table from FCR ready to go. If they agreed to all the conditions, I would have moved to closing. They ran into hiccups with Section D, special conditions. I had negotiated for several months for all parties to agree that it was going to be okay because the back up plan was that Bibi Yassin would go and get another lender. ***She said she could get them refinanced with a new lender that would not have these special conditions, specifically for removal of the senior pastor.*** That was the strategy we tried to employ to get it out of foreclosure, what you have in your hand to put the church in performing status within six months, show the loan to a new lender, get them refinanced....

... so it almost looks like ... we're competing against each other. She locked down a contract with them knowing that she could take that commitment and get out of it and then refinance down the road after it performed....

This contract that locked her down with the church for the next 36 months allowed her to get a refinance of the deal we were working on at a later time and still be under contract....

[emphasis supplied] Dallenbach EBT, pp 38-41.

Dallenbach testified that he thought that the purpose of Yassin's trip to New York was to discuss the Foundation loan and a subsequent refinancing to get away from its conditions. Dallenbach EBT, pp 59-60. Dallenbach's understanding was that the Foundation commitment he obtained was to be fee number one, and that he and Yassin would work together to close the second loan "down the road" and share that fee. Dallenbach EBT, p 73. At her deposition, Yassin confirmed that she and Dallenbach had designed the two-phase plan. Yassin EBT, p 90. She also testified that she had to go to New York with a commitment offer in hand, and that Roberts had invited her to the October 6 meeting to explain the two-phase strategy. Yassin EBT, pp 123-124. Yassin testified that the Loan Program Offer she presented on October 6 was "[a] document I produced for phase 2 of the funding after the refinance with FCR." Yassin EBT, p 38.

On November 2, 2011, Yassin sent a letter to Ross about Creative's fee. Yassin EBT, Ex D-8. It said that under the Creative Contract, the fee was 2% of the gross amount of the loan, 75% payable when the Foundation commitment closed, and 1.25% "due and payable upon phase two of the refinance." *Id.* The letter added, "[i]n the event the church decides not to proceed with phase two; the remainder fee of 1.25% will be due and payable in full immediately." *Id.* The Creative Contract did not say that. It said that Creative was to be paid for obtaining a commitment; it did not mention phases.

On March 20, 2012, Yassin emailed Dallenbach, "Per the arrangement between CND and [Creative], note on the 2nd phase of the refinance, your firm will be compensated .50%, contingent upon closing." Yassin EBT, Ex D-15. She added, "the client has not been made aware of the arrangements between [Creative] and CND" *Id.* According to Yassin, she was

referring to the fact that Calvary did not know about the proportional split of the fee between her and Dallenbach. Yassin EBT, pp 93-95. She said Calvary only knew that they were working jointly and sharing a fee. *Id.*

The record contains minutes of a meeting of the Foundation Executive Loan Committee, dated April 26, 2012, signed by Bartlotti. Yassin EBT, Ex D-24. April 26 was the day after CND's 9-month exclusive brokerage period expired. CND Contract, Dkt 217. Foundation approved a different loan to Calvary in the amount of \$10,101,875, amortized over 30 years, with a starting interest rate of 5.75%, an initial monthly payment of \$58,951.80, and a 20-year balloon (New Loan). *Id.* It contained the original Pastoral Clause. Yassin admitted that the New Loan had a lower interest rate and a more attractive term than the deal that she and Dallenbach had brokered. Yassin EBT, pp149-152; see also, Stipulation, ¶15.

On May 1, 2012, Foundation rescinded the commitment CND had obtained, on the ground that Calvary had suffered a material adverse change in its financial condition. Roberts EBT, Ex P-18. However, Yassin and Dallenbach testified that Foundation rescinded its commitment because of an unrelated dispute between Dallenbach and Foundation over a fee for a church called Family Worship. Yassin EBT, pp 142-146; Dallenbach EBT, pp 62-66. They said that when Dallenbach would not agree to escrow his fee, Foundation retaliated against him by rescinding Calvary's commitment. *Id.*

On May 4, 2012, Foundation issued a new commitment to Calvary, revised May 11, 2012 (New Commitment). Yassin EBT, Ex D-29. It had the Revised Pastoral Clause. *Id.*, Special Condition (f). It provided that it was Calvary's "contention" that it was not under any agreement with a broker for the loan, and that no broker's fee would be paid in conjunction with the loan, "unless compelled by a court of competent jurisdiction." *Id.*, Special Condition (d). On May 11,

2012, Calvary entered into a Confidentiality and Non-Disclosure Agreement with Foundation, which it had required Calvary to execute. Stipulation, ¶16.

On May 10, 2012, Creative sent an invoice to Calvary for obtaining the commitment it had signed on October 6, 2011. Yassin EBT, Ex D-26. It also reflects Yassin's travel expenses for the trip to New York on October 6, 2011, in the amount of \$618.39, a cost previously paid by Calvary. *Id.* In fact, Yassin admits that Calvary reimbursed her for the trip. Yassin Moving Aff, ¶14. The invoice said the fee was payable on the closing date. *Id.* The closing on that commitment never took place. On June 1, 2012, Yassin sent a letter to Calvary demanding payment of a 2% fee in the event that it closed on any loan from Foundation within 36 months of the Creative Contract. Yassin EBT, Ex D-28.

Calvary accepted the New Commitment on May 22, 2012. Yassin EBT, Ex D-29. By order dated July 16, 2012, and entered July 27, 2012, the Supreme Court, Kings County, authorized Calvary to mortgage its real property on the terms in the New Commitment. Yassin EBT, Ex P-35. The New Loan closed on July 30, 2012. Stipulation, ¶18.

Dallenbach did not sue for a fee pursuant to the CND Contract and said that he had declined an offer from Yassin to share in any recovery in this action. Dallenbach EBT, pp 30-31. He stated that his religious principles prevented him from suing Calvary. *Id.* He also said that he was only entitled to compensation from Foundation if the loan he had negotiated closed. Dallenbach EBT, p 12. That never occurred.

II. Discussion

A. Standard of Review

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is

on the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). The motion must be “supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions.” CPLR 3212(b). A failure to make such a prima facie showing requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). The evidence submitted on the motion for summary judgment must be examined in the light most favorable to the parties opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997).

On a summary judgment motion, once the movant has laid bare its proof, the opposing party is compelled to do the same. *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 38 (1st Dept 2011). A failure to contradict facts is an admission. *Costello Associates, Inc. v Standard Metals Corp.*, 99 AD2d 227, 229 (1st Dept 1984), *appeal dismissed*, 62 NY2d 942 (1984). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman, supra*, at 562. One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim, or must demonstrate an acceptable excuse for his failure to offer admissible evidence. *Id.* Nor can summary judgment be defeated by the “shadowy semblance of an issue.” *Jeffcoat v Andrade*, 205 AD2d 374, 375 (1st Dept 1994). Although hearsay evidence may be considered in opposition to a motion for summary judgment, it is insufficient to bar summary judgment if it is the only evidence submitted. *Arnold v NY City Hous. Auth.*, 296 AD2d 355, 356 (1st Dept 2002). Upon the completion of the court's examination of all of the documents submitted in connection with a summary judgment motion,

the motion must be denied if there is any doubt as to the existence of a triable issue of fact.

Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 (1978).

B. Summary Judgment on Creative's Breach of Contract Claim

The Creative Contract is governed by Florida law. Under Florida law, the language used in a contract is the best evidence of its meaning and the parties' intent, and where the words employed are clear and definite, they must be understood according to their ordinary meaning. *Merin Hunter Codman, Inc. v Wackenhut Corr. Corp.*, 941 So2d 396, 398 (Fla Ct App 2006). If the provisions of a contract are unambiguous, a court should enforce it as written, giving effect to each provision. *Fla. Recycling Servs. v Greater Orlando Auto Auction, Inc.*, 898 So2d 129, 131 (Fla Ct App 2005). The court should not ignore the plain meaning to create an ambiguity or rewrite the agreement. *Id.*

In Florida, a party cannot recover under a contract if it fails to perform its part of the bargain. *Slaughter v Barnett*, 114 Fla. 352, 360 (FL Sup Ct 1934) (action for breach of contract cannot be maintained by one who did not perform, or tender of performance, unless performance has been excused), citing *Otstott v Merryman*, 71 Fla 352, 353 (Fla Sup Ct 1916) (money judgment on settlement agreement reversed where plaintiff refused to perform by surrendering all rights to property); *Ruiz v Huddle*, 1982 Fla. App. LEXIS 21734, 420 So2d 327, 328 (Fla Dist Ct App 1982) (nor), citing *Slaughter, supra*.

The evidence conclusively demonstrates that Creative did not produce a commitment, but instead "presented" Calvary with a commitment that had been obtained by CND. Creative was obligated, pursuant to the plain meaning of its contract, to "secure a mortgage or bond issue loan commitment." Yassin testified that Roberts contacted her no earlier than September 13, 2011. At that time, Dallenbach had already negotiated the September 12 version of the August 11

commitment letter, which contained the Revised Pastoral Clause and eliminated the prepayment penalty. Yassin admitted that she was not involved in the September 12 revision. The final, September 26 revision was *before* Creative was engaged and *before* the Creative Contract was effective, which according to Yassin was September 29 or 30. Moreover, the only difference between the September 12 and 26 versions was the extension of the expiration date to October 7, 2011. Yassin admitted that she never communicated with Foundation and that the extension was given “per Dallenbach’s request.” Dallenbach corroborated that he obtained it. There is no evidence that Yassin did anything to obtain an extension or change the terms of the Foundation commitment. Thus, the commitment was obtained by CND, and Creative is not entitled to recover for breach of contract because it did not perform by obtaining a commitment. Yassin’s testimony about the two-phase strategy is an admission that Calvary hired her to obtain a different commitment, which she failed to do.

In addition, because Creative did not obtain the commitment, it is not entitled to a fee under the 36-month tail in its contract. Creative was entitled to a fee if Calvary closed a loan with Creative’s proposed lender within 36 months from the effective date of the Creative Contract. As there was no closing with a lender proposed by Creative, the fact that Calvary closed with CND’s lender, Foundation, does not entitle Creative to a fee.

Then too, there was no consideration for the Creative Contract. Providing past services rendered without the expectation of compensation is not adequate consideration to support a contract. *Gollobith v Ferrell*, 84 So3d 1095, 1096 (Fla Dist Ct App 2012); *Smith v Locklear*, 906 So2d 1273, 1274 (Fla Dist Ct App 2005). An agreement made without consideration is unenforceable, leaving the promisor “free to change his mind at will.” *Gollobith, supra*.

Here, the September 26 version was obtained before the Creative Contract was signed. Yassin was already working with Dallenbach under the CND Contract to obtain the Foundation commitment. Consequently, there was no new consideration flowing from Creative to Calvary to support Creative's fee. Calvary gained no advantage. It got the same commitment it obtained without Creative through Dallenbach's efforts. If Yassin did anything, which she did not, before contracting with Calvary, they were past services rendered without expectation that Calvary would pay her. At best, Yassin expected at that time to share Dallenbach's fee.

Creative cannot recover on the ground that its contract superseded CND's. A new contract cannot be legally substituted for an old one, unless there is a novation. *Thompson v Jared Kane Co., Inc.*, 872 So2d 356, 361 (Fla Dist Ct App 2004). A novation is a mutual agreement between the parties for the discharge of a valid existing obligation by the substitution of a new valid obligation. *Id.* To prove the substitution of the new contract for the old, four elements must be shown: (1) the existence of a previously valid contract; (2) the agreement of the parties to cancel the first contract; (3) the agreement of the parties that the second contract replace the first; and (4) the validity of the second contract. *Id.* A novation must be supported by consideration. *Miami National Bank v Forecast Construction Corp.*, 366 So2d 1202 (Fla Dist Ct App 1979); *Cataret Sav Bank, FA v Weiner*, 601 So2d 1310 (Fla Dist Ct App 1992); 1-12 *LN Practice Guide: FL Contract Litigation* 12.31 (2015).

If all Creative had to do was produce a commitment CND had obtained before the Creative Contract was signed, then the replacement of the CND's contract was not supported by consideration. There was no benefit to Calvary, only a detriment, in paying Creative a fee that doubled CND's. Also, Calvary was saddled with the expense of having Yassin come to New York to sign the commitment that contained only terms negotiated by CND. Furthermore, there

is no evidence that Calvary and Dallenbach, the parties to the CND Contract, agreed to substitute Creative's Contract for CND's, one of the requisites for a novation. At most, Yassin said that she discussed it with Roberts and his daughter, and at the October 6 meeting. Dallenbach testified that he never spoke to Calvary about Yassin.

In sum, Creative cannot recover for breach of contract because it did not perform by obtaining a commitment, and its purported contract was not supported by consideration. The Creative Contract was not a novation that superseded CND's contract because there was no consideration and because Dallenbach and Calvary did not agree to the substitution. As its contract is not enforceable, Creative is not entitled to recover attorneys' fees pursuant to its terms. It follows that Calvary is entitled to summary judgment dismissing the complaint.

C. Calvary's Counterclaim for Tortious Interference with the CND Contract

Calvary argues that if this court enforces the Creative Contract, then Creative tortiously interfered with it by usurping the commitment CND obtained. As Calvary only argues that there would be tortious interference with the CND Contract, if the Creative Contract were enforced, and the court is not enforcing it, the third counterclaim for tortious interference with the CND Contract is dismissed.

D. Calvary's Counterclaim for Fraud and Constructive Fraud

Calvary argues that it had a confidential relationship with Yassin, that it relied on her by giving her an opportunity to make good on her "rosy promises" to obtain a better offer and by cancelling the CND Contract, and that Yassin wrongfully intended to usurp the Foundation commitment CND had obtained instead. See Calvary's Memorandum of Law in Opposition to Creative's motion, p 12.

1. *Conflict of Law Analysis*

Under New York law, a contract's choice of law does not apply to tort claims. *Knieriemen v Bache Halsey Stuart Shields Inc.*, 74 AD2d 290, 292 (1st Dept 1980). The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved. *Elson v Defren*, 283 AD2d 109, 114 (1st Dept 2001). Where no conflict exists, there is no reason to engage in a choice of law analysis. *Id.*

No conflicts analysis is required for fraud because its elements are the same under New York and Florida law. *Lance v. Wade*, 457 So2d 1008, 1011 (Fla Sup Ct 1984) (elements of fraud are a deliberate and knowing misrepresentation designed to cause, and actually causing detrimental reliance by plaintiff); *Kaufman v Cohen*, 307 AD2d 113, 119 (1st Dept 2003) (elements of fraud are false representation of material fact, by party with knowledge of falsity, justifiable reliance by plaintiff and resulting injury).

With respect to constructive fraud by a fiduciary, there also is no difference. In both Florida and New York, a broker is a fiduciary in relation to the principal. *Dubbs v Stribling & Assoc.*, 96 NY2d 337, 340 (2001) (broker, like agent, is fiduciary); *Silverman v Pitterman*, 574 So2d 275 (Fla Dist Ct App 1991). Florida allows recovery for constructive fraud where there is any abuse of a fiduciary relationship. *Rogers v Mitzi*, 584 So2d 1092, 1094 (Fla Dist Ct App 1991) (constructive fraud is deemed to exist where a duty under a confidential or fiduciary relationship has been abused); *Taylor v Kenco Chem. & Mfg. Corp.*, 465 So2d 581, 589 (Fla Dist Ct App 1st Dist 1985) (constructive fraud does not require intent to deceive). In New York, a contract that personally benefits a fiduciary is presumed void, unless the fiduciary affirmatively demonstrates that "no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood." *Matter of Aoki v Aoki*, 27 NY3d 32, 39-40 (2016).

In New York, scienter is not an element of constructive fraud. *Levin v Kitsis*, 82 AD3d 1051, 1054 (2d Dept 2011); *Del Vecchio v Nassau County*, 118 AD2d 615, 618 (1986). In both States, a fiduciary must disclose all material information to the principal. *Silverman v Pitterman*, *supra*; *Beatty v Guggenheim Exploration Co.*, 223 NY 294, 304 (1918) (agent must disclose any interest which would naturally influence employer's conduct in dealing with subject of employment). In Florida and New York, damages for fraud by a fiduciary include forfeiture of the fee. *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 416 (2001); *TPL Associates v Helmsley-Spear, Inc.*, 146 AD2d 468, 471 (1st Dept 1989); *Silverman v Pitterman*, *supra*.

Applying these principles here, the Florida choice of law in the Creative Contract does not govern the torts of fraud and constructive fraud. There is no need to do a conflicts analysis for fraud or constructive fraud because the law is the same in both States.

2. Constructive Fraud

Calvary's motion for summary judgment on its counterclaim for constructive fraud is granted, and Creative's motion for summary judgment on that counterclaim is denied. On a motion for summary judgment on a constructive fraud claim involving a transaction that benefits a fiduciary, the burden of proof is on the fiduciary to prove that the transaction was fair, open, voluntary, and well understood. *Matter of Aoki v Aoki*, *supra*. There is no evidence in the record that Yassin disclosed to Calvary, before it signed the Creative Contract on September 29, that Calvary would be bound to pay Creative for the September 26 version of the Foundation commitment already in place. There is no evidence that Yassin told Roberts that Creative's Contract would supersede Dallenbach's; there is only an unverified bill of particulars. The Teaser Email's statement that Creative and CND/Dallenbach would work jointly is not a complete disclosure. Nor do the alleged discussions of Yassin with Pastor Roberts that CND and

Creative would share a fee constitute a complete disclosure. They fall short of saying that Creative would earn a fee for the previously obtained commitment. The fact that Yassin told Roberts that he would not have to pay fees to both brokers also is not complete transparency. There is no evidence that Yassin told Roberts that the fee for the Foundation commitment would be doubled, even if Yassin failed to produce a better offer. Finally, the alleged disclosure to Roberts of the two-phase strategy is insufficient evidence that Yassin disclosed that the phase 1 fee would be 2% in the event that Calvary got a better deal from Foundation without her help and did not proceed to phase 2. In short, there is no evidence that Calvary knew before it signed the Creative Contract that it would be billed 2% whether or not Creative obtained a commitment with better terms from Foundation, or a better offer from another lender, as alleged in Yassin's affidavit. There is no admissible evidence that Creative's principal, Yassin, was fully candid with her principal, as befits a fiduciary. As a result, Creative must forfeit the \$5,000 fee it received, and the \$618.39 Calvary paid for Yassin's travel expenses.

3. Fraud

Creative's motion for summary judgment on Calvary's counterclaim for fraud is granted, and Calvary's motion for summary judgment on that counterclaim is denied. Generally, the false statement of material fact necessary to establish fraud must concern a past or existing fact.

Lance v Wade, supra; Prieto v Smook, Inc., 97 So3d 916, 917–18 (Fla Dist Ct App 2012). There is no evidence and Calvary does not argue that Yassin misrepresented a fact. Rather, Calvary alleges that Yassin failed to disclose her agreement with Dallenbach to share a 2% fee for the CND commitment once Calvary signed the Creative Contract. Hence, Calvary's counterclaim for fraud is dismissed.

E. Calvary's Attorneys' Fees

Calvary is not entitled to recover attorneys' fees. "Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 (1989). There is no contract, statute or court rule that would authorize an award of attorneys' fees to Calvary. Accordingly, it is

ORDERED that the motion (Sequence 006) by plaintiff Creative Financial Group, Inc., for summary judgment on its complaint and dismissing the counterclaims of defendant Calvary Pentecostal Calvary, Inc., a/k/a Calvary Cathedral of Praise, is granted solely to the extent of dismissing the counterclaims for fraud and tortious interference with contract, and the motion is otherwise denied; and it is further

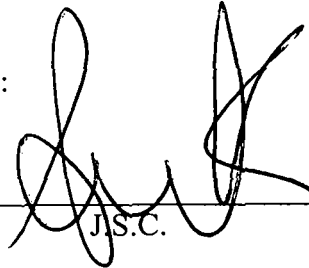
ORDERED that the motion (Sequence 005) by defendant Calvary Pentecostal Calvary, Inc., a/k/a Calvary Cathedral of Praise (Calvary), for summary judgment dismissing the complaint of Creative Financial Group, Inc. (Creative), and for summary judgment on Calvary's counterclaims, is granted to the extent of dismissing the complaint with prejudice and with costs and granting summary judgment in favor of Calvary and against Creative in the amount of \$5,618.39, with costs, on Calvary's counterclaim for constructive fraud; and the motion is otherwise denied; and it is further

ORDERED that upon service upon the County Clerk, at cc-nyef@nycourts.gov, of a copy of this order with notice of entry, he is directed to enter judgment in favor defendant Calvary Pentecostal Calvary, Inc., a/k/a Calvary Cathedral of Praise, and against plaintiff Creative Financial Group, Inc., dismissing the complaint with prejudice and with costs, and awarding judgment in the amount of \$5,618.39 on the counterclaim for constructive fraud in favor of

Calvary Pentecostal Calvary, Inc., a/k/a Calvary Cathedral of Praise and against Creative
Financial Group, Inc..

Dated: November 2, 2016

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C