Gargano v Morey
2016 NY Slip Op 32964(U)
May 18, 2016
Supreme Court, Nassau County
Docket Number: 608026/15
Judge: Robert A. Bruno

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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SALVATORE GARGANO and COMPASS CONSTRUCTION OF N.Y. CO., INC.,

Plaintiffs,

-against-

MICHAEL MOREY, CHAMPLAIN STONE LTD., EAGLES NEST LLC, GREGORY GRANDE, SEAN CARROLL, GRANDE AGGREGATES, GRANDE AGGREGATES LLC, NORTHEAST AGGREGATES DOCK OPERATOR LLC, NORTHEAST AGGREGATES DOCK OWNERS LLC, NORTHEAST AGGREGATES EQUIPMENT LEASING LLC, NORTHEAST AGGREGATES, LLC, NORTHEAST AGGREGATES QUARRY OWNERS LLC, STONY CREEK SERVICES, LLC, WHITEHALL AGGREGATES, LLC, MONROE TRACTOR & IMPLEMENT CO., INC., CHRISTOPHER BAUM AND BAUM & BAILEY, P.C.,

Defendants,

-and-

MAGNOLIA ASSOCIATES, LLC,

Proposed Intervenor-Defendant.

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TRIAL/IAS PART 15
Index No.: 608026/15
Submission Date: 04/14/16
Motion Sequence: 011

DECISION & ORDER

Papers Numbered

Sequence #011

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Upon the foregoing papers, motion by defendant Stony Creek Services, LLC ("Stony Creek") for judgment dismissing the causes of action in the complaint against it pursuant to

CPLR §3211(a)(1) and (a)(7), CPLR §3016(b), and General Obligations Law §5-701 is granted in part and denied in part, as set forth below.

Plaintiff Salvatore Gargano is the president of plaintiff Compass Construction of N.Y. Co., Inc.. They are investors located in Nassau County, New York. Plaintiffs' claims arise out of an alleged investment in the amount of $3,006,000.00, that they made in a mining business, and equipment for that business, in upstate New York. The business is located at a quarry west of Rout 4 in Whitehall, New York, identified as Section 86, Block 1, Lot 19.2 ("the real property"). Two large pieces of mining equipment, a jaw crusher and a cone crusher ("the equipment") are located on the real property.

Stony Creek is a limited liability company, "primarily engaged in the production, recycling and distribution of construction products including, but not limited to soil, aggregate, concrete and fill" (Casale affirmation, par. 2). Defendant Sean Carroll is both a member, and an employee, of Stony Creek.

Plaintiffs had previously worked with defendant Carroll and defendant Stony Creek. Defendant Carroll introduced plaintiffs to the individual defendants, Morey and Grande (complaint, par.74). Plaintiff Gargano claims that he gave "the Morey-Grande-Carroll group over $3,000,000.00 in less than one year, having fallen for their scheme" that he would be a "majority owner of Grande Aggregates LLC," (Gargano affidavit, dated December 24, 2015, at par. 14). Grande Aggregates LLC ("Grande LLC") was the entity that plaintiffs claim was originally supposed to operate the mining business. Plaintiffs complain that they received nothing for their money.

Defendant Carroll states that he was a member of defendant Grande LLC, together with defendant Gregory Grande and non-party Ted Ruttura (Carroll affidavit in opposition, dated January 13, 2016, annexed as Exhibit C to Stony Creek's moving papers). After Mr. Ruttura withdrew from the group, Carroll states that plaintiffs learned of the investment opportunity in the mining business and wanted to participate. Plaintiffs' investment of capital was to be used to purchase the equipment and pay a bond. According to Carroll, plaintiffs tried to convert the purchase of the real property and the business into a deal all for themselves, and both he and defendant Grande sustained significant monetary losses.

Plaintiffs commenced this action in December, 2015. In the complaint they allege a total of thirty causes of action against a variety of defendants. Plaintiffs collectively refer to the "mining defendants," and include within this term: Morey, Eagles Nest, Champlain Stone, Grande, Grande Aggregates, Grande Aggregates LLC, Stony Creek, Northeast Aggregates, Northeast Owner, Northeast Operators, Northeast Leasing, Northeast Quarry, Whitehall and Carroll (complaint, par. 28).

On this motion defendant Stony Creek seeks judgment dismissing all causes of action against it. Carroll states that Stony Creek never had any involvement in the investment which is the subject of this action.

3211 Dismissal Standard

On a motion to dismiss pursuant to CLR §3211, the facts as alleged must be accepted as true, the pleader must be accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable theory (*ABN AMRO Bank, N.V. v. MBIA, Inc,* 17 N.Y.3d 208, 227 [2011], citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 [1994]; *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79 [2008]). "Bare legal conclusions, as well as factual claims flatly contradicted by the record, are not entitled to any such consideration" (*Everett v. Eastchester Police Dept.*, 127 A.D.3d 1131, 1132 [2d Dept. 2015], lv. app. den. 26 N.Y.3d 911 [2015], quoting *Riback v. Margulis*, 43 A.D.3d 1023 [2d Dept. 2007]; *Goel v. Ramachandran*, 111 A.D.3d 783, 791-792 [2d Dept. 2013]).

A motion to dismiss pursuant to CPLR §3211(a)(1) "may be appropriately granted only where documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]). Neither affidavits, nor letters are considered documentary evidence for the purposes of CPLR §3211(a)(1) (*Shofel v. DaGrossa*, 133 A.D.3d 649, 650 [2d Dept. 2015]; *JBGR, LLC v. Chicago Tit. Ins. Co.*, 128 A.D.3d 900, 903 [2d Dept. 2015]).

Where a party offers evidentiary proof on a motion pursuant to CPLR §3211(a)(7), the criterion is whether the proponent of the pleading has a cause of action (*Leon, supra* at 88; *Randazzo v. Nelson*, 128 A.D.3d 935, 936 [2d Dept. 2015]). Affidavits submitted almost never warrant dismissal under CPLR §3211(a)(7) unless they establish conclusively that the plaintiff has no cause of action (*Dolphin Holdings, Ltd. v. Gander & White Shipping, Inc.*, 122 A.D.3d 901, 902 [2d Dept. 2014]; *Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682, 683 [2d Dept. 2012]).

Whether a claim will later survive a summary judgment motion, or whether the plaintiff will ultimately be able to prove his or her claims, is not part of the calculus in determining a motion to dismiss (*see EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]; *Vasomedical, Inc. v. Barron,* 137 A.D.3d 778 [2d Dept. 2016]; *Zellner v. Odyl, LLC*, 117 A.D.3d 1040, 1041 [2d Dept. 2014]).

Discussion

In support of its motion for dismissal, defendant Stony Creek submits the following documents: the complaint (Exhibit A), a Gargano affidavit sworn December 24, 2015 (Exhibit

B), the Carroll affidavit sworn January 13, 2016 (Exhibit C), a letter dated August 13, 2015, from Brian Premo, plaintiff Gargano's lawyer in August, 2015 ("the Premo letter"), and an LLC Membership Interest Purchase Agreement contract signed by Carroll and Ruttura for sale their interest in Grande LLC to Grande (collectively Exhibit D).

Much of the documentation presented by Stony Creek does not qualify as "documentary evidence" for the purposes of CPLR §3211(a)(1). To the extent that it may qualify as "documentary evidence," the documentation does not "utterly refute" plaintiffs' claims. For this reason, dismissal pursuant to CPLR §3211 (a)(1) is denied.

Stony Creek argues that all of plaintiffs' claims herein arise out of a business dispute between plaintiffs and defendants Grande and Carroll. Stony Creek alleges that it has been lumped into "the mining defendants" simply to harass it, because its prior dealings with plaintiffs did not end well.

Plaintiffs' argument for holding Stony Creek in this action is that Stony Creek worked together with the other defendants to defraud plaintiffs out of over $3,006,000.00 (complaint, pars. 90-91), including $365,000.00 paid directly by plaintiffs to Stony Creek (complaint, par. 92). Plaintiffs argue that defendants Morey, Grande and Carroll acted as agents of Stony Creek (complaint, pars. 21and 24), and that Carroll's actions "were done in the scope of his employment" for Stony Creek (complaint, par. 24).

The first cause of action alleges a claim against the mining defendants for a constructive trust over payments made by plaintiffs, the equipment, and revenues from the mining of the property. The elements of a cause of action to impose a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) resulting unjust enrichment (see *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 [1976]; *Loeuis v. Grushin*, 126 A.D.3d 761, 765 [2d Dept. 2015]). A conventional business relationship, without more, is insufficient to create a fiduciary relationship (*Chi Lo Liu v. Radmin*, 106 A.D.3d 1042, 1043 [2d Dept. 2013], quoting *Legend Autorama, Ltd. v. Audi of Am., Inc.*, 100 A.D.3d 714, 717 [2d Dept. 2012]; *Friedman v. Anderson*, 23 A.D.3d 163, 166 [1st Dept. 2005]). In the absence of a confidential or fiduciary relationship with the defendants, plaintiffs have no cause of action for imposition of a constructive trust (*County of Nassau v. Expedia, Inc.*, 120 A.D.3d 1178, 1181 [2d Dept. 2014]; *Evans v. Rosen*, 111 A.D.3d 459 [1st Dept. 2013]).

A fiduciary relationship may exist when one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge, but not in an arm's-length business transaction involving sophisticated business people (*Faith Assembly v. Titledge of N.Y. Abstract, LLC*, 106 A.D.3d 47, 62 [2d Dept. 2013]; *Guarino v. North Country Mtge. Banking Corp.*, 79 A.D.3d 805, 807 [2d Dept. 2010]). The core of a fiduciary relationship is "a higher level of trust than normally present in the marketplace between those involved in arm's length

business transactions" (*EBC I, Inc*, *supra* at 19; *Faith Assembly*, *supra*). Dismissal of a cause of action for the imposition of a constructive trust pursuant to CPLR §3211 is warranted where the plaintiff fails to plead facts demonstrating the existence of a fiduciary or confidential relationship (*Refreshment Mgt. Servs., Corp. v. Complete Off. Supply Warehouse Corp.*, 89 A.D.3d 913, 915 [2d Dept. 2011]; *Baer v. Complete Off. Supply Warehouse Corp.*, 89 A.D.3d 877, 878 [2d Dept. 2011]; *Pfeiffer v. Jacobowitz*, 29 A.D.3d 661, 662 [2d Dept. 2006]). Conclusory allegations of a fiduciary relationship also fail to satisfy the requirements of CPLR §3016(b) (*Faith Assembly*, *supra*).

Defendant Carroll's insistence that Stony Creek never had any involvement in the transaction upon which this lawsuit is based (Carroll affidavit, par. 1), goes to credibility, which is not before the court on a 3211 motion.

Plaintiffs allege that a fiduciary relationship exists between themselves and the mining defendants (complaint pars. 140-141), based upon, *inter alia*, a principal/agent relationship between Stony Creek and Carroll (complaint, par. 23), and an employer/employee relationship between Stony Creek and Carroll (complaint, par. 24). However, the existence of a principal/agent relationship or an employer/employee relationship between two defendants is not the equivalent of a fiduciary relationship between the plaintiffs and a defendant, here, Stony Creek. Nor have plaintiffs alleged facts or circumstances that would give rise to a fiduciary relationship between themselves and Stony Creek (see *Faith Assembly, supra* at 61; *Refreshment Mgt. Servs., Corp.*, *supra* at 915; *Baer, supra* at 878). Based on the foregoing, plaintiffs have no cause of action against Stony Creek for a constructive trust, and dismissal of the first cause of action is granted.

In the third cause of action, plaintiffs allege a claim of fraud against the mining defendants. The elements of a claim for fraud are: "a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury (*Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276 [2011]). "[A] principal must answer to an innocent third person for the misconduct of an agent acting within the scope of its authority" (*Faith Assembly*, *supra* at 58, quoting *Tucci v. Hartford Cas. Ins. Co.*, 167 A.D.2d 387, 388 [2d Dept. 1990]).

Again, plaintiffs use the alleged principal/agent relationship between Stony Creek and Carroll and other defendants, as the basis of their fraud claim. Alleged misrepresentations are set forth in some detail as required by CPLR §3016 (b)(complaint, par.76 (a)-(I), 86 (a)-(h)). Plaintiffs have also alleged knowledge of falsity, reliance and injury. On this record, for pleading purposes only, plaintiffs have stated a cause of action for fraud against defendant Stony Creek. Dismissal of the third cause of action is denied.

In the fourth cause of action plaintiffs allege a claim for conversion of the equipment against the mining defendants. In order to establish a cause of action for conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights (see *Nugent v. Hubbard*, 130 A.D.3d 893, 895 [2d Dept. 2015]; see *Mackey Reed Elec., Inc. v. Morrone & Assoc., P.C.*, 125 A.D.3d 822, 824 [2d Dept. 2015]).

Stoney Creek argues that it never had possession, nor exercised any right, title or interest over the equipment (Stony Creek memorandum of law, p. 11). It claims that the equipment is located on land previously owned by Eagles Nest, and that the equipment was sold by Monroe to Grande Aggregates. (*Id.*).

In opposition, plaintiffs again rely on the principal/agent relationship alleged, to attribute conduct by Carroll and other defendants to Stony Creek.

At this pleading stage of this action, plaintiffs have stated a cause of action for conversion of the equipment against Stony Creek, and therefore, dismissal of the fourth cause of action is denied.

In the fifth cause of action plaintiffs purport to allege a cause of action for deceit against the defendants, based upon their "false affirmations" to plaintiffs. In the seventh cause of action plaintiffs purport to allege a cause of action for deceit against the mining defendants, again based upon "false affirmations" to plaintiffs. These causes of action are duplicative of the cause of action for fraud. Furthermore, plaintiffs' reliance upon *Rosenzweig v. Givens* (62 A.D.3d 1 [1st Dept. 2009], affd. 13 N.Y.3d 774 [2009]), and *Tuck v. Tuck*, (14 N.Y.2d 341 [1964]), is misplaced as the former involved deceit of fraudulent inducement to marry (a bigamous relationship), and the latter, deceit with respect to a sham marriage ceremony. Based on the foregoing, dismissal of the fifth and seventh causes of action against Stony Creek is hereby granted.

In the eighth cause of action plaintiffs allege a claim for breach of fiduciary duty against the mining defendants. The elements of a cause of action for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct (*Armentano v. Paraco Gas Corp.*, 90 A.D.3d 683 [2d Dept. 2011]).

Again, plaintiffs rely upon an alleged principal/agent relationship between Stony Creek and others as the basis of an alleged fiduciary relationship between plaintiffs, themselves, and Stony Creek. As set forth above, this does not suffice, and plaintiffs have failed to allege facts that would give rise to a fiduciary relationship between themselves and Stony Creek.

Plaintiffs then insist that they were joint venturers with defendants, because a joint venture gives rise to a fiduciary relationship between joint venturers (*Rocchio v. Biondi*, 40 A.D.3d 615, 616 [2d Dept. 2007]). However, a joint venture does not arise simply because two parties have agreed together to act in concert to achieve some stated economic objective (*Rocchio*, supra at 616-617). The elements of a joint venture are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking, some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses (*Mawere v. Landau*, 130 A.D.3d 986, 988 [2d Dept. 2015]).

Stony Creek denies that there was ever a "partnership arrangement or joint venture discussions" (Carroll affidavit, par.7). Plaintiffs certainly have not alleged any mutual promise to share the burden of the losses of the mining business (*Rocchio, supra*), only the profits. On this record, there is no basis for plaintiffs' claim of a joint venture with Stony Creek.

Based on the foregoing, plaintiffs have no fiduciary relationship with Stony Creek, and therefore, dismissal of the eighth cause of action for breach of fiduciary duty is granted.

In the ninth cause of action plaintiffs allege a claim for money had and received against the mining defendants. A claim for money had and received is available "in the absence of an agreement, when one party possesses money that in equity and good conscience [it] ought not to retain and that belongs to another" (*Board of Educ. of Cold Spring Harbor Cent. School Dist. v. Rettaliata*, 78 N.Y.2d 128 [1991]).

In the complaint plaintiffs allege, *inter alia*, that they were induced by Carroll to loan himself and Stony Creek $365,000.00 for the mining business (complaint, pars. 92 and 95), no part of which has been repaid. Stony Creek's insistence that any such loan pre-dated plaintiffs' investment in the mining business is not clearly documented. The Premo letter does not unequivocally establish Stony Creek's defense of an earlier loan. For pleading purposes, plaintiffs have stated a cause of action against Stony Creek for money had and received, and therefore, dismissal is denied.

In the twelfth cause of action plaintiffs allege a claim against the mining defendants for unjust enrichment in the amount of $3,060,000.00.[1] The elements of this cause of action are (1) that the other party was enriched, (2) at the pleader's expense, and (3) that "it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (see *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 [2011]).

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[1] The Court assumes that plaintiffs meant to allege $3,006,000 as set forth earlier in the complaint (complaint, par. 91).

Plaintiffs allege that Stony Creek received $365,000.00 as part of the scheme to defraud them (complaint, pars. 24 and 92). Pursuant to plaintiffs' agency theory, plaintiffs further allege that monies received by Grande, Morey, and Carroll, (complaint, pars. 21,24) may be attributed to Stony Creek. These allegations suffice to allege this cause of action for unjust enrichment for the purposes of CPLR §3211(a)(7). Dismissal of the claim for unjust enrichment is denied.

In the thirteenth cause of action plaintiffs allege a claim against the mining defendants for negligent misrepresentation. The elements of a claim for negligent misrepresentation are: (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was not correct; and (3) reasonable reliance on the information (*Mandarin Trading Ltd., supra* at180; *Simmons v. Allstate Indem. Co.*, 112 A.D.3d 611 [2d Dept. 2013]). "Liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmell v. Schaefer*, 89 N.Y.2d 257, 263 [1996]). An arm's-length business relationship does not suffice (*High Tides, LLC v. DeMichele*, 88 A.D.3d 954, 960 [2d Dept. 2011], even after a period of prior dealings for years (*J.P. Morgan Sec. Inc. v. Adler*, 127 A.D.3d 506, 507 [1st Dept. 2015]).

In their opposition papers plaintiffs rely upon alleged false representations by Grande, Morey and Carroll, made on behalf, and with full knowledge, of Stony Creek, that plaintiffs would be co-owners of the mining business upon payment of more than $3,000,000.00 to defendants' agents. However, plaintiffs have not alleged any facts to support the existence of a special or confidential relationship between themselves and Carroll, Grand, or Morey, upon which a cause of action for negligent misrepresentation could be predicated (*Simmons, supra*; *Baer, supra*). For this reason, dismissal of the thirteenth cause of action for negligent misrepresentation against Stony Creek is granted.

In the fourteenth cause of action plaintiffs allege a claim against the mining defendants that they now describe as one for promissory estoppel. The elements of a cause of action based upon promissory estoppel are: (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on that promise (*AHA Sales, Inc. v. Creative Bath Prods., Inc.*, 58 A.D.3d 6, 21-22 [2d Dept. 2008]; *NGR, LLC v. General Elec. Co.*, 24 A.D.3d 425 [2d Dept. 2005]). Again, the promises at issue here, are the alleged promises by Grande, Carroll, and Morey, on behalf of Stony Creek (complaint, pars. 76 and 86). On this motion, plaintiffs have alleged a cause of action for promissory estoppel against Stony Creek, and dismissal of this fourteenth cause of action is therefore denied.

In the sixteenth cause of actions plaintiffs allege a claim against the mining defendants for quasi contract. Quasi contract is a theory of recovery to prevent unjust enrichment (see *Scott*

v. Fields, 92 A.D.3d 666, 669 [2d Dept. 2012]). As plaintiffs have already stated a quasi contract cause of action for unjust enrichment, this sixteenth cause of action against Stony Creek must be dismissed as duplicative.

In the eighteenth cause of action plaintiffs allege a cause of action for replevin against the mining defendants. "To state a cause of action for replevin, a plaintiff must allege that he or she owns specified property, or is lawfully entitled to possess it, and that the defendant has unlawfully withheld the property from the plaintiff" (*Khoury v Khoury*, 78 A.D.3d 903, 904 [2d Dept. 2010]). The property at issue is the equipment. Plaintiffs allege that they demanded the return of the equipment, and their demand was denied (complaint, pars. 168-169).

Stony Creek denies that it is in possession of the equipment.

In opposition, plaintiffs argue that if Grande, Carroll, and Morey are in possession of the equipment, then Stony Creek is in possession of the equipment.

Assuming the truth of the allegations in the complaint, plaintiff has stated a cause of action for replevin and dismissal of the eighteenth cause of action is denied.

In the nineteenth and twentieth causes of action plaintiffs allege against the mining defendants a trespass with respect to the equipment, and a trespass with respect to the subject real property. A trespass to personal property is defined as an intentional use or "intermeddling with a chattel in the possession of another" where "the chattel is impaired as to its condition, quality or value" (*Gary Friedrich Enterprises, LLC v. Marvel Enterprises, Inc.*, 713 F.Supp2d 215, 230 [S.D.N.Y. 2010]). A trespass to real property represents an injury to the right of possession (*C&B Enters. USA, LLC v. Koegel*, 136 A.D.3d 957, 959 [2d Dept. 2016]).

Here, plaintiffs have alleged that the equipment depreciates in value each day that it is used (complaint, par 132), and the real property is being mined, with the aggregate sold and proceeds dissipated (complaint par. 136). Stony Creek is allegedly subject to these claims as a result of the agency alleged. Plaintiffs' allegations state causes of action against Stony Creek for trespass to the equipment and trespass to the subject real property, and consequently dismissal of the nineteenth and twentieth causes of action is denied.

In the twenty-first cause of action plaintiffs allege a claim against the mining defendants for trover of the equipment. The tort of conversion had its origins in the ancient common law writ of trover (*Shmueli v. Corcoran Group*, 9 Misc.3d 589, 592 [Sup. Ct., N.Y. Cty, 2005]). Trover originated as a cause of action aimed at a person who found goods and refused to return them to the title owner; its use was stretched, until trover gave way to the tort of conversion, and the technical differences between trover and conversion have disappeared (*Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 287-288 [2007]). As plaintiffs have already alleged a cause of

action against Stony Creek for conversion of the equipment, this cause of action for trover is hereby dismissed as duplicative.

In the twenty-second cause of action plaintiffs allege a claim against the mining defendants for an accounting. The right to an accounting is premised upon the existence of a fiduciary duty and a breach of that duty (*Center for Rehabilitation & Nursing at Birchwood, LLC v. S&L Birchwood, LLC*, 92 A.D.3d 711, 713 [2d Dept. 2012]). As set forth above, plaintiffs' claim that they have a fiduciary relationship with the mining defendants by virtue of the principal/agent relationship between various defendants is incorrect. Plaintiffs have failed to show any other basis for a fiduciary relationship between themselves and Stony Creek and consequently, they have no cause of action against Stony Creek for an accounting. Accordingly, the twenty-second cause of action must be dismissed.

In the twenty-fourth cause of action plaintiffs allege a cause of action against the mining defendants for aiding and abetting the commission of a tort. The elements of a cause of action for aiding and abetting fraud are: (1) the existence of an underlying fraud, (2) knowledge of the fraud by the aider and abettor, and (3) substantial assistance by the aider and abettor in the achievement of the fraud (*Nabatkhorian v. Nabatkhorian*, 127 A.D.3d 1043 [2d Dept. 2015). Aiding and abetting fraud must be plead with specificity pursuant to CPLR §3016(b), and this heightened pleading requirement is met when the material facts alleged in the complaint "are sufficient to permit a reasonable inference of the alleged conduct," including the adverse party's knowledge of, or participation in, the fraudulent scheme (*Goel, supra* at 793, citing *Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 492 [2008]).

For pleading purposes, plaintiffs have plead facts that are sufficient to permit a reasonable inference of the alleged fraud, including the knowledge of such fraud and substantial assistance therein, by Stony Creek. Furthermore, as alternative pleading is allowed, the aiding and abetting claim is not duplicative of the fraud claim (*Allenby, LLC v. Credit Suisse, AG*, 134 A.D.3d 577, 581 [1st Dept. 2015]). Accordingly, dismissal of the twenty-fourth cause of action must be denied.

In the twenty-sixth cause of action plaintiffs allege a cause of action against the defendants for conspiracy. New York does not recognize an independent cause of action for civil conspiracy (*Rose v. Different Twist Pretzel, Inc.*, 123 A.D.3d 897 [2d Dept. 2014]; *Dune Deck Owners Corp. v. Liggett*, 85 A.D.3d 1093, 1096 [2d Dept. 2011]; see generally *Alexander & Alexander of N.Y. v. Fritzen*, 68 N.Y.2d 968, 969 [1986]). In any event, the causes of action for fraud and conversion have been sustained against Stony Creek, for pleading purposes. Consequently, dismissal of the twenty sixth cause of action for conspiracy is granted.

In the twenty-seventh cause of action plaintiffs purport to allege a claim of respondent (sic) superior against the mining defendants. This cause of action contains no allegations against Stony Creek. Under these circumstances, this cause of action is summarily dismissed.

In the twenty-ninth and final cause of action against the mining defendants, plaintiffs allege that they loaned the defendants money and defendants have failed to repay the interest and principal when due (complaint, pars. 287-288). Allegations of loans by plaintiffs set forth in the complaint include:

(1) six-month loan, plus extension, to Carroll and Stony Creek in the amount of $365,000.00 for the mining operation, to be repaid with interest (complaint, pars. 92-94);

(2) wire transfer of $250,000.00 to Monroe as deposit toward new equipment, to be repaid by Grande and Carroll with interest at 5% (complaint, pars. 99-102);

(3) $100,000.00 loan to Grande and Carroll, interest to be paid at annual rate of 5% (complaint, pars. 103-104);

(4) $100,000.00 to Grande and Carroll; the mining defendants were to pay interest to plaintiffs at the annual rate of 5% (complaint, pars. 114-115); and

(5) additional $250,000.00 to the mining defendants for the mining permit; the mining defendants agreed to pay 5% interest (complaint, pars. 121-122); the permit was issued to Champlain.

Stony Creek argues that any claim stemming from alleged unwritten loans should be dismissed pursuant to the statute of frauds because the loans have a term of greater than one year. Pursuant to the statute of frauds, an agreement not reduced to a writing is void if, by its terms, it cannot be performed within one year of its making [General Obligations Law §5-701(a)(1)]. However, only those agreements which "'have no possibility in fact and law of full performance within one year' will fall within the statute of frauds" (*JNG Constr., Ltd v. Roussopoulos*, 135 A.D.3d 709, 710 [2d Dept. 2016]). Where an oral loan agreement was capable of being performed within one year of its making, dismissal based upon the statute of frauds was denied (*JNG Const., Ltd., supra*). Such is the case here, where it was possible for the alleged loans to have been repaid within a year of their making. Therefore, the statute of frauds does not bar the twenty-ninth cause of action.

On this record, plaintiffs have alleged a cause of action against Stony Creek for breach of contract in the failure to repay various loans, as alleged. Dismissal of the twenty-ninth cause of action is hereby denied.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: May 18, 2016
Mineola, New York

ENTERED
MAY 25 2016
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

Hon. Robert A. Bruno, J.S.C.

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