

**Gargano v Morey**

2016 NY Slip Op 32965(U)

May 18, 2016

Supreme Court, Nassau County

Docket Number: 608026/15

Judge: Robert A. Bruno

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**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,

TRIAL/IAS PART 15  
Index No.: 608026/15  
Submission Date: 03/09/16  
Motion Sequence: 008

-against-

**DECISION & ORDER**

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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**Papers Numbered**

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Upon the foregoing papers, motion by defendants Michael Morey, Champlain Stone Ltd. (“Champlain”), and Eagles Nest LLC (“Eagles”) for judgment dismissing the twenty causes of action against them pursuant to CPLR §3211(a)(1) and (a)(7) and CPLR §3016(b) is granted in part, and denied in part, pursuant to CPLR §3211(a)(7) as set forth below.

Plaintiffs are investors located in Nassau County, New York. Plaintiff Salvatore Gargano is the president of plaintiff Compass Construction of N.Y. Co., Inc.. Their 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.

Plaintiffs had previously worked with defendant Carroll, and Carroll introduced them to the individual defendants, Morey and Grande. Defendant Morey is the managing member of defendants Eagles and Champlain.

According to plaintiffs, defendant Morey, individually, and through Eagles and Champlain, owned real property in Whitehall, New York, on which a quarry is located (“the real property”). Plaintiffs allege that Morey, Grande, and Carroll, together with defendants Grande Aggregates, Grande Aggregates LLC, and Monroe, engaged in a scheme to induce them to invest in a sham purchase of the real property, and two large pieces of mining equipment (“the equipment”) for the mining business.

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, Champlain, Grande, Grande Aggregates, Grande Aggregates LLC, Stony Creek, Northeast Aggregates, Northeast Owner, Northeast Operators, Northeast Leasing, Northeast Quarry, Whitehall and Carroll (complaint, ¶ 28).

Defendant Morey denies the allegations of the complaint in his answer (Exhibit B to the moving papers), and alleges fifteen affirmative defenses.

On this motion, Morey, Eagles, and Champlain seek judgment dismissing the twenty causes of action alleged against them. In a footnote in Morey’s moving affidavit (p.1, fn.1), and in the Preliminary Statement to Defendants’ Memorandum of Law, Morey and the attorney for the moving defendants state that the term “Champlain” shall collectively refer to all three defendants, Champlain, Eagles and Morey. In the interests of a complete and understandable record, this Court declines the collective approach and will address the defendants individually.

### **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. MBLA, 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. Odyll, LLC*, 117 A.D.3d 1040, 1041 [2d Dept. 2014]).

### **Discussion**

In support of their motion for dismissal defendants Morey, Eagles, and Champlain submit the following documents: two affidavits by Morey, the pleadings, a transcript of the oral argument before this Court on January 26, 2016, a Gargano affidavit dated December 24, 2015, a Purchase and Sale Agreement between Eagles and Champlain as seller, and Grande Aggregates LLC, as buyer of the subject real property, documentation of wire transfers by Gargano, and a letter by Brian Premo, Gargano’s attorney, dated August 17, 2015.

The Court has reviewed this documentation, and finds that much of it 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’ claim. For this reason, dismissal pursuant to CPLR §3211 (a)(1) is denied.

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*).

Defendants Morey, Eagles, and Champlain argue that none of them ever entered into any contracts or any business relationship of any kind with plaintiffs.

In opposition, plaintiffs argue that Morey, Eagles, and Champlain are the principals and/or employers of Grande and Carroll, their agents and/or employees. Under this theory, plaintiffs allege that Morey, Eagles, and Champlain are responsible for the torts of their agents/employees. This is the linchpin of the entire complaint against these moving defendants. Plaintiffs further argue that on this 3211 motion, they are only required to plead their claim for a

constructive trust, not prove it, and credibility is not at issue.

In reply, defendant Morey submits an additional affidavit wherein he avers that Grande and Carroll are not employees of Champlain, Eagles or himself, and that Grande and Carroll were never authorized to act on behalf of Champlain, Eagles or himself. In addition, Morey states that neither he, nor Eagles, nor Champlain, exercised any control or dominion over Grande and Carroll. These claims go to credibility, which is not before the Court on a 3211 motion.

The Court has considered plaintiffs' principal/agent argument. "Agency is a legal relationship between a principal and agent. It is a fiduciary relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other to so act. The agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority" (*Faith Assembly, supra* at 58, quoting *Maurillo v. Park Slope U-Haul*, 194 A.D.2d 142, 146 [2d Dept. 1993]).

Plaintiffs allege in the complaint, that representations made by Grande and Carroll were made on behalf of Morey, and that actions taken by Grande and Carroll were done with the full knowledge and approval of Morey, Eagles and Champlain. The problem with these allegations is that they do not establish a confidential or fiduciary relationship between plaintiffs and Morey, Eagles or Champlain. The existence of a principal/agent relationship, or an employer/employee relationship between two defendants is not the equivalent of a fiduciary relationship between plaintiffs and the moving defendants nor do plaintiffs allege any other sufficient facts with respect to the existence of the requisite confidential or fiduciary relationship between themselves and these three moving defendants (see *Faith Assembly, supra* at 61; *Refreshment Mgt. Servs., Corp., supra* at 915; *Baer, supra* at 878). For this reason plaintiffs have no cause of action against Morey, Eagles or Champlain for a constructive trust, and their motion to dismiss the first cause of action must be 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 with Grande and Carroll as the cornerstone of their fraud claim. Here, the alleged principal/agent relationship suffices to extend liability for alleged fraud by Grande, Carroll and Morey, to Morey, Eagles, and Champlain. Alleged misrepresentations are set forth in some detail as required by CPLR §3016

(b)(complaint, pars.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 defendants Morey, Eagles and Champlain. 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]).

Morey, Eagles and Champlain argue that although the equipment may have been located on land previously owned by Eagles, they never exercised dominion over the equipment. They state that Grande, Grande Aggregates LLC and Whitehall Aggregates are the owners of the equipment (Defendants' Memorandum of Law, p. 13, fn.5).

In opposition, plaintiffs again rely on the principal/agent relationship alleged, to attribute conduct by Carroll and Grande to Morey, Eagles and Champlain. At this pleading stage of this action, plaintiffs have stated a cause of action for conversion of the equipment against the moving defendants, 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. *Rosenzweig* involved deceit of fraudulent inducement to marry (a bigamous relationship), while *Tuck* involved deceit with respect to a sham marriage ceremony. Based on the foregoing, dismissal of the fifth and seventh causes of action against Morey, Eagles and Champlain 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]).

Defendants Morey, Eagles and Champlain deny any fiduciary relationship with

plaintiffs.

“Plaintiffs allege that the actions of defendants Morey, Grande and Carroll were on their own behalf and as agents of Champlain”(Plaintiffs’ Memorandum of Law, p. 12). That plaintiffs connect some defendants with other defendants, does not establish any kind of fiduciary relationship between plaintiffs and the moving defendants. Nor do plaintiffs allege facts that would give rise to a fiduciary relationship between themselves and the moving defendants.

Plaintiffs’ fall-back position is that they were joint venturers with the moving 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]).

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 Morey, Eagles and Champlain.

Based on the foregoing, plaintiffs have no fiduciary relationship with the moving defendants, 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 their opposition papers plaintiffs state that this cause of action is based upon the monies paid to, or on behalf of Grande, Carroll and Stony Creek, who were agents for Morey, Eagles and Champlain. For pleading purposes, plaintiffs have stated a cause of action against the moving defendants 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.<sup>1</sup> 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]). Again, the alleged agency relationship between Morey, Eagles, and Champlain, and Grande, Carroll, and Stony Creek suffices to support this cause of action for unjust enrichment for the purposes of CPLR §3211(a)(7). Dismissal of the unjust enrichment claim 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* at 180; *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 representations by Morey, Grande and Carroll, on behalf of Morey, Eagles and Champlain, 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 relationship between themselves, and Morey, Grande and Carroll, individually, or on behalf of the moving defendants, upon which a cause of action for negligent misrepresentation could be predicated (*Simmons, supra; Baer, supra*). Accordingly, dismissal of the thirteenth cause of action against the moving defendants for negligent misrepresentation must be granted.

In the fourteenth cause of action plaintiffs allege a claim against the mining defendants that they characterize 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

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<sup>1</sup>The Court assumes that plaintiffs meant to allege \$3,006,000, as set forth in the complaint (complaint, par. 91).

Morey, Eagles and Champlain. Whether plaintiffs can establish reasonable reliance is not before this Court. On this motion, plaintiffs have alleged a cause of action for promissory estoppel against the moving defendants, and dismissal of this fourteenth cause of action is consequently 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 cause of action against defendants Morey, Eagles and Champlain must be dismissed as duplicative.

In the eighteenth cause of action plaintiffs allege a claim 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, ¶¶ 168-169).

The moving defendants deny that they are in possession of the equipment. In opposition, plaintiffs argue that if Grande, Carroll, and Morey are in possession of the equipment, then Champlain 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, ¶ 132), and the real property is being mined, with the aggregate sold and proceeds dissipated (complaint ¶ 136). These allegations state forth causes of action for trespass to the equipment and trespass to the subject real property. The moving defendants are allegedly subject to these claims as a result of the agency alleged. 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 the moving defendants 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 Morey, Eagles and Champlain, and Grande, Carroll and Grande Aggregates LLC. is incorrect. Plaintiffs have failed to show any other basis for a fiduciary relationship between themselves and the moving defendants and consequently, they have no cause of action against the moving defendants for an accounting. 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 Morey, Eagles and Champlain. 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 Morey, Eagles, and Champlain, 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 Morey, Eagles or Champlain. Under these circumstances, this cause of action is summarily dismissed.

In their final cause of action against the mining defendants, plaintiffs allege a cause of action for breach of contract in connection with a loan. The complaint contains the following allegations of loans by plaintiffs:

- (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, ¶¶ 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, ¶¶ 99-102);
- (3) \$100,000.00 loan to Grande and Carroll, interest to be paid at annual rate of 5% (complaint, ¶¶ 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, ¶¶ 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, ¶¶ 121-122); the permit was issued to Champlain.

Morey, Eagles and Champlain are three of the mining defendants. On this record, plaintiffs have alleged a cause of action against the moving defendants for breach of contract in the failure to repay various loans, as alleged. Dismissal of the twenty-ninth cause of action against Morey, Eagles and Champlain 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

ENTER:

**ENTERED**

MAY 25 2016

NASSAU COUNTY  
COUNTY CLERK'S OFFICE



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