

Poten & Partners, Inc. v Greco
2017 NY Slip Op 32260(U)
October 18, 2017
Supreme Court, New York County
Docket Number: 600895/2010
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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POTEN & PARTNERS, INC.,

Plaintiff,

Index No.: 600895/2010

-against-

RICHARD GRECO, JR., FILANGIERI ADVISORY CORPORATION, FILANGIERI CAPITAL PARTNERS, COLUMBUS CAPITAL FUND, NINEPOWER CORP., MARCO IORI, MARCO BERTETTI, PIERLUIGI SERRA, MARLA GRECO, CLEOMAX MARICE CORP., and ENTITIES A to Z, whose names are currently unknown to the plaintiff but are intended to be entities that are the "Solar Companies" as set forth herein,

DECISION AND ORDER

Defendant.

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SALIANN SCARPULLA, J.:

In this action to recover damages for, *inter alia*, fraud, defendants Richard Greco, Jr. ("Greco"), Filangieri Advisory Corporation, Filangieri Capital Partners (together "Filangieri companies"), Marla Greco ("M. Greco"), and Cleomax Marice Corp. ("Cleomax") (collectively "Greco defendants") move for summary judgment dismissing the complaint of plaintiff Poten & Partners, Inc. ("Poten") insofar as asserted against them, with prejudice. Greco also moves for summary judgment on his counterclaim for Poten's failure to pay his signing bonus.

Poten asks the court to search the record pursuant to CPLR 3212(b) and grant it summary judgment on its second through sixth and thirteenth through sixteenth causes of action, and for summary judgment dismissing Greco's counterclaim.

Poten is an energy brokerage firm that, at the time of the events giving rise to this action, was owned by Michael Tusiani. In 2007, Poten put in place an employee stock option plan ("ESOP"), whereby the employees could purchase Poten's assets under certain conditions. The plan was supervised by a trustee, whose approval was required for certain expenditures. Tusiani was Chairman of Poten, and Steve Garten served as in-house attorney at Poten and operated the company.

Greco had been running Filangieri Advisory Corporation since 2006, which provided investment and advisory services to several different companies. Between 2008 and 2009, Greco met with defendants Marco Iori ("Iori") and Marco Bertetti ("Bertetti") about a project in Italy to construct greenhouse solar panels mounted on the roofs, which could be subsidized by the Italian government as part of its broader solar power initiative ("the solar project"). Greco believed that the project was a good investment opportunity but did not "believe in it at the time" and gave it a "zero probability of materializing."

According to Greco, in April 2009, Iori proposed that Greco become a founding 25% equity owner of the solar project company. There is a dispute as to which party proposed that Greco would accept an equity interest; Greco claims it was the Italian defendants who wanted him to have a personal interest in the solar project, but Iori and

Bertetti claim it was Greco's idea. That summer, Greco met with Iori and representatives of an Italian bank to discuss financing the solar project. After further discussions, Greco states that he, Iori, Bertetti, and defendant Pierluigi Serra (collectively, "the Italian defendants") agreed that each would each own 25% of the solar project. In July 2009, the four individuals formed defendant Columbus Capital Fund, an American corporation, and Columbus Capital S.r.l, an Italian corporation, to hold the assets of the project. The shares of Columbus Capital Fund were never subscribed, and Greco claims that he never acquired an interest in the solar project.

While Greco was discussing the solar project with Iori, he was also meeting with Tusiani about taking a position with Poten as head of its Capital Services division. After some negotiation, Poten and Greco entered into an employment agreement dated June 19, 2009. ("June agreement"). The June agreement provided that Poten would pay Greco a salary of \$200,000, a signing bonus of \$100,000, and an additional minimum bonus of \$100,000 on March 15, 2010. Greco was required to repay both bonuses if he "resign[ed] or [was] discharged for cause prior to September 1, 2010." Greco's employment was to be at will.

Additionally, Poten agreed that Midstream Partners ("Midstream"), a company owned by Tusiani, would enter into an agreement with Greco to acquire 25% of Greco's interests in those Filangieri clients in which he had equity. During his first year of employment, Greco agreed to give Poten 25% of the net income from those clients he had

advisory positions, and to spend no more than five days per month working on matters related to the Filangieri clients. Finally, Greco acknowledged that he was working exclusively for Poten, and that any “clients, transactions and other opportunities identified by [Greco] will be solely for the benefit of Poten.” Greco was to start on September 8, 2009.

On August 17, 2009, as part of his employment with Poten, Greco executed a Confidentiality and Non-Competition Agreement. The non-compete agreement provided that Greco would not “directly or indirectly, use, disclose, or disseminate to any other person or entity, including family members and others within [Poten]” any confidential or proprietary information that he was “privy to or [had] a hand in developing.”

Confidential and proprietary information included “information relating to costs, profits, markets or sales; and information regarding the identity of, and relationships with, customers, suppliers, and other parties.” In addition, the non-compete agreement barred Greco from competing with Poten for six months after his employment ended, and from working for “any business which provides investment banking, project development or financial services relating to: (a) marine transportation, (b) energy, or (c) energy infrastructure” for three months after his employment ended.

As discussed in more detail below, the relationship among the parties involved with the solar project was rife with miscommunication, and there are differing accounts

of the actual status of the authorizations necessary to construct solar plants and connect them to the Italian power grid. The process for constructing a solar plant and connecting it to the power grid comprised multiple steps during the relevant period. The company constructing the solar panels had to obtain approval from various government entities and agencies to construct the solar panels on a parcel of land, and obtain separate approval to connect said panels to the power grid. Once authorized, the project owners could then seek financing and conduct the requisite due diligence. Greco claims that his understanding of the requirements for an authorization changed throughout his work on the solar project. Similarly, Bertetti claims that Poteri and Greco never really understood the complexities of the process.

Right before Labor Day in 2009, shortly before starting at Poteri, Greco informed Tusiani about the solar project.¹ Greco states that, at the time, he believed the solar project had 500 megawatts of authorization for solar plant construction between roughly forty projects in Sardinia and Puglia. In contrast, Iori and Bertetti state that there were only 8 megawatts at a single project in Uta, and no more than fifty-four megawatts total that were fully authorized.

¹ Greco testified that he spoke to Tusiani about the solar project in May 2009. However, he also testified that at that time, the solar project had not yet reached a stage where Greco was claiming an interest in the project, and that Greco himself thought the solar project was “science fiction, just a distraction.”

Poten expressed concern about Greco's possible ownership interest in the solar project. Greco then suggested Poten participate in the project. On November 5, 2009, Iori and Greco put together a presentation on the solar project for Poten. During the presentation, Greco stated that Columbus Capital S.r.l had a portfolio of 550 megawatts ready for development, and that the whole project was valued at between €192,500,000 and €330,000,000 by Klecha & Co., an Italian investment bank that was subsequently hired by the solar project. Further, Greco stated that construction had begun on the Uta plant, which was valued at €73,088,130 net profit.

At the time, Greco claims that he believed that Columbus Capital S.r.l owned the authorizations for the Uta plant and that, according to the Italian defendants, there were an additional 500 megawatts available for production. Iori, however, testified that authorizations for 500 megawatts were only a goal, and that only 60 to 70 megawatts were fully authorized. Greco testified that he later came to learn that Columbus Capital S.r.l and the Italian defendants had not received the authorizations described in the presentation, and that not all the authorizations were complete at the time of the presentation.

Further, Greco also learned that the Uta plant was never actually constructed, and that only a small prototype was built. According to Greco, the presentation was not formal, rather it was a demonstration of a business opportunity that still needed much

development to come to fruition. It was proposed that instead of four partners at 25% each, the equity would be divided for 20% for each of five partners, including Poten.

It is undisputed that Poten chose not to invest in the solar project at that time. According to Greco, Poten took issue with Greco having an ownership interest in the solar project. Tusiani suggested that Greco begin preparing to leave Poten and Greco claims that he offered his resignation. Nevertheless, discussions continued regarding Greco's potential interest in the solar project and the terms of his relationship with Poten.

On November 10, 2009, Greco and Poten signed a term sheet regarding the solar project and Greco's non-Poten interests ("the November agreement"). The November agreement provided that Greco would transfer 100% of any equity interest in his Filangieri clients to Poten in exchange for \$200,000 and 75% of the "net cash flow" from those companies in the form of an increased annual bonus. Poten would be entitled to 100% of "all income/compensation associated with the [those] companies otherwise payable to [Greco]."

The November agreement also provided that Poten "[would] be granted 40% of the equity in the 'Solar Companies,'" which included both the Columbus Capital entities and any other companies relating to the solar project; "a minimum of three board of directors' positions" in each company, and; the right to approve all major decisions in the event a company's board exceeded five members. In return, Poten would "invest up to \$2 million" in the solar project, and Greco would receive 50% of the "[n]et [c]ash [f]low"

from the solar project as an additional bonus payment. If Greco was terminated with cause or resigned before November 9, 2012, he would not be entitled to the bonus payments.

The remainder of the November agreement duplicates the terms of the June agreement regarding the exclusivity of Greco's employment, those companies with which Greco held advisory positions, and the division of net income and costs for those companies between Poten and Greco. It is undisputed that the interest transfer never took place, and that Greco never received \$200,000. It is also undisputed that the November agreement was subject to approval by Poten's board, trustee, and lender, as well as by Midstream.

After signing the November agreement, Greco and Poten embarked on due diligence of the solar project. Between November 2009 and February 2010, the parties exchanged hundreds of emails, reports, other documents, and phone calls regarding all aspects of the solar project. However, miscommunications and delays among the parties continued. Tusiani testified that different people were telling Greco different things about the various aspects of the project, and that there was constant uncertainty and a lack of information.

On January 27, 2010, Greco wrote an email in which he explained to Garten that a table listing all the separate projects and their "MW Potential" referred not to pending authorizations but to the total potential power each project could generate.

On February 25, 2010, Poten pulled out of the solar project. Tusiani testified that Poten had become “frustrated with the promises that were made that were never delivered,” and wearied by the constant funding requests. Negotiations continued among the parties, though they characterize them differently. Tusiani testified that he told Greco to negotiate Poten’s exit from the project, while Greco believed that there was still a way to save the project.

Greco proposed to Garten that he could broker a deal where he would obtain 57% of the solar project held by Columbus Capital S.r.l, and give 20% of that to Poten. Garten rejected that proposal, and countered that, among other things, Poten should receive 50% of the 57%, and would offer a loan to Columbus Capital to cover three months of Greco’s salary and benefits as he transitioned away from Poten and offer a waiver of repayment of the original signing bonus.

Greco agreed to Garten’s proposal on March 7, 2010. On the same day, Greco claims that he first discovered that Columbus Capital S.r.l only had 78 MW of authorizations fully completed, not the 500 MW that he believed had existed for the last several months. The parties dispute whether Greco was aware of this fact earlier; Iori claims that the Italian defendants never told Greco they had 500 MW authorized.

The next day, March 8, 2010, Garten informed Greco that he had recommended to Poten that Greco be terminated on March 10, 2010, with no additional bonus or benefits; that Greco be required to repay his signing bonus within thirty days; and that Greco be

required to sign a release of all claims against Poten. Two days later, Tusiani and Garten informed Greco by telephone that he had been terminated. The termination was never reduced to writing. Garten testified that he could not remember whether Greco was fired or had resigned. Tusiani testified that Greco was fired for cause.

At the same time, Greco told his wife, defendant M. Greco, that he was worried about a potential lawsuit. Shortly before his termination, M. Greco suggested to Greco that they move their assets into her name. However, M. Greco testified that none of the couple's assets were transferred, and nowhere in the record does Poten refute this testimony.

Greco continued to work on the solar project after leaving Poten. In the spring of 2010, M. Greco formed defendant Cleomax, and gave Greco a power of attorney to purchase shares of the solar project. In July 2010, Greco acquired 35% of Columbus Capital S.r.l for Cleomax, at a cost of €3,000. The shares were owned by P&L Energy, which had purchased 95% of Columbus Capital S.r.l for €450,000. Greco testified that he wanted to offer that interest back to Poten. Poten does not dispute that Greco offered it Cleomax's shares of Columbus Capital S.r.l. Ultimately, Cleomax neither received income from the solar project, nor tried to sell its interest in Columbus Capital S.r.l. It appears from the papers submitted that Cleomax's share of Columbus Capital S.r.l is worthless.

Poten commenced this action in April 2010. Poten's complaint alleges claims for breach of contract, fraud, breach of fiduciary duty, theft of corporate opportunity, unjust enrichment, and seeks a declaratory judgment against the Greco defendants. On November 30, 2015, the court granted Poten leave to amend its complaint to add M. Greco and Cleomax as defendants, and to allege two causes of action for fraudulent conveyance against Greco, M. Greco, and Cleomax.

Discussion

The Greco defendants now move for summary judgment dismissing Poten's complaint with prejudice, and for summary judgment on Greco's counterclaim for failure to pay him his minimum bonus. Poten asks the court to search the record, pursuant to CPLR 3212 (b), and award it summary judgment on several of its causes of action, as set forth further below.

I. Breach of the November Agreement (First, Fourth, and Fourteenth Causes of Action)

Poten alleges that Greco breached the November agreement in two ways: Greco failed to deliver the requisite 40% equity in the solar project or the seats on the Solar Companies' boards of directors, and failed to "deliver to [Poten]" the "income and/or compensation" from his prior clients. Poten seeks damages for Greco's non-compliance on its first and fourth causes of action, and a declaratory judgment awarding it the above-referenced equity and directorships in its fourteenth cause of action.

Greco argues that the claims alleging breach of the November agreement must be dismissed because it is an unenforceable agreement to agree that lacks required material terms. Even if the November agreement is enforceable, Greco argues, Poten's own unreasonable conduct led to it not receiving any equity in the Solar project, and further, Poten's failure to pay Greco for his equity in his Filangieri clients relieves Greco of any obligation to perform under the agreement. Poten responds that the terms of the agreement are reasonably certain and may be enforced; that Greco's misrepresentations and not Poten's conduct, led to the deal breaking down; and that the equity purchase was to be part of the solar project deal itself, which never closed.

Breach of contract requires proof of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dept. 2010). The plaintiff must establish "the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated." *Matter of Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dept. 1995). "[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable." *Matter of 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 91 (1991)(internal quotation marks and citations omitted). However, "[s]triking down a contract as indefinite and in essence meaningless is at best a last resort." *Id.* (internal quotation marks and citations omitted).

Here, the November term sheet is sufficiently definite in its terms to fulfill its purpose, which was to provide a framework for Poten and Greco to pursue the solar project. Greco persuasively argues that, on this record, his ability to deliver the promised equity interests, board seats, and decision-making power for any solar company with more than five board members, was contingent on the agreement of the Italian defendants. The terms of the November agreement, however, are sufficiently definite for the court “to determine what in fact the parties have agreed to.” *Matter of 166 Mamaroneck Ave. Corp.*, 78 N.Y.2d at 91.

First, as Greco points out, the November agreement provides that it is subject to approval by “Midstream Partners and Poten’s Board of Directors, Trustee and Lender.” Tusiani testified that Poten could not have acquired 40% of the solar project at the time, and would have needed permission of the ESOP trustee to acquire an interest in the solar project or Greco’s interests in the Filangieri companies. No such permission was sought. Further, the agreement was never approved by Poten’s board. “[W]here an agreement . . . calls for future approval, and expressly anticipates future preparation and execution of contract documents, there is a strong presumption against finding a binding and enforceable obligation.” *Carmon v. Soleh Boneh Ltd.*, 206 A.D.2d 450, 450 (2d Dept 1994).

Second, it is undisputed that Poten ultimately pulled out of the solar project in February 2012. Tusiani testified that he sent Greco to Italy to negotiate Poten’s exit

from the project, and that Greco instead attempted to negotiate a different structure for the solar project than that contemplated in the November agreement. Thus, Poten abandoned the November agreement, and Greco acquiesced in that abandonment by attempting to negotiate a different deal. “A contract will be treated as abandoned when one party acts in a manner inconsistent with the existence of the contract and the other party acquiesces in that behavior.” *Savitsky v. Sukenik*, 240 A.D.2d 557, 559 (2d Dept. 1997)(internal quotation marks and citation omitted). Put another way, “[a] contract may be abandoned by mutual actions of the parties that clearly and unequivocally point in that direction.” *Atlantic Co. v. Jarll Realty Corp.*, 36 A.D.2d 883, 884 (3d Dept. 1971). Tusiani also informed the Italian defendants that Poten had “discussed [the solar project] internally and decided to terminate our efforts. [Greco] and [Garten] will be discussing the issues surrounding our exit.” Tusiani’s testimony and conduct shows that Poten was acting in a manner inconsistent with the existence of the November agreement. Having unequivocally stated that it was not investing in the solar project, Poten was plainly abandoning the November contract and may not now assert that it has not received the 40% equity in the solar project, or the seats on the Solar Companies’ boards of directors.

Third, Poten never acquired Greco’s equity interests in his former clients, as provided by the November agreement. The requirement that Greco give 100% of any income/compensation associated with those companies to Poten was contingent on Poten paying \$200,000 to Greco for Greco’s ownership interests in those companies. While

Poten argues that the purchase was meant to be a part of the solar project deal itself, which never closed, the November agreement does not contain any language reflecting this condition. As Poten failed to fulfill its obligation to purchase Greco's interests in his former clients, Greco was not obligated to provide his income from those clients to Poten. *Special Situations Fund III v Versus Tech.*, 227 A.D.2d 321, 321 (1st Dept. 1996)(“A party will be relieved or discharged from the performance of futile acts or conditions precedent, including the tender of payment, upon the failure or refusal by a party to honor its obligations under their contract.”)

Accordingly, that branch of the Greco defendants' motion for summary judgment dismissing the first and fourth causes of action based on the November agreement is granted. Also, that branch of the Greco defendants' motion for dismissal of the fourteenth cause of action for a declaratory judgment is granted to the extent of declaring that, under the November agreement, Poten is not entitled to “a 40% interest in the above referenced Solar Companies[, or to] a controlling interest in the solar project either by virtue of holding three of five seats on the board of directors or, if there are more than five directors, by having the right of approval of all major decisions.”

II. Breach of the Non-Compete Agreement (Second Cause of Action)

For its second cause of action, Poten alleges that Greco breached the non-competes agreement by disclosing Poten's confidential information to certain of his codefendants while still working for Poten, and by “actively engaging in businesses involving energy

and energy infrastructure and conducting business with, soliciting, and/or enticing away [Poten's] customers." Poten seeks a declaration that Greco is in violation of the non-compete agreement and an order directing Greco to abide by the terms therein.

Greco argues that the three months non-compete provision has long since expired, and therefore, Poten's claim is moot. Poten responds that Greco explicitly worked on the solar project with the Italian defendants during the three-month period, which is a violation of the Non-Compete agreement.

Non-competition agreements are strictly construed "because of the powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood." *Shearson Lehman Bros. Holdings v. Schmertzler*, 116 A.D.2d 216, 223 (1st Dept. 1986)(internal citations and quotation marks omitted). "A restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388-89 (1999).

The non-compete agreement bars Greco from employment in certain industries for three months after leaving Poten, and from competing with Poten for six months. As Greco notes, both the three-month ban on working in the "energy" or "energy infrastructure" industries, and the six-month ban on directly or indirectly competing with Poten, have expired. Thus, to the extent that the second cause of action seeks

declaratory relief regarding the continued breach of the non-compete and non-solicitation provisions, such claim is dismissed as moot.

However, the non-compete agreement also contains a provision barring Greco from disclosing any confidential or proprietary information gathered while working for Poten, if such information remains confidential and/or proprietary. The non-compete agreement does not provide any time limit on Greco's obligation not to disclose such information. As neither party refers to this provision or argues whether it is enforceable, summary judgment for both parties is denied to the extent that the second cause of action seeks a declaratory judgment enforcing the confidentiality provision.

Accordingly, that branch of the Greco defendants' motion that seeks summary judgment dismissing the second cause of action for breach of the non-compete agreement is granted only to the extent of the non-compete and non-solicitation provisions of the agreement, and is otherwise denied.

III. Breach of the June Agreement (Third and Fifth Causes of Action)

In Poten's third and fifth causes of action, it alleges that Greco breached the June agreement by, respectively, failing to repay his signing bonus after he was terminated for cause, and dedicating more time than allowed toward the Filangieri companies, in violation of his exclusive employment obligation under the June Agreement.

Greco argues that Poten cannot seek the return of his signing bonus, because he was not fired for cause. Further, he contends that Poten breached the June agreement by

failing to purchase 25% of his equity in his former clients as set forth in the agreement, thus relieving him from any obligation to perform under it. Finally, Greco argues that the term “exclusive,” as used in the June agreement to define his obligation to Poten, is ambiguous, and the agreement permitted him to work on the Filangieri companies.

Poten responds that it did terminate Greco for cause, specifically for his alleged repeated misrepresentations regarding the solar project. Further, it claims, Greco had already begun to breach the agreement before his equity interests in his former clients were ready for closing. Finally, it states, the term “exclusive” is not ambiguous, and, in any case, the solar project was not listed as a project that Greco could pursue for his own interest.

The June agreement requires Greco to repay the signing bonus of \$100,000 if he resigned or was discharged for cause prior to September 1, 2010. Neither the June agreement, nor Poten’s employee handbook, defines a “termination for cause.” It is undisputed that Greco never received a written notice that he was terminated for cause, and Greco avers that he was not told that he was being fired for cause at the time of his termination. Further, the June agreement provides that Greco’s employment was at will, meaning that he could be fired for any reason or no reason at all.

In opposition, Poten argues that, under the circumstances, it should be clear that Greco was terminated for cause. Specifically, Garten testified that he believed Greco lied to Poten about the status of the solar project, and that he had recommended to

Tusiani that Greco be terminated for the way he handled the solar project by putting his interest in front of Poten's. Tusiani testified that Greco was terminated for cause after the fact, although he also testified that he told Garten to be kind to Greco; that Poten had continued Greco's health coverage under COBRA; and that Poten had worked with Greco on his exit from the company.

Based on the evidence presented, there are material issues of fact as to whether Greco was fired for cause. Accordingly, that branch of the Greco defendants' motion for summary judgment dismissing the third cause of action for breach of the June agreement based on Greco's failure to repay his signing bonus is denied.

With respect to the fifth cause of action regarding the time Greco spent working for the Filangieri companies, neither Poten nor the Greco defendants presented any evidence regarding the amount of time Greco spent working for the Filangieri companies, or whether that amount exceeded that allowed under the June agreement. While Greco argues that he was permitted to work for the Filangieri companies under the terms of the June agreement, he submits no evidence that he complied with the requirement to spend no more than five days of each month doing so. Further, Poten submits no evidence that Greco spent more than five days per month working for the Filangieri companies. Thus, neither party is entitled to summary judgment.

Notably, the parties also address the issue of whether Greco violated the exclusivity provision of the June agreement by acquiring a share of the solar project for

himself. The exclusivity provision is raised in the amended complaint with respect to the time Greco spent working for the Filangieri companies; however, the allegation regarding the solar project is not made in the complaint with respect to the fifth cause of action. Even if it had been, however, Greco has established that he did not breach the exclusivity provision in this manner. Greco's unrebutted testimony is that the shares of the Columbus Capital corporations were unsubscribed, and that he never received any interest in them during his employment with Poten. A review of the record shows that Poten does not raise a material issue of fact in opposition on this point. Because there is no evidence in this record that Greco possessed any equity interest in the solar project during his time working for Poten, as a matter of law, Greco did not breach the exclusivity provision.

Accordingly, that branch of the Greco defendants' motion for summary judgment dismissing the fifth cause of action is granted to the extent that it is based on Greco's alleged interest in the solar project, and is denied to the extent that it is based on the time Greco spent working for the Filangieri companies.

IV. Breach of Fiduciary Duty and Theft of Corporate Opportunity (Sixth and Thirteenth Causes of Action)

In its sixth cause of action, Poten alleges that Greco breached his fiduciary duty by procuring an interest in the solar project for himself during his employment with Poten, and by pursuing his interests in the Filangieri companies at the expense of Poten. In its thirteenth cause of action, Poten alleges that Greco stole a corporate opportunity

belonging to Poten, by using information and materials gained during his employment with Poten to acquire a personal interest in the solar project. The parties make essentially identical arguments with respect to each of these two causes of action, thus I address them together.

Greco argues that he timely informed Poten about the solar project, that he never procured an interest in the solar project prior to working with Poten, that Poten ultimately decided not to invest in the project, and that Poten subsequently authorized him to negotiate on both of their behalves, and agreed to Greco obtaining an interest in the solar project. Poten responds that Greco was supposed to be working solely on Poten's behalf, and that he breached his fiduciary duty by obtaining an interest in the solar project for himself.

“To establish a breach of fiduciary duty, the movant must prove the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct.” *Pokoik v. Pokoik*, 115 A.D.3d 428, 429 (1st Dept. 2014). “A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand.” *William Kaufman Org. v. Graham & James*, 269 A.D.2d 171, 173 (1st Dept. 2000).

Similarly, “[t]he doctrine of corporate opportunity provides that corporate fiduciaries and employees cannot, without consent, divert and exploit for their own benefit any opportunity that should be deemed an asset of the corporation.” *Alexander &*

Alexander of N.Y. v. Fritzen, 147 A.D.2d 241, 246 (1st Dept. 1989)(internal quotation marks and citations omitted).

Here, Poten claims that Greco breached his fiduciary duty by obtaining his own interest in the solar project and by pursuing an “active, ongoing interest in Filangieri and . . . placing its interests ahead of PPI.” Further, Poten claims that Greco utilized its propriety and confidential information to secure a personal interest in the solar project at Poten’s expense. These allegations are substantially identical to Poten’s claims that Greco (i) breached the non-compete agreement by disclosing confidential information to certain of his codefendants, which altered the negotiating process at Poten’s expense; and, (2) breached the June agreement by obtaining an interest in the Solar project for himself or for Filangieri² and maintaining an active interest in Filangieri at the expense of his interest in Poten. Because these claims are duplicative of the breach of contract causes of action, the breach of fiduciary duty and theft of corporate opportunity causes of action cannot stand. *William Kaufman Org.*, 269 A.D.2d at 173.³

Accordingly, those branches of the Greco defendants’ motion for summary judgment dismissing the sixth and thirteenth causes of action are granted.

² As previously noted, though, this allegation is not specifically pled in the complaint as part of the fifth cause of action, the parties have argued this motion as if it were part of the cause of action.

³ Poten also alleges that Greco offered the solar project to a firm called the Scowcroft group before signing the November agreement, although the deposition testimony does not support this allegation.

V. Fraud (Seventh Cause of Action)

In its seventh cause of action, Poten alleges that Greco misrepresented several aspects of the solar project while working for Poten, and that Poten relied on these misrepresentations to its detriment in investing in the solar project.

Greco argues that Poten, a sophisticated investor, conducted its own due diligence on the solar project and elected not to go forward. Thus, it did not reasonably rely on Greco's alleged misstatements. Further, Greco claims, the record does not reflect an intent to deceive Poten, or that Greco knew his representations were false. Finally, he argues, New York law prohibits recovery of due diligence expenses absent an explicit agreement. Poten argues, in response, that there are material issues of fact as to Greco's intent and Poten's justifiable reliance that preclude summary judgment on this claim.

"Generally, in a claim for fraudulent misrepresentation, a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 (2011)(internal quotation marks and citations omitted). Further, the elements must be plead with particularity CPLR 3016 (b).

Here, Greco fails to establish that he is entitled to summary judgment dismissing the fraud claim. The record reflects misstatements of fact, or at least contested

statements by Greco regarding the number of authorizations available, the construction of the Uta plant, and the necessity of Greco having an interest in the solar project. There are issues of fact relating to when Greco learned that Columbus Capital S.r.l did not possess the number of authorizations that he had represented to Poten, and thus, whether he knowingly misrepresented the available authorizations. Greco argues that he relied solely on the Italian defendants for the number of authorizations set forth in the November presentation. However, Greco also testified that he and Iori jointly worked on the presentation, and Iori testified that he never told Greco that there were 500 MW authorized for production.

A party may not ordinarily recover its due diligence expenses absent a written agreement to that effect. *See Chatterjee Fund Mgt. v. Dimensional Media Assoc.*, 260 A.D.2d 159, 159 (1st Dept. 1999). Greco, however, provides no authority, for his contention that Poten may not recover other funds expended during its participation in the solar project. Poten has submitted evidence showing that it laid out other sums of money on the solar project beyond its due diligence costs. Moreover, the evidence submitted shows that Poten relied entirely on Greco's representations at all stages of the project, and not just during due diligence. As Garten testified, no one at Poten assisted Greco in evaluating the solar project, nor did Poten independently evaluate the project. The fact that Poten ultimately did not invest in the solar project directly does not, as

Greco suggests, prove that Poten did not rely on Greco's alleged misrepresentations to its detriment.

Accordingly, that branch of the Greco defendant's motion for summary judgment dismissing the seventh cause of action for fraud is denied.

VI. Unjust Enrichment (Eleventh Cause of Action)

For its eleventh cause of action, Poten alleges that Greco failed to uphold his duties as an employee to Poten, and was unjustly enriched in the amount of his salary and allowances. To state a claim for unjust enrichment, "[a] plaintiff must show that (1) the [defendant] was enriched, (2) at [the plaintiff's] expense, and (3) that it is against equity and good conscience to permit [the defendant] to retain what is sought to be recovered."

Mandarin Trading Ltd., 16 N.Y.3d at 182 (internal quotation marks and citations omitted). "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987).

Here, Greco argues, and Poten does not dispute, that the June agreement is a valid and enforceable contract that governs the matter of Greco's compensation. Because Greco's compensation is the subject of a valid and enforceable written agreement, Poten's unjust enrichment claim fails. Accordingly, that branch of the Greco

defendants' motion for summary judgment dismissing the eleventh cause of action for unjust enrichment is granted, and that claim is dismissed.

VII. Fraudulent Conveyance under Debtor and Creditor Law § 273, 273-a, 275, and 276 (Fifteenth and Sixteenth Causes of Action)

Poten alleges that, aided by defendant M. Greco, Greco transferred his equity in the solar project and other assets to defendant Cleomax to protect himself from the present lawsuit. Further, it alleges that such conveyance was either intentionally fraudulent under Debtor and Creditor Law § 276, or made for insufficient consideration under DCL §§ 273, 273-a, and 275, respectively, in Poten's fifteenth and sixteenth causes of action.

Greco argues that both causes of action are "based solely on Poten's alleged entitlement to equity in the Solar Companies under the November [agreement]," and that, because the November agreement is unenforceable, all claims based on it must be dismissed. In response, Poten argues that Greco and M. Greco conspired to convey assets to Cleomax, and/or to M. Greco directly, to hinder Greco's creditors. Further, Poten argues that M. Greco received Greco's interest in the solar project for insufficient consideration, making that transfer constructively fraudulent.

"Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors" (DCL § 276).

“Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on ‘badges of fraud’ to support his case, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent. Among such circumstances are: a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance”

Wall St. Assoc. v. Brodsky, 257 A.D.2d 526, 529 (1st Dept. 1999)(internal quotation marks and citations omitted).

Here, Greco and M. Greco's unrebutted testimony is that none of their assets were transferred following M. Greco's email suggesting such a transfer. Further, their unrebutted testimony is that the conveyance of shares in Columbus Capital S.r.l from P&L Energy to Cleomax, for consideration of €3,000, was made so that Greco could obtain an interest in the solar project and offer it to Poten, and to otherwise continue the solar project. Greco avers that he offered Cleomax's interest in the solar project to Poten three times, and Poten does not dispute that it rejected those offers. Further, the testimony establishes that Greco holds several board and advisory positions, and that his family has an average annual income of \$200,000-\$300,000, as well as some other assets.

In response, Poten fails to raise a material issue of fact. It argues that Greco and M. Greco will be unable to pay a judgment in this action, but provides no evidence in support, other than restating M. Greco's testimony regarding the family's assets. While Poten is correct, that Greco facilitated the conveyance to Cleomax, it offers no evidence

to rebut Greco's evidence regarding his expressed intent in making the transfer. Moreover, the potential value of the solar project, as expressed in the November presentation, is not evidence of the value of the solar project at the time the conveyance was made. As Poten's own witness testified, the value of a project relying heavily on subsidies from the Italian government was volatile. Poten offers no evidence of the value of Columbus Capital S.r.l at the time of the conveyance that would suggest that it was made for inadequate consideration. Indeed, M. Greco testified that, currently, Cleomax's share of Columbus Capital S.r.l. may be worthless.

Accordingly, that branch of the Greco defendants' motion for summary judgment dismissing the fifteenth cause of action for intentional fraudulent conveyance is granted.

Turning to Poten's claims for constructive fraudulent conveyance, "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." DCL § 273. "A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." DCL § 271(1). If the transferor is not made insolvent by the conveyance, then the conveyance is not constructively fraudulent. *See Sorenson v. 257/117 Realty, LLC*, 62 A.D.3d 618, 619 (1st Dept. 2009)(internal quotation marks omitted). Here, as set forth above, M. Greco and Greco's testimony establishes that

they are not insolvent, and Poten fails to raise a material issue of fact in opposition.

Accordingly, summary judgment dismissing this claim pursuant to DCL § 273 is appropriate.

A conveyance for less than fair consideration, made by a defendant in an action for money damages or after a money judgment has been entered against said defendant, is fraudulent as to the plaintiff “without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.” DCL § 273-a. “The existence of an unsatisfied judgment is an ‘essential element’ of a constructive fraud cause of action pursuant to Debtor and Creditor Law § 273-a.” *Coyle v. Lefkowitz*, 89 A.D.3d 1054, 1056 (2d Dept. 2011). As no unsatisfied judgment exists between the parties in this action, summary judgment dismissing this claim pursuant to DCL § 273-a is appropriate.

Finally, a conveyance made without fair consideration also is fraudulent “when the person making the conveyance . . . intends or believes that he or she will incur debts beyond his or her ability to pay as they mature.” DCL § 275. Proof of the transferor’s actual intent or belief that they would incur debts they could not pay is necessary. *Matter of Shelly v. Doe*, 249 A.D.2d 756, 757–58 (3d Dept. 1998). Here, as set forth above, Greco and M. Greco testified that they intended the transfer either to offer the interest in Columbus Capital S.r.l. to Poten or to continue the solar project. In response, Poten fails to raise a material issue of fact. While Poten references M. Greco’s email,

suggesting that Greco transfer his assets into her name, as proof that Greco believed he would shortly incur a debt he could not pay in the form of the instant action, it is undisputed that no such asset transfer occurred. Thus, to the extent that M. Greco's email presents a factual question, it is not a material one requiring trial. Summary judgment dismissing this claim pursuant to DCL § 275 is appropriate.

Accordingly, that branch of the Greco defendants' motion for summary judgment dismissing the sixteenth cause of action for constructive fraudulent conveyance is granted.

VIII. Greco's First Counterclaim

Greco also moves for summary judgment on his first counterclaim for breach of contract, based on Poten's failure to pay him a "minimum bonus of \$100,000 on or about March 15, 2010," pursuant to the June agreement. In his first counterclaim, Greco alleges that he was owed a minimum bonus of \$100,000 under the June agreement, unless Poten fired him for cause. Because he was not fired for cause, Greco argues, Poten must pay him the signing bonus. Poten responds that Greco was terminated for cause.

As noted above, there are issues of fact as to whether Greco was terminated for cause. Further, the June agreement did not expressly provide that Greco would be entitled to his minimum bonus if he was no longer working for the company when it became due. Greco was no longer employed by Poten on March 15, 2010. Because neither the June agreement, nor the parties' submissions on this motion, definitively

resolves this issue, neither party is entitled to summary judgment. Accordingly, that branch of Greco's motion for summary judgment on his first counterclaim is denied.

In accordance with the foregoing, it is

ORDERED that the motion of defendants Richard Greco, Filangieri Advisory Corporation, Filangieri Capital Partners, Marla Greco, and Cleomax Marice Corp. for summary judgment dismissing the complaint insofar as asserted against them is granted to the extent that the first, fourth, sixth, eleventh, thirteenth, fifteenth and sixteenth causes of action are dismissed, the second cause of action to the extent it is based on the non-compete and non-solicitation provisions of the non-compete agreement is dismissed, and the fifth cause of action to the extent it is based on Richard Greco's alleged interest in the solar project is dismissed; and it is further

ORDERED that the branch of defendants' motion which seeks a declaratory judgment with respect to the subject matter of the amended complaint's fourteenth cause of action is granted; and it is further

ADJUDGED and DECLARED that plaintiff Poten & Partners, Inc. is not entitled to a 40% interest in the above referenced Solar Companies, or a controlling interest in the solar project either by holding three of five seats on the board of directors or, if there are more than five directors, by having the right of approval of all major decisions; and it is further

ORDERED that the motion of defendant Richard Greco for summary judgment on his first counterclaim is denied; and it is further

ORDERED that the remainder of this action is severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York
October 18, 2017

ENTER:


HON. SALIANN SCARFULLA
J.S.C.