

Greenberg v Shak

2018 NY Slip Op 33874(U)

June 18, 2018

Supreme Court, Nassau County

Docket Number: 606938-17

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**MARTIN GREENBERG, STERLING
COMMODITIES CORPORATION, and G. MARTIN
ASSOCIATES INC.,**

Plaintiffs,

-against-

**DANIEL SHAK, SHK MAMANGEMENT, LLC, SHK
ASSET MANAGEMENT, LLC, SHK DIVERSIFIED,
LLC., HOWARD MALZBERG, BERMAIN
IRIZARRY, JR., LPS FUTURES LLC., and JOHN
DOE # 1 through JOHN DOE # 10, said names being
fictitious and intended to designate persons and
entities who participated with the named defendants in
the acts complained of herein,**

Defendants.
-----X

TRIAL/IAS PART: 11

NASSAU COUNTY

**Index No: 606938-17
Motion Seq. Nos. 1, 2 and 3
Submission Date: 5/18/18**

The following papers have been read on these motions:

- Notice of Motion.....X
- Affirmation in Support and Exhibits.....X
- Memorandum of Law in Support.....X
- Memorandum of Law in Opposition.....X
- Reply Memorandum of Law in Support.....X
- Notice of Motion.....X
- Affirmation in Support and Exhibit.....X
- Memorandum of Law in Support.....X
- Memorandum of Law in Opposition.....X
- Reply Memorandum of Law in Support.....X
- Notice of Motion, Affirmation in Support and Exhibit.....X
- Memorandum of Law in Support.....X
- Memorandum of Law in Opposition.....X
- Reply Memorandum of Law in Support.....X

This matter is before the court on 1) the motion filed by Defendants Daniel Shak (“Shak”), SHK Management, LLC (“SHK1”), and SHK Diversified, LLC (“SHK3”) on November 10, 2017, 2) the motion filed by Defendant LPS Futures, LLC (“LPS”) on December 18, 2017, and 3) the motion filed by Defendants Howard Malzberg (“Malzberg”) and Bermain Irizarry, Jr. (“Irizarry”) on March 5, 2018. The Court held oral argument on the motions on May 18, 2018, and submitted the motions thereafter.

For the reasons set forth below, the Court grants the motions to the extent that the Court:

- 1) dismisses the complaint in its entirety as asserted against the SHK entities;
- 2) dismisses the first cause of action as asserted by Plaintiff Martin Greenberg;
- 3) dismisses the second, third, fourth, fifth and sixth causes of action as asserted against Defendant Shak;
- 4) dismisses the seventh, eighth, tenth and eleventh causes of action as asserted against Defendant Irizarry; and
- 5) dismisses the twelfth, thirteenth, fourteenth and fifteenth causes of action.

The Court also limits Plaintiffs’ claim in the ninth cause of action to the assertion of a cause of action against LPS and Shak for aiding and abetting the conversion and misappropriation of corporate assets by Malzberg, but not by Irizarry. The Court reminds counsel for Plaintiffs, and counsel for Defendants Shak, Malzberg and LPS, of their required appearance before the Court for a Preliminary Conference on July 23, 2018 at 9:30 a.m.

BACKGROUND

A. Relief Sought

Defendants Shak, SHK1 and SHK3 (collectively, the “Shak Defendants”) move for an Order, pursuant to CPLR §§ 3211(a)(1), (3), and (7), 3013 and 3016, and General Obligations Law (“GOL”) § 5-701, dismissing this action against the Shak Defendants.

Defendant LPS moves for an Order, pursuant to CPLR §§ 3211(a)(3) and (7), 3013 and 3016, dismissing this action against LPS.

Defendants Malzberg and Irizarry move for an Order, pursuant to CPLR § 3211(a)(7), 3013 and 3016, dismissing this action against Defendants Malzberg and Irizarry.

Plaintiffs Martin Greenberg (“Greenberg”), Sterling Commodities Corporation (“Sterling”) and G. Martin Associates Inc. (“GMA”) (“Plaintiffs”) oppose the motions.

B. The Parties’ Background

As noted in the Prior Order, the complaint in this action alleges as follows:

Greenberg was and is a shareholder, officer and director of Sterling and GMA. Sterling, which Greenberg founded, provides services and support to individuals and institutions transacting business on the various commodity exchanges. Shak is a commodity contracts trader who has traded and continues to trade commodity contracts on the New York Mercantile Exchange and Chicago Mercantile Exchange ("CME"). Shak was and is the sole shareholder, officer and director of Defendants SHK1, SHK Asset Management, LLC ("SHK2") and SHK3. Plaintiffs allege that Shak exercised complete control over SHK1, SHK2 and SHK3 and they were alter egos of each other. Defendant Malzberg was an officer and employee of Sterling whose duties included overseeing Sterling's daily business operations. Defendant Irizarry was an employee at Sterling and assisted Malzberg in overseeing Sterling's daily business operations. LPS is a direct competitor of Sterling, by whom Defendants Malzberg and Irizarry are now employed, and with whom Shak now trades his commodities and futures accounts.

Sterling initially provided services to its clients as a "Futures Commission Merchant" or "Clearing House" (Comp. at ¶ 44). A Clearing House solicits or accepts orders for commodity contracts traded on an exchange and holds client funds to margin.

On or about May 1, 2014, Sterling ceased providing services as a clearing house and began providing services to its trading customers as an "Introducing Broker" (Comp. at ¶ 45) which, similar to a Clearing House, solicits or accepts orders for commodity contracts traded on an exchange. Unlike a Clearing House, however, an Introducing Broker does not hold customer funds to margin. When Sterling became an Introducing Broker, it used the services of Int'l FC Stone ("FC Stone") as a clearing house for its trading customers. All clients and employees of Sterling, including Malzberg and Irizarry, were required to sign written agreements with FC Stone that contained restrictions on the dissemination of confidential information including, but not limited to, financial data and client information relating to Sterling's business operations.

Shak was a regular customer of Sterling for decades, due in large part to his reliance on Greenberg who assisted Shak in resolving problems over the years related to his trading activities. The Complaint outlines those problems (see Comp. at ¶¶ 49-65), which included enforcement actions by the United States Commodity Futures Trading Commission ("CFTC"), an independent federal agency created in 1974 to regulate commodity futures and option markets. As a result of admissions made by Shak in the CFTC enforcement actions, the CME imposed a further sanction which resulted in Shak being banned from participating in an

incentives program offered by the CME pursuant to which, *inter alia*, the CME issues rebates in the form of discounted fees to commodity contracts traders who satisfy certain minimum trading volume requirements (“CME Rebates”).

Shak asked Greenberg to advocate for him before the CME in seeking to have his CME Rebate privileges restored. In light of Shak’s past history of trading violations and being the subject of CFTC enforcement actions, Greenberg was reluctant to assist Shak because the help that Shak needed would require Greenberg to put his personal reputation at risk. To induce Greenberg to assist him in resolving this matter, on or about August 26, 2015, Shak offered, in writing, to pay Greenberg 30% of all CME Rebates which he would earn in the future, on a monthly basis, for as long as the rebates were granted to Shak by the CME (the “Agreement”), if Greenberg succeeded in persuading the CME to reinstate Shak’s rebate privileges. Greenberg accepted Shak’s offer and agreed to advocate on Shak’s behalf to the CME. Greenberg, based on his good reputation and personal relationship with members of the commodities trading industry, was able to negotiate a resolution with the CME, which resulted in Shak being granted the right to again participate in the CME Rebate program. Greenberg was required to offer his personal assurances that he would oversee Shak’s future trading activities to ensure that Shak was in compliance with all trading rules, as a condition of the restoration of Shak’s ability to participate in the Rebate program.

At or about the time that Shak’s Rebate privileges were reinstated, Greenberg assigned his rights under the Agreement to GMA, a corporation in which Greenberg is a 50% shareholder. Pursuant to the Agreement, beginning in October 2015, Shak paid 30% of the CME Rebate commissions that he received to GMA, on a monthly basis. Shak, however, has failed to make payments due under the Agreement for commissions earned since February 2017. Greenberg has demanded an accounting in accordance with the Agreement but Shak has failed to provide that accounting.

Shak, who had been a long time customer of Sterling, left Sterling in March 2017 to trade his account through LPS, who is Sterling’s direct competitor. Plaintiffs allege that the timing of Shak’s departure from Sterling is a direct consequence of a scheme orchestrated by Shak, together with Malzberg, Irizarry and LPS, to misappropriate Sterling’s clients, accounts, business assets and confidential information as to its trading practices. Greenberg previously gave Malzberg a power of attorney to act on Greenberg’s behalf in overseeing Sterling’s operations, and entrusted him with Sterling’s confidential information and trade secrets. Irizarry

was also provided with Sterling's confidential information and trade secrets, including the needs of Sterling's clients and customers, services and products. Plaintiffs allege that, on the day after their departure from Sterling on March 20, 2017, Malzberg and Irizarry went to work for LPS and, prior to their departure from Sterling, Malzberg and Irizarry had arranged for the majority of Sterling's clients and/or customers to transfer their accounts to LPS, to coincide with the date of Malzberg and Irizarry's departure from Sterling. On March 17, 2017, Sterling effectively ceased functioning as a viable commodities firm after almost 40 years of operation, as a result of the actions of Malzberg, Irizarry, Shak and LPS.

As also noted in the Prior Order, the complaint contains fifteen (15) causes of action:

- 1) against Shak, SHK1, SHK2 and SHK3 for breach of the Agreement;
- 2) against Shak, SHK1, SHK2 and SHK3 for money had and received;
- 3) against Shak, SHK1, SHK2 and SHK3 for conversion;
- 4) against Shak, SHK1, SHK2 and SHK3 for an accounting;
- 5) against Shak, SHK1, SHK2 and SHK3 for unjust enrichment based on the allegation that, by virtue of their wrongful acts and unlawful conduct, they have received monies due to Greenberg and/or GMA which they cannot in good conscience be permitted to retain;
- 6) against Shak, SHK1, SHK2 and SHK3 for a constructive trust on 30% of the CME rebates earned by Defendants that were not paid to Greenberg and GMA;
- 7) against Malzberg and Irizarry for breach of fiduciary duty/theft of corporate assets and opportunity/conversion of corporate assets/waste based on the allegation, *inter alia*, that Malzberg and Irizarry "are therefore liable pursuant to Section(s) 720 and 626 of the [BCL]" (Comp. at ¶ 168);
- 8) against Malzberg and Irizarry for intentional misconduct and mismanagement, in violation of their fiduciary duties to Plaintiffs as set forth in BCL §§ 720 and 626 based on the allegation, *inter alia*, that Malzberg and Irizarry "are therefore liable pursuant to Section(s) 720 and 626 of the [BCL]" (Comp. at ¶ 174);
- 9) against LPS, Shak, SHK1, SHK2 and SHK3 for aiding and abetting the conversion and misappropriation of corporate assets by Malzberg and Irizarry;
- 10) against all Defendants for a constructive trust on all assets that Defendants have received or will receive in connection with monies wrongfully taken from Plaintiffs;

- 11) against all Defendants for unjust enrichment based on the allegation that Defendants Malzberg, Irizarry, LPS, Shak, SHK1, SHK2 and SHK3 have wrongfully acquired assets belonging to and/or due to Plaintiffs;
- 12) against all Defendants for tortious interference with contract based on the allegations that Malzberg, Irizarry and LPS were aware of the Agreement, intentionally procured Shak's breach of the Agreement, and the conduct of Malzberg, Irizarry and LPS was intentional, willful and malicious;
- 13) against all Defendants for tortious interference with prospective business relations;
- 14) against all Defendants for *prima facie* tort; and
- 15) a request for a preliminary injunction restraining Defendants from disposing of, or engaging in future tortious conduct with respect to, funds in their possession to which Plaintiffs are entitled.

In support of the motion by Shak, SHK1 and SHK3, counsel for moving Defendants ("Defendants' Counsel") provides a copy of the Certificate of Dissolution for SHK3 (Ex. B to Goldberg Aff. in Supp.). Defendants' Counsel submits that Plaintiffs have placed Defendants in the position of proving a negative, in that Defendant SHK Asset Management, LLC, which Plaintiffs refer to as SHK2, is an unrelated entity in which the other Defendants have no interest. Defendants' Counsel affirms that he has so advised Plaintiffs' Counsel, and affirms that he does not represent SHK2 which, upon information and belief, has not been served in this action.

C. The Parties' Positions

In the Prior Order, the Court set forth the positions of the Shak Defendants, LPS and Plaintiffs with respect to the motions by the Shak Defendants and LPS. Accordingly, the Court will not set forth those positions again, and the Court incorporates the Prior Order by reference as if set forth in full herein.

With respect to the motion by Defendants Malzberg and Irizarry, those defendants address the causes of action asserted against them, specifically the seventh, eighth, and tenth through fifteenth causes of action in the complaint (*see* Ds' Memo. of Law in Supp. at pp. 7-8). They submit that the Court should dismiss those causes of action on the grounds that 1) the seventh cause of action is not viable because BCL §§ 626 and 720 do not apply to the claims against Malzberg and Irizarry in light of the fact that a) BCL § 626, which permits shareholders to bring derivative actions under certain circumstances, is inapplicable because this is not a derivative action; and b) BCL § 720, which addresses actions against directors and officers for

misconduct, cannot apply to Irizarry because he is not an officer or director; 2) Plaintiffs have failed to plead the seventh, eighth, tenth, eleventh, thirteenth and fourteenth causes of action with the particularity required by CPLR § 3016(b) because the complaint contains no factual allegations concerning the alleged theft or conversion of Plaintiffs' customers and/or property, and conclusory allegations that Defendants abused their authority or misappropriated Plaintiffs' assets are insufficient to apprise Defendants of the improper conduct in which they allegedly engaged; 3) the tenth and eleventh causes of action, alleging unjust enrichment and constructive trust, are duplicative of the insufficient breach of fiduciary claim, lack the required particularity, and are insufficient because there is no allegation in support of the constructive trust claim that there was a transfer of property in reliance of a promise; 4) the twelfth cause of action, alleging tortious interference with contract, is legally insufficient because there is no factual support for Plaintiffs' conclusory allegation that Malzberg and Irizarry were aware of the alleged contract between Shak and Greenberg, and because there is no allegation that, but for Malzberg and Irizarry's tortious interference, the contract would not have been breached; 5) Plaintiffs have failed to state a cause of action for tortious interference with prospective business relations, the thirteenth cause of action, because a) Plaintiffs have not alleged with any particularity that Defendants used wrongful means; b) even assuming that it is true that Malzberg and Irizarry diverted customers from a former employer to a new one, economic self-interest is not malicious and cannot support this cause of action; and c) there is no allegation that, but for the actions of Malzberg/Irizarry, Plaintiffs would have entered into some specific business relationship; 6) the fourteenth cause of action, alleging *prima facie* tort, is legally insufficient because there is no allegation of special damages, or that there was no excuse or justification for the conduct, and because it is duplicative of the cause of action alleging tortious interference with Sterling's contractual and business relationships; and 7) the fifteenth cause of action, seeking permanent injunctive relief, is legally insufficient because Plaintiffs' injury, if any, is compensable by money damages.

Plaintiffs oppose the motion by Defendants Malzberg and Irizarry, submitting *inter alia* that 1) with respect to the seventh and eighth causes of action, BCL § 720 does apply to Irizarry in light of the fact that the complaint characterizes or describes Irizarry as an officer or director of Sterling, including the allegation that Irizarry "supervised and directed the day to day business operations of Plaintiff Sterling, maintained its books and records and maintained client relations on behalf of and with the trust of Plaintiff(s) GREENBERG and STERLING for almost four

decades until they both abruptly resigned on the same day, that being, March 17, 2017 (Comp. at ¶ 98); 2) to the extent that the seventh and eighth causes of action are based on BCL § 720, the particularity requirements of CPLR § 3016 are inapplicable; 3) even assuming that CPLR § 3016(b) is applicable to the seventh and eighth causes of action, they are adequately pleaded in light of Plaintiffs' allegations, *inter alia*, that Malzberg and Irizarry provided confidential information and trade secrets to LPS and Shak for the purpose of misappropriating Sterling's clients, customers, accounts and business assets, and solicited and diverted business clients and business opportunities of Sterling to LPS and Shak (see Comp. at ¶¶ 105, 107); 4) Plaintiffs have sufficiently pleaded their tenth and eleventh causes of action, for a constructive trust and unjust enrichment because a) there is no particularity requirement pursuant to CPLR § 3016 with respect to the tenth and eleventh causes of action which are not breach of fiduciary claims and do not sound in fraud, 5) the Complaint contains sufficient factual allegations pursuant to CPLR § 3013 to sustain the tenth and eleventh causes of action, including the allegation that Malzberg and Irizarry, acting in concert with Defendants LPS and the Shak Defendants, through their misconduct and illicit activities, for their own interests and unjust enrichment, wrongfully diverted assets and other property belonging to Plaintiffs (see Comp. at ¶¶ 187, 195); 6) Plaintiffs have also sufficient alleged that, with respect to the tenth and eleventh causes of action, there is no remedy at law due to the uncertainty of valuing the confidential information, trade secrets and other property that Malzberg and Irizarry allegedly misappropriated from Plaintiffs (see Comp. at ¶ 190); 7) Plaintiffs have sufficiently pleaded their thirteenth cause of action, alleging tortious interference with prospective business relations, including the element of wrongful means which is satisfied by the multiple allegations in the Complaint regarding Defendants' breach of their fiduciary duties; and 8) Plaintiffs have sufficiently their cause of action for injunctive relief, including the element of irreparable injury in light of Plaintiffs' allegation that, without injunctive relief, Sterling and Greenberg will incur an irreparable injury for which there is no adequate remedy at law (see Comp. at ¶ 218).

In reply, Malzberg and Irizarry submit *inter alia* that 1) Plaintiffs do not contest Defendants' assertion that BCL § 626 is inapplicable to this action; 2) BCL § 720 does not apply to Irizarry in light of the fact that there is no allegation that he was an officer or director of Sterling, unlike their allegations regarding Malzberg which include the allegation that Malzberg, prior to his recent departure, held the position of Sterling's Senior Vice President; and 3) there is no merit to Plaintiffs' assertion that CPLR § 3016(b) is inapplicable to the constructive trust

claim, and such an assertion is contrary to CPLR § 3016(b) which requires particularization when a plaintiff's claims are based on fraud or breach of fiduciary duty.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

A motion to dismiss a cause of action pursuant to CPLR § 3211(a)(1) may be granted only if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d at 957, citing *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945 (2d Dept. 2014), quoting *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63 (2012).

B. Relevant Causes of Action

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach. *El-Nahal v. FA Management, Inc.*, 126 A.D.3d 667, 668 (2d Dept. 2015) citing, *inter alia*, *Dee v. Rakower*, 112 A.D.3d 204, 208-209 (2d Dept. 2013).

The elements of a claim for money had and received are 1) the defendant received money belonging to the plaintiff; 2) the defendant benefitted from receipt of the money; and 3) under principles of equity and good conscience, the defendant should not be permitted to keep the money. *Matter of Estate of Witbeck*, 245 A.D.2d 848(3rd Dept. 1997), quoting 22A N.Y. Jur. 2d Contracts, § 520 at 244. Where there is an express contract between the parties, an action for money had and received does not lie. *Fesseha v. TD Waterhouse Investors Services, Inc.*, 305 A.D.2d 268, 269 (1st Dept. 2003), citing *Phoenix Garden Rest. v. Chu*, 245 A.D.2d 164, 166 (1st Dept. 1999); *Yeterian v. Heather Mills*, 183 A.D.2d 493, 494 (1st Dept. 1992).

A conversion takes place when defendant, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. *Colavito v. Organ Donor Network*, 8 N.Y.3d 43, 49-50 (2006). The two key elements of conversion are 1) plaintiff's possessory right or interest in the property, and 2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights. *Id.* at 50. A cause of action for conversion cannot be predicated on a mere breach of contract. *Fesseha v. TD Waterhouse Investor Services, Inc.*, 305 A.D.2d 268, 269 (1st Dept. 2003), citing *Yeterian v. Heather Mills N.V.*, 183 A.D.2d 493, 494 (1st Dept. 1992).

The right to an accounting is premised on the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking an accounting has an interest. *Dee v. Rakower*, 112 A.D.3d 204, 214 (2d Dept. 2013), citing *Lawrence v. Kennedy*, 95 A.D.3d 955, 958 (2d Dept. 2012), quoting *Palazzo v. Palazzo*, 121 A.D.2d 261, 265 (1st Dept. 1986).

The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in good conscience should be paid to the plaintiff. *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012), *rearg. den.*, 19 N.Y.3d 937 (2012), citing *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011), quoting *Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y.2d 415, 421 (1972), *reh. den.*, 31 N.Y.2d 709 (1972), *cert. den.*, 414 U.S. 829 (1973). Unjust enrichment is not a catchall cause of action to be used when others fail. Rather, it is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. *Corsello*, 18 N.Y.3d at 790. An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim. *Id.* at 790-791 citing, *inter alia*, *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388-389 (1987). Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated. *Mandarin Trading*, 16 N.Y.3d at 182 citing *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215 (2007).

The necessary elements for the imposition of a constructive trust are: 1) a confidential or fiduciary relationship, 2) a promise, 3) a transfer in reliance on that promise, and 4) unjust enrichment. *Maiorino v. Galindo*, 65 A.D.3d 525 (2d Dept. 2009), citing *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 (1976).

A party claiming tortious interference with contractual relations must establish the following elements: 1) the existence of a valid contract with a third party, 2) defendants' knowledge of the contract, 3) defendants' intentional procurement of the third party's breach of the contract without justification, 4) actual breach of the contract, and 5) damages resulting therefrom. *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (1996). The plaintiff must specifically allege that the contract would not have been breached but for the defendant's conduct. *Ferrandino & Son, Inc. v. Wheaton Bldrs., Inc.*, 82 A.D.3d 1035, 1036 (2d Dept. 2011), quoting *Burrowes v. Combs*, 25 A.D.3d 370, 373 (1st Dept. 2006) (internal quotation marks omitted). Although on a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim, a plaintiff must support his claim with more than mere speculation. *Ferrandino*, 82 A.D.3d at 1036, quoting *Burrowes v. Combs*, 25 A.D.3d at 373.

To state a cause of action to recover damages for tortious interference with prospective contractual relations, the plaintiff must allege that the defendant engaged in culpable conduct that interfered with a prospective contractual relationship between the plaintiff and a third party. *Adler v. 20/20 Companies*, 82 A.D.3d 915, 918 (2d Dept. 2011), citing *Smith v. Meridian Techs., Inc.*, 52 A.D.3d 685 (2d Dept. 2008). As a general rule, such culpable conduct must amount to a crime or an independent tort, and may include wrongful means, defined as physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure. Mere knowing persuasion would be insufficient. *Adler v. 20/20 Companies*, 82 A.D.3d at 918, quoting *Lyons v. Menoudakos & Menoudakos, P.C.*, 63 A.D.3d 801, 802 (2d Dept. 2009) (internal citations omitted). Actions intended to solicit business, which are motivated by economic self-interest, cannot be characterized as malicious. *Tri-Star Light. Corp. v. Goldstein*, 151 A.D.3d 1102, 1107 (2d Dept. 2017), citing *Nassau Diagnostic Imaging & Radiation Oncology Assoc. v. Winthrop-University Hosp.*, 197 A.D.2d 563, 564 (2d Dept. 1993).

To demonstrate entitlement to a preliminary injunction under CPLR § 6301, the movant must demonstrate a probability of success on the merits, the danger of irreparable harm in the absence of an injunction, and a balance of the equities in favor of granting the injunction. *Matter of Advanced Digital Security Solutions, Inc. v. Samsung Techwin Co., Ltd.*, 53 A.D.3d 612, 613 (2d Dept. 2008) citing *Matter of K.W.F. Realty Corp. v. Kaufman*, 16 A.D.3d 688, 689-90 (2d Dept. 2005); *Olabi v. Mayfield*, 8 A.D.3d 459 (2d Dept. 2004).

The elements of a claim for breach of fiduciary duty are: 1) existence of a fiduciary relationship, 2) misconduct, and 3) damages directly caused by the wrongdoer's misconduct. *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 A.D.3d 664 (2d Dept. 2008); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007). Directors and officers of a corporation, in the performance of their duties, stand in a fiduciary relationship to their corporation. As such, they owe the corporation their undivided loyalty and may not, without consent, divert and exploit for their own benefit any opportunity that should be deemed an asset of the corporation. *Morales v Galeazzi*, 72 A.D.3d 765, 766 (2d Dept. 2010), quoting *Yu Han Young v. Chiu*, 49 A.D.3d 535 (2d Dept. 2008) (citations and internal quotation marks omitted).

A cause of action for aiding and abetting a breach of fiduciary duty requires a showing of a fiduciary duty owed to plaintiff by another, a breach of that duty, defendant's substantial assistance in effecting the breach, together with resulting damages. *Keystone Int'l v. Suzuki*, 57 A.D.3d 205, 208 (1st Dept. 2008). Although a plaintiff is not required to allege that the aider and abettor had an intent to harm, there must be an allegation that the defendant had actual knowledge of the breach of duty. *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dept. 2003). Constructive knowledge of the breach of fiduciary duty by another is legally insufficient to impose aiding and abetting liability. *Id.*

To sufficiently allege a cause of action for *prima facie* tort, a plaintiff must plead the intentional infliction of harm without justification or excuse, which results in special damages, by one or more acts which would otherwise be lawful. *Wiggins & Kopko, LLP v. Masson*, 116 A.D.3d 1130, 1131 (3d Dept. 2014) quoting *Cavanaugh v. Doherty*, 243 A.D.2d 92, 101 (3d Dept. 1998) (citation omitted). Moreover, there is no recovery in *prima facie* tort unless malevolence is the sole motive for the defendant's otherwise lawful act. *Wiggins & Kopko, LLP v. Masson*, 116 A.D.3d at 1131, quoting *Cusimano v. United Health Servs. Hosps., Inc.*, 91A.D.3d 1149, 1153 (3d Dept. 2012), *lv. den.* 19 N.Y.3d 801 (2012) (internal quotation marks and citation omitted).

BCL § 626 is the provision governing shareholders' derivative actions "brought in the right of the corporation to procure a judgment in its favor." BCL § 720 is the provision governing actions "against directors and officers for misconduct, and pursuant to BCL § 720(a), "a]n action may be brought against one or more directors or officers of a corporation to procure a judgment" for certain relief, including to compel the defendant to account for his official conduct in the event of his failure to perform his duties (*see* BCL § 720(a)(1)(A) and (B)).

C. Pleading Requirements

CPLR § 3016 (b) provides as follows:

Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

CPLR § 3016(b) provides that where a cause of action is based upon misrepresentation, fraud, breach of trust, and certain other claims the circumstances constituting the wrong shall be stated in detail. The purpose of this pleading requirement is to inform a defendant of the incidents which form the basis of the action. *Pludeman v. Northern Leasing Systems*, 10 N.Y.3d 486, 491 (2008).

D. Assignment

It is well settled that the assignee of a cause of action has the right to sue for its enforcement free from any control or interference of the assignor. *Hernandez v. Kalpakis*, 2013 N.Y. Misc. LEXIS 7117, *4 (Sup. Ct. Nassau Cty. 2014), citing *Gleason v. Northwestern Mut. Life Ins. Co.*, 203 N.Y. 507 (1911). Ordinarily, the assignee is the real party in interest who alone can bring suit. *Hernandez* at *4, citing *Wagner v. Braunsberg*, 5 A.D.2d 564 (1st Dept. 1958). That is, the assignor generally has no right to sue and it is only in cases where the assignor retains some protectable interest in the subject of the assignment and the assignee refuses or neglects to bring suit to recover the claim, that the assignor is permitted to bring an action. *Hernandez* at *4-5, citing *Foster v. Central Nat. Bank*, 183 N.Y. 379 (1906).

E. Piercing the Corporate Veil

Generally, a corporation exists independently of its owners, who are not personally liable for the corporation's obligations. Moreover, individuals may incorporate for the express purpose of limiting their liability. *East Hampton v. Sandpebble*, 66 A.D.3d 122, 126 (2d Dept. 2009), *aff'd* 16 N.Y.3d 775 (2011), citing *Bartle v. Home Owners Coop.*, 309 N.Y. 103, 106 (1955) and *Seuter v. Lieberman*, 229 A.D.2d 386, 387 (2d Dept. 1996). The concept of piercing the corporate veil is an exception to this general rule, permitting, under certain circumstances, the imposition of personal liability on owners for the obligations of their corporations. *East Hampton*, 66 A.D.3d at 126, citing *Matter of Morris v. N.Y.S. Dept. Of Taxation*, 82 N.Y.2d 135, 140-41 (1993).

A plaintiff seeking to pierce the corporate veil must demonstrate that a court should intervene because the owners of the corporation exercised complete domination over it in the

transaction at issue. Plaintiff must further demonstrate that, in exercising this complete domination, the owners of the corporation abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that caused injury to plaintiff. *East Hampton*, 66 A.D.3d at 126, citing, *inter alia*, *Love v. Rebecca Dev., Inc.* 56 A.D.3d 733 (2d Dept. 2008). In determining whether the owner has “abused the privilege of doing business in the corporate form,” the Court should consider factors including 1) a failure to adhere to corporate formalities, 2) inadequate capitalization, 3) commingling of assets and 4) use of corporate funds for personal use. *East Hampton*, 66 A.D.3d at 127, quoting *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016-1017 (2d Dept. 2007).

F. Application of these Principles to the Instant Action.

The Court grants the motions to the extent that the Court

- 1) dismisses the complaint in its entirety as asserted against the SHK entities;
- 2) dismisses the first cause of action as asserted by Plaintiff Martin Greenberg;
- 3) dismisses the second, third, fourth, fifth and sixth causes of action as asserted against Defendant Shak;
- 4) dismisses the seventh, eighth, tenth and eleventh causes of action as asserted against Defendant Irizarry; and
- 5) dismisses the twelfth, thirteenth, fourteenth and fifteenth causes of action.

The Court also limits Plaintiffs’ claim in the ninth cause of action to the assertion of a cause of action against LPS and Shak for aiding and abetting the conversion and misappropriation of corporate assets by Malzberg, but not by Irizarry.

The Court so rules based on its conclusion that

- 1) as a result of his assignment of the Agreement, Greenberg no longer has standing to enforce that Agreement;
- 2) the second, third and fifth causes of action are duplicative of the first cause of action, alleging breach of contract, because Plaintiffs allege that there is a contract governing the parties’ dispute which resulted when “Shak offered, in writing, to pay Plaintiff Greenberg thirty (30%) per cent of all CME Rebates which he would earn in the future, on a monthly basis, for as long as the rebates were granted to Defendant Shak by the CME” (Comp. at ¶ 66) and Greenberg accepted Shak’s offer;

- 3) the Complaint as alleged against the SHK entities is legally insufficient because there are insufficient non-conclusory allegations supporting Plaintiffs' efforts to breach the corporate veil and hold those entities, which were not parties to the Agreement, liable;
- 4) the accounting cause of action (fourth) and constructive trust cause of action (sixth) are not viable because, even assuming that there is a fiduciary relationship between Greenberg and Shak, it is Greenberg, not Shak, who is the fiduciary and, therefore, there is no operative fiduciary relationship to support those causes of action;
- 5) the seventh and eighth causes of action as asserted against Irizarry are legally insufficient because BCL § 626 is inapplicable to this action, which is not a derivative action, and BCL § 720 is inapplicable to Irizarry who was not an officer or director of Sterling;
- 6) it is appropriate to limit Plaintiffs' claim in the ninth cause of action to the assertion of a cause of action against LPS and Shak for aiding and abetting the conversion and misappropriation of corporate assets by Malzberg, but not by Irizarry, in light of the Court's determination that the seventh and eighth causes of action are viable only against Malzberg;
- 7) the tenth cause of action, seeking a constructive trust, and the eleventh cause of action, alleging unjust enrichment, are insufficient as asserted against Irizarry in light of the Court's conclusion that Plaintiffs have not established that Irizarry owed a fiduciary duty, or had a sufficiently close relationship to Plaintiffs, that would support these claims;
- 8) the twelfth and thirteenth causes of action, alleging tortious interference with contract and with prospective business relations, are insufficient because the factual assertions in the Complaint do not support Plaintiffs' allegation that the conduct comprising tortious interference with contract was "intentional, willful and malicious" (Comp. at ¶ 201), and because there are only conclusory allegations of culpable conduct which are insufficient to support the cause of action for tortious interference with prospective business relations;
- 9) the fourteenth cause of action, for *prima facie* tort, is legally insufficient because malevolence was not the sole motive for Defendants' otherwise lawful acts; and

- 10) the fifteenth cause of action, seeking an injunction, is legally insufficient because Plaintiffs cannot establish irreparable injury, as any injury suffered by Plaintiffs is compensable by money damages.

In light of the foregoing, the remaining causes of action in the Complaint are the following:

- 1) the first cause of action, as asserted by GMA,
- 2) the seventh and eighth causes of action as asserted against Defendant Malzberg,
- 3) the ninth cause of action as asserted against LPS and Shak, for aiding and abetting the conversion and misappropriation of corporate assets by Malzberg, and
- 4) the tenth and eleventh causes of action as asserted against Shak, Malzberg and LPS.

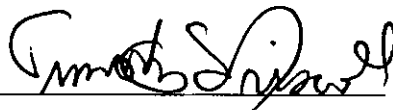
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for Plaintiffs, and counsel for Defendants Shak, Malzberg and LPS, of their required appearance before the Court for a Preliminary Conference on July 23, 2018 at 9:30 a.m.

ENTER

DATED: Mineola, NY
June 18, 2018


HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
JUN 19 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE