SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:
HON. MARY H. SMITH
JUSTICE OF THE SUPREME COURT

COTTAGE INTERNATIONAL DEVELOPMENT GROUP, LLC, BLUE REAL ESTATE HOLDING, LLC and THOMAS CONNEALLY,

Plaintiff(s),

-against-

TIMOTHY FINNERAN, SHANNON & HUDSON, LLC, KIMBALL I LTD and KIMBALL II LTD,

Defendant(s).

DECISION & ORDER

Action No. 1
Index No.: 52808/2015

TIMOTHY FINNERAN, KIMBALL I LTD., KIMBALL II LTD., and SHANNON & HUDSON, LLC,

Plaintiff(s),

-against-

THOMAS J. CONNEALLY, COTTAGE INTERNATIONAL DEVELOPMENT GROUP LLC, COTTAGE FUND I, L.P., BLUE REAL ESTATE HOLDING, LLC, CIDG LLC, COTTAGE DEVELOPMENT SERVICES LLC, COTTAGE EQUITIES LLC, COTTAGE FUND I ADVISORS, LLC, COTTAGE FUND I MANAGEMENT, LLC, COTTAGE LAND & ACQUISITION, LLC, COTTAGE LIVING, LLC, COTTAGE MANAGEMENT SERVICES LLC, COTTAGE REALTY SERVICES LLC, 185 RIVERDALE AVENUE LLC, 185 RIVERDALE CIDG LLC, 185 RIVERDALE MANAGERS LLC, 25 NORTH BROADWAY LLC, HIGHLAND CLIFFS LLC, COTTAGE CONSTRUCTION LTD., GLENMAN CONSTRUCTION

Action No. 2
Index No.: 68299/2017

CORPORATION and GLENMAN INDUSTRIAL &
COMMERCIAL CONTRACTOR CORE.,

Defendant(s).

This non-jury trial emanates from a personal, ongoing battle between two real estate developers, pitting the same two men as plaintiffs and the same two men as defendants against each other. At trial, for approximately three weeks (April to May 2019), the Court heard multiple charges of duplicity, double dealing, and betrayal against each other from two intractable, but otherwise personable litigants. The decision from the Court necessarily encompasses the recitation of the background and procedural history, followed by the Court's findings after trial.

BACKGROUND AND PROCEDURAL HISTORY

In or about 2006, Thomas Conneally (Conneally) began work on a project to develop a large apartment building on an assemblage of certain tax lots located at or near 1219 Yonkers Avenue, Yonkers, New York (Project). In or about 2008, Conneally obtained a line of credit with non-party Cathay Bank with a view to using the proceeds to obtain all of the lots for the Project. Conneally acquired six of the lots (Initial Parcels) through plaintiff Blue Real Estate Holding LLC (Blue RE), which was an entity wholly owned/controlled by Conneally.

On March 4, 2013, Cathay Bank commenced an action against, among others, Conneally and Blue RE to foreclose the line of credit on the Initial Parcels in Westchester Supreme Court under index number 52801/2013 (Foreclosure Action).

On or about June 18, 2013, Blue RE entered into a contract of sale with non-party Chiu Sam Kwan (Kwan) to purchase another tax lot (Kwan Parcel), which was envisioned as part of the Project.

On December 20, 2013, pursuant to the action for non-payment brought by Cathay Bank against Conneally, a judgment of foreclosure and sale was entered in the Foreclosure Action in the principal amount of $2,213,762.62. In response, on January 3, 2014, Blue RE commenced a bankruptcy proceeding in the U.S. Bankruptcy Court for the Southern District of New York under petition number 14-22007 (Bankruptcy Proceeding).

On or about January 18, 2014, Conneally entered into a non-disclosure agreement (NDA) with defendant Shannon & Hudson, LLC (S&H), which is an entity wholly owned/controlled by Timothy Finneran (Finneran). The NDA provided that Conneally intended to provide certain information to S&H regarding his plans to raise funding for certain real estate enterprises and that S&H, if retained, intended to provide certain information, analyses, recommendations, client and investor introductions, and advice to assist Conneally with his efforts to raise funding for these enterprises. The NDA defined "Confidential Information," but provided, among other things, that restrictions on such information would not apply to information that was publicly known at the time of the disclosure to S&H or becomes publicly known through no fault of S&H subsequent to the time of the disclosure. The term of the NDA was eighteen months, but provided that the non-disclosure obligations would continue for one year with respect to Confidential Information received prior to the expiration or termination of the NDA.

On March 27, 2014, the U.S. Bankruptcy Court for the Southern District of New York granted the motion of Cathay Bank to terminate the bankruptcy stay so that it could proceed with the Foreclosure Action. The foreclosure sale was then scheduled for June 6, 2014 (Foreclosure Sale).

On April 30, 2014, Conneally and Finneran entered into a consulting agreement (Consulting Agreement). Under the Consulting Agreement, Finneran and S&H were to provide fundraising services to Conneally and his related entities, including plaintiff Cottage International Development Group LLC for a term of six months after which the parties were to determine whether to sever ties or continue the relationship. The Consulting Agreement also contained a confidentiality provision, which, among other things, incorporated the NDA and precluded either party from pursuing the "contacts" of the other for a period of two years following the termination of the agreement. The term "contacts" is not expressly defined in the Consulting Agreement or in the NDA.

On May 30, 2014, Conneally and two related entities executed and delivered a promissory note to Finneran in the amount of $131,500.00; payable upon demand. On June 4, 2014, Conneally and two related entities executed and delivered a second promissory note (collectively, the Promissory Notes) to Finneran in the amount of $55,000.00; payable upon demand.[1] Conneally and Finneran subsequently decided to use approximately $160,000 of these funds, as well as additional monies supplied by Finneran in the amount of approximately $39,000.00, in order to bid on the Initial Parcels at the

[1] On August 19, 2014, Finneran commenced an action in Westchester County Supreme Court under index number 63199/2014 against Conneally and two related entities to collect on the Promissory Notes. On March 23, 2015, a judgment in the amount of $218,470.85 was entered against Conneally and the two related entities.

Foreclosure Sale. On June 6, 2014, Finneran made the winning bid at the Foreclosure Sale, in the name of S&H. However, the parties were not able to close on this purchase and obtained extensions from Cathay Bank. Finneran paid for the fees associated with these extensions.

On July 24, 2014, Finneran sent a letter to Conneally, notifying him that he was terminating the Consulting Agreement and set forth various reasons therefor.

In or about October 2014, Finneran, through defendant Kimball II, Ltd. (Kimball II), entered into an agreement to purchase the Kwan Parcel and, through defendant Kimball I, Ltd. (Kimball I) entered into an agreement to purchase a nearby lot occupied by a derelict movie theater (Movie Theater Parcel). The parties deemed both of these lots as necessary to move the Project forward. The agreement relating to the Kwan Parcel contained a provision that made it subject to approval of the bankruptcy court in the Bankruptcy Proceeding. On November 17, 2014, Kwan filed a motion for relief from the bankruptcy stay. On January 26, 2015, the bankruptcy court dismissed the Bankruptcy Proceeding. On January 28, 2015, Kwan set the closing for February 12, 2015. Counsel for Blue RE attempted to adjourn the closing without success. On February 12, 2015, Kwan appeared at the scheduled closing and Blue RE did not. On February 13, 2015, Kwan canceled the contract with Blue RE.

KWAN ACTION

On February 18, 2015, Blue RE commenced an action in Westchester County Supreme Court under index number 52154/2015, seeking a declaration that the June 2013 contract for the purchase of the Kwan Parcel was valid and binding and an injunction

barring Kwan from selling, transferring title or disposing of the Kwan Parcel (Kwan Action). On February 24, 2015, Blue RE and Kwan appeared in court and Blue RE represented that it was ready willing and able to close the sale on February 27, 2015. The Court (per Hon. William J. Giacomo, J.S.C.) stayed any sale to Kimball II until February 27, 2015. On February 26, 2015, Kimball II filed an order to show cause to intervene in the Kwan Action and for specific performance of its contract of sale with Kwan. On February 26, 2015, Blue RE, Kwan, and Kimball II appeared in court and Blue RE's counsel stated on the record that Blue RE could not close on the Kwan Parcel on February 27, 2015. At that time, the Court (per Hon. William J. Giacomo, J.S.C.) cancelled the contract and denied Blue RE's application to stay the sale of the Kwan Parcel until the resolution of the Kwan Action. Kimball II then withdrew its order to show cause. On February 27, 2015, Blue RE filed an amended complaint seeking $10,000,000 in damages against Kimball II and Finneran for tortiously interfering with its contract with Kwan and for a conspiracy among the defendants to sell the Kwan Parcel to Kimball II. Blue RE also filed a notice of pendency on the Kwan Parcel. On March 30, 2015, Kwan moved to vacate the notice of pendency and impose sanctions, which the Court (per Hon. William J. Giacomo, J.S.C.) granted on July 7, 2015, immediately vacating the notice of pendency and setting the matter down for a hearing on the proper amount of sanctions. On November 27, 2015, the Court (per Hon. Nicholas Colabella, JHO) dismissed the Kwan Action when the parties failed to appear at a scheduled conference.

ACTION NO. 1

On February 26, 2015, Conneally, Blue RE, and Cottage commenced an action in Westchester County Supreme Court under index number 52808/2015 (Action No. 1) against Finneran and Finneran's three wholly owned/controlled companies (that is, S&H, Kimball I, and Kimball II). In Action No. 1, the complaint alleges two claims against Finneran and his related entities. The first claim is for breach of a non-disclosure agreement and consulting agreement, which has allegedly "caused damage to plaintiff as defendants have caused third parties to enter into and bid up prices on the properties and prevent plaintiffs from completing the assemblage of the properties within The Project." The second claim alleges that defendants, "as consultants to plaintiff under the consulting agreement owed plaintiff a fiduciary duty." The second claim also alleges that "[d]efendants' actions in asserting ownership over the Cathay Auction Properties was a direct contravention to the agreements between the parties and constitutes a breach of defendants' duty of loyalty to plaintiffs." The second claim further alleges that defendants had, without proper authorization, revealed the Project to third-parties and had "commenced negotiations with the owners of two properties that are part of [t]he Project but that are not within the Cathay Auction Parcels." The second claim then alleges that defendants' "breach of the duty of loyalty to plaintiff has caused damages to plaintiffs." Subsequently, the parties engaged in discovery. On March 20, 2018, plaintiffs filed a note of issue. Thereafter, defendants moved for summary judgment. On January 17, 2019, the Court (per Hon. Gerald E. Loehr, J.S.C.) granted the motion as to the third cause of action, which alleged tortious interference with contract relating to Finneran's efforts, through

Kimball I and Kimball II to acquire the Kwan Parcel and the Movie Theater Parcel, and otherwise denied the motion.

CONCLUSION OF THE PROJECT FOR CONNEALLY AND FINNERAN

In or about May 2015, subsequent to the commencement of Action No. 1, Cathay Bank refused to provide any further extensions on the closing of the Initial Parcels. On May 22, 2015, a second foreclosure sale was conducted on the Initial Parcels; non-party Titan Capital ID, LLC was the highest bidder; effectively ending the efforts of Conneally and Finneran regarding the Project. In its motion for a deficiency judgment in the Foreclosure Action, Cathay Bank outlines the monies, in addition to the initial down payment of $199,000.00, which were paid by S&H. From July 2014 through March 2015, S&H paid Cathay Bank $560,000.00 to obtain extensions on the closing of the Initial Parcels. These payments, among others, reduced the resulting deficiency judgment against Conneally and several companies owned/controlled by Conneally from $1,014,106.49 to $343,515.44.

ACTION NO. 2

On October 31, 2017, Finneran, S&H, Kimball I, and Kimball II commenced an action (Action No. 2) against Conneally and a number of other entities owned/controlled by Conneally. In Action No. 2, the complaint alleges eight causes of action. The first is for fraud relating to various representations allegedly made by Conneally to Finneran regarding the Project. The second is for fraudulent concealment relating to various material facts allegedly withheld or omitted by Conneally to Finneran relating to the Project. The third is for breach of contract, which alleges that Conneally failed to make any payments

as provided for in the Consulting Agreement. The fourth is for tortious interference with contract, which alleges that Conneally tortiously interfered with Finneran's contracts to purchase the Kwan Parcel and the Movie Theater Parcel. The fifth is for tortious interference with contract, which alleges that Conneally tortiously interfered with Finneran's agreements with an architectural firm and an engineering firm to perform work on the Project. The sixth is for tortious interference with contract, which alleges that Conneally tortiously interfered with Finneran's agreements with Cathay Bank regarding the extension of the closing on the Initial Parcels. The seventh is for tortious interference with prospective economic advantage, which alleges that Conneally's actions and inactions tortiously inhibited Finneran's ability to complete the Project. The eighth is for account stated, which alleges that Finneran sent invoices for services rendered under the Consulting Agreement from January 19, 2014 through July 24, 2014.

TRIAL OF ACTION NO. 1 AND ACTION NO. 2

In April of this year, these two actions were joined for a bench trial. At trial, any and all Court efforts to effectuate a settlement were rejected by both sides. Once commenced, the trial extended for approximately three weeks from April 1, 2019 to May 1, 2019. Both Conneally and Finneran testified for days at a time and submitted numerous exhibits into evidence in an effort to support the various claims against one another.[2]

The evidence disclosed that Conneally, Blue RE, and Cottage initiated the Project in or about 2006. Conneally testified that it was his hope that the Project would stimulate

[2] Although Conneally and Finneran operated through corporate entities at various times throughout the events that are the subject of this action, the Court finds that, in the end, the matters set forth herein were essentially always between Conneally and Finneran and thus are generally addressed in this fashion.

interest from many commercial real estate financiers, despite its estimated completion costs of four to six million dollars, primarily due to its proximity to mass transit and various highways and its expected rental marketability to New York City commuters. Conneally testified that the final assemblage of property when fully developed was appraised to be worth twelve million dollars.

Conneally testified that over the years he had hired an architectural firm and an engineering firm to file various paperwork with the City of Yonkers for permits and had traffic studies completed on the impact of the Project on the neighborhood. Conneally testified that he obtained various parcels necessary for the Project and had contracts of sale for two other parcels necessary for the Project. In sum, Conneally testified that he invested approximately six million dollars in his effort to bring the Project to fruition.

However, the evidence also revealed many obstacles to the completion of the Project, prior to Conneally's engagement with Finneran. For example, the evidence showed that Conneally was largely only able to acquire the various parcels associated with the Project by obtaining large mortgages, which then became the subject of the Foreclosure Action. In addition, although Conneally possessed contracts of sale for the Kwan Parcel and the Movie Theater Parcel, these contracts lingered for years without closing. Furthermore, Conneally needed to obtain an easement through a parking lot owned by the State of New York as a secondary means of ingress and egress to the eventual premises. Moreover, the assemblage of parcels included land contaminated with pollutants (Environmental Issues), with its incumbent uncertainty as to rehabilitation and looming costs. Although Conneally had applied for and was later approved for a federal grant to

address this contamination through New York's Brownfield Cleanup Program, this aspect of the Project could not move forward until Conneally could close on all the individual parcels, which by the end of 2013, appeared increasingly unlikely that he could do without additional financial assistance.

For this, Conneally turned to Finneran. Finneran, who had formerly been a banker experienced in the financing of real estate ventures, could be of real assistance in raising money, Conneally believed. Conneally testified that, in January 2014, he took on Finneran as an unpaid consultant for the purpose of raising a $2.4 million fund to address the debt owed to Cathay from the Foreclosure Action. In January 2014, Conneally and Finneran entered into the NDA and in April 2014, Conneally and Finneran entered into the Consulting Agreement.

Although Finneran did not bring in any investment money between the signing of the Consulting Agreement and June 6, 2014, he appeared to work diligently and was busy contacting his former banking clients with a view to obtaining financing for the Project. On May 30, 2014 and June 4, 2014, Finneran loaned Conneally a total of $186,500.00, evidenced by the Promissory Notes.

On June 6, 2014, the Cathay Bank Foreclosure Sale was held. That day, Conneally held checks for $160,000.00, which represented a portion of the loans from Finneran (monies specifically earmarked for other business projects). That morning, however, Conneally asked Finneran to bid on the Initial Parcels in Finneran's name and to further lend $39,000.00 for the total amount of $199,000.00. Conneally testified he felt he had no choice because the day before the Foreclosure Sale, on June 5, 2014, Titan Capital, a

purported "committed" financier who had promised Conneally $3.5 million dollars to buy the Initial Parcel mortgaged by Cathay Bank, suddenly backed out due to concerns about the Environmental Issues. In addition, Conneally told Finneran that he could not risk making a down payment bid in his own name due to the fact that several of his companies were the subject of bankruptcy proceedings and that such a bid could open inquiry about the source of the money. Thus, Conneally was essentially deceiving the bankruptcy court and using Finneran and Finneran's money to do it. There seems no dispute that without the Initial Parcels, the Project could not be completed.

The Court did not find Conneally to be generally credible. Throughout his testimony, the Court put numerous questions to Conneally, which he frequently evaded or, if he did not, he would then contradict his answer by later testimony or conduct. For instance, Conneally told the Court that, under the NDA, Finneran was required to get potential financial investors for the Project to sign an NDA, which Finneran would bring back to Conneally. Conneally repeatedly promised to produce these returned NDAs. He never did. In addition, the conduct of Conneally in the Kwan Action for which he was sanctioned by the Court (Hon. William J. Giacomo, J.S.C.) reinforced the Court's lack of confidence in Conneally's credibility during the trial.

For the reasons set forth above, and after reviewing the evidence at trial, the Court makes the following findings regarding Conneally's claims.

As to Conneally's first claim for breach of the NDA and Consulting Agreement, the Court finds in favor of Finneran. In order to recover damages for a claim for breach of contract, a plaintiff must demonstrate the existence of a contract, plaintiff's performance

thereunder, defendant's breach thereof, and that the plaintiff sustained "actual damages as a natural and probable consequence of the defendant's breach" (*Vil. of Kiryas Joel v County of Orange*, 144 AD3d 895, 896 [2d Dept 2016], internal quotation marks omitted).

Here, once Finneran won the bid for the Initial Parcels at the Foreclosure Sale, the evidence is clear that Finneran had every intention of assuming control over the Project, though not necessarily to the exclusion of Conneally as evidenced by their ongoing cooperation. However, after so many years, much of the information that Conneally had put together for the Project was publicly known, as reflected in the longstanding filings for permits with the City of Yonkers (in 2014, soon to expire) and with other public agencies. As noted above, the NDA specifically provided that information that was publicly known would not be considered "Confidential Information" under the NDA and thus Finneran could disclose it without violating the NDA. In the presentation of his case, Conneally failed to demonstrate what Confidential Information, as opposed to publicly known information, Finneran improperly disclosed and how such disclosure damaged Conneally. In addition, Conneally failed to demonstrate that Finneran "pursued any contact" of Conneally's, which resulted in damage to Conneally. In short, although there may have been violations of the NDA and the Consulting Agreement, Conneally has entirely failed to establish those violations or that he suffered actual damages resulting from Finneran's breaches of the parties' agreements by a fair preponderance of the evidence.

Paragraph 9 of NDA provides that "the prevailing party in any action brought regarding a dispute hereunder or to enforce the provisions of this Agreement will be entitled to recover actual attorney fees and court costs in addition to the other forms of

relief that it may be entitled to." The Second Department has explained that "[t]o be considered a prevailing party, a party must be successful with respect to the central relief sought" (*Fatsis v 360 Clinton Ave. Tenants Corp.*, 272 AD2d 571, 571 [2d Dept 2000]). In making this determination, the Court must consider "the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope" (*DKR Mortg. Asset Tr. 1 v Rivera*, 130 AD3d 774, 776 [2d Dept 2015], internal quotation marks omitted). Although the Court found that Conneally had failed to establish his breach of contract claim under the NDA, the Court does not find Finneran to be the prevailing party, as none of the evidence before the Court exonerated him on this claim.

As to Conneally's second claim for breach of the duty of loyalty,[3] the Court finds in favor of Finneran. "It is well settled that an employee owes a duty of good faith and loyalty to an employer in the performance of the employee's duties" (*Wallack Frgt. Lines, Inc. v Next Day Express, Inc.*, 273 AD2d 462, 463 [2d Dept 2000]). An employer bringing a claim for a breach of this duty may seek damages by way of profit disgorgement or as "a calculation of what the employer would have made of the diverted corporate opportunity is an available measure of damages" (*see Gomez v Bicknell*, 302 AD2d 107, 114 [2d Dept 2002]). The latter remedy is limited to situations where the employer has a "tangible expectancy" in the opportunity, which is something less than ownership, but something

[3] At one point in its prior order, dated January 17, 2019, the Court (per Hon. Gerald E. Loehr, J.S.C.) characterized Conneally's second cause of action as one for the breach of the covenant of good faith and fair dealing. This is not what is alleged by Conneally, who never moved to amend the complaint to incorporate this claim. Regardless, Conneally failed to demonstrate by a fair preponderance of the evidence that Finneran's conduct, which although not expressly forbidden by the NDA or the Consulting Agreement, nevertheless deprived Conneally of the right to receive the benefits under these agreements (*see P.T. & L. Contr. Corp. v Trataros Const., Inc.*, 29 AD3d 763, 764 [2d Dept 2006]).

more than mere desire or hope (*see Morales v Galeazzi*, 72 AD3d 765, 766 [2d Dept 2010]; *Alexander & Alexander of New York, Inc. v Fritzen*, 147 AD2d 241, 247-48 [1st Dept 1989]).

Here, whether Conneally is seeking profit disgorgement or diversion of corporate opportunity (a fact not clear from the complaint), Conneally has failed to establish by a preponderance of the evidence that he is entitled to recover under either theory. Conneally failed to present any evidence that Finneran profited in any way from the alleged breach of his duty of loyalty. Conneally also failed to demonstrate that he possessed a tangible expectancy in acquiring the Initial Parcels or the Kwan Parcel or the Movie Theater Parcel. The Court finds that, by the time of the signing of the NDA and the Consulting Agreement and certainly by the date of the Foreclosure Sale, Conneally had nothing more than the mere desire to acquire the parcels necessary to complete the Project.

For the reasons set forth above, and after reviewing the evidence at trial, the Court makes the following findings regarding Finneran's claims.

As to Finneran's first claim for fraud and the second claim for fraudulent concealment, the Court finds in favor of Conneally. In order to sustain a cause of action for fraud, a plaintiff must establish by clear and convincing evidence (*see Felder v Storobin*, 100 AD3d 11, 16 [2d Dept 2012]) that the defendant made "a misrepresentation or omission of material fact which the defendant knew was false, that the misrepresentation was made to induce the plaintiff's reliance, the plaintiff's justifiable reliance on the misrepresentation or material omission, and a resulting injury" (*Hense v Baxter*, 79 AD3d

814, 816 [2d Dept 2010]). In such a case, "[d]amages are limited to actual loss, [and are] not to provide compensation for a possible gain" (*id.*).

Here, Finneran described himself as an experienced banker in real estate; as such he should have possessed the wherewithal to investigate the economic viability of Conneally's companies. Although he had not made real estate investments himself in the past, he knew many companies and clients who had. The Court finds it incredible that Finneran had no inkling of the extent of Conneally's economic distress during the period between January 2014 and the date of the Foreclosure Sale. The Foreclosure Action was a matter of public record as was the Bankruptcy Proceeding. Moreover, within one month of signing the Consulting Agreement, Finneran was loaning money to Conneally as evidenced by the Promissory Notes. In his post-trial brief, Finneran asserts that Conneally asked Finneran to bid at the Foreclosure Sale "for undisclosed reasons." Even assuming that all of the previous warning signals had gone unnoticed by Finneran, the Court finds it incredible that Finneran would not have fully apprehended the extent of Conneally's economic troubles by this request. Failing that, like anyone else, Finneran must suffer the consequences of not performing his due diligence or seeing what any reasonable person would have seen. Based hereon, the Court finds that Finneran has failed to establish by clear and convincing evidence that Conneally made any misrepresentations or omissions of material fact and, to the extent that he did, Finneran could not have justifiably relied thereon.

As to Finneran's third claim for breach of the Consulting Agreement, the Court finds that Finneran has established by a fair preponderance of the credible evidence that he is owed $3,000.00 under the Consulting Agreement. Finneran never received any payment

from Conneally for anything. At the very least, Finneran is owed the $1,500.00 up-front payment for signing the Consulting Agreement on April 30, 2014 and one month's salary of $1,500.00 for May 2014, with interest to run on this amount from May 31, 2014. On June 6, 2014, Finneran he took title of the Initial Parcels and the parties' relationship was fundamentally altered, resulting in Finneran's purported termination of the Consulting Agreement on July 24, 2014. The Court finds no basis to award any amounts to Finneran under the Consulting Agreement for June 2014 and July 2014.

Finneran's fourth, fifth, and sixth claims are for tortious interference with various contracts. The fourth relates to Finneran's contracts for the Kwan Parcel and the Movie Theater Parcel, the fifth relates to Finneran's agreements with an architectural firm and an engineering firm, and the sixth relates to Finneran's agreements with Cathay Bank. As to each of these claims, the Court finds in favor of Conneally. "The elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages" (*Nagan Const., Inc. v Monsignor McClancy Mem. High School*, 117 AD3d 1005, 1006 [2d Dept 2014].

As to the fourth claim, Finneran entirely failed to establish that Conneally procured the breach of any party in connection with Finneran's contracts for the Kwan Parcel or the Movie Theater Parcel. As to the fifth claim, Finneran entirely failed to establish that he actually entered into any such agreements or that Conneally intentional procured the breach of those firms. As to the sixth claim, it is clear that Conneally did try to interfere with

Finneran's dealings with Cathay Bank; specifically, in connection with Finneran's requests for extensions to close on the Initial Parcels. However, Finneran entirely failed to establish that Finneran had a contract with Cathay Bank and that Conneally intentionally procured Cathay Bank's breach of that contract. Regardless, Finneran has not proved to the Court's satisfaction that Conneally's attempted interference with Finneran's dealings with Cathay Bank was a substantial factor in causing Cathay Bank to decline another extension to close on the Initial Parcels.

As to Finneran's seventh claim for tortious interference with prospective economic advantage, the Court finds in favor of Conneally. In order to prevail on a claim for tortious interference with prospective business advantage, a plaintiff must demonstrate that, "(a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship" (*N. State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 21 [2d Dept 2012], internal quotation marks omitted). To constitute "wrongful means," the defendant must have engaged in physical violence, fraud or misrepresentation, commenced or caused to be filed frivolous civil suits or criminal prosecutions, and, in some instances, economic pressure (*see Law Offices of Ira H. Leibowitz v Landmark Ventures, Inc.*, 131 AD3d 583, 586 [2d Dept 2015]; Restatement [Second] of Torts § 767 [1979], Comment on Clause [a]).

Here, the Court initially notes that there was no credible evidence that Conneally undertook a course of action with the sole purpose of harming Finneran. However, as noted above, the Court (per Hon. William J. Giacomo, J.S.C.) did find that Conneally's filing of

a notice of pendency was frivolous and merited the imposition of sanctions. Although Finneran submitted some evidence that certain investors remained interested in the Project at the time that Conneally filed the disputed notice of pendency in the Kwan Action, Finneran failed to "submit evidence that there was 'a reasonable certainty' that a contract would have been entered into but for [Conneally's] interference" (*Long Is. Univ. v Grucci For Congress, Inc.*, 10 AD3d 412, 413 [2d Dept 2004]).

As to Finneran's eighth claim for account stated regarding his claim for $102,437.50 for compensation for work performed, the Court finds in favor of Conneally. A claim for account stated is an agreement between the parties and may be based on an express agreement or may be implied based on their prior transactions (*see Citibank, N.A. v Abraham*, 138 AD3d 1053, 1056 [2d Dept 2016]).

Here, as noted above, the Court found that Conneally owes $3,000.00 to Finneran based on the express terms in the Consulting Agreement. At trial, invoices for $102,437.50 were submitted, wherein Finneran asserted that Conneally owed Finneran for 421.75 hours worked from January 19, 2014 to May 8, 2014 at a rate of $250.00 per hour and $3,000.00 in unpaid retainer fees. Nothing in the NDA or in the Consulting Agreement supports Finneran's assertion that Conneally ever agreed to this arrangement and the Court heard no credible testimony that Conneally had agreed to this arrangement. Although Finneran sent Conneally this invoice and Conneally did not respond, the Court does not find that this constitutes an admission by Conneally as to an amount due nor does it amount to credible proof that such amount is justified.

As stressed throughout this decision, neither Conneally nor Finneran has succeeded in proving their damages. This was a speculative project as evidenced by the numerous "commitment letters" from potential investors proffered first by Conneally and then by Finneran. None of these investments came to fruition for either party. The obstacles to success of the Project were myriad, which began with the parties' inability to obtain clear title to all the necessary parcels in the assemblage. Beyond this, there were the Environmental Issues, which worried some lenders (such as Titan Capital), and the need to obtain an easement from the State of New York (*see supra* at 7) which concerned other lenders (such as Daniel Houlihan of Houlihan & O'Malley). Further, during all times relevant to this action, neither party possessed the financial wherewithal to move the Project to completion. In the end, this Project, in the hands of Conneally and Finneran, simply proved to be not bankable, as Mr. Houlihan testified. Neither party is liable to the other for the failure of the Project.

The foregoing constitutes the decision and order of the Court. The parties are directed to submit a proposed judgment to the Court within 30 days hereof.

Dated: August 19, 2019
White Plains, New York

HON. MARY H. SMITH
Justice of the Supreme Court