At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 3rd day of SEPTEMBER, 2020

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

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ANGEL MARTINEZ, individually and derivatively on Behalf of DERMALUXE LASER SPA INC.,

Plaintiff,

-against-

DERMALUXE LASER SPA INC., MARIA INZHIM and BORIS INZHIM,

Defendants,

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Index No.: 524134/2019
Decision and Order

After having heard Oral Argument on July 10, 2020 and upon review of the submissions herein the court finds as follows:

Defendants move pursuant to (a) CPLR 3211(a)(3) to dismiss the complaint alleging the plaintiff does not have standing or capacity to bring this action as he is not a shareholder or officer of the defendant corporation; (b) Dismissing this action pursuant to CPLR 3211(a)(8) as the Complaint was defectively served according to the affidavits of service, which indicate service on September 19, 2019, over a month prior to the filing of the action on November 5, 2019; — later amended to November 22, 2019 — and because certified mailing of the pleadings were not sent until 60 days after such service, and for other substantial violations of the requirements of CPLR 308 (2) and (4); (c) Pursuant to CPLR §3211(a)(1) and (a)(7) dismissing the First (Breach of

Contract) Cause of Action in Complaint as documentary evidence establishes plaintiff was never party to a contract between the parties nor a shareholder or officer in the Corporation; (d) Pursuant to CPLR §3211(a)(7) and (a)(1) dismissing the Second (Breach of Fiduciary Duty) and Fifth (Aiding and Abetting a Breach of Fiduciary Duty) Causes of Action in plaintiff's Complaint for failure to state a claim upon which relief can be granted since plaintiff has no standing to assert such claims as he was not a shareholder or officer of the Corporation; and (e) Pursuant to CPLR §3211(a)(7) and (a)(1) dismissing the Fourth (Prima Facie Tort) and Sixth (Unjust Enrichment) Causes of Action in plaintiff's Complaint for failure to state a claim upon which relief can be granted since plaintiff has no basis for such claims and such claims are duplicative of a breach of contract claim; and; (f) Pursuant to CPLR §3211(a)(7) dismissing the Third Cause of Action (Accounting) as no prior demand was made and such is a remedy, not a claim, which only available to shareholders, and Plaintiff is not a shareholder in the Corporation; and; (g) Dismissing all claims as against the individual defendants, members of the Corporation as there is no valid cause of action against any individual defendant in this action and therefore no legal reason to pierce the corporate veil; and; (h) Dismissing this action as the Complaint is defective with multiple errors in the caption; different dates on the documents; different law firms listed; and; (i) transferring this action to a Court of lesser jurisdiction pursuant to CPLR 325(d), as the total amount in controversy is less than $25,000 according to the Complaint; and; (j) Pursuant to CPLR §3211(c), treating this motion as one for summary judgment, granting such relief and dismissing all claims with prejudice as a matter of law as there exists no issue of fact. (MS#1). Plaintiff opposes the same. Plaintiff cross-moves for and order pursuant to

CPLR 3215, entering a default judgment against Defendants. (MS#2). Defendant opposes the same.

ANALYSIS

Pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We 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 (*Morone v. Morone*, 50 NY2d 481, 484, 429 NYS2d 592, 413 NE2d 1154; *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 634, 389 NYS2d 314, 357 NE2d 970). **"The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"** (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17; *Rovello v. Orofino Realty Co.*, 40 NY2d at 636, 389 NYS2d 314, 357 NE2d 970). **"[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion"** (*Palazzolo v. Herrick, Feinstein, LLP*, 298 AD2d 372, 751 NYS2d 401). When a party, usually the defendant, moves for a motion to dismiss, it is asking the court to make that determination instead. "Courts are not infallible. In undertaking such a task, a court should be mindful to prevent errors which could result in the dismissal of a worthy claim, even if it means risking an unworthy claim proceeding to trial. In other words, it must err on the side of the plaintiff..." *Poolt v. Brooks*, 38 Misc. 3d 1216(A), 967 NYS2d 869 (Sup Ct 2013). The determination to be made on a motion to dismiss is not whether there is a claim but whether the plaintiff has stated one. **"Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims ... plays no part in**

the determination of a pre-discovery 3211[a][7] motion to dismiss" (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP,* 38 AD3d 34, 38; *see EBC I, Inc. v. Goldman Sachs & Co.,* 5 NY3d 11, 19). **"A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint, "conclusively establishing a defense as a matter of law"** (Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190); *quoting, Endless Ocean, LLC v. Twomey, Latham, Shea, Kelley, Dubin & Quartararo,* 113 AD3d 587, 588, 979 NYS2d 84, 87 (2 Dept 2014)

In the present case, the defendant have established by documentary evidence that plaintiff does not have standing to sue for relief requested, there is no valid claim for relief stated in the Complaint. Annexed to defendants motion (MS#1) as Exhibit "C" is a copy of the New York State Department of State filing certificate for the corporation and pages from the only tax filing, 2018, which shows the shareholders as only MARIA INZHIN (50%) and BORIS INZHIN (50%). Further, plaintiff admits he never signed any "paperwork" (Exhibit "A", paragraph 55). To prevail on a breach of fiduciary duty claim, plaintiffs must show "an actual, existing fiduciary relationship between the plaintiff and the defendants at the time of the alleged breach" (*Omnicare, Inc. v. NCS Healthcare, Inc.,* 809 AD2d 1163, 1169 [Del.Ch. 2002], *appeal dismissed in part, revd. in part* 818 AD2d 914 [Del. 2003]). Thus, for example, a director who has resigned or has been terminated no longer owes fiduciary duties to the company (*see Dionisi v. DeCampli,* 1995 WL 398536, *8–10, 1995 Del.Ch. LEXIS 88, *21–28 [Del.Ch. 1995]; *In re Walt Disney Co. Derivative Litig.,* 907 AD2d 693, 758 [Del.Ch. 2005], *affd.* 906 A.2d

27 [Del. 2006]); *quoting,* Schroeder v. Pinterest Inc., 133 AD3d 12, 23, 17 NYS3d 678, 687 (2015). In the present case the plaintiff has not alleged any fiduciary relations between the plaintiff and the defendants at any time. Therefore, this cause of action must be dismissed. In the present case, the complaint does not allege any of the essential elements of a cause of action to recover damages for breach of contract, to wit: the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages (*see Agway, Inc. v. Curtin*, 161 AD2d 1040, 1041, 557 NYS2d 605; *Furia v. Furia*, 116 AD2d 694, 695, 498 NYS2d 12). The plaintiff does not allege a contract with the defendants existed. All legal claims, including breach of contract, breach of fiduciary duty, aiding and abetting breach of fiduciary duty and demand for an accounting must be dismissed as plaintiff MARTINEZ admits he is not a shareholder and therefore he cannot demand such relief (Exhibit "A", paragraph 55). In addition to the certificate of incorporation demonstrating plaintiff is not a shareholder, annexed to the moving papers are the affidavits of BORIS INZHIM and MARIA INZHIM said affidavits of personal knowledge detail and confirm that plaintiff ANGEL MARTINEZ is not a shareholder, investor or officer in the LLC, and never has been. Therefore, all causes of action except the Seventh Cause of Action for Unjust Enrichment and the cause of action for Prima Facie Tort must be dismissed on the basis of documentary evidence.

The remaining cause of action for Unjust Enrichment must also be dismissed as the elements of the claim are not met. "A claim for unjust enrichment under New York law is an equitable claim not derived from a real contract but from a "quasi-contract." *Gidatex v. Campaniello Imports, Ltd.,* 49 F. Supp. 2d 298, 301 (SDNY 1999). "The

essence of unjust enrichment is that one party has received money or a benefit at the expense of another" (*City of Syracuse v R.A.C. Holding, Inc.*, 258 AD2d 905, 906, 685 NYS2d 381; *see also, Nakamura v. Fujii,* 253 AD2d 387, 677 NYS2d 113; *Cohn v. Rothman–Goodman Mgt. Corp.*, 155 AD2d 579, 547 NYS2d 881); *quoting Wolf v. Nat'l Council of Young Israel*, 264 AD2d 416, 417, 694 NYS2d 424, 425–26 (1999). Unjust enrichment is a quasi-contract theory of recovery, and "is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142, 879 NYS2d 355, 907 NE2d 268 [2009]). The plaintiff must show that the other party was enriched, at plaintiff's expense, and that "it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 182, 919 NYS2d 465, 944 NE2d 1104 [2011] [internal quotation marks and citation omitted]). Further, "although privity is not required for an unjust enrichment claim (Sperry v. Crompton Corp., 8 N.Y.3d 204, 215, 831 N.Y.S.2d 760, 863 N.E.2d 1012 [2007]), a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part" (*Mandarin Trading*, 16 NY3d at 182, 919 NYS2d 465, 944 NE2d 1104). Courts in New York have held that "an unjust enrichment claim can only be sustained if the services were performed at the defendant's behest" (*Ehrlich v. Froehlich*, 72 AD3d 1010, 1011, 903 NYS2d 400 [2010]; *Seneca Pipe & Paving Co., Inc. v. South Seneca Cent. School Dist.*, 63 AD3d 1556, 880 NYS2d 807 [2009]; *Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108, 744 NYS2d 384 [2002]; *Kagan v. K–Tel Entertainment*, 172 AD2d 375, 376, 568 NYS2d 756

[1991]). The Court of Appeals in Mandarin Trading held that **"the plaintiff was unable to establish an unjust enrichment claim where the "pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement"** (*Mandarin Trading*, 16 NY3d at 182, 919 NYS2d 465, 944 NE2d 1104); *Georgia Malone & Co. v. Ralph Rieder*, 86 AD3d 406, 408, 926 NYS2d 494, 497 (2011), *aff'd sub nom. Georgia Malone & Co. v. Rieder*, 19 NY3d 511, 973 NE2d 743 (2012). In the present case, the record reflects that the plaintiff did not have any interactions or relationship with the defendants in this case. In the present case, the defendant company is at best, an innocent third-party beneficiary of the funds acquired by Ms. Betancur from Mr. MARTINEZ for her own personal gain. (*Dormitory Auth. of the State of N.Y. v. Samson Constr. Co.*, 30 NY3d 704 (2018).) There is no claim in the complaint that Ms. Betancur intended this investment to be on behalf of Mr. MARTINEZ. "[A] third party may sue as a beneficiary on a contract made for [its] benefit. However, an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts" *(Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 655 [1976] [citations omitted]). Furthermore, "it is not enough that the "defendant received a benefit from the activities of the plaintiff[s]; if services were performed at the behest of someone other than the defendant, the plaintiff[s] must look to that person for recovery" (*see, Kagan v. K–Tel Entertainment, Inc.*, 172 AD2d 375, 376, 568 NYS2d 756; *quoting Schuckman Realty, Inc. v. Marine Midland Bank*, N.A., 244 A.D.2d 400, 401, 664 NYS2d 73, 74–75 (1997).

Finally, the remaining claim of "Prima Facie Tort" will be addressed. It is well settled that prima facie tort is not designed to "provide a catch-all alternative for every

cause of action which cannot stand on its legs'" (*Kickertz v New York Univ.*, 110 AD3d 268, 277 [1st Dept 2013], *quoting Bassim v Hassett*, 184 AD2d 908, 910 [3d Dept 1992]). Here, plaintiff makes this claim in the alternative of the legal and equitable claims. In the present case, the "plaintiff does not identify or itemize with any specificity the special damages he allegedly suffered that are encompassed within the prima facie tort claim" (*Britt v. City of New York*, NY Slip Op 051154 (1st Dept. 2017); *see Phillips v New York Daily News*, 111 AD3d 420, 421 [1st Dept 2013]). As such this cause of action must also be dismissed for failure to state a cause of action.

As to plaintiff's motion for default against the defendants, plaintiff has informed the court that they withdraw said motion during oral argument, motion sequence #2.

Accordingly, defendant motion to dismiss for lack of standing is hereby granted, for the reasons stated above. (MS#1). Plaintiff motion for a default judgment is hereby deemed withdrawn, for the reasons stated above. (MS#2).

Dated: Brooklyn, New York
September 3, 2020

HON. RICHARD VELASQUEZ

So Ordered
Hon. Richard Velasquez

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