

**Gateway Intl. 360, LLC v Richmond Capital Group,
LLC,**

2021 NY Slip Op 30219(U)

January 19, 2021

Supreme Court, New York County

Docket Number: 654636/2018

Judge: Shawn T. Kelly

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHAWN TIMOTHY KELLY PART IAS MOTION 57

Justice

-----X

GATEWAY INTERNATIONAL, 360, LLC, HARPER ZARKER,

Plaintiff,

INDEX NO. 654636/2018

MOTION DATE 11/17/2020

MOTION SEQ. NO. 019

- v -

RICHMOND CAPITAL GROUP, LLC, GTR SOURCE, LLC, MZEED, INC. D/B/A MEGA CAP FUNDING, ORANGE ACH, LLC, MICHELLE GREGG, TSVI DAVIS, JONATHAN BRAUN,

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 019) 516, 517, 518, 519, 520, 521, 522, 540, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 592, 595

were read on this motion to/for DISMISS

Upon the foregoing documents, it is

Defendants GTR Source, LLC ("GTR"), Orange ACH, LLC ("Orange") and Tsvi Davis ("Davis) (collectively, "Defendants") move to dismiss Plaintiffs' Gateway International 360, LLC's ("Gateway") and Harper Franklin Zarker, Jr.'s ("Zarker") (collectively, "plaintiffs") Amended Complaint pursuant to CPLR §3211(a)(7) for failure to state a claim upon which relief can be granted. Plaintiffs' Amended Complaint alleges nine causes of action: (1) Breach of GBL § 349 against all defendants; (2) Fraudulent Inducement against, inter alia, GTR and Orange; (3) Breach of Contract against, inter alia, Davis, GTR and Orange; (4) Breach of the Implied Covenant of Good Faith and Fair Dealing against Davis; (5) Negligence against Davis; (6) Fraud against, inter alia, GTR and Orange; (7) Civil Conspiracy against all defendants; (8) Conversion against, inter alia, GTR and Orange; and (9) Unjust Enrichment/Money Had and Received against all defendants.

Background

Plaintiffs allege various forms of purported wrongdoing by defendants in connection with certain Merchant Cash Advance (“MCA”) agreements, pursuant to which plaintiffs borrowed money from the defendant entities and, in turn, plaintiff Gateway provided the defendant entities with access to its accounts receivable in order to repay the borrowed funds. Specifically, plaintiffs allege the existence of a fraudulent scheme among closely related “merchant cash advance” companies which share the same address and personnel. The scheme involves luring plaintiffs into paying off advances from one defendant at a purported “discount” from the amount that would have been due over time with the expectation of a larger cash advance on better terms from another defendant that would satisfy the initial advance as well as plaintiffs’ other debts. Plaintiffs contend that the larger advance would not be made, and plaintiffs would be left with mounting unpaid debts as defendants reaped a quick and substantial return from plaintiffs’ first cash advance. Plaintiffs would then be worse off than before taking the original advance. Plaintiffs seek to recover damages incurred as a result of this alleged fraudulent scheme.

Analysis

On a CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true” (*Alden Global Value Recovery Master Fund, L.P. v KeyBank National Association*, 159 AD3d 618, 621-22 [2018]). In addition, “on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff” (*Id.* at 622). However, vague and conclusory allegations cannot survive a motion to dismiss (*see, Kaplan v Conway and Conway*, 173 AD3d 452, 452-53 [2019]; *D. Penguin*

Brothers Ltd. v City National Bank, 270 NYS3d 192, 192 [2018] [noting that “conclusory allegations fail”]; *R & R Capital LLC, et al., v Linda Merritt*, 68 AD3d 436, 437 [2010]).

The criterion for establishing whether a complaint should be dismissed pursuant to §3211(a)(7) is “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Foley v D’Agostino*, 21 AD2d 60, 64-65 [1964]). Whether the pleader will ultimately be able to establish the allegations in the pleading is irrelevant to the determination of a motion to dismiss pursuant to CPLR §3211(a)(7) (see *EBC I, Inc., v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001][motion must be denied if “from [the] four corners [of the pleadings] factual allegations are discerned which taken together manifest any cause of action cognizable at law”]).

First Cause of Action- Breach of General Business Law §349

The first cause of action is breach of General Business Law §349 (herein “GBL”) against all defendants. New York GBL §349 prohibits “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service” in New York State (see *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 55–56, 720 NE2d 892 [1999]). Defendants contend that the vague allegations advanced by plaintiffs are insufficient to state a GBL §349 claim. Defendants further argue that the alleged consumer-oriented conduct was limited to just the parties and did not involve the purchase of goods or services for personal use. In opposition, plaintiffs argue that they have pled sufficient allegations to support a claim for breach of GBL §349.

To state a claim under the statute, a plaintiff must allege that the defendant has engaged “in an act or practice that is deceptive or misleading in a material way and that plaintiff has been

injured by reason thereof” (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25, 647 NE2d 741 [1995]). As a threshold matter, plaintiffs claiming the benefit of section 349, whether individuals or entities, must allege conduct on the part of defendant that is consumer oriented. Consumer oriented conduct does not require a repetition or pattern of deceptive behavior, nor does it require recurring conduct. Plaintiff must demonstrate that the acts or practices have a broader impact on consumers at large (*Benetech, Inc. v Omni Fin. Group, Inc.*, 116 AD3d 1190, 1190 [2014]). Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute (*see, e.g., Genesco Entertainment v Koch*, 593 F Supp 743, 752 [1984]).

Plaintiffs argue that the present matter affects the public interest in New York because the defendants are based in New York, their contracts are governed by the State of New York, and their confessions on judgments are filed in New York State Courts before being domesticated around the country. These allegations are not adequate to demonstrate that defendants’ actions are consumer-oriented and therefore, defendants’ motion as to the first cause of action is granted.

Second Cause of Action- Fraudulent Inducement and Sixth Cause of Action- Fraud

The second cause of action is Fraudulent Inducement and the sixth cause of action is Fraud as against defendants GTR Source (herein “GTR”), and Orange ACH, LLC (herein “Orange”), as alter egos. This cause of action is not asserted against Davis.

Plaintiffs’ sixth cause of action for fraud is asserted against GTR and Orange based on the alleged intentional misrepresentations that (i) if Gateway paid the balances owed to RCG, GTR, and MZeed early, Gateway would receive \$725,000 from Orange., (ii) all other MCA debts, totaling \$421,000, would be paid in full directly from the proceeds of the larger MCA

financing, and (iii) that Gateway would receive \$304,000 in liquid capital after all of the MCA debt was paid in full (Amended Complaint ¶85-116).

When a plaintiff brings a cause of action based upon fraud, “the circumstances constituting the wrong shall be stated in detail” (CPLR §3016 [b]). “The purpose of section 3016 (b)'s pleading requirement is to inform a defendant with respect to the incidents complained of.” thus. “[w]e have cautioned that section 3016 (b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud” (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]). What is “[c]ritical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action.” and although under CPLR §3016 (b) “the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud” (*id.* at 492). “Necessarily, then, section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct” (*id.*). The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages (*Eurycleia Partners, LP v Seward & Kissel. LLP*, 12 NY3d 553 [2009]).

Further, the elements of a fraudulent inducement or misrepresentation claim are: (1) the defendant made a false representation of fact, (2) the defendant had knowledge of the falsity, (3) the misrepresentation was made in order to induce the plaintiff's reliance, and (4) there was justifiable reliance on the part of the plaintiff resulting in an injury for which compensable damages are sought (*see Connaughton v Chipolte Mexican Grill*, 29 NY3d 137, 142 [2017]; *McSpedon v Levine*, 158 AD3d 618, 620 [2d Dept 2018]; *Mariano v Fiorvante*, 118 AD3d 961, 962 [2d Dept 2014]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]).

Giving plaintiffs the benefit of every inference, the complaint states a cause of action for fraudulent inducement and fraud, by alleging that defendants knowingly misrepresented a present fact in order to induce plaintiffs to enter into the agreement (*see GoSmile, Inc. v Levine*, 81 AD3d 77, 81, 915 NYS2d 521 [1st Dept 2010], *lv. dismissed* 17 NY3d 782, 929 NYS2d 83 [2011]; *Rossetti v Ambulatory Surgery Ctr. of Brooklyn, LLC*, 125 AD3d 548, 549, 5 NYS3d 373, 375 [2015]). The fraudulent inducement claim is not duplicative of the fraud claim or the breach of contract claim. Courts have consistently held that allegations, such as the type plaintiffs have outlined, are sufficient to state a cause of action for fraud in the inducement (*522 Realty, LLC v. Heurtelou*, No. 523175/2018, 2020 WL 3124239, at *2–3 [2020]; *Caboara v Babylon Cove Development*, 82 AD3d 1141, 1142 [2d Dept 2011]; *Bhandari v Ismael Leyva Architects*, 84 AD3d 607, 608 [1st Dept 2011]; *Bd. of Managers of Marke Gardens Condominium v 240/242 Franklin Ave LLC*, 71 AD3d 935, 936 [2d Dept 2010]).

Finally, damages for fraud are calculated according to the “out-of-pocket” rule and must reflect “the actual pecuniary loss sustained as the direct result of the wrong” (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421, 646 NYS2d 76, [1996]). Plaintiffs have properly alleged their damages, but even if they had not, the issue of damages in connection with a fraudulent inducement claim is a question of fact that cannot be resolved on a motion to dismiss (see *Ambac Assurance Corp. v Countrywide Home Loans, Inc.*, 179 AD3d 518 [2020]). Accordingly, defendants’ motion to dismiss the second and sixth cause of action is denied.

Alter Ego/Piercing the Corporate Veil and Presumption of Imputation

Plaintiffs allege that GTR and Orange (and RCG and MZeed) deceived the public by portraying themselves as competing unaffiliated entities when they are really alter-egos of each other because they share the same owners, personnel, office, phone numbers, assets, and

commingle funds. Plaintiffs contend that Orange does not advance funds but is a shell company used to incentivize early repayment to GTR (and RCG and Mzeed). Further, plaintiffs contend that RCG, GTR, and MZeed each offered plaintiffs MCA financing codified in three (3) separate MCA contracts dated July 26, 2018 that were offered and emailed to plaintiffs by defendant Braun using the alias "Jack Snyder". Pursuant to each of the July 26, 2018 agreements, RCG, GTR, and MZeed were each required to deliver \$30,000, \$90,000 total, in exchange for the receivables purchased, \$44,970 per each contract, or \$134,910 total. Plaintiffs performed their obligations pursuant to the agreement by selling \$44,970 worth of Gateway's receivables at a discounted price, executing the MCA Agreements, the ACH authorizations, and the COJs that secured each. Plaintiffs allege that RCG, GTR, and MZeed materially breached the agreements by delivering only \$21,002 each, or \$63,006 total, almost 30% less than the purchase price. Plaintiffs suffered damages because they did not receive the benefit of the bargains (Amended Complaint ¶76-107).

The doctrine of piercing the corporate veil is typically employed by a party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 183 AD2d 5, 588 NYS2d 927 [Court of Appeals 1993]; *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 432 NYS2d 879 [1980]; *Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 389 NYS2d 327 [1976]). The doctrine is equitable in nature and the piercing of the corporate veil does not constitute an independent cause of action, but is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners (*see Matter of Morris*, 183 AD2d 5).

Piercing of the corporate veil is dependent on the specific facts and equities, but generally requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff, which resulted in plaintiff's injury (*see Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 997 NYS2d 67 [2014]; *Matter of Morris*, 183 AD2d 5). The theory of piercing the corporate veil involves a fact intensive inquiry that is not well suited for determination prior to discovery (*see Gardner v Yanko*, No. 600606/09, 2011 WL 3565829 [2011]; *Ledy v Wilson*, 38 AD3d 214, 214 [1st Dept 2007]; *Kralic v Helmsley*, 294 AD2d 234, 235-36 [1st Dept 2002]; *International Credit Brokerage Co. Inc. v Agapov*, 249 AD2d 77, 78 [1st Dept 1998]).

In the present case, plaintiffs allege that GTR and Orange are liable for the actions of Braun, as he acted as their agent/representative. Specifically, plaintiffs contend that through the presumption of imputation, GTR and Orange can be held liable for Braun's illegal acts. Agency law presumes imputation even where the agent acts less than admirably, exhibits poor business judgment, or commits fraud (*see e.g. Price v Keyes*, 62 NY 378, 384-385 [1875]). A manager's misconduct within the scope of their employment may be imputed onto the corporation that employs such person as their agent (*see e.g. Wight v BankAmerica Corp.*, 219 F.3d 79, 86-87 [2d Cir.2000])[under "fundamental principle(s) of agency," managers' misconduct within the scope of their employment is imputed and "bars a trustee from suing to recover for a wrong that he himself essentially took part in"]. Viewing the complaint in a light most favorable to plaintiffs, the allegations sufficiently support plaintiffs' assertions that the GTR and Orange are alter ego corporations and that Braun's conduct should be imputed to them.

Third Cause of Action- Breach of Contract

The third cause of action set forth in the Amended Complaint is for breach of contract against Davis as non-party World Global Capital, LLC's (herein "WGC") alter ego and, also, GTR and Orange as alter egos of each of the other defendants.

Plaintiffs allege that Davis should be held liable as the alter ego of WGC. Plaintiffs have previously alleged that Davis is the managing member of WGC, which is a subsidiary of Yellowstone Capital, LLC ("Yellowstone"), one of the largest merchant cash advance funding companies in the United States. Plaintiffs original complaint asserted the same causes of action as contained in the Amended Complaint as against WGC. Subsequently, Plaintiffs settled with WGC. Defendants contend that unless the WGC settlement contained a specific exception as to Davis's liability, plaintiffs cannot allege a breach of contract claim as against Davis (*see e.g. Ballon v Guane Coach Corp.*, 78 AD3d 608, 608 [1st Dept 2010][release granted to one party acts as a release of that party's alter egos]; *ePlus Group, Inc. v SNR Denton LLP*, No. 114208/11, 2014 WL 4430347 [2014]). Plaintiffs have alleged that the settlement with WGC contained any sort of exclusion as to Davis, nor do they disagree that Davis was an employee as a managing member of WGC. Accordingly, the breach of contract claim is dismissed as against Davis as barred by the plaintiffs' settlement with WGC.

The elements of a breach of contract claim are "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 AD3d 425, 426 [1st Dept 2010]). Taken in the light most favorable to plaintiffs, the allegations contained in the Amended Complaint are sufficient to support a breach of contract cause of action as against GTR and Orange.

Defendant also argues that the fraud claims are duplicative of the breach of contract claim. However, “[a] fraud based cause of action is duplicative of a breach of contract claim ‘when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract’ ” (*Manas v VMS Associates, LLC*, 53 AD3d 451, 454 [1st Dept 2008], quoting *First Bank of the Americas v Motor Car Funding*, 257 AD2d 287, 291 [1st Dept 1999]). The allegations set forth in the Amended Complaint are sufficient to support both a breach of contract cause of action and allegations of fraud, independent of the breach of contract, as against GTR and Orange. Accordingly, defendants’ motion to dismiss the third case of action is granted as to Davis and denied as to GTR and Orange.

Fourth Cause of Action- Breach of the Implied Covenant of Good Faith and Fair Dealing against Davis

Plaintiffs have asserted a claim for breach of the covenant of implied faith and fair dealing against Davis. They contend that an implied covenant of trust and confidence is inherent in business dealings, including the WGC/Gateway transaction. Further, plaintiffs state that implicit in the WGC Agreement was a covenant to safeguard plaintiffs’ confidential personal information which plaintiffs state WGC recognized by having a “Privacy of Information” clause in its contract. Plaintiffs allege that they reasonably relied on an implied provision in the WGC Agreement that neither it, nor its members, would act in bad faith and that plaintiffs’ personal and confidential information would not be misused, misappropriated, and/or shared with third parties without plaintiffs’ authority or consent. Plaintiffs argue that it is irrelevant that Davis was not a signatory to the contract as the intent of the contract was to bind all individuals working for or on behalf of WGC.

In opposition, defendants contend that plaintiffs have failed to allege a claim for breach of the implied covenant of good faith and fair dealing against Davis because said claim is based upon Davis' alleged acts and omissions on behalf of WGC, which is no longer a party in this case, which precludes plaintiffs from suing Davis individually as an agent of WGC. Additionally, defendants argue that plaintiffs' claim is also fatally flawed because (a) the implied covenant of good faith and fair dealings arises solely in connection with contracts, and Davis is not personally a party to any contract at issue in this action and (b) this cause of action is duplicative of Plaintiffs' claim for breach of contract, and must therefore be dismissed.

As discussed, in regard to the breach of contract claim, without any specific exclusion as to Davis's liability, the settlement of plaintiffs with WGC precludes a cause of action for breach of implied covenant of good faith and fair dealing. Accordingly, plaintiffs' fourth cause of action for breach of implied covenant of good faith and fair dealing is dismissed.

Fifth Cause of Action- Negligence against Davis

Plaintiffs fifth cause of action is negligence as to Davis, as an individual. Plaintiffs contend that Davis had, and still has, a duty to Mr. Zarker and Gateway to protect confidential information he obtained while employed at WGC and as a member, and that Davis disclosed plaintiffs' information to Braun which caused harm to Plaintiffs. In opposition, defendants contend that the negligence cause of action should be dismissed because (a) it is duplicative of their claim for breach of contract and (b) it is asserted against Davis in his capacity as WGC's agent, and, in light of the dismissal of WGC with prejudice, it cannot be maintained against Davis individually. Plaintiffs' negligence cause of action stems from Davis's actions as a member of WGC. As discussed, plaintiffs have not asserted any exclusion in the settlement with

WGC in regard to Davis, and as such, the settlement precludes plaintiffs' claims of negligence. Accordingly, defendants' motion to dismiss the fifth cause of action is granted.

Seventh Cause of Action- Civil Conspiracy

The seventh cause of action is Civil Conspiracy against all defendants. Defendants' motion to dismiss as to the seventh cause of action, civil conspiracy, is granted. New York does not recognize an independent cause of action for conspiracy to commit fraud (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457 [1st Dept 2011]) "While a plaintiff may allege, in a claim of fraud or other tort, that parties conspired, the conspiracy to commit a fraud or tort is not, of itself, a cause of action" (see *MBF Clearing Corp. v Shine*, 212 AD2d 478, 479 [1995], citing *Brackett v Griswold*, 112 NY 454 [1889]). Given that civil conspiracy is not an independent tort, it cannot have its own independent measure of damages; any damages attributable to plaintiff's conspiracy claim exists only within those damages that may be assessed for fraud" (*id.*). Accordingly, defendants' motion to dismiss as to civil conspiracy is granted.

Eighth Cause of Action- Conversion

The eighth cause of action is conversion as against GTR and Orange as alter egos. A conversion takes place when someone, 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 New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]). Two key elements of conversion are (1) plaintiff's possessory right or interest in the property (*Pierpoint v Hoyt*, 260 NY 26 [1932]; *State v Seventh Regiment Fund*, 98 NY2d 249, 259 [2002]) and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights (*Employers' Fire Ins. Co. v Cotten*, 245 NY 102 [1927]).

Plaintiffs contend that although the MCA agreement granted RCG, GTR, and Mzeed access to their bank accounts, the unauthorized debits on July 31, 2018, amount to conversion. Though these facts without more would not be sufficient to survive a motion to dismiss, the plaintiffs have sufficiently plead a theory of alter ego liability and discovery has not been completed yet. Therefore, the eighth cause of action will not be dismissed at this time (*see Gowen v Helly Nahmad Gallery, Inc.*, 60 Misc 3d 963, 984–85, 77 NYS3d 605, 622–23 [2018], *aff'd*, 169 AD3d 580 [2019]).

Ninth Cause of Action- Unjust Enrichment

The ninth cause of action is Unjust Enrichment against all defendants. With regard to Davis, Plaintiffs' alleges that "[u]pon information and belief, Davis received \$26,994 for selling Plaintiffs' information to Braun." (Amended Complaint at ¶ 255.) Defendants' contend the amount stated is the alleged difference between the funds allegedly promised to Plaintiffs by RCG, GTR and Mzeed (not Davis) and the amount Plaintiffs received. (*Id.*, ¶ 81.) Defendants allege that the difference is attributable to certain fees that Plaintiffs were informed of under the explicit terms of the GTR agreement and agreed to by Plaintiffs as part of their transactions with GTR. Further, the Complaint does not state any allegations that support claims that Orange was unjustly enriched.

"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' " (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *aff'd*, 19 NY3d 511 [2012], *quoting IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege "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' ” (*Georgia Malone & Co.*, 86 AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

However, “[t]he 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 NY2d 382, 388 [1987]).

Further, although privity is not required for an unjust enrichment claim (*Sperry v Crompton Corp.*, 8 NY3d 204, 215, 831 NYS2d 760 [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). An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388–389, 521 NYS2d 653 [1987]; *Samiento v World Yacht Inc.*, 10 NY3d 70, 81 [2008]).

While a claim for unjust enrichment may stand alongside a breach of contract cause of action at the pleading stage (*see Wilmoth v Sandor*, 259 AD2d 252, 254 [1st Dept 1999]), when, as here, plaintiffs allegations merely duplicate the tort and contract claims stated, a claim for unjust enrichment is not stated (*see Khurdayan v Kassir*, No. 159480/17, 2020 WL 3511498, at *4 [2020]; *Shilkoff Inc. v 885 Third Avenue Corp.*, 299 AD2d 253 [1st Dept 2002]; *Brintec Corp. v Akzo, N.V.*, 171 AD2d 440 [1st Dept 1991][recovery for unjust enrichment applies only in the absence of an express agreement]. Accordingly, the ninth cause of action is dismissed.

Conclusion

Defendants' motion to dismiss is partially granted to the extent that the first, seventh and ninth causes of action are dismissed as against GTR, Orange and Davis. Defendants' motion to dismiss is granted as to the third, fourth and fifth causes of action as against Davis.

Accordingly, it is hereby

ORDERED that the motion to dismiss is partially granted and the first, seventh, ninth, third as against Davis, fourth and fifth causes of action of the complaint are dismissed; and it is further

ORDERED that the complaint is dismissed in its entirety as against defendant Davis, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that counsel are directed to appear for a preliminary conference to be conducted remotely on March 17, 2021 at 12:30 PM.

1/19/2021 DATE SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE: [] CASE DISPOSED [] DENIED [X] NON-FINAL DISPOSITION [] OTHER
[] GRANTED [] SETTLE ORDER [X] GRANTED IN PART [] REFERENCE
APPLICATION: [] SUBMIT ORDER
CHECK IF APPROPRIATE: [] INCLUDES TRANSFER/REASSIGN [] FIDUCIARY APPOINTMENT