

**Lalani v Shrestha**

2021 NY Slip Op 32830(U)

December 30, 2021

Supreme Court, New York County

Docket Number: Index No. 654108/2021

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LOUIS NOCK PART 38M**

*Justice*

-----X

ROZMIN LALANI,

Plaintiff,

- v -

SUNITA SHRESTHA, TOTAL LOOKS THREADING  
SALON, OM JAI MATA DI, INC., and MATA RANI, INC.,

Defendants.

-----X

INDEX NO. 654108/2021

MOTION DATE 08/05/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12

were read on this motion for DISMISSAL.

Upon the foregoing documents, the motion to dismiss is granted in part, in accord with the following memorandum decision.

**Background**

Plaintiff Rozmin Lalani (“Plaintiff”) commenced this action by filing a summons and verified complaint on June 29, 2021 (NYSCEF Doc Nos. 1-2). The complaint alleges that Plaintiff and defendant Sunita Shrestha (“Shrestha”) entered into a partnership agreement (the “Agreement”) on or about September 2014, pursuant to which Plaintiff invested a total of \$63,000.00 in the three entity defendants (the “businesses”) and whereupon business profits would be shared every month (NYSCEF Doc No. 2 ¶ 8-10). In an affidavit submitted in opposition to the present motion, Plaintiff attests that she also contributed “sweat equity” and “help operating the businesses daily” pursuant to the Agreement (NYSCEF Doc No. 11 ¶ 6). The complaint further alleges that, in September 2020, Shrestha “ousted the Plaintiff from the businesses without proper recompense” and has “reaped all of the benefits of the business profits

since [Plaintiff] was evicted from the business” NYSCEF Doc No. 2 ¶ 11). The complaint interposes causes of action for (1) breach of contract, (2) conversion, (3) unjust enrichment, and (4) promissory estoppel. By this pre-answer motion, all defendants (“Defendants”) move to dismiss the complaint in its entirety. Defendants argue that the breach of contract claim fails because Plaintiff failed to allege her own performance of the Agreement and moves to dismiss the remaining causes of action as duplicative of the breach of contract claim. Plaintiff opposes the motion.

### Discussion

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must “accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff’s favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232 Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of “bare legal conclusions” is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *aff’d* 9 NY3d 836 [2007], *cert denied sub nom Spiegel v Rowland*, 552 US 1257 [2008]) and “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions

that are unsupported based upon the undisputed facts” (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

#### **A. Breach of Contract**

To state a cause of action for breach of contract, a plaintiff must plead the existence of a contract between the parties, plaintiff’s performance, the defendant’s breach, and damages (*Belle Lighting LLC v Artisan Construction Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019]). The verified complaint in this action adequately pleads a cause of action by alleging that the parties entered in to a partnership agreement (NYSCEF Doc No. 2 ¶¶ 8-9, 13), that Plaintiff performed by contributing capital to the business pursuant to the agreement (*id.* ¶ 17), that Shrestha breached the agreement by “ousting” Plaintiff from the business and failing to share profits (*id.* ¶ 18), and that she was damaged as a result (*id.* ¶ 19). Plaintiff’s allegations regarding her own performance are further amplified by the affidavit submitted in opposition to the motion in which she attests that she performed by contributing “sweat equity” and “help operating the businesses daily” pursuant to the Agreement (NYSCEF Doc No. 11 ¶ 6) (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007] [Affidavits may be considered on motion to dismiss to remedy pleading defects]). Therefore, this portion of the motion to dismiss is denied.

#### **B. Conversion**

“Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights” (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 883 [1st Dept 1982]). “Money, if specifically identifiable, may be the subject of a conversion action” (*id.*). However, an action for conversion cannot be validly maintained where damages are merely being sought for breach of contract (*id.*; *Liegey v Gadeh*, 198 AD3d 460, 460 [1st Dept 2021]). Such is the case here, where Plaintiff alleges only that

Defendants converted the initial \$63,000.00 capital investment because Shrestha breached the Agreement and “treated said funds in a particular manner which is in contravention to the agreement between the parties” (NYSCEF Doc No. 2 ¶¶ 23-24). Moreover, “[i]t is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated” (*Dormitory Authority v Samson Construction Co.*, 30 NY3d 704, 711 [2018]). “[W]here a party is merely seeking to enforce its bargain, a tort claim will not lie” (*New York University v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]). The conversion claim interposed in the complaint fails because Plaintiff alleges no separate legal duty independent of the Agreement and seeks only to enforce the terms of the Agreement. Therefore, this portion of the motion to dismiss is granted and the second cause of action for conversion is dismissed.

### C. Unjust Enrichment

Unjust enrichment arises when a defendant was enriched at plaintiff’s expense and it is against equity and good conscience that defendant retain what is sought to be recovered (*Travelsavers Enterprises, Inc. v. Analog Analytics, Inc.*, 149 AD3d 1003 [2d Dept 2017]). An unjust enrichment claim does not lie where there is an enforceable agreement between the parties (*Accurate Copy Serv. of America, Inc. v. Fisk Bldg. Assocs. L.L.C.*, 72 AD3d 456 [1st Dept 2010] citing *Singer Asset Fin. Co., LLC v. Melvin*, 33 AD3d 355, 358 [2006]). Here, a copy of the purported Agreement was not attached to the complaint and it appears that Shrestha contests the existence of same (*see* NYSCEF Doc No. 5 at 6, mem in support [“Here, if there is no agreement, the partnership is at will”]). Therefore, it appearing that a *bona fide* dispute exists regarding the existence of the Agreement, dismissal of the cause of action for unjust enrichment is not appropriate on a motion to dismiss and this portion of the motion is denied.

#### D. Promissory Estoppel

To plead a cause of action for promissory estoppel, a plaintiff must allege “(i) a sufficiently clear and unambiguous promise; (ii) reasonable reliance on the promise; and (iii) injury caused by the reliance” (*Castellotti v Free*, 138 AD3d 198, 204 [1st Dept 2016]). In this action, Plaintiff has adequately pled a claim for promissory estoppel by alleging that the parties entered into an agreement where Plaintiff would contribute funds and work in the day to day operations of the businesses in exchange for a share of profits, on which she reasonably relied, which caused her to suffer financial losses. These allegations are sufficient to put Defendants on notice of the transactions or occurrences on which the claim is based (*see CPLR 3013; CIP GP 2018, LLC v Koplewicz*, 194 AD3d 639, 640 [1st Dept 2021] [“Since the terms of the partnership agreement were adequately alleged, plaintiff’s promissory estoppel claim that it reasonably relied on the agreement to its detriment is also adequately pleaded”]). Where, as here, there is a *bona fide* dispute as to the existence of a contract between the parties, the Plaintiff may proceed upon a theory of quasi contract and proceed with both claims (*see CIP GP 2018*, 194 AD3d at 640 Plaintiff permitted to maintain claims for breach of contract, unjust enrichment, and promissory estoppel where *bona fide* dispute exists regarding the existence or enforceability of the contract]). Therefore, this portion of the motion to dismiss is denied.

Accordingly, it is

ORDERED that the motion to dismiss is granted in part and the second cause of action for conversion is dismissed; and it is further

ORDERED that the remainder of the motion is denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed, within 30 days of service of the answer, to meet and confer regarding discovery and submit a proposed preliminary conference order, in a form that substantially conforms to the court’s form Commercial Division Preliminary Conference Order located at <https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-CD.pdf>, to the Part Clerk at [SFC-Part38-Clerk@nycourts.gov](mailto:SFC-Part38-Clerk@nycourts.gov).

*Louis L. Nock*

<u>12/30/2021</u>		<u>LOUIS NOCK, J.S.C.</u>	
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE