

**Kim v Francis**

2023 NY Slip Op 32501(U)

July 21, 2023

Supreme Court, New York County

Docket Number: Index No. 650481/2018

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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PAUL KIM,  Plaintiff,  - v -  JONATHON FRANCIS, DAVID ARABOV, GERARD R. ADAMS, ELITE DAILY, ELITE DAILY.COM, BDG MEDIA, INC., DMG MEDIA, LLC, and BUSTLE DIGITAL GROUP,  Defendants.	INDEX NO. <u>650481/2018</u>  MOTION DATE _____  MOTION SEQ. NO. <u>011 012</u>  <b>DECISION + ORDER ON                  MOTION</b>
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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 352, 364, 365, 370, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 357, 358, 359, 360, 361, 362, 363, 366, 367, 368, 369, 371, 387, 388

were read on this motion to/for STRIKE JURY DEMAND.

In motion sequence number 011, defendants David Arabov, Jonathon Francis, a/k/a Jonathon Francis San Pedro a/k/a Jonathon F. San Pedro (San Pedro), and Gerard R. Adams (collectively, Individual Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff’s remaining causes of action in the amended complaint for breach of contract and unjust enrichment.

In motion sequence number 012, the Individual Defendants move to strike plaintiff’s jury demand.

**Procedural Background**

This action arises from plaintiff’s claim that he is entitled to a 15% equity position in Elite Daily, a company that was owned by the Individual Defendants. (See generally

NYSCEF 114, Amended Complaint.) Plaintiff brought this action in January 2018 against the Individual Defendants, Elite Daily, Elite Daily.com, BDG Media, Inc., DMG Media, LLC and Bustle Digital Group. (NYSCEF 1, Summons and Complaint.) Plaintiff filed an amended complaint on July 23, 2019, asserting twelve causes of action against these defendants. (NYSCEF 114, Amended Complaint.) After motions to dismiss and an appeal,<sup>1</sup> the remaining causes of action against the Individual Defendants are the first cause of action for breach of contract and the twelfth cause of action for unjust enrichment.<sup>2</sup>

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<sup>1</sup> On June 3, 2019, this court dismissed the complaint against movant BDG Media, Inc. d/b/a Bustle Digital Group (BDG) and dismissed the second through twelfth and fourteenth causes of action against movants Arabov and San Pedro, leaving only the claims for breach of contract and promissory estoppel against them. (NYSCEF 102, Decision and Order [mot. seq. nos. 001-003].) The court granted plaintiff leave to replead. (*Id.*) On January 17, 2020, upon a motion by the Individual Defendants to dismiss the amended complaint, the court struck the causes of action that were previously dismissed except the claim for unjust enrichment, leaving claims against the Individual Defendants for unjust enrichment, promissory estoppel, and breach of contract. (NYSCEF 168, Decision and Order [mot. seq. no. 007].) The court confirmed BDG's dismissal. (NYSCEF 169, Tr at 22:7-16.) On June 4, 2020, the First Department modified the court's decision and order on motion seq. nos. 001, 002, and 003 to the extent that the First Department also dismissed the promissory estoppel claim as duplicative of breach of contract and otherwise affirmed. (NYSCEF 243, First Department Decision and Order.) The parties do not dispute that, as a result of the First Department's decision, plaintiff's promissory estoppel claim in the amended complaint is dismissed against the Individual Defendants, including Adams, who did not move to dismiss the original complaint.

<sup>2</sup> The other remaining defendants Elite Daily, EliteDaily.com and DMG Media, LLC (DMG) have not appeared in this action. After failing to answer the complaint or appear, plaintiff moved for default judgments against EliteDaily.com and DMG, which were denied. (See NYSCEF 97, Decision and Order [mot. seq. no. 004] [denying default as to EliteDaily.com because plaintiff cannot sue a website which has no separate jural existence]; NYSCEF 99, Decision and Order [mot. seq. no. 006] [denying default as to DMG because plaintiff failed to allege facts against DMG in the complaint].) These defendants also failed to answer the July 2019 amended complaint or otherwise appear since the filing of that amended pleading. As plaintiff has not since moved for a default, these defendants are dismissed pursuant to CPLR 3215(c).

## Background

Plaintiff and San Pedro met when they were both undergraduate students at Pace University. (NYSCEF 335, Kim Dep Tr at 35:25-36:17; NYSCEF 339, San Pedro Dep Tr at 54:23-56:7.) Arabov also attended Pace where he became friends with San Pedro. (NYSCEF 338, Arabov Dep Tr at 28:15-30:3.) In February 2011, San Pedro sent an email to plaintiff and Arabov, introducing them and stating that Arabov “was interested in collaborating on upcoming projects.” (NYSCEF 336, February 3, 2011 Email.) While attending Pace, plaintiff learned how to build websites through an internship with nonparty Insight Media Group (NYSCEF 335, Kim Dep Tr at 16:19-17:7), and Arabov needed a website built for a project known as Elite Wall Street. (NYSCEF 338, Arabov Dep Tr at 44:9-45:6.)

In May or June 2011, Arabov started an internship at Adams’ marketing company and came up with the idea for Elite Wall Street. (NYSCEF 338, Arabov Dep Tr at 11:24-12:2, 15:6-8, 16:24-18:14, 45:15-47:20; NYSCEF 341, Adams Dep Tr at 33:5-6.) In June 2011, San Pedro emailed plaintiff about the Elite Wall Street concept that Arabov pitched to him. He stated that Arabov and Adams wanted to create a website in a “basic blog format” providing stock tips to investors alongside photos of nude women. (NYSCEF 337, June 15, 2011 Email; see *a/so* NYSCEF 114, Amended Complaint ¶ 21.) San Pedro wrote “[. . .] I think we should try to keep costs down as much as possible from the front end -- And then enter into a contract which gives us a % of all yearly revenue depending on the overall costs that we assume from the budget (if we say it costs xxx amount to produce and we will “cover” those costs (by doing the labor??)) [. . .]” (NYSCEF 337, June 15, 2011 Email.) Plaintiff responded:

“Yo!

Im DOWN! I can totally make a site like that. Easy. So its a legit site with legit info on stocks but with 1 daily naked chick a day?

so its catering towards the 18+ investors ish? something like the 'naked news' in europe where grls [sic] broadcast news naked

IM DOWNN come thru and we'll talk about it”

(*Id.*)

From June 15-22, 2011, plaintiff built a test website for the Individual Defendants at the address Juno.com/NakedNews. (NYSCEF 335, Kim Dep Tr at 68:6-8, 141:23.)

On July 7, 2011, San Pedro sent plaintiff an email, with the subject line “Elite Wall St,” stating

“PK!!

Domain is purchased :)

I spoke to David this morning -- We're getting all the content sorted out frame by frame page by page so it wont be too crazy on your end -- Going to try to make it as easy and clean as possible for you to get this up on deadline.

I told David that you would love to have stake in the company as opposed to just building a project and then us contracting you out for all web [\*\*\*\*] -- He was like, are you crazy of course he has to be in on this with us for this whole thing -- With that in mind, he initially offered 15% of overall revenue -- We toyed with the thought of breaking it down btw Stock Marketing Income and Ad Revenue/Membership and that gets too confusing and I don't want you getting stuck on the shrot [sic] end of the stick so we're going to do an All-in on this [\*\*\*\*] -- Let me know if you're cool with that piece of the pie or if you want to counter. DA is totally not a greedy dude at all, hes just interested in being a full time winner like we are so let me know!

JSP”

(NYSCEF 342, July 7, 2011 Email.) Plaintiff did not respond. (NYSCEF 335, Kim Dep Tr at 96:2-3, 8-11.) Nevertheless, he continued to work on the project. (*Id.* at 96:6-7, 105:7-12.)

Arabov, San Pedro, and Adams agreed to be partners on Elite Wall Street. (NYSCEF 385, Defendants' Joint Response to Plaintiff's Statement of Material Facts [Defendants' Response] ¶ 69; NYSCEF 338, Arabov Dep Tr at 50:9-12, 51:6-7; NYSCEF 339, San Pedro Dep Tr at 66:19-23.) According to Arabov, in August 2011, San Pedro, Arabov, and Adams specifically agreed that Arabov would own 40% of their company, Adams would own 35% and San Pedro would own 25%. (NYSCEF 338, Arabov Dep Tr at 51:13-14.<sup>3</sup>)

Although the initial concept for the site was a "penny stock picking site" (NYSCEF 335, Kim Dep Tr at 111:5-10; NYSCEF 338, Arabov Dep Tr at 22:15-16, 23:15-17), by September 2011 the name and concept for the project changed, and the website was converted to Elite Daily, because according to plaintiff, it became apparent that the other pages focusing on luxury lifestyle were generating more hits than the pages with stock tips.<sup>4</sup> (NYSCEF 335, Kim Dep Tr at 154:8-24.) Despite the name

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<sup>3</sup> Arabov testified that these percentages were formalized in writing in an operating agreement. (NYSCEF 338, Arabov Dep. 52:17-53:2.) Plaintiff asserts that, despite his demand, that operating agreement was never produced. The court notes that the docket does not reflect any motion by plaintiff to compel production of the operating agreement.

<sup>4</sup> It is not clear from the record when exactly the concept for the website changed. The Individual Defendants argue, citing in part, plaintiff's testimony, that Elite Wall Street remained the concept for the website until late August/September 2011. (NYSCEF 349, Individual Defendants' Statement of Facts ¶ 5.) Plaintiff testified that "Now it's about September, so I am pretty sure Elite Daily was up and running, just content had to be updated . . ." (NYSCEF 335, Kim Dep. 114:3-5.) Arabov testified that he came up with

change, the overall look of the website stayed the same. (NYSCEF 373, Plaintiff's Response and Counterstatement ¶¶ 61; NYSCEF 385, Defendants' Response ¶¶ 61; NYSCEF 335, Kim Dep Tr at 153:18-154:3.) On September 10, 2011, plaintiff emailed San Pedro:

"check out the analytics. i just set it up last night. our #1 hit from google searches is melanie Iglesias

definitely try to post more chicks, and make sure to TAG each post as much as you can so it shows up on google."

(NYSCEF 343, September 10, 2011 Email.) San Pedro responded on September 13, 2011 in part:

"Elite --  
So what I'm going to push them along for is the 1stquarter budget for you

Tentative Launch: 9/26  
Retainer Dates: 9/26-12/6  
12 weeks // Come in 3-4 times per week  
Fee: \$3,000 // \$250/week."

(NYSCEF 343, September 13, 2011 Email.)

On September 18, 2011, San Pedro emailed plaintiff, stating, in part, that "[i]n RE to deal for Elite, david got you a shamballah and I'm getting \$500 from G this week PRIOR to the site launching." (NYSCEF 347, September 18, 2011 Email.)

Starting in September 2011 until January 2012, plaintiff worked full time for Adams' company AEG<sup>5</sup>, while also working in some capacity on the Elite Daily website. (NYSCEF 349, Individual Defendants' Statement ¶¶ 21; NYSCEF 373, Plaintiff's

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the idea for Elite Daily "[e]nd of August, beginning of September 2011." (NYSCEF 338, Arabov Dep. 20:7-15, 22:2-4.)

<sup>5</sup> The Individual Defendants assert that the name of this company is actually EAG but refer to it as AEG because plaintiff does. The court will also refer to it as AEG.

Response and Counterstatement ¶¶ 21, 63, 76; NYSCEF 385, Individual Defendants' Response ¶¶ 63, 76; NYSCEF 335, Kim Dep Tr at 114:24-115:2.) In January or February 2012, plaintiff was denied access to the website. (NYSCEF 335, Kim Dep Tr at 179:15-20.) On March 12, 2012, plaintiff emailed the Individual Defendants,

“Waddup, Just tried calling you guys and no ones picking up / or replying to any emails.

Just want an update on what's going on with everything. I don't get why no body is responding.. ???

If someone can call me back that would be nice. Thanks.”

(NYSCEF 344, March 12, 2012 Email.) Adams responded on March 17, 2012,

“I have called and texted along with left a voicemail weeks ago. As usual, you don't answer and decide to pop up when you feel like it. I'm now in London for the week.

Best,

Gerard Adams.”

(NYSCEF 344, March 17, 2012 Email.) Plaintiff testified that, after March 2012 to the filing of this lawsuit, he did not further communicate with the defendants. (NYSCEF 335, Kim Dep Tr at 180:24-181:7.)

At some point in 2012, the Individual Defendants formed an LLC, EliteDaily.com. (NYSCEF 373, Plaintiff's Response and Counterstatement ¶ 71; NYSCEF 385, Individual Defendants' Response ¶ 71.) According to Adams, the company became a C-corporation; Arabov was CEO, Adams was president, and San Pedro was COO. (NYSCEF 341, Adams Dep Tr at 74:24-76:21.) In January 2015, Elite Daily was sold to DMG for approximately \$50,000,000. (NYSCEF 349, Individual Defendants' Statement ¶ 34.) Plaintiff claims he is entitled to 15% of the sale or “approximately \$7,500,000.00,

together with 15% of revenue and pre-judgment interest.” (NYSCEF 114, Amended Complaint ¶ 5.)

### **Discussion**

Movant on a motion for summary judgment must make “a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted].) “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” (*Id.* [citation omitted].) “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” (*Id.* [citation omitted].) The motion should be denied if there is any doubt about the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]); however, bare allegations or conclusory assertions are insufficient to create genuine issues of fact to defeat the motion. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

### Motion Sequence Number 011 – Individual Defendants’ Motion for Summary Judgment

#### *Breach of Contract*

The Individual Defendants argue that the breach of contract claim must be dismissed because (1) San Pedro did not have actual or apparent authority to make an offer of equity to plaintiff; (2) the July 7, 2011 Email does not contain any offer, and even if there were an offer, plaintiff never accepted it; (4) plaintiff does not know what was

offered or what he accepted; and (5) the September 13, 2011 Email conclusively refutes plaintiff's assertion that he made an agreement to receive equity.

The Individual Defendants argue that no contract was formed between plaintiff and defendants, because there was no offer or acceptance. "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." (*Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999] [citation omitted].) "Generally, courts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract." (*Id.*) The court must first "determine whether there is a sufficiently definite offer such that its unequivocal acceptance will give rise to an enforceable contract." (*Id.*) "[D]efiniteness as to material matters is of the very essence in contract law. Impenetrable vagueness and uncertainty will not do." (*Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105, 109 [1981] [citations omitted].)

The July 7, 2011 Email does not contain a definite offer; rather, it is quite unclear what is being offered. The Email states that Arabov "initially offered 15% of overall revenue ...", but then goes on to state that "[w]e toyed with the thought of breaking it down btw Stock Marketing Income and Ad Revenue/Membership" and finally ends with a statement that "so we're going to do an All-in on this" with no clear explanation what an "All-in" entails. (NYSCEF 342, July 7, 2011 Email.) Further, despite Kim's contention that the Email was an offer for 15% equity, the Email does not reference any amount of equity or even contain the term equity. San Pedro does use the word "stake"

in the first sentence of his email,<sup>6</sup> but then mentions an initial offer of “15% of overall revenue ...” which is not the same as an offer for a 15% equity stake. (NYSCEF 342, July 7, 2011 Email.) Nevertheless, that 15% offer appears to be off the table as the “All-in on this” was then proposed. While the court acknowledges that not all terms need to be fixed with absolute certainty, “All-in on this” is impenetrably vague. (*Joseph Martin, Jr., Delicatessen, Inc.*, 52 NY2d at 109.) The court is hard-pressed to find that there was a clear offer and a meeting of the minds. (See *Express Indus. & Term. Corp.*, 93 NY2d at 589.)

Plaintiff argues, relying on *Nash v Port Auth. of New York & New Jersey*, that the terms of the offer must be construed against the drafter, San Pedro. (192 AD3d 482, 485 [1st Dept 2021].) However, plaintiff improperly applies the principle that the terms of an *agreement* must be construed against the drafter, to an *offer*. (See *id.* [holding that any ambiguity in the subject letter agreement must be construed against the drafter].) In contrast, where, as here, an offer is ambiguous, there can be no acceptance. (*Express Indus. & Terminal Corp.*, 93 NY2d at 589.)

Moreover, plaintiff suggests that there was an oral agreement between himself and the Individual Defendants for 15%. However, an oral agreement may only be enforceable if “the terms are clear and definite and the conduct of the parties evinces mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms.” (*Kramer v Greene*, 142 AD3d 438, 439 [2016] [internal quotation marks and citation omitted].) Plaintiff’s self-serving testimony that “15 percent

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<sup>6</sup> The July 7, 2011 Email states “I told David that you would love to have stake in the company ... .” (NYSCEF 342, July 7, 2011 Email.)

was discussed throughout the whole time I was there” (NYSCEF 335, Kim Dep Tr at 177:17-18) is not sufficient to defeat summary judgment. Further, in the amended complaint, plaintiff only alleges an agreement made via email on July 7, 2011 and not an oral agreement. (NYSCEF 114, Amended Complaint ¶¶ 24-26.)

As the July 7, 2011 Email contained no offer, the court does not address the parties’ remaining arguments as to the breach of contract claim. Thus, the Individual Defendants’ motion for summary judgment dismissing plaintiff’s claim for breach of contract is granted.

### *Unjust Enrichment*

The criteria for recovery under the quasi-contract theory of unjust enrichment are: “(1) the other party was enriched, (2) at that party's expense, and (3) 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 [2011] [internal quotation marks and citation omitted].) Generally, “[r]ecovery on a claim premised upon quasi-contract or unjust enrichment is limited to the reasonable value of the services rendered by the plaintiff.” (*Collins Tuttle & Co. v Leucadia, Inc.*, 153 AD2d 526, 527 [1st Dept 1989] [citation omitted].)

There is no dispute that plaintiff performed web building services for the Individual Defendants and that the Individual Defendants were enriched. The issues that remain are whether plaintiff was compensated for the services he provided, and what compensation is plaintiff entitled to.

The Individual Defendants assert that plaintiff was adequately compensated for the services he performed. They also assert that under this quasi-contract theory, as a matter of law, plaintiff cannot recover damages equal to a 15% share of Elite Daily. Plaintiff, on the other hand, argues that his recovery under the unjust enrichment claim is not so limited, because the benefit conferred on the Individual Defendants is “the ability for them to conduct business and generate internet traffic under the website used for Elite Daily, i.e., defendants’ entire business model.” (NYSCEF 382, Plaintiff’s Memorandum at 19.) In support of this argument, plaintiff cites to *Carlino v Kaplan*. (139 F Supp 2d 563, 565 [SD NY 2001] [“Where a business appropriates an invention or project devised by another and would be unjustly enriched by the appropriation, a percentage of the profits produced by that invention or device is likely to be awarded.”] [citation omitted].)

However, plaintiff presents no evidence showing that Elite Wall Street or Elite Daily was his invention or a project he devised. In fact, the evidence shows the contrary. (NYSCEF 337, June 15, 2011 Email [San Pedro informing plaintiff of the Elite Wall Street concept pitched to him by Arabov and Adams]; NYSCEF 338, Arabov Dep Tr at 20:7-15, 22:2-4 [Arabov testified that he came up with the idea for Elite Daily “[e]nd of August, beginning of September 2011.”]; NYSCEF 335, Kim Dep Tr at 63:19-23 [Q. “What was your understanding of the concept that Mr. Arabov had for his website? A. ... They’re asking for every stock tip they want, put up a nude photo of a girl, and our site would not include log-in security”], 55:2-4 [responding to a question about the June 15, 2011 email, Kim states “I guess it was like an introduction -- like, hey, I got a new project for you; what do you think about this idea?”].) This is not a situation where “the

value of the benefit conferred is likely to be disproportionate to the value of the services rendered, causing unjust and inequitable results if compensation were to be based on [reasonable value] rather than the benefits that were appropriated.” (*Carlino*, 139 F Supp 2d at 565.) Plaintiff created the website; he did not create a business model that was appropriated by the Individual Defendants, and thus, he is not entitled to a profit share.

There is, however, a genuine dispute as to whether plaintiff was paid for his services, and if so, whether such compensation equates to a reasonable value of his services. The Individual Defendants assert that plaintiff was compensated with \$500 and a Shamballa bracelet which retails for “thousands to tens of thousands of dollars.” (NYSCEF 348, Individual Defendants’ Memorandum at 30.) However, Kim testified that he was never paid for his services, the \$500 was for travel expenses, and the bracelet was probably worth \$10. (NYSCEF 335, Kim Dep Tr at 112:4, 9-13.)

As an initial matter, even if the court assumes the bracelet was a form of compensation, there is a dispute as to the value. The Individual Defendants assert, citing to a website shamballajewels.com, that they “retail from thousands to tens of thousands of dollars.” (NYSCEF 348, Individual Defendants’ Memorandum at 15.) However, the Individual Defendants do not assert that the bracelet given to plaintiff was purchased from this particular site and present no evidence of the value of the bracelet that was actually given to plaintiff such as a sales receipt.<sup>7</sup> Nor have the Individual

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<sup>7</sup> The Individual Defendants admitted during oral argument that they would need to hire experts to prove the value of the bracelet at trial. (NYSCEF 386, tr. 18:15-21.)

Defendants made a prima facie case that the value of the bracelet equates to the reasonable value of plaintiff's services.

As to the \$500, while plaintiff admits that he received the money, there remains a genuine dispute as to the purpose of the payment. In support of their assertion that the \$500 was paid for plaintiff's work on Elite Daily, the Individual Defendants provide the September 18, 2011 Email, from San Pedro to plaintiff stating, in part, "[i]n RE to deal for Elite, david got you a shamballah and I'm getting \$500 from G this week PRIOR to the site launching." (NYSCEF 347, September 18 Email.) San Pedro also testified that this portion of the September 18 Email meant that "Mr. Kim agreed to work on Elite Wall Street for \$500, a shamballah bracelet and for us to obtain a computer for him so he could work from Edgewater, New Jersey." (NYSCEF 340, San Pedro Dep Tr at 294:13-18.) However, this email and San Pedro's testimony does not conclusively show that plaintiff was paid \$500 for his web building services.

The Individual Defendants also assert that plaintiff was paid \$3,000 in September 2011 for his work on Elite Daily, and that plaintiff was paid \$250 a week for making the changes to the website. In support of their assertion, the Individual Defendants point to the September 13, 2011 Email from San Pedro (NYSCEF 343) as well as testimony from Adams and San Pedro that plaintiff was paid. (See NYSCEF 341, Adams Dep Tr at 79:7-20, 125:23-16, 153:16-18; NYSCEF 340, San Pedro Dep Tr at 321:8-14.) However, again, plaintiff asserts that he was never paid anything for his work for Elite Daily, and the Individual Defendants do not provide any proof of these payments and that they were for plaintiff's web building services for Elite Daily. Thus, the portion of the

Individual Defendants' summary judgment motion seeking to dismiss the unjust enrichment claim is denied.

*Laches*

Defendants assert that plaintiff's claims are barred by the doctrine of laches, because he waited nearly six years after he last spoke to the Individual Defendants in March 2012, and three years after the sale of Elite Daily, which plaintiff heard about, to bring this action. "Laches is 'an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party.'" (*In re Linker*, 23 AD3d 186, 189 [1st Dept 2005] [citation omitted].) "The mere lapse of time, without a showing of prejudice, is insufficient to sustain a claim of laches." (*Id.* [citation omitted].) "Prejudice may be demonstrated 'by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay.'" (*Id.* [citation omitted].)

As plaintiff argues, the First Department previously held, in reviewing this court's decision on defendants' motion to dismiss, that plaintiff had not demonstrated laches as a bar because:

"defendants acknowledged plaintiff's role in the company through correspondence, in February 2012, which plaintiff submitted in opposition to the motion, and defendants failed to assert what prejudice they suffered as a result of the filing of the complaint in January 2018 for laches to apply."

(*Kim v Francis*, 184 AD3d 413, 414 [1st Dept 2020].) The Individual Defendants have not demonstrated any prejudice suffered as a result of plaintiff's delay. The only prejudice defendants assert is that there have been multiple changes in the ownership of Elite Daily, which is the same prejudice they asserted in their motion to dismiss already rejected by the First Department.

### *Estoppel*

The Individual Defendants assert that plaintiff's claims are also barred by the doctrine of estoppel. However, the Individual Defendants' argument that plaintiff is estopped from asserting an ownership interest in Elite Daily when he did not assert the same on his tax returns does not apply to his unjust enrichment claim, is moot, because as a matter of law plaintiff is not entitled to damages in the form of an ownership interest pursuant his unjust enrichment claim.

### Motion Sequence Number 012 – Defendants' Motion to Strike Plaintiff's Jury Demand

The Individual Defendants move to strike plaintiff's jury demand because of plaintiff's joinder of a claim for unjust enrichment. "CPLR 4101(1) provides for a trial by jury in an action where the party 'demands and sets forth facts which would permit a judgment for a sum of money only.'" (*Kaplan v Long Island Univ.*, 116 AD2d 508, 509 [1st Dept 1986], quoting CPLR 4101.) While a claim for unjust enrichment "rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]), plaintiff is correct that his unjust enrichment claim does not require striking the jury demand, even though it is the only claim left, because plaintiff seeks monetary damages in satisfaction of that claim. (See *Ratto v Oliva*, 195 AD3d 870, 872 [2d Dept 2021].)

While the Individual Defendants are correct that "[o]nce the right to a jury trial has been intentionally lost by joining legal and equitable claims, any subsequent dismissal, settlement or withdrawal of the equitable claim(s) will not revive the right to trial by jury,"

(*Errant Gene Therapeutics, LLC v Sloan-Kettering Inst. for Cancer Research*, 176 AD3d 459, 459 [1st Dept 2019] [citation omitted]), plaintiff's original complaint only sought money damages and no equitable relief. Monetary damages have always afforded plaintiff a complete remedy. (*Id.*) This motion is denied.

The court has considered all other arguments by the parties and finds they do not alter its decision.

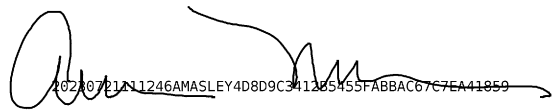
Accordingly, it is

ORDERED that motion sequence number 011 is granted in part and plaintiff's first cause of action for breach of contract is dismissed; and it is further

ORDERED that the amended complaint is dismissed against defendants Elite Daily, Elite Daily.com, and DMG Media, LLC; and it is further

ORDERED that motion sequence number 012 is denied; and it is further

ORDERED that the parties are to appear for a Trial Scheduling Conference on July 27, 2023 at 12 noon.



7/21/2023  
DATE

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ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE