SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SHLOMO S. HAGLER** **PART 17**

Justice

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MAURICE HYDE, as Administrator of the Estate of William Boise, Deceased,

Plaintiff,

- v -

CYRIL OKOLIE a/k/a CY OKOLIE individually, PHYLLIS WEITZMAN, a/k/a PHYLLIS OKOLIE individually and as general partner of BOW FAITH CO, LLC, a New York limited liability company, TIAA-CREFF, as a necessary party and stakeholder,

Defendants.

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INDEX NO. 152489/2016

MOTION DATE 04/01/2023

MOTION SEQ. NO. 016

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 016) 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 636, 640

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing cited papers and after hearing oral argument on October 17, 2023, the motion of defendants Phyllis Weitzman a/k/a Phyllis Okolie ("Weitzman") and Bow Faith Co. LLC ("LLC") (collectively referred to as "defendants") for an order pursuant to CPLR 3212 dismissing the fourth, fifth, sixth, eighth, ninth, tenth, twelfth, thirteenth, fifteenth, and sixteenth causes of action pled in the Second Amended Complaint is granted in part, in that plaintiff's tenth and twelfth causes of action for declaratory judgment and punitive damages are dismissed without prejudice, and denied in part as to the remaining causes of action.

I. Factual Background

Plaintiff Maurice Hyde ("plaintiff"), as executor of the estate of William Boise ("Boise") commenced this action for recovery from Cyril Okolie ("Okolie") and defendants for monies allegedly misappropriated from Boise's life savings through financial exploitation. Plaintiff alleges that Boise, who was born in 1928, was of advanced age, frail and suffering with dementia (NY St Cts Elec Filing [NYSCEF] Doc No. 506, Second Amended Complaint ¶¶ 6, 12). Okolie gained authority to act as an agent for Boise through a power of attorney and a health care proxy executed in 2010 (*id.* ¶ 13). Plaintiff claims that Weitzman and Okolie acted in concert, made representations to induce Boise to give Weitzman and the LLC, through Okolie, access to Boise's funds which Weitzman then used to purchase the Maspeth property for the sole benefit of Weitzman, Okolie and the LLC (*id.* ¶ 151). After initially placing the property in her individual name, Weitzman transferred the property obtained with Boise's funds to the LLC (*id.* ¶ 162). Plaintiff further claims that between 2011 and 2014, Okolie used his authority over Boise's finances to make other transactions not related to the purchase of the Maspeth property and that Weitzman and the LLC allegedly benefitted from these transactions ("Non-Maspeth Transactions") (*id.* ¶¶ 95-144).

Plaintiff asserts causes of action against Weitzman for (1) aiding and abetting Okolie in constructive fraud (fourth cause of action); (2) aiding and abetting Okolie in actual fraud (fifth cause of action); (3) actual fraud (sixth cause of action); (4) undue influence (eighth cause of action); (5) promissory estoppel (ninth cause of action); and (6) unjust enrichment (fifteenth cause of action). The remaining causes of action are for (1) punitive damages (twelfth cause of action); (2) joint and several liability (thirteenth cause of action); (3) constructive trust (sixteenth cause of action); and (4) declaratory judgment (tenth cause of action).

Weitzman Affidavit

Weitzman claims that she and Okolie were married in 1983 and separated in 2009, but not legally divorced (NYSCEF Doc No. 491 ¶¶ 3-4). Weitzman met Boise for the first time on February 5, 2010, to witness him signing a health care proxy (*id.* ¶ 6). After the meeting, Okolie suggested that Weitzman speak with Boise about buying a property together, which was followed by the parties having several phone conversations about joint real estate ventures, and Boise having the option to live at the property (*id.* ¶¶ 8-9). The parties met on January 1, 2012, and signed a Partnership Agreement ("Agreement") (*id.* ¶ 13). Pursuant to the Agreement, Boise was a limited partner and would contribute $43,500 as a non-refundable deposit for the purchase of the real property (*see* NYSCEF Doc No. 493, "Agreement"). Weitzman found a property located at 60-40 69th Place, Maspeth, New York ("Maspeth property"), and called Okolie and told him that she needed Boise to contribute his initial capital contribution of $43,500[1] to bid on the property (*id.* ¶ 16). Weitzman signed a binder agreement on June 13, 2012, and received a certified check for $20,000 from her bank account on June 19, 2012, to complete the contract deposit (*id.* ¶¶ 17-18). She received two certified checks from Okolie on August 11, 2012, for $125,000, and on August 17, 2012, for $146,500[2] (*id.* ¶ 19).

Prior to the closing date, Weitzman received a call from Okolie and Boise informing her that Boise had other tax-related financial obligations and needed to withdraw from the partnership (*id.* ¶ 20). Weitzman informed Okolie the two payments were working capital and she was under no obligation under the agreement to refund the payment because he wanted to withdraw from the partnership (*id.* ¶ 21). Weitzman claims she closed on the property on September 27, 2012, using

[1] The certified check in the amount of $43,500 dated June 7, 2012, is payable to Bow Faith (*see* NYSCEF Doc No. 494).
[2] Movant annexed copies of two deposit slips (*see* NYSCEF Doc No. 497).

funds from her personal funds and a mortgage check (*id.* ¶ 22). Weitzman formed the LLC on July 31, 2012, and transferred the ownership of the property to the LLC in January 2013, after Boise withdrew from the partnership (*id.* ¶¶ 23-24). Weitzman further claims that in June 2013, she provided Okolie a check for $250,000, as requested by Boise, to reimburse for Boise's capital contributions (*id.* ¶ 26). Weitzman had no further dealings with Boise (*id.* ¶ 28).

Okolie EBT

At his deposition, Okolie testified that Boise was aware that Boise's rent was very high, and "he needed a place to go" (NYSCEF Doc No. 518, tr at 158). After the Agreement was signed, a property was purchased (*id.* at 164). Okolie withdrew funds for a check in the amount of $43,000 to the LLC from a joint account with Boise (*id.* at 165-166). In June 2012, Okolie received two checks in the amount of $250,000 each from Boise and deposited them into his personal TD account to pay for Boise's taxes (*id.* at 167-169). Okolie further stated that he and Boise verbally notified Weitzman that he was withdrawing from the partnership (*id.* at 182). Okolie used $324,000 of the funds to pay for Boise's taxes (*id.* at 176). He confirmed that money from Boise's funds was used to purchase the Maspeth property and the money was returned by Weitzman (*id.* at 173, 175).

II. Parties' Contentions

In their motion for summary judgment, defendants first argue that because the Agreement between the parties is valid, and Boise entered into it knowingly after arms-length negotiations, there were no elements of a false promise or unjust enrichment related to the purchase of the Maspeth property (NYSCEF Doc No. 525, Memorandum of Law in Support of Matthew Carmody, Esq., [memo] at 13). Second, defendants argue that plaintiff cannot prove the sixteenth cause of action for constructive trust in the Maspeth property because there was no promise of an ownership

interest to Boise. Boise was promised only a life-term interest and life estate, which are not an ownership interest (*id.* at 14-15). Additionally, defendants argue they were not unjustly enriched by the Maspeth transaction because the Agreement is a valid contract, Boise paid below market rate for his life estate option, he forfeited his capital contributions when he withdrew from the partnership, and Weitzman returned the capital contributions of $250,000 to Boise despite having no contractual obligation to do so[3] (*id.* at 16-17). Moreover, they argue that the claim for a constructive trust on behalf of the beneficiaries fails because the estate has no equitable interest to have an ownership interest in the Maspeth property (*id.* at 17).

Third, defendants contend that the sixth cause of action for actual fraud fails as there is no evidence of material misrepresentation as the value of Boise's option for a life estate was $50,171.35 more than his consideration of $43,500, and the agreement states that any additional working capital contributions would be forfeited if a partner withdraws from the partnership (*id.* at 19). Additionally, defendants argue that the eighth cause of action for undue influence fails as the agreement was beneficial to both parties – Boise had the option to purchase a life estate at a market value, and Weitzman returned to Boise the working capital contributions $250,000, which was not required pursuant to the agreement (*id.* at 19-20). As to the ninth cause of action for promissory estoppel, defendants argue that there was no breached promise or detrimental reliance as Weitzman performed her obligation by purchasing the property with the partnership funds so that Boise could exercise his option of a life estate in accordance with the agreement, and Boise did not detrimentally rely on the promise as he continued to live in his Stuyvesant Town apartment until his death (*id.* at 20-21).

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[3] Defendants repeat the same arguments for dismissal of the fifteenth cause of action for unjust enrichment regarding the Maspeth property.

Fourth, defendants contend that the causes of action against defendants for the non-Maspeth transactions should be dismissed. Specifically, they contend the fourth, fifth, and eighth causes of action for fraud-based claims should be dismissed pursuant to CPLR 3016 (b) for failure to plead the above fraud claims with sufficient detail, and the documentary evidence plaintiff produced regarding the Non-Maspeth Transactions are financial statements and cancelled checks, none of which defendants are a payor or payee (*id.* at 22-23). Similarly, they argue that plaintiff made only conclusory allegations regarding any promissory estoppel (ninth cause of action) and unjust enrichment (fifteenth cause of action) claims which therefore should be dismissed (*id.* at 24).

Fifth, defendants argue that the tenth cause of action for declaratory judgment against the Maspeth transaction should be dismissed because it is inappropriate as plaintiff is requesting the court for a finding of a constructive trust in the Maspeth property (*id.* at 24-25). Furthermore, they argue that the twelfth cause of action for punitive damages should be dismissed because the Maspeth transaction was made pursuant to a private partnership agreement, and not a public transaction (*id.* at 25). In their last argument, defendants contend that plaintiff's thirteenth cause of action for joint and several liability should be dismissed because plaintiff did not establish the fraud claims against defendants[4] (*id.* at 26).

In opposition, plaintiff argues that the Agreement is irrelevant as the claims are not premised on breach of contract, but are equitable ones premised on defendants' misrepresentations and false promises to Boise. As such, there is an issue of fact for a jury to determine whether the subject financial transactions were made pursuant to the Agreement or upon Weitzman's promises and representations to purchase the Maspeth property in which Boise would have an ownership

[4] At the oral argument, an issue was raised whether joint and several liability applies to a fraud cause of action, and neither party cited to any case-law (*see* NYSCEF Doc No. 635, tr at 30-31).

interest (NYSCEF Doc No. 530, Memorandum of Law in Opposition of Colleen M. Meenan, Esq. [opp memo], at 4-6). Plaintiff further contests the validity of the Agreement (*see* NYSCEF Doc No. 635, tr at 22-23). Second, plaintiff argues that the claim for undue influence is valid as Weitzman and Boise were in a confidential relationship under the oral agreement to purchase real estate together, which gave rise to a fiduciary relationship, and plaintiff admitted to a fiduciary relationship with Boise by stating they were partners under the Agreement (*see* NYSCEF Doc No. 530 at 6-7). Plaintiff further argues that Weitzman exerted undue influence over Boise for financial gain, to acquire title and occupancy of the Maspeth property using Boise's funds, and for access to Boise through Okolie, who served as his live-in caretaker and financial and health agent (*id.* at 7).

Third, plaintiff argues that the law of constructive fraud applies because there was a fiduciary relationship between Boise and Weitzman, and it is Weitzman's burden to demonstrate an absence of fraud, which she did not (*id.* at 8-9). Plaintiff disputes Weitzman's claim that Boise contributed $315,000.00 for the purchase of the property in return for a life estate valued at $50,171.35 (*id.* at 9). He further claims that Weitzman misrepresented to Boise that he would occupy the premises' first floor which would be renovated to meet his physical limitations, as Boise never occupied the premises, and she did not produce evidence of renovations (*id.*). Moreover, plaintiff argues there is no evidence establishing Weitzman or Okolie returned to Boise the $250,000 (*id.*). Plaintiff points out that the documentary evidence shows the check was payable to "Okolie," with no admissible evidence to establish the source of the funds, or proof that the reimbursement check was deposited into Boise's accounts (*id.* at 10). Plaintiff further argues that there is no evidence to show the reimbursed money was used to pay Boise's tax liabilities (*id.* at 11).

Fourth, plaintiff contends that Weitzman has been unjustly enriched at Boise's expense, as she has resided rent-free in the Maspeth property titled in the name of the LLC, whose sole members are Weitzman and her close relatives, and Boise never occupied the premises and continued to pay monthly rent on his Stuyvesant apartment (*id.* at 12-13).

Fifth, plaintiff further argues that the elements of a constructive trust exist by virtue of Boise's status as a partner in a joint venture, his undisputed payment of $315,000 and not receiving any benefit from the purchase of the premises (*id.* at 14-15). As to the cause of action for promissory estoppel, plaintiff argues that there is a clear and unambiguous promise by Weitzman to Boise to purchase the premises together and with Boise to occupy its first floor after renovation; Boise's foreseeable reliance is demonstrated by the $315,000 payment for the premises' purchase, and he suffered injury by the loss of those monies with no benefit in return (*id.* at 15). As to the causes of action for damages[5], plaintiff argues that he is entitled to declaratory judgment as the LLC is liable under the doctrine of reverse piercing of the corporate veil as he established Weitzman's fraud and the use of the LLC to shield from recovery (*id.* at 19-20). Plaintiff argues that there is sufficient evidence to establish joint and several liability as Weitzman and Okolie acted in together and contributed concurrently to the same substantial financial wrongdoing (*id.* at 21-22). Plaintiff further argues that he is entitled to punitive damages as Weitzman's conduct rises to the level of "gross, wanton, or fraud" or "other morally culpable conduct" (*id.* at 22).

In reply, defendants argue that plaintiff has not produced any evidence of Weitzman's involvement in the non-Maspeth transactions and has focused only on the Maspeth transactions (NYSCEF Doc No. 615, Memorandum of Law in Reply of Matthew Carmody, Esq. [reply], at 6).

[5] At the oral argument, plaintiff conceded on the point that the damages were inartfully pled and should be decided at a trial (*see* NYSCEF Doc No. 635, tr at 27).

III. Discussion

"'[T]he proponent of a summary judgment motion 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'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "[F]ailure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Ayotte*, 81 NY2d at 1063 [internal quotation marks and 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" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman*, 49 NY2d at 562).

"Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]; *see also American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]). "On a summary judgment motion, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]).

While the movant's burden on a summary judgment motion is generally a high one, matters like fraud, as here, prove even more difficult to warrant such relief. Intent is a fact-laden inquiry and is inappropriate for determination on summary judgment (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Robert Christopher Assocs.*, 257 AD2d 1, 6 [1st Dept 1999]; *see also Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.p.A.*, 2008 NY Slip Op 52596(U) *2 [Sup Ct, NY

County 2008], citing *Friedman v Meyers*, 482 F2d 435, 439 [2d Cir 1973] ["Fraud claims are often not appropriate for summary decision, because motive, intent and subjective feelings are at issue"]). As previously stated on the record, it is difficult to bifurcate the Maspeth and non-Maspeth transactions, and a jury or this Court on a motion for summary judgment can take the transactions all together to make a reasonable inference that Okolie and Weitzman worked together (*see* NYSCEF Doc No. 635, tr at 19).

A. Fourth and Fifth Causes of Action for Aiding and Abetting in Constructive and Actual Fraud, and Sixth Cause of Action for Actual Fraud

The evidence submitted by defendants fail to establish their entitlement to summary judgment dismissing plaintiff's sixth cause of action for fraud. To establish entitlement to summary judgment dismissing a cause of action for fraud, a defendant must demonstrate that 1) it did not make a material misrepresentation of a fact that was false, 2) it did not have knowledge of its falsity of the statement or an intent to deceive the plaintiff, 3) the plaintiff did not justifiably rely on the representation, or 4) plaintiff did not suffer damages as a result of the representation (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). "The question of what constitutes reasonable reliance is always nettlesome because it is so fact-intensive" (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 155 [2010] [citations omitted]). Constructive fraud arises in situations where there is a fiduciary relationship between the parties (*see Matter of Gordon v Bialystoker Ctr. & Bikur Cholim*, 45 NY2d 692, 698-699 [1978]). "Where those relations exist there must be clear proof of the integrity and fairness of the transaction, or any instrument thus obtained will be set aside or held as invalid between the parties" (*Sepulveda v Aviles*, 308 AD2d 1, 8 [1st Dept 2003], quoting *Ten Eyck v Whitbeck*, 156 NY 341, 353 [1898]). "In determining whether a fiduciary relationship exists, a court will look to whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge"

(*Sergeants Benevolent Assn. Annuity Fund v Renck*, 19 AD3d 107, 110 [1st Dept 2005] [internal quotation marks and citations omitted]. "It is not mandatory that a fiduciary relationship be formalized in writing . . . [t]hus, the ongoing conduct between the parties may give rise to a fiduciary relationship that will be recognized by the courts" (*id.*). In a cause of action for constructive fraud, the burden is shifted to the party seeking to uphold the transaction to demonstrate the absence of fraud (*see Matter of Aoki v Aoki*, 27 NY3d 32, 40 [2016]).

Defendants failed to establish that they did not make a material misrepresentation of fact. In her affidavit, Weitzman stated that that Okolie was aware that she was looking for investment properties, and shortly after her meeting with Boise, Okolie suggested that Weitzman speak with Boise about buying a property together (*see* NYSCEF Doc No. 491 ¶ 8). Weitzman further stated that she had several phone conversations with Boise and Okolie about joint real estate ventures in the future, with Boise having the option to live at the property (*id.* ¶ 9). At her deposition, Weitzman testified that she told Boise his funds would be used to purchase real property for him to live in (*see* NYSCEF Doc No. 520, tr at 153). The record demonstrates that Boise never resided at the Maspeth property, and the deed was solely in defendants' name (*see* NYSCEF Doc Nos. 498 and 502). Additionally, Weitzman attested that she received two checks from Okolie in total for $250,000 to apply towards the purchase of the Maspeth property, and there is no proof that Weitzman returned the $250,000 to Boise, as the copy of the check for $250,000 is payable to Okolie (*see* NYSCEF Doc No. 503). Although fraud must be proved and cannot be assumed, the motive with which an act is done may be ascertained and determined by inferences drawn from the proof of facts and circumstances connected with the transaction and the parties to it (*see Hennequin v Naylor*, 24 NY 139, 141 [1861]). The parties present diametrically opposed narratives about plaintiff's fraud claims, including Weitzman's role in these transactions. Therefore, genuine

issues of material fact preclude summary judgment (*Norddeutsche Landesbank Girozentrale v Tilton*, 178 AD3d 539 [1st Dept 2019] ["[T]he facts do not present the rare circumstances in which the issue of reasonable reliance can be resolved at the summary judgment stage of a fraud case"] [citations omitted]).

Moreover, defendants' argument to dismiss the fraud causes of action against the non-Maspeth transactions pursuant to CPLR 3016 (b) is meritless (see *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008] [CPLR 3016 [b] may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct], citing *Polonetsky v Better Homes Depot*, 97 NY2d 46, 55 [2001] [alleged facts sufficient to merit a jury to infer [defendant's] knowledge of or participation in the fraudulent scheme]. Based on the foregoing, dismissal of the sixth cause of action for fraud is denied. Since defendants failed to establish dismissal of the underlying fraud cause of action, their motion to dismiss the fourth and fifth causes of action for aiding and abetting in constructive and actual fraud is denied.

B. Eighth Cause of Action for Undue Influence

Defendants failed to establish their entitlement to summary judgment dismissing plaintiff's eighth cause of action. "Normally, the burden of proving undue influence rests with the party asserting its existence" (*Sepulveda*, 308 AD2d at 7 [citations omitted]). "However, if a confidential relationship exists, the burden is shifted to the beneficiary of the transaction to prove the transaction fair and free from undue influence" (*id.*). In the absence of an explanation, the beneficiary has the burden of proving by clear and convincing evidence that the transaction was fair and free from undue influence (*see Matter of Gordon v Bialystoker Ctr. & Biku Cholim*, 45 NY2d 692, 695-696 [1978]). "Appellate courts in this State have, time and time again, applied this burden-shifting mechanism to evaluate transactions which, at least on the surface, appear to

involve the exploitation of elderly or mentally incapacitated persons by those intent on violating the trust reposed in them" (*Sepulveda*, 308 AD3d at 8 [citations omitted]).

Here, by virtue of a joint venture, a confidential relationship existed between Boise and Weitzman (*see Rocchio v Biondi*, 40 AD3d 615, 616 [2d Dept 2007] ["A confidential relationship may arise between parties engaged in a joint venture"]), thereby shifting the burden to defendants. Defendants' argument that Weitzman lacked the motive to exercise undue influence on Boise because she returned his capital contributions is meritless as they did not submit clear and convincing evidence that she returned the $250,000 to Boise. Additionally, it is heavily disputed whether Boise entered into the Agreement free from undue influence as the record demonstrates the Agreement was exchanged between Weitzman and Okolie by leaving it under a rock, and she was not present to see whether Okolie reviewed it with Boise (*see* NYSCEF Doc No. 519, tr 56-58). Based on the foregoing, dismissal of the eighth cause of action for undue influence is denied.

C. Ninth Cause of Action for Promissory Estoppel and Fifteenth Cause of Action for Unjust Enrichment

Similarly, a party relying upon promissory estoppel must demonstrate that there was: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance (*Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409, 411 [1st Dept 2017]). Here, questions of fact exist concerning whether Weitzman made clear and unambiguous promises to Boise, and whether he reasonably relied upon the alleged promises (*see Agress v Clarkstown Cent. School Dist.*, 69 AD3d 769, 771 [2d Dept 2010] [triable issues of fact exist as to whether representations were made, and whether it was reasonable for plaintiff to rely upon them if they were made]). Therefore, dismissal of the ninth cause of action for promissory estoppel is denied.

Moreover, unjust enrichment may be found where the defendant has obtained a benefit bestowed by the plaintiff, and the plaintiff was not adequately compensated (*see Swain v Brown*, 135 AD3d 629, 632 [1st Dept 2016]). "Unjust enrichment however, does not require the performance of any wrongful act by the one enriched" (*Simonds v Simonds*, 45 NY2d 233, 242 [1978] [citations omitted]). As discussed previously, defendants failed to prove a lack of unjust enrichment in the submissions before this Court as there is a dispute regarding the reimbursement of the $250,000 of Boise's funds. As defendants have not demonstrated they were not unjustly enriched, dismissal of the fifteenth cause of action is denied.

D. Causes of Action for Damages

Defendants are entitled to dismissal of the tenth cause of action for declaratory judgment because it is well settled that a cause of action for declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action (*see BGW Dev. Corp. v Mt. Kisco Lodge No. 1552 of Benevolent and Protective Order of Elks of U.S. of Am.*, 247 AD2d 565, 568 [2d Dept 1998], *lv denied* 92 N2Yd 813 [1998]). Plaintiff failed to raise a triable issue of fact as he has also asserted a claim for constructive trust. Moreover, defendants have failed to make a prima facie showing of entitlement to dismissal on the merits as a matter of law on the constructive trust cause of action (sixteenth cause of action). "The elements necessary for the imposition of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010] [citations omitted]). While defendants argue that there was no unjust enrichment to them, there is a question of fact on this point (*see Toobian v Golzad*, 193 AD3d 778, [2d Dept 2021]

> ["While any single factor might not be sufficient, by itself, to establish a fiduciary relationship, viewed collectively,

> they demonstrate that triable issues of fact exist regarding the existence of a fiduciary relationship between the plaintiff and the defendant, whether the defendant was unjustly enriched and whether, under the circumstances, a constructive trust should be imposed on the subject property and the LLC"]).

Furthermore, defendants are entitled to dismissal of the twelfth cause of action for punitive damages because "there can be no separate cause of action for punitive damages" (*Feiner & Lavy, P.C. v Zohar*, 195 AD3d 411, 413 [1st Dept 2021] [citations omitted]). This is not to say, however, that plaintiff may not be entitled to punitive damages at trial, only that a separately stated cause of action is unwarranted. Lastly, dismissal of plaintiff's claim for joint and several liability (thirteenth cause of action) is not warranted (*see Hyde & Sons v Lesser*, 93 AD 320, 322 [1st Dept 1904] ["Where the cause of action is based solely upon fraud of the defendant, and the recovery sought is the damages caused by such fraud, the action is in tort, and can be maintained against one responsible for the fraud"]).

In light of the foregoing determination, the parties' remaining contentions need not be addressed.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendants Phyllis Weitzman a/k/a Phyllis Okolie and Bow Faith Co. LLC is denied as to the fourth, fifth, sixth, eighth, ninth, thirteenth, fifteenth and sixteenth causes of action, and granted as to the tenth and twelfth causes of action without prejudice.

1/30/2025
DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

APPLICATION: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER

152489/2016 MAURICE HYDE vs. CYRIL OKOLIE ET. AL.,
Motion No. 016