SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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CODEFAB, LLC,

Index No. 108861/08

Plaintiff,

- against -

WG, LTD., a Canadian corporation, d/b/a "VIRGIN GAMING," PLUS 44 HOLDINGS, INC., a Panamanian corporation, JOHN KENNEDY FITZGERALD, WILLIAM C. LEVY, ZACHARY ZELDIN, "ABC CORPORATION," a fictitious name representing an unidentified entity d/b/a "WORLDGAMING," and "JOHN DOES" 1 through 5, fictitious names representing unidentified persons acting in concert with the Defendants,

Defendants.

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JOAN A. MADDEN, J.:

Defendants WG, LTD. d/b/a Virgin Gaming (WG) and Plus 44 Holding, Inc. (Plus 44) (together "the corporate defendants"), move for summary judgment dismissing the claims against them (motion sequence number 009). Defendants John Kennedy Fitzgerald, William C. Levy, and Zachary Zeldin (together "the individual defendants") separately move for summary judgment dismissing the claims against them (motion sequence number 010).[1] Plaintiff CodeFab, LLC opposes both motions.

BACKGROUND

Plaintiff is a New York limited liability company engaged in the business of computer consulting and software design. Defendant Plus 44 is a Panamanian corporation that was incorporated in March 2007, by some or all of the individual defendants to own and operate an online gaming website. As of late 2008, Plus 44 was either formally dissolved or no longer

[1]Motion sequence nos. 009 and 010 are consolidated for disposition.

operating. Plaintiff was paid $420,000 for its services in connection with development of the gaming website and claims it is still owed $240,000. Plaintiff maintains that it gave Plus 44 and the individual defendants access to the programming source code for the website for testing, that they refused to return or pay for it, and that Plus 44 and the individual defendants transferred the source code to WG, and other defendants, and that WG maintains a gaming website which uses the source code that plaintiff created. Defendants counter, *inter alia*, that they discarded the source code because it was worthless and that they did not use the code or any part of plaintiff's website.

In or about the fall of 2006, the plaintiff, through its Chief Executive Officer, Alexander Cone ("Cone"), first met with defendants William C. Levy ("Levy") and Zachary Zeldin ("Zeldin") regarding providing its services to develop an interactive internet gaming website. The website would allow users to log in and compete against each other by playing specific video games on a specific platforms against other users for money (Levy Aff. ¶ 5).[2] The website was referred to as "World Gaming[3]" (Id, ¶ 4).

In or about February 16, 2007, plaintiff provided Levy and Zeldin with a developmental roadmap outlining specific services and the dates by which they would be completed, known as the Roadmap (corporate defendants' Motion, Exh. G). The Roadmap indicates that the website

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[2]The record contains two different Levy affidavits dated February 19, 2006; one submitted by the corporate defendants and the individual defendants. Unless otherwise indicated, the Levy affidavit refers to the version submitted with the corporate defendants' motion, and is referred to as Levy Aff. The Levy affidavit submitted with the individual defendants motion is referred to as Levy Aff. II.

[3]The website was also allegedly known as "Game for Green" (Third Amended Verified Complaint, ¶ 8).

will "go live" as of September 1, 2007 (Id., at 35). At his deposition, Cone testified that the Roadmap "was at best a theoretical exercise based on best guesses about what we would actually end up doing" (12/5/11 Cone Dep, at 84).

Plaintiff provided defendants with a document entitled Development Agreement which was dated as of February 1, 2007 ("the Development Agreement")(Cone Aff., Exhibit A). The Development Agreement states that it is between plaintiff and Plus 44, which is identified as "the Client," and the name Plus 44 is above the signature line. The Development Agreement is executed by Cone on behalf of plaintiff but is not executed on behalf of Plus 44. At his deposition, Cone acknowledged that he understood that he was contracting with Plus 44, as opposed to the individual defendants (11/11/15 Cone Dep, at 134-135).

Paragraph one of the Development Agreement, entitled Scope of Services, states that plaintiff is engaged by "the Client as independent contractor to perform certain services for Client...as those specified in the Statements of Work, which shall be agreed to by the parties... and incorporated into this Agreement by reference." With respect to compensation, paragraph 2 states that "Client will pay [plaintiff] the amount specified in the Statements of Work for Services according to the payment terms specified in the Statements of Work....In addition to the fees for services, Client will pay [plaintiff] for any and all pre-approved actual and reasonable expenses." It further states that plaintiff "will invoice Client monthly for fees for services performed and expenses incurred and Client will pay all invoices within fifteen days of the date of invoice unless specified in the Statement of Work."

Paragraph 3,entitled Ownership of Development Work, provides, in part, that "upon periodic payment for services (as set forth in the Statement of Work) which produced Work

Product for which the periodic payment applies, [plaintiff] hereby irrevocably assigns to Client all right, title, and interest in Work Product (as defined in the Statement of Work)... including without limitation all intellectual property rights..."

Paragraph 8, entitled Term and Termination, provides, in part, that "[t]his Agreement shall commence on the date set forth in the first paragraph and continue for an initial term of six months ("the Initial Term")...and shall automatically continue in the event [plaintiff] continues to provide services to Client. After the Initial Term, this Agreement may be terminated by either party upon thirty days (30) days written notice.... "

Attached to the Development Agreement is an unsigned document entitled "Statement of Work," which indicates that it is between plaintiff and an unidentified client pursuant to a Consulting Agreement dated November 11, 2006. It provides, *inter alia*, for the staffing of the project with two full time and two half time employees of plaintiff, and provides for a payment upon signing of $57,600 and then that amount per month until the gaming website is completed. At his deposition, Cone testified that the annexed Statement of Work was "an unfinished draft document," and that the Statement of Work referred to in the Development Agreement would be similar to the draft, but that he could not recall if a finalize version was ever prepared (11/11/15 Cone Dep, at 45-46).

Plaintiff maintains that the Development Agreement was a final agreement and that it was entered into after substantial negotiations between Cone, on behalf of plaintiff, and Levy and Zeldin, on behalf of Plus 44, and although the Agreement was not signed by a representative of

Plus 44, Levy agreed to its terms orally (Cone Aff., ¶ 12; [4] 11/11/15 Cone Dep, at 20-23). Defendants, however, deny that Plus 44 or anyone representing Plus 44 agreed to the terms and conditions of the Development Agreement, and maintain that the agreement "was merely a draft that was to be negotiated further between Plaintiff and Plus 44" (Levy Aff., ¶ 14). In this connection, defendants note that the Statement of Work is a draft document which is missing information as to the scope of services to be provided during three phrases of work.

In further support of their position, defendants refer to an unsigned draft Consulting Agreement dated May 18, 2007 (Corporate Defendants' Motion, Exh. J), which defendants maintain was "a counterproposal to the draft Development Agreement" (Levy Aff. ¶ 17). Plaintiff contends that it rejected this draft which it describes as an attempt to "unilaterally revise" the Development Agreement as it purported to change the parties' understanding under which they had been performing for more than three months (Third Verified Amended Complaint, ¶ 19, fn 6; Cone Aff. ¶ 28, n. 2).

In any event, it is undisputed that plaintiff began performing services in connection with creation of the gaming website in or about late February 2007, and that plaintiff issued invoices for its work in the amount of $60,000 per month beginning in February 2007 through December 1, 2007, for a total of $659,784.75[5] (Individual Defendants' Motion, Exh. H; M Third Amended Verified Complaint, ¶ 19, 20). The invoices were sent to Plus 44 to the attention of Levy in the amounts of $60,000, "for consulting services as per contract." Plaintiff was paid an amount

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[4]Defendants argue that Mr. Cone's affidavit is not properly notarized and should not be considered by the court. As plaintiff subsequently submitted a notarized version of Mr. Cone's signature page, this objection is unavailing.

[5]The amount is less certain fees, including for bank wire transfers.

totaling $419,784.75, via wire transfer into plaintiff's account (Third Amended Verified Complaint, ¶ 20).

With respect to the progress of the work, by the summer of 2007, it was clear that plaintiff would be unable to meet the deadlines in the Roadmap. Levy avers that "Plus 44's team communicated regularly with plaintiff regarding the delay in the project and to troubleshoot the many issues that arose from the poor quality of plaintiff's work. These conversations included frequent disputes about the amount billed, what monies were owed to Plaintiff and quality (or lack thereof) of Plaintiff's services" (Levy Aff. ¶ 22). Cone, on the other hand, avers that the delays in meeting the milestones in the Roadmap were caused by issues outside plaintiff's control, including those related to defendants' delays in fulfilling their responsibilities under the agreement "to deliver decisions, priorities, designs and access to external services and systems" (Cone Aff. ¶ 31, 12/5/11 Cone Dep., at 85-92, 115-117). He also states that "[d]efendants' working relationship [with plaintiff] continued on a regular and congenial basis through email exchanges, telephone calls and the like...while Defendants' project..was developed, improved and approached substantial completion" (Cone Aff. ¶ 38).

On October 26, 2007, a conference call was held regarding progress on the website. The minutes from the conference call (Corporate Defendants' Motion, Exh. K), identify the participants as, *inter alia*, Levy, Zeldin, and Angelo Genovese ("Genovese"), who plaintiffs maintain was an employee of defendants,[6] and Cone. The minutes state, *inter alia*, that:

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[6]While defendants assert that there is no evidence that Genovese is their employee (Individual Defendants' Statement of Undisputed Facts, ¶ 59), this assertion ignores that Cone's statement in his affidavit that Genovese was an employee of defendants (Cone Aff. ¶ 45) and Cone's testimony that Genovese was working on behalf of the defendants (11/11/15 Cone Dep, at 83) Notably, defendants provide no proof that Genovese was not their employee or agent.

1. 12 noon 11/9 is agreed date for code complete...
3. CF (i.e. plaintiff) purposed a check list for the final code complete 11/9 delivery. Check List will be made and [a]greed on by teams. Angelo [Genovese] will produce initial check list for review and [plaintiff] will provide feedback....
8 Notice of current MSA (i.e. Master Service Agreement[7]) termination was given November 19, 2007. WG (i.e. World Gaming[8]) will be billed according to current contract for first half of November.
9. A new MSA/SOW (i.e. Master Services Agreement/Statement of Work) needs to be agreed upon post 11/18, both sides need to sit down and discuss terms, i.e. invoices, project management rates, scope of work, etc. This will probably be worked out post 11/9 as to efficiently use everyone's time prior.

According to Levy, during the conference call, "Plus 44 demanded that Plaintiff deliver the complete source code by November 9, 2007 at 12:00 pm [and that] [a]lthough there were certain disagreements as to what would happen in the event the Plaintiff failed to deliver the completed source code by November 9, 2009, Plaintiff agreed to deliver the completed code by that date and time" (Levy Aff ¶ 23). Levy also states that during the call, Cone was notified that "Plus 44 was terminating its 'contract' between Plaintiff and Plus 44 effective November 18, 2007 [and that] Plus 44 told Mr. Cone that Plus 44 did not agree to pay $60,000 per month for any work performed by Plaintiff after November 19, 2007 (Id. ¶ 24). He further states that "Cone did not reject the termination because it was not in writing [as required under the Development Agreement]" (Id).

Cone, on the other hand, testified that the parties discussed terminating the contract, but only for the purpose of replacing it with a new one, and that when no new contract was

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[7]At the deposition, Cone referred to the Development Agreement, as the Master Service Agreement, and it appears that the two are used interchangeably.

[8]World Gaming, as opposed to Plus 44, is identified in the minutes as the party with which plaintiff was working to develop the website.

negotiated, plaintiff continued its work under the previous agreement (11/11/15 Cone Dep, at 40-46). Notably, Cone's testimony is consistent with the meeting minutes to the extent that they indicate that a new agreement must be made after November 18, 2007.

In or about October 2007, plaintiff provided Genovese its source code for the purpose of testing the website's appearance and functionality, and Genovese copied the code from plaintiff's management system (Third Amended Verified Complaint ¶ 25, Cone Aff. ¶ 47; 11/11/15 Cone Dep, at 6, 55-56). By email dated October 30 and October 31, 2007, plaintiff provided Genovese with detailed instructions on setting up and operating plaintiff's source code (Cone Aff, Exh. L). Plaintiff received its last payment, for the August 2007 invoice, on November 1, 2007 (Id, ¶ 47; Third Amended Verified Complaint, ¶ 20).

Plaintiff issued two invoices for payment for work, one through November 19, 2007 for $36,000, and another through the end of the month for $24,000 (Individual Defendants' Motion Exh. H).

Plaintiff continued to perform development work in November and December 2007, and Cone testified that Genovese continued to have access to the source code modifications through January 2008 (11/11/15 Cone Dep., at 10-12; 82-83). Plaintiff alleges, upon information on belief, that in or about November 2007, defendants transferred their assets including the source code to WG, ABC and/or Intertaintech corporation without notice to plaintiff, and concealed such transfer from plaintiff (Third Amended Verified Complaint ¶ 26). WG's Supplemental Response to Interrogatories and annexed documents (Cone Aff., Exh. C), which is submitted by plaintiff, show, *inter alia*, that at or about the time plaintiff maintains the source code was

transferred and used by WG, Levy and Zeldin were officers and directors of WG,[9] (formerly known as 2101106 Ontario Ltd), and that Fitzgerald was an advisor to WG and that individual defendants were compensated for their work, including with shares of WG stock. As for Intertainment, plaintiff submits documentary evidence showing that in January 2008, Fitzgerald, as a director, signed an amendment to change the name of a corporation from 2130023 Ontario Inc. to Intertainment in January 2008, and that he signed the documents of incorporation for 2130023 Ontario Corp which was incorporated on March 8, 2007. Plaintiff also points to documentary evidence that Levy and Zeldin were respectively, the President and Secretary, and that Vice President of Gaming Operations, Intertainment's predecessor and correspondence from VirginGaming and Intertainment indicating that they were compensated in connection with these positions.[10]

While at his deposition, Cone testified that the World Gaming website was not running until 2009, he also testified that in 2008, he was able to view a publicly accessible portion of the World Gaming website which at the time "seemed to be constructed from exactly the same pieces as the equivalent code we developed. It used the same CSS files[11], the same Javascript

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[9]The response indicates that Levy was the President and Secretary of of WG from April 28, 2006 until 2013; and an officer from April 28, 2006 to February 11, 2011, while Zeldin was the Vice President of Gaming Operations from April 28, 2006 to approximately May 23, 2014, and a director from April 28, 2006 to October 1, 2008.

[10]Plaintiff also submits a March 2014 consulting agreement between Intertainment and Zeldin and a January 2010 non-compete agreement between Levy, as consultant, and Intertainment (Cone Aff., Exh. N).

[11]CSS, which stands for Cascading Style Sheets, is "style sheet language used for describing the presentation of a document written in a markup language. Although most often used to set the visual style of web pages and user interfaces written in HTML and XHTML, the language can be applied to any XML document, including plain XML, SVG and XUL, and is

files,[12] the same images, the same user avatars ... in the relatively static pages." (11/11/15 Cone Dep., at 57-58). He further testified that he printed and captured those publically accessible images of the World Gaming website[13] (Id, at 62); (Cone Aff., Exh B). However, he also testified that when the World Gaming website went public in 2009, "they had clearly done a year of further developments and changes ... and the website that was presented to the public at the time that they actually started doing gaming was different from the one that we developed" (Id, at 66-67). When asked if the functionality which plaintiff developed for defendant was ever available to the public, Cone answered "you are using the word functionality in a slippery way. Were the features and functionality that we developed the things that a user could do available to the public? Yes. Was the implementation of the features, the actual applications that drove the website, done with the same code that we had done? I do not believe so" (Id, at 66). Cone's

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applicable to rendering in speech, or on other media. Along with HTML and JavaScript, CSS is a cornerstone technology used by most websites to create visually engaging webpages, user interfaces for web applications, and user interfaces for many mobile applications." See Wikipedia contributors, "Cascading Style Sheets," *Wikipedia, The Free Encyclopedia*, 10 May 2017. https://en.wikipedia.org/w/index.php?title=Cascading_Style_Sheets&oldid=779639693.

[12]JavaScript "is a high-level, dynamic, untyped, and interpreted run-time language." "Alongside HTML and CSS, JavaScript is one of the three core technologies of World Wide Web content production; the majority of websites employ it, and all modern Web browsers support it without the need for plug-ins." Programmers use JavaScript for various uses including video game development. See Wikipedia contributors, "JavaScript," *Wikipedia, The Free Encyclopedia*, 4 May 2017. https://en.wikipedia.org/wiki/JavaScript#CITEREFFlanagan2011.

[13]Cone testified that he printed the images from a website known as Domain tools (Id, at 74-75).

claim is that there were "overlaps in both functionality and in the generated HTML,[14] but it appeared to be a different back end. There were portions of page source that were the same, there were images that were the same. There were Javascript and CSS that were the same (Id, at 70-71). Notably, although not moving for summary judgment, in opposition, plaintiff did not provide an expert evidence to explicate Cone's testimony regarding defendants' alleged use of the source code in connection with the World Gaming website.

Cone testified that he did not know whether Genovese transferred the source to any of the defendants (Id, at 56), and Levy, Zeldin and Fitzgerald each deny possessing or transferring the source code (Levy Aff. II ¶'s 17 and 18, Zeldin Aff. ¶'s 6,8 Fitzgerald Aff. ¶'s 5, 6) He also testified plaintiff maintained a repository containing the source code, and continues to have access to the code (11/11/15 Cone Dep, at 10; 12-6-11 Cone Dep at 291-292).

Defendants deny that they used plaintiff's source code, and although moving for summary judgment, they fail to provide an expert opinion to substantiate their arguments. Instead, defendants rely on affidavits of WG's employees, one which is conclusory and the other lacking technical expertise or support, to refute Cone's testimony that defendants used certain aspects of plaintiff's source code in the gaming website. WG's Director of Development, Eyal Susser, states that "to the best of my knowledge, no code developed by [plaintiff] is used in connection with the Virgin Gaming website [and that] the code used in connection with the Virgin Gaming Website does not bear any indicators of any WebObjects code [i.e. the code

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[14]HTML, which stands for Hypertext Markup Language, "is the standard markup language for creating web pages and web applications. With Cascading Style Sheets (CSS) and JavaScript it forms a triad of cornerstone technologies for the World Wide Web." See Wikipedia contributors, "HTML," *Wikipedia The Free Encyclopedia*, 24 April 2017. https://en.wikipedia.org/w/index.php?title=HTML&oldid=776964090.

developed by plaintiff] has ever been used [and that] I would be able to tell if any code using WebObjects is being used in connection with the Virgin Gaming website. It is not" (Susser Aff. ¶'s 2-5).

The former Chief Technology Officer for Virgin Gaming, Jacob Ofir, also denies that plaintiff's code was used in connection with the Virgin Gaming website (Ofir Aff. ¶ 2). Instead, he states that when WG was formed "a third party software development firm was engaged to begin the code development process from scratch [and that] subsequently, developers were hired internally to work on the website project, which ultimately became the Virgin Gaming Website" (Id ¶'s 3, 4). In addition, he states that the code used in connection with the website "did not bear any indicators that any WebObjects code [i.e. the code developed by plaintiff] had ever been used ...[and that]... there were numerous comments in the code which mentioned the third party developer referenced in paragraph 3. There were no references to [plaintiff and that] I would be able to tell if any code written by anyone other than the third party developer or our internal developers was included in the original code base that I encountered when I joined the project. It was not" (Id ¶'s 6-8).

In further support of Ofir's statements regarding a third-party developer, defendants attached an invoice dated June 15, 2008 from Digi Group Inc., billed to Intertainment Corporation, the parent company of WG, for work performed between January 26, and May 31, 2008, totaling approximately $200,000[15] (Corporate defendants' Motion, Exh. N).

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[15]In its opposition papers, plaintiffs state that "Cone opines and is prepared to testify as supported by experts, that such total cost is a small fraction of the cost of development of the WG website unless it had possession of the Source Code from a similar looking and operating previously developed Website...like the [plaintiff's] website" (Plaintiff's Memo in Opp at 6, n. 10). Notably, however, plaintiff's opposition is not supported by any expert opinion to this

On January 15, 2008, Levy sent plaintiff an email from defendant John Fitzgerald Kennedy stating, *inter alia* ,that plaintiff had not performed up to expectations based on delays and the quality of work, and that a new relationship between plaintiff and defendants needed to be worked out that "would include a complete write off of all costs that you may have invoiced to date that have not been paid" (Cone Aff., Exh. K). Cone testified that until his receipt of the January 15, 2008 email, Levy promised to pay the outstanding invoices (11/11/15 Cone Dep, at 109-116; 12/5/11 Cone Dep, at 169-171).

At the time plaintiff received the January 15, 2008 email, invoices issued by plaintiff for September 2007 through December 2007, for $60,000 per month, totaling $240,000, had not been paid (Cone Aff . ¶ 35, 36). Plaintiff claims that it is owed an additional $60,000, for work it performed through January 1, 2008, although no invoices were sent for such services (Id ¶ 40). Plaintiff commenced this action by filing the summons and complaint on June 26, 2008. WG was not a originally named as defendant[16] and was added after the court granted plaintiff's motions to amend over defendants' opposition.[17] WG subsequently moved to dismiss the second

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effect.

[16]Plaintiff sought to add WG after the corporation was identified in connection with defendants' opposition to plaintiff's 2012 motion to amend.

[17]Plaintiff also moved to amend to add World Gaming as the d/b/a for defendant ABC Corporation. The court granted leave to amend but it appears from the record that World Gaming was not served. In the third amended verified complaint defendant ABC Corporation is identified as the name of an entity unknown to plaintiff, "which may or may not be Intertaintech Corporation, which owned and controlled by, or acting in concert with, the other Defendants...which acquired CodeFab's Gaming Website which it has used in internet commerce initially under the name World Gaming and/or it has used as a model or otherwise modified for the same or similar use by Defendant WG under the brand Virgin Gaming" (Third Amended Verified Complaint ¶ 9).

amended complaint on various grounds, including for lack of personal and subject matter jurisdiction, and Plus 44 and the individual defendants separately moved to dismiss or to strike the second amended complaint. Plaintiff opposed the motions and cross moved to file a third amended verified complaint. By decision and order dated January 20, 2015, this court denied defendants' motions and granted the cross motion to the extent of permitting plaintiff to add certain of the proposed claims against defendants.

On February 19, 2015, plaintiff filed the third amended verified complaint, asserting claims allowed by the court's order, for breach of contract (against all defendants except for WG), fraud (against all defendants), unjust enrichment (against all defendants), services rendered (against all defendants except WG), account stated (against all defendants except WG), accounting and constructive trust (against all defendants), permanent injunction (against all defendants), and fraudulent conveyance (against all defendants). Plaintiff seeks compensatory and punitive damages,[18] as well as attorneys' fees.

In their third amended verified answer, defendants assert various affirmative defenses, and a counterclaim, for unjust enrichment, alleging that plaintiff failed to deliver the gaming program by the agreed upon deadline, and that the program, when delivered, was non-confirming and unsatisfactory, and that plaintiff was unjust enriched by the $419,784.75[19], the amount paid by Plus 44 for the gaming program.

Plaintiff filed its note of issue and certificate of readiness on December 29, 2015.

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[18]The January 20, 2015 decision and order held that it was premature to dismiss plaintiff's request for punitive damages.

[19]This amount includes deductions made for certain wiring fees from the $420,000 payment.

Thereafter, the corporate defendants and the individual defendants made these motions for summary judgment, which are opposed by plaintiff.

DISCUSSION

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law." Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc., 96 AD3d 551, 553 (1st Dept 2012)(internal quotation marks and citation omitted). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" Id. "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v Citibank Corp., 100 NY2d 72, 81 (2003).

Breach of Contract

With respect to the breach of contract cause of action, defendants argue that the Development Agreement is unenforceable as it was not signed on behalf of Plus 44. They also argue that the undisputed facts show that defendants did not intend to be bound by the draft and that the terms of the Development Agreement were not final, as evidenced, *inter alia*, by the draft Statement of Work annexed to the agreement and based on the May 18, 2007 Draft Consulting Agreement which, they argue, constituted a counteroffer.

Defendants further argue that the parties' course of dealing demonstrates an intention to be bound only by a signed writing, including Cone's failure to insist that the defendants' termination of the agreement after the October 2007 conference call, be in writing as required by

the Development Agreement. In addition, defendants point to plaintiff's subsequent invoicing of for its services ending on November 19, 2007, the date they argue any agreement with plaintiff was terminated.

The individual defendants separately argue that as there is no evidence that they were parties to any purported contract with plaintiff and no evidence they intended to be bound by it, the breach of contract claim must be dismissed against them.

Plaintiff counters that there are triable issues of fact as to whether the parties intended to form a contract despite the lack of a writing signed by defendants, particularly as there is no documentary evidence showing that a signature was a prerequisite to an enforceable contract, and that the conduct of the parties, including defendants' payment for plaintiff's services, shows the parties intended to be bound by the terms of the Development Agreement.[20]

As for the individual defendants, plaintiff argues that they may be held liable under the Development Agreement based on statements by Cone that when he met defendants Levy and Zeldin, they introduced themselves as individuals and that the first time the name of Plus 44 was mentioned was after plaintiff submitted its first invoices for payment, and that individual defendants failed to document or explain their alleged agency relationship with Plus 44 (Cone Aff. ¶ 's 2-8).

The elements of a cause of action for breach of contract are (i) formation of a contract between plaintiff and defendant, (ii) performance by plaintiff, (iii) defendant's failure to perform,

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[20]To the extent plaintiff cites to the unpleaded doctrine of promissory estoppel to provide a basis of holding individual defendants liable under the contract, such reliance is misplaced in the absence of evidence of a clear and unambiguous promise made by defendants. See Thome v. Alexander & Louisa Calder Foundation, 70 AD3d 88, 105 (1st Dept 2009), lv denied 15 NY3d 703 (2010).

(iv) resulting damages. Harris v. Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dept 2010); Clearmont Prop., LLC v. Eisner, 58 AD3d 1052, 1055 (1st Dept 2009). A written contract signed by the parties is not necessary to form a contract as long as the agreement contains the essential terms, including the fees or other costs involved. Kasowitz, Benson, Torres & Friedman, LLP v. Reade, 98 AD3d 403, 404 (1st Dept 2012), aff'd 20 NY3d 1082 (2013). In this connection, "all the terms contemplated by the contract need not be fixed with complete with perfect certainty for a contract to have legal efficiency." Kolchins v. Evolution Markets, Inc., 128 AD3d 47, 61 (1st Dept 2015), lv denied 28 NY3d 1177 (2017). Moreover, it is well established that "a contract may be valid even if it is not signed by the party to be charged, provided its subject matter does not implicate a statute... such as the statute of frauds.[21]" Flores v. Lower E. Side Serv Ctr., Inc., 4 NY3d 363, 368 (2005). At the same time, however, "[w]hen parties do not intend to be bound until their agreement is reduced to writing and signed, there is no contract in the interim ... even if the parties have orally agreed upon all the terms of the proposed contract." Chatterjee Fund Mgt. v. Dimensional Media Assoc., 260 AD2d 159 (1st Dept 1999).

Here, the court finds that the Development Agreement contains sufficient terms to constitute an enforceable agreement even though certain of its terms were not finalized. Kolchins v. Evolution Markets, Inc., 128 AD3d at 61. In addition, defendants provide no documentary or other conclusive evidence to support defendants' position that their signature was a prerequisite to enforcement of the Development Agreement, or that the Development

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[21]Except insofar as plaintiff argue that the individual defendants guaranteed payment under the contract, which argument is without support in the record, there is no basis for applying the statute of frauds to the agreement at issue. See e.g., Roth Law Firm, PLLC v. Sands, 82 AD3d 675, 677 (1st Dept 2011)(where an agreement is a primary obligation as opposed to an agreement to answer for the debt of another the statute of frauds has no application).

Agreement was merely an unenforceable draft proposal. Next, even assuming *arguendo* defendants have provided sufficient evidence to meet their burden of showing that the parties did not intend to be bound by the Development Agreement in the absence of a fully executed agreement and a finalized Statement of Work, the plaintiff has controverted this showing based on Cone's statements and testimony as to the parties' intent and evidence that the parties performed in accordance with the terms of the Development Agreement. This conduct includes plaintiff's commencement of work, its issuance of monthly invoices to Plus 44, and the payment of such invoices. Moreover, Cone's alleged failure to insist that any termination of the agreement be in writing is not dispositive in this regard, particularly as the record raises issues of fact as to whether agreement was terminated and/or whether any such termination was conditioned on the agreement's replacement with a new contract.

That said, however, the court finds that individual defendants are entitled to summary judgment dismissing the breach of contract claim against them. It is well settled that "'an agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal.'" Salzman Sign Co. v. Beck, 10 NY2d 63, 67 (1961), quoting Mencher v. Weiss, 306 NY2d 1, 4 (1953); see also, Rene Boas and Associates v. Vernier, 22 AD2d 561 (1st Dept 1965); Jevremov v. Crisci, 129 AD2d 174 (1st Dept 1987). Under this rule, "when an agent acts on behalf of a disclosed principal, the agent will not be personally liable for a breach of contract unless there is clear and explicit evidence of the agent's intention to be personally bound ." Weinreb v. Stinchfield, 19 AD3d 482, 483 (2d Dept 2005); See also, Lichtman v. Mount Judah Cemetary, 269 AD2d 319, 320 (1st Dept) lv dismissed, 95 NY2d 860 (2000).

Here, defendants have provided evidence that the individual defendants, were agents of Plus 44, who did not intend to be bound any agreement to pay plaintiff. See Levy Aff. II ¶'s 1, 3 Zeldin Aff. ¶'s 1-5 Fitzgerald Aff. ¶'s 2-4. In addition, the terms of the Development Agreement on which plaintiff relies, identifies the parties to the agreement as plaintiff and Plus 44, and Cone testified that he understood that he was contracting with Plus 44, as opposed to the individual defendants. In addition, the invoices sent for payment were addressed to Plus 44, as opposed to the individual defendants.

Plaintiff has not controverted this showing at it provides no evidence that the individual defendants contracted with plaintiff in their individual capacity or otherwise agreed to pay any obligation owed by Plus 44. In this connection, Cone's statements in his affidavit that the individual defendants originally did not inform him of their connection to Plus 44 and subsequently failed to clarify the nature relationship to Plus 44 is insufficient to raise an issue of fact in this regard and plaintiff cites no case law to the contrary.

Accordingly, the defendants are entitled to summary judgment to the extent of dismissing the breach of contract claim as against the individual defendants only and the claim shall continue as against Plus 44.

Fraud

In connection with the fraud claim, the third amended verified complaint alleges that the individual defendants "made ... representations to ...Cone ...initially between October 2006 and February 2007, to induce [plaintiff] to create the Gaming Website and deliver it to the individual defendants while concealing the subsequent conversion thereof to defendants WG, ABC and John Does 1-5 and/or Intertaintech Corporation, or unknown other persons and entities acting in

concert with them" (Third Amended Verified Complaint ¶ 36). In particular, it is alleged that the "to induce [plaintiff] to develop the proposed Gaming Website without having signing the Agreement the individual defendants represented that they were in control of the otherwise unidentified parties in interest purchasing the Gaming Website...[h]owever, ...the individual defendants concealed the names and relationships and/or respective interests of the other corporate partnerships and individual defendants, including especially defendants WG and/or Intertaintech [and that] [c]onsequently, despite requesting Defendant Plus 44's name to be identified as a purchaser on [plaintiff's] invoices, individual defendants...represented both within and from without State of New York that they owned or controlled the actual purchasers of the Gaming Website; further...Levy represented to [plaintiff] in April and June 2007 in emails as well as orally while in [plaintiff's] offices on or about April 10, 2007 that the payment to [plaintiff] was going to be made because the individual defendant would cause the actual purchasers to pay [plaintiff] pursuant to their invoices " (Id ¶ 15-17)

It is next alleged that the individual defendants "subsequently made additional representations (collectively "Representations") to the effect that the corporate defendants would pay the entire balance to [plaintiff] that they would purchase additional software from [plaintiff] and they were moving forward with [plaintiff's] website for 2008 and that they wanted access to [plaintiff's] Gaming Website for testing purposes [and that] the Representations were false when made and known to be false by Defendants and were made to induce [plaintiff's] reliance upon them so it would continue to work on the Gaming Website without the required monthly payments therefor and so Defendants could use [plaintiff's] source code without paying in full" (Id, ¶'s 37, 38). It is also alleged that the "Representations were not known to be false by

[plaintiff and] had [plaintiff] known that the Representations by the individual defendants were false, or that Defendants would not pay the balance of the Payments, [plaintiff] would not have continued working to finish the Gaming Website and would not have delivered [plaintiff's] source code to Defendants" (Id, ¶ 39, 40).

Defendants argue that the fraud claim is not pleaded with sufficient particularity and is duplicative of the breach of contract claim as it is based on allegations that defendants failed to pay plaintiff in accordance with the parties' alleged agreement and made alleged misrepresentations to induce plaintiff to provide services, and seeks the same damages recoverable under the breach of contract cause of action. They also argue that any alleged promise to provide plaintiff's services in the future is not an actionable misrepresentation. In addition, with respect to the individual defendants, defendants asserts that there are no allegations, or evidence that, any of the purported representations attributed to these defendants were made in their individual capacity.

Plaintiff counters that the fraud claim is not duplicative of the breach of contract claim since the fraud relating to Plus 44 as "the true vendee" of the parties' agreement continued after the agreement was entered into and involved concealing material facts regarding the defendants' relationship to WG and Intertainment, and that plaintiff's work was being used for the WG website and that the misrepresentations were made to induce plaintiff to do as much work as possible before defendants' final default in January 2008 for refusing to pay plaintiff for its work beginning in November 2007. As for the individual defendants, plaintiff argues that they are subject to personal liability for the corporate defendants' tortious conduct based on evidence that they participated in such conduct, and that their participation can be inferred from the evidence

showing that they were shareholders and officers of WG and Intertainment and that they benefitted from the scheme to use plaintiff's source code without paying plaintiff for its work.

In reply, defendants argue, *inter alia*, that plaintiff's allegations that the individual defendants' concealed their relationship with Plus 44 and never intended to pay are duplicative of their breach of contract claim, that plaintiff's assertions of fraud are unsupported by any evidence, that assertions of concealment are ineffective in the absence of a duty to disclose, and that record shows that the individual defendants were not officers or directors, but only agents, of Plus 44 and therefore may not be held liable for any tortious conduct by Plus 44.

To plead a viable cause of action for fraud, it must be alleged that the defendant made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendant when made, for the purpose of inducing reliance, justifiable reliance on the alleged misrepresentation or omission by the victim of the fraud, and injury. Lama Holding Company v Smith Barney Inc., 88 NY2d 413, 421 (1996).

To recover damages in tort such as fraud in a contract action, "plaintiff needs to plead and prove 'a breach of duty distinct from, in or addition to, a breach of contract.'" Gosmile, Inc. v. Levine, 81 AD3d 77, 81 (1st Dept 2010), lv dismissed 17 NY3d 782 (2011), quoting Non–Linear Trading Co. v. Braddis Assoc., 243 AD2d 107 (1998). Thus, "[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). In other words, "[a] cause of action for fraud does not arise

when the only fraud charged relates to a breach of contract.[22]" Id.

However, "a misrepresentation of present facts, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty." Gosmile, Inc. v. Levine, 81 AD3d at 81; see also First Bank of the Americas v. Motor Car Funding, 257 AD2d at 291-292 (holding that fraudulent inducement claim may be based on allegations that a defendant made "a misrepresentation of present facts [that] is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of a duty").

Here, the alleged misrepresentations that the individual defendants would compensate plaintiff for its services constitute future promises to pay which arise out of a contractual obligation and not an obligation collateral to the contract. Manas v. VMS Associates, LLC, 53 AD3d at 454; compare First Bank of the Americas v. Motor Car Funding, 257 AD2d 287 (finding that the complaint stated a cause of action for fraudulent inducement when misrepresentations related to present facts regarding the quality of the collateral and individual's credit rating that allegedly induced plaintiff to enter into agreement). Moreover, that damages sought in connection with the fraud claim are the same as those recoverable under the breach of contract claim, indicates that the fraud claim is duplicative of the breach of contact claim. Manas v. VMS Associates, LLC, 53 AD3d at 454 (noting that fraud claim cannot be maintained when plaintiff fail to allege that she sustained any damages that would not be recoverable under the breach of contract claim); See Orix Credit Alliance, Inc. v. R.E. Hable Co., 256 A.D.2d 114, 115

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[22]The same principles apply when a plaintiff seeks to recover based on a theory of quasi contract. Mid Atlantic Perfusion Assoc., Inc., v. Westchester County Health Care Corp., 54 AD3d 831 (2d Dept. 2008) (holding that plaintiff's fraudulent inducement claim was duplicative of its quasi contract cause of action and must be dismissed).

(1st Dept. 1998)(same).

Next, to the extent the alleged defendants' misrepresentations that Plus 44 was the "true vendee," and as to individual defendants' control of those in charge of purchasing the gaming website are collateral to the contract, it cannot be said that plaintiff reasonably relied on such representations since the Development Agreement is between Plus 44 and plaintiff, and Cone acknowledged that he understood that he was contracting with Plus 44, as opposed to the individual defendants. Moreover, the record is devoid of evidence to support allegations that individual defendants made specific representations as to the entities purchasing the website or that such representations to plaintiff induced plaintiff to continue working on the website and to allow access to the source code so that it could be transferred to WG. To the contrary, the record shows that the plaintiff provided the source code to defendant's employee or agent in accordance with its contractual obligations.[23]

Furthermore, to the extent it is alleged that there was fraudulent concealment by the individual defendants as to their relationship to WG and Intertainment, such allegations do not provide a basis for a fraud claim in the absence of an affirmative duty owed by defendants to plaintiff to disclose such information, which has not been shown here. See P.T. Bank Central Asia v. ABN Ambro Bank, N.V., 301 AD2d 373, 376 (1st Dept 2003); Oppenheimer & Co. v. Oppenheimer, Appel, Dixon & Co., 173 AD2d 203 (1st Dept 1991). As there is no factual or legal basis for defendants' fraud claim, the court need not reach the parties' arguments related to the individual defendants purported liability as directors and officers alleged to have participated

[23]In fact, under the Development Agreement, plaintiff's work belonged to Plus 44 upon payment, and thus allegations that plaintiff was not paid for the source code constitutes a claim for breach of contract and not for fraud.

in the fraud.

Accordingly, the defendants are entitled to summary judgment dismissing the fraud claim against them.

Unjust Enrichment

As for the unjust enrichment claim, it is alleged in the third amended verified complaint that "in the event the court should determine that the unsigned agreement was not enforceable for any reason, ...Defendants have been unjustly enriched by obtaining possession and making use of the Gaming Website to the extent of the Unpaid Balance Due of $240,215.25 plus interest, [and that plaintiff] is entitled to restitution of the Gaming Website or, payment of the Unpaid Balance due of $240,215.25 from the Purchase Price, or any reasonable share of WG's equity from each of its equity holders, including the Defendants, who acting in concert, contracted with [plaintiff], plus accrued interest from on or about December 1, 2007."

In order to recover on a claim for unjust enrichment, a plaintiff must show that "(1) the other party was enriched, (2) at that party's expense, and (3) 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 , 65 AD3d 448, 453 (1st Dept 2009), aff'd, 16 NY3d 173 (2011). "[T]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what was recovered." Id., quoting Paramount Film Distrib. Corp. v. State of New York, 30 NY2d 415, 421, rearg denied 31 NY2d 709 (1972), cert denied 414 US 829 (1973). Central to a claim for unjust enrichment is an allegation that a "'benefit was bestowed...by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiff'" Weiner v. Lazard Freres & Co., 241 AD2d

114, 119 (1st Dept 1998), quoting, Tarrytown House Condominiums v. Hainje, 161 AD2d 310, 313 (1st Dept 1990). Moreover, when, as here, there is a dispute as to the existence of a contract, the assertion of a breach of contract claim, does not preclude plaintiff from alternatively seeking recovery for unjust enrichment. See Sabre Intern. Sec., Ltd. v. Vulcan Capital Mgt., Inc., 95 AD3d 434, 438 (1st Dept 2012)(holding that where "there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract") .

With respect to the individual defendants and WG, defendants argue the unjust enrichment claim must be dismissed against these defendants, relying on case law holding that to recover for unjust enrichment a plaintiff must show that it performed services for a defendant, and "it is not enough that the defendant received a benefit from the activities of the plaintiff." Kagan v. K-Tel Entertainment, Inc., 172 AD2d 375, 376 (1st Dept 1991); see also Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp., 296 AD2d 103, 108 (1st Dept 2009); Liberty Marble, Inc. v. Elite Stone Setting Corp., 248 AD2d 302 (1st Dept 1998). In particular, defendants argue that since services performed by plaintiff were allegedly based on its contract with Plus 44, plaintiff does not have a claim for unjust enrichment against the other defendants even if these defendants incidentally received the benefit of plaintiff's work, citing Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp., 296 AD2d at 108 (where plaintiff provided services pursuant to a contract with a corporate defendant it could not recover in unjust enrichment against a corporate officer who allegedly received a benefit as a result of plaintiff's work).

Contrary to defendants' argument, privity of contract is not required to assert a claim for

unjust enrichment. Georgia Malone & Co. v. Rieder, 19 NY3d 511, 517 (2012); Philips Intern. Investments, LLC v. Pektor, 117 AD3d 1, 3 (1st Dept 2014). Instead, the law requires that there be a "relationship between the parties that could have caused or induced reliance" and which is not "too attenuated." Georgia Malone & Co. v. Rieder, 19 NY3d at 517.

In Georgia Malone & Co., the plaintiff real estate broker asserted an unjust enrichment claim against another broker, who earned a commission for the sale of a property that plaintiff had contracted with a developer to sell, using due diligence materials that plaintiff created for the developer. The Court of Appeals dismissed the unjust enrichment claim, on the grounds that the relationship between plaintiff and defendant broker "is too attenuated because they simply had no dealings with each other." In Philips Intern. Investments, LLC , in an action by plaintiff who asserted a joint venture agreement with certain defendants in connection with the purchase of real property, the First Department held that the plaintiff joint venturer alleged a sufficient relationship between plaintiff and the limited partnerships formed by the defendant venturers to state a claim for unjust enrichment against the partnerships. In reaching this conclusion, the court noted plaintiff alleged that the defendant venturers used the partnerships as a vehicle to appropriate the venture's business opportunities to buy commercial properties that had been offered to the venture.

Here, at the very least, the record raises triable issues of fact as to whether there is a sufficient relationship between plaintiff and Levy and Zeldin to support an unjust enrichment claim against these defendants. Unlike the circumstances in Georgia Malone & Co., in this case, there is evidence of direct dealings between plaintiff and these individual defendants which allegedly induced reliance by plaintiff. Specifically, Cone testified and averred as to his dealings

with Levy and Zeldin that induced plaintiff to continue working on developing the gaming website, including Levy's continued acceptance of invoices on behalf of Plus 44, and statements made during a conference call in which Levy and Zeldin participated, regarding the parties entering into a new contract after the source code was delivered. With respect to whether Levy and Zeldin benefitted from the plaintiff's work, the record contains evidence that at time the source code was allegedly transferred and used by WG, Levy and Zeldin were officers and directors of WG and were paid for their work including with shares of WG stock.

As for Plus 44, the record raises triable issues of fact as to the viability of the unjust enrichment claim against this defendant based on proof that plaintiff performed services for Plus 44, and such services were accepted by Plus 44, and that Plus 44 received a benefit from such services, including the source code, for which it did not pay. See generally Georgia Malone & Co. v. Rieder, 19 NY3d at 517. Moreover, while the reasonable value of services rendered is one measure of damages for unjust enrichment (Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp., 296 AD2d at 108), another measure is the value of the benefit received. See Mayer v. Bishop, 158 AD2d 878, 881 (3d Dept), appeal denied 76 NY2d 704 (1990). Thus, contrary to defendants' position, plaintiff's failure to keep time records or other evidence to support the reasonable value of its services does not warrant dismissal of the unjust enrichment claim.

That said, however, defendants are entitled to summary judgment dismissing the unjust enrichment claim against Fitzgerald and WG as there is no evidence that these defendants had a sufficient relationship with plaintiff so as to provide a basis for the claim.

Accordingly, defendants are entitled to summary judgment dismissing the unjust

enrichment claim as against Fitzgerald and WG only, and the claim shall continue as against Levy, Zeldin and Plus 44.

Services Rendered

To prevail on a claim for services rendered, also known as quantum meruit, a "plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." Fulbright & Jaworski, LLP v Carucci, 63 AD3d 487, 489 (1st Dept 2009). When, as here, there is a dispute as to the existence of a express contract, a plaintiff may proceed with a claim for quantum meruit. See Wilmoth v. Sandor, 259 AD2d 252, 254 (1st Dept 1999)

Defendants argue that this claim must be dismissed since plaintiff concedes that it kept no time records that would establish the reasonable value of the services performed, citing Geraldi v. Melamid, 212 AD2d 575, 576 (2d Dept 1995)(granting summary judgment dismissing quantum meruit claim where record was "devoid of evidence which would establish the reasonable value of plaintiff's services"). In addition, as to the individual defendants and WG, defendants argue the claim must be dismissed as plaintiff's services were performed for, and accepted by, Plus 44 and not these defendants, citing Georgia Malone & Co. v. Rieder, 86 AD3d 406 aff'd 19 NY3d 511, 517 (2012).

As the services rendered were performed for Plus 44 only, the claim must be dismissed as against individual defendants and WG. See Fulbright & Jaworski, LLP v Carucci, 63 AD3d at 489 (dismissing claim for service rendered where there were no allegations that defendant accepted services from plaintiff). However, with respect to Plus 44, although there are no time

records, the reasonable value of plaintiff's service can be inferred from the compensation provision in the draft Statement of Work and from the $60,000 monthly amount paid to plaintiff. See I.S. Design, Inc. v. Planned Management Const. Corp., 243 AD2d 425 (1st Dept 1997)(plaintiff entitled to be reimbursed for the reasonable value paid for cabinet based on the amount designated in contract as fair value of cabinet); Kronish, Lieb, Shainswit, Weinger & Hellman v. Howard Stores Corp, 44 AD2d 813 (1st Dept 1974)(amount agreed to under retainer agreement is a factor in determining amount owed to attorney for services rendered).

Accordingly, with respect to the services rendered claim, defendants are entitled to summary judgment dismissing such claim as against the individual defendants and WG and the claim against Plus 44 shall continue.

Account Stated

As for the account stated claim, such a claim "has long been defined as an 'account balanced and rendered with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note has been given for the balance." Morrison Cohen Singer & Weinstein, LLP v Ackerman, 280 AD2d 355, 355-356 (1st Dept. 2001) (quoting Interman Industrial Products, Inc. v. R.S.M. Electron Power, 37 NY2d 151 (1975)). The receipt and retention of an account, without objection for a reasonable period of time, gives rise to an account stated. Shea & Gould v. Burr, 194 AD2d 369, 370 (1st Dept 1993).

At the same time, however, an account stated does not exist where there is any dispute about the account within a reasonable period of time. Abbott, Duncan & Wiener v. Ragusa, 214 AD2d 412, 413 (1st Dept 1995)(finding triable issues of fact as to claim for an account stated where defendants' affidavits submitted in opposition to plaintiff's motion for summary judgment

indicated there were disputes as to the amount due and the quality of work); M & A Constr. Corp. v. McTague, 21 AD3d 610, 611-12 (3d Dept 2005).

Defendants argue that they are entitled to summary judgment dismissing the account stated claim based on evidence that they objected to the invoices due to concerns about the quality and the timeliness of plaintiff's work, and that during the October 26, 2007 conference call, plaintiff was notified that Plus 44 did not agree to pay $60,000 for any work performed after November 19, 2007.[24] Defendants also argue that summary judgment dismissing this claim is warranted as an account stated "cannot be used to create liability where none otherwise exists" (M. Paladino, Inc. v J. Lucchese & Son Contr. Corp., 247 AD2d 515, 516 [2d Dept 1998]), and "may not be utilized simply as another means to attempt to collect under a disputed contract" (Martin H. Bauman Assocs., Inc. v H & M Intl. Transport, Inc., 171 AD2d 479, 485 (1st Dept 1991). With respect to the account stated claim as against the individual defendants, defendants additionally argue that the account stated claim fails as the invoices were not addressed to them as individuals.

Here, as to the individual defendants, since the invoices were addressed solely to Plus 44, and not to the individual defendants, and there is no evidence that the individual defendants paid any invoice, summary judgment is appropriately granted dismissing the account stated claim against them. See Brown Rudnick Berlack Israels LLP v Zelmanovitch, 11 Misc 3d 1090(A), *5 (Sup Ct Kings Co. 2006)(granting summary judgment dismissing account stated claim where there was no evidence that individual defendant, who was chairman of a company, agreed to be

[24]The court denied plaintiff leave to amend its complaint to assert the account stated claim against WG.

held liable for legal bills and had not made any personal payment of the bills); compare Butowsky v. RWG Support Services, Inc., 1997 WL 72149 (SD NY 1997)(denying summary judgment on account stated claim as against individual defendant when documentary and other evidence was insufficient to establish whether the legal fees sought were owed by the individual or corporate defendant).

As for Plus 44, while defendants provide evidence that Levy disputed the bills, Cone's testimony that Levy received the invoices on behalf of Plus 44 without protest and promised to pay them is sufficient to raise a triable issue of fact with respect to the account stated claim against Plus 44. Abbott, Duncan & Wiener v. Ragusa, 214 AD2d at 413. Moreover, as there are issues of fact as to the existence of a contract between the parties and whether any such contract was effectively terminated, summary judgment is not warranted on the ground that no contractual liability exists between the parties. See Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc., 95 AD3d at 438 (denying summary judgment dismissing account stated claim on the ground that there unfulfilled contractual obligations negated payment where there were issues of fact as to whether the parties had a binding contract and the nature of plaintiff's agreement).

Accordingly, summary judgment is granted to the extent of dismissing the account stated claim as against the individual defendants only.

Fraudulent Conveyance

Plaintiff's cause of action for fraudulent conveyance under the Debtor and Creditor Law alleges that defendants "caused defendant Plus 44 to transfer its assets, including [plaintiff's] source code (collectively, the "Assets") to some or all of the other defendants and/or defendant ABC Corporation, John Does 1-5 or other persons currently unknown to plaintiff, to delay,

hinder or defraud [plaintiff] as a creditor" (Third Amended Verified Complaint, ¶ 62). It is further alleged that "defendants' wrongful conduct violated §§ 276, 273-a, 273 and 275 of the Debtor-Creditor Law because the defendants transferred Plus 44's assets in order to delay, hinder or defraud [plaintiff] from collecting the Unpaid Balance Due for its Services rendered and caused defendant Plus 44 to become insolvent and otherwise incapable of satisfying its obligations [and that] [a]s a result ...Plus 44 and those other defendants acting [in] concert, and any transferees that received all or any part of defendant Plus 44's Assets, including especially all or any part of [plaintiff's] Gaming Website and/or Source Code, are liable to [plaintiff] in the amount of the Unpaid Balance Due of $240,215.25, together with accrued interest from December 1, 2007" (Id ¶ 63, 64).

Defendants argue that they are entitled to summary judgment dismissing the fraudulent conveyance claim, as the source code, the only identified asset that is the subject of the claim, remains in the possession of plaintiff based on Cone's testimony that plaintiff maintained a repository containing the source code, and plaintiff continues to have access to the code. In addition, defendants argue that the source code is not "a salable asset" with value since it was custom made for Plus 44 and has no market value, and therefore plaintiff cannot demonstrate damage resulting from its transfer. Next, defendants argue that the record shows they did not possess or transfer the source code as required to impose liability for a fraudulent transfer, pointing to, *inter alia*, Cone's testimony that he did not know whether the source code was transferred to the defendants, the affidavits of the individual defendants stating that they were never in possession of the source code, and the affidavits from representatives of WG that they did not use the source code. As for allegations that DCL § 276 was violated, defendants point

out that the right to recovery under this section requires clear and convincing evidence that a transfer was made with the intent to defraud, and argue that the record is devoid of such evidence.

In opposition, plaintiff argues that, at the very least, there are triable issues of fact as to whether Plus 44 obtained the code through its employee, pointing to, *inter alia*, Cone's testimony as to the similarity between the WG website and the code created by plaintiff, and that the WG website, while not using all of work done by plaintiff, incorporated certain aspects of it. In this connection, plaintiff also asserts that even if it maintained a repository for the source code, the record shows that it provided defendants with the information that went into the code's creation and defendants' subsequent transfer of this intangible asset which rendered it insolvent is covered by the fraudulent conveyance statute. Plaintiff further argues that source code is a "salable asset" under the statute based on the defendants' payment of more than $400,000 for plaintiff's work and their agreement to pay plaintiff more than $600,000 for it. Plaintiff also contends that the defendants have not meet their burden of demonstrating plaintiff was not hindered or delayed or defrauded by defendants' transfer of the source code. As for Debtor and Creditor Law § 276, plaintiff argues that issues of fact exist as to whether the transfer was made by defendants with the intent to defraud.

Under Debtor and Creditor Law § 273, a conveyance made by an entity (or person)which will be rendered insolvent thereby is fraudulent as to creditors, without regard to his or her actual intent, if the conveyance is made without fair consideration. "Fair consideration" exists "when in exchange for such property or obligation, as a fair equivalent therefor, and in good faith property is conveyed or an antecedent debt satisfied." (DCL § 272 [b]), or "[w]hen

such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compare to the value of the property or obligation obtained" (DCL § 272[b]). With respect to the issue of insolvency, only salable assets are considered in determining insolvency under the Debtor Creditor Law.[25] See generally, Grace Plaza of Great Neck, Inc. v Heitzler, 2 AD3d 780, 781 (2d Dept 2003). Thus, "claims that are inchoate, uncertain, and contested have no present value and cannot be considered an asset of the transferor." Ede v Ede, 193 AD2d 940, 940 (3d Dept 1993); see also, Chase Nat. Bank of City of N.Y. v. U.S. Trust Co. of New York, 236 AD 500 (1st Dept 1932), aff'd, 262 NY 557 (1933); see generally 30 NYJur 2d Creditors Rights § 324.

As for Debtor and Creditor Law § 275, it provides that a conveyance made without fair consideration at a time when the person making the conveyance "intends or believes that he [or she] will incur debts beyond his [or her] ability to pay as they mature, is fraudulent as to both present and future creditors." "Pursuant to this constructive fraud provision, a conveyance made by a person who has a 'good indication of oncoming insolvency' is deemed to be fraudulent Grace Plaza of Great Neck, Inc. v Heitzler, 2 AD3d at 781.

Debtor and Creditor Law § 276 provides that "[e]very conveyance made . . . with actual intent . . . to hinder, delay, or defraud either present or future creditors" is fraudulent. "[T]he burden of proof to establish actual fraud under Debtor and Creditor Law § 276 is upon the

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[25]DCL § 271 provides that:

> A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.

creditor who seeks to have the conveyance set aside... and the standard for such proof is clear and convincing evidence. " Marine Midland Bank v. Murkoff , 120 AD2d 122 (2d Dept 1986), appeal dismissed 69 NY2d 875 (1987).

As a preliminary matter, contrary to defendants' position, evidence that plaintiff remained in possession of the source code does not bar its claim under the fraudulent conveyance statute since plaintiff's physical possession of the source code does not preclude a finding that defendants transferred the information contained in the code, and conveyance of property under the statute includes "intangible property." See DCL § 270. Next, while defendants contend that they, and in particular Plus 44, the entity alleged to have been rendered insolvent, did not receive or possess the source code at any stage of its development, plaintiff has controverted this contention based on Cone's testimony that the code was given to Plus 44's employee and with respect to the similarity of the World Gaming website and the code created by plaintiff, as well as evidence that individual defendants were officers, directors and/or agents of WG, the alleged transferee. Moreover, it cannot be said on this record that the source code had no value such that it does not constitute a salable asset, particularly as Plus 44 paid over $400,000 for its development, and in light of evidence that the source code was used in connection with the World Gaming website.

Accordingly, defendants are not entitled to summary judgment dismissing plaintiff's fraudulent conveyance claim based on DCL §§ 273 and 275.

However, with respect to the plaintiff's claim under DCL § 276, plaintiff has failed to meet its burden of demonstrating that the transfer was made with the "actual intent... to hinder, delay, or defraud either present or future creditors." Sorenson v. 257/117 Realty LLC, 62 AD3d

618 (1st Dept 2009).

In addition, plaintiffs' claim for relief under § 273-a, which provides a conveyance made without consideration by a defendant in an action for money damages is fraudulent "without regard to actual intent if after final judgment for the plaintiff, the defendant fails to satisfy the judgment," is inapplicable here as there has been no final judgment for plaintiff.

Accordingly, defendants are entitled to summary judgment with respect to the fraudulent conveyance claim only to the extent of dismissing that part of the claim seeking relief under DCL § 276 and § 273-a.

Accounting and Constructive Trust

"The constructive trust doctrine is a fraud rectifying vehicle." Meier v. Meier, 76 AD2d 810, 811 (1st Dept 1980). To invoke it, there must be a confidential relationship, a promise, a transfer in reliance on that promise and unjust enrichment. Id. Similarly, "the right to an accounting is premised upon the existence of a confidential or fiduciary relationship." Palazzo v. Palazzo, 121 AD2d 261, 264 (1st Dept 1986).

In this case, as there is no confidential or fiduciary relationship between the parties, defendants are entitled to summary judgment dismissing the claim for an accounting and a constructive trust.

Permanent Injunction

Plaintiff seeks "a permanent injunction enjoining defendants from using, copying, transferring or otherwise implementing the Gaming Website directly or indirectly, unless and until the entire purchase price has been paid in full to [plaintiff] with interest [and that] [plaintiff] has no adequate remedy at law (Third Amended Verified Complaint ¶ 59, 60).

"[A] mandatory preliminary injunction (one mandating specific conduct), by which the

movant would receive some form of the ultimate relief sought as a final judgment, is granted only in unusual situations, where the granting of the relief is essential to maintain the status quo pending trial of the action." Second on Second Café, Inc. v Hing Sing Trading, Inc., 66 AD3d 353, 36–361 (1st Dept 2009)(internal citations and quotations omitted).

Under this standard, there is no basis for imposing a permanent injunction here, particularly as the alleged transfer of the source code occurred in 2007 or 2008. According, this claim is dismissed.

Punitive Damages

Punitive damages are available in contract cases, where the defendant has engaged in misconduct, which amounts to a tort independent of the contract and is directed at plaintiff and the public. New York Univ. v Continental Ins. Co., 87 NY2d 308, 316 (1995). The Court of Appeals also noted that such damages are available "only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as 'gross' and 'morally reprehensible,' and of ' "such wanton dishonesty as to imply a criminal indifference to civil obligations" ' Id., at 315-316, quoting Walker v. Sheldon, 10 NY2d 401 (1961).

Here, as summary judgment has been granted dismissing the fraud and fraudulent conveyance claims, there exists no legal basis for maintaining the request for punitive damages which is therefore stricken.

Conclusion

In view of the above, it is

ORDERED that the motions for summary judgment by the corporate defendants (motion seq. 009) and the individual defendants (motion sequence 010) are granted to the extent of (i)

dismissing against all defendants the claims for fraud (second cause of action), an accounting and a constructive trust (sixth cause of action), permanent injunction (seventh cause of action) and the fraudulent conveyance (eighth cause of action) to the extent of dismissing that part of the claim seeking relief under DCL § 276 and § 273-a, (ii) striking plaintiff's request for punitive damages, (iii) dismissing the breach of contract claim (first cause of action) as against defendants Fitzgerald, Levy and Zeldin, (iv) dismissing the unjust enrichment claim (third cause of action) against Fitzgerald and WG, (v) dismissing the services rendered claim (fourth cause of action) against defendants Fitzgerald, Levy and Zeldin and WG, and (vi) dismissing the account stated claim (fifth cause of action) against defendants Fitzgerald, Levy and Zeldin; and it is further

ORDERED that action shall continue with respect to (i) the breach of contract claim against Plus 44, (ii) the unjust enrichment claim against Plus 44, Levy and Zeldin, (iii) the services rendered claim against Plus 44, (iv) the account stated claim against Plus 44, (v) the fraudulent conveyance claim against all defendants pursuant to DCL §§ 273 and 275, and (vi) defendants' counterclaim for unjust enrichment against plaintiff; and it is further

ORDERED that the parties shall proceed forthwith to mediation.

Dated: May 17, 2017

J.S.C.
HON. JOAN A. MADDEN
J.S.C.