At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of October 2004

P R E S E N T:

HON. GLORIA DABIRI,

Justice.

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ROBERT RUDERMAN AND DEBRA RUDERMAN,

Plaintiffs,

- against -

Index No. 39179/97

GARY STERN MATTI STERN, MARCH CLOTHING, M and G CLOTHING CORP., MARCH CLOTHING CORP., MARGT LICHTSCHEIN, M & G CORP., MARCH CLOTHING WHOLESALE BUSINESS,

Defendants.

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The following papers numbered 1 to 4 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
_____ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants Gary Stern ("Stern"), Matti Stern, Marcy Clothing Corp. ("Marcy Clothing"), M & G Clothing ("M & G") and Marcy Clothing Wholesale Business (collectively referred to as "the defendants") move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the third, fourth, sixth, seventh and

eighth causes of action in the complaint of plaintiffs Robert Ruderman ("plaintiff") and Debra Ruderman or, in the alternative, pursuant to CPLR 3211 (a) (1) and/or (a) (7) dismissing said causes of action.

Facts and Procedural Background

In their complaint, as is relevant to the motion now before the court, plaintiffs assert that in May 1995, plaintiff and Stern entered into a an oral agreement pursuant to which a partnership known as "Ultimoda" was created to purchase mens' and boys' clothing. Defendants financed Ultimoda and plaintiff ran the company on a day-to-day basis and designed clothing to be manufactured by Campiv, an Italian company.[1] On October 18, 1996, Stern allegedly caused plaintiff to be arrested, claiming that he had stolen clothing from the business; on August 27, 1997, the criminal proceeding against plaintiff was dismissed. Plaintiff's association with Campiv and Ultimoda terminated upon his arrest.

Plaintiffs seek to recover compensatory, special and derivative damages, including plaintiff's alleged lost earnings and his share of the profits earned by Ultimoda. Plaintiffs' demands are premised upon their claims that defendants initiated plaintiff's arrest intentionally, maliciously, negligently, recklessly and with the intent of inflicting emotional

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[1]As was noted in its earlier decision dated January 17, 2004, plaintiffs' claims against the City of New York, the New York City Police Department, and detectives Howard Messing and John Doe ("the City defendants") have been settled and the causes of action as to them have been dismissed.

distress, for the purpose of procuring economic gain (third cause of action).[2] Plaintiffs also assert causes of action sounding in malicious prosecution (fourth cause of action), conversion (seventh cause of action), and the intentional infliction of emotional distress (eighth cause of action). Based upon defendants' action in informing numerous persons and business contacts that plaintiff was arrested, that he was stealing from defendants, and that he was an alcoholic and a compulsive gambler, plaintiffs also seek damages as predicated upon claims of defamation; slander; unjust enrichment; unlawful, deceptive and unfair trade practice; and breach of the fiduciary duty and the duty of good faith and fair dealing (sixth cause of action).

Defendants' Contentions

In support of their motion, defendants allege that Stern is the president of M & G, which has operated Marcy Clothing, a retail store, for approximately 50 years. In May 1995, Stern hired plaintiff as a salesman for Ultimoda to promote a new line of boys' suits; Stern claims that he introduced plaintiff to the representatives of Campiv. Ultimoda, as a wholesaler, was intended to deal exclusively with Campiv and was not permitted to sell to stores located in the geographic area in which Marcy Clothing was located, *i.e.* Flatbush and Boro Park. Further, Stern avers that plaintiff was not a partner in any of Stern's business ventures, but was instead an employee who did not share in the profits or losses; he was paid $1,000 per week, plus expenses; and he did not have any ownership interest.

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[2]Although the third cause of action is pleaded against the City defendants, the above noted allegations are made against defendants.

In the fall of 1995, Stern became suspicious that plaintiff was stealing merchandise, selling it to stores "off the books," and keeping the profits for himself. More specifically, Stern alleges that a customer advised him that a store a few blocks away was selling the same coat as was Marcy Clothing for $40 less. Upon investigation, defendants found that the near-by store was selling 20 to 25 Ultimoda coats; Stern asserts that he could find no bills or invoices associated with this merchandise coats. When confronted with Stern's suspicions, plaintiff offered an "unsatisfactory excuse." In October 1996, Stern alleges that he discovered that Ultimoda garments were being shipped from the Improved Packing and Consolidation Corporation ("IMPAC"), a warehouse in New Jersey, to Rosa Englander, a store located in Flatbush. Defendants claim that the store was not approved by M & G's factory and was located in an area in which Ultimoda was not authorized to do business. Additionally, IMPAC's invoice indicated that 299 units had been shipped, while the bill reflected the sale of only 159 pieces. Stern accordingly concluded that plaintiff stole the missing 140 pieces for sale to Rosa Englander.

Stern alleges that thereafter, he found that IMPAC shipping invoices revealed that other unauthorized stores were receiving Ultimoda goods.[3] Stern accordingly reported his suspicions to the police, who conducted an independent investigation and arrested plaintiff on October 16, 1997. In addition, the police allegedly seized clothing, business equipment and documents from plaintiff's home when they executed a search warrant. In August 1997,

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[3]Stern supports this assertion with a list of 23 stores that allegedly received 565 units. No supporting documents are referred to or provided to substantiate these figures.

the charges against plaintiff were dismissed upon the motion of the Kings County District Attorney.

Following plaintiff's arrest, Utlimoda's activities essentially came to a halt; the company only collected its accounts receivable and recovered its wholesale stock. M & G, however, continued to sell Campiv products on a limited basis at Marcy Clothing. Ultimoda conducted no business after December 31, 1996. Stern further claims that Ultimoda did not earn any profit, but instead lost $225,000.

Stern also states that after plaintiff was arrested, the former told certain concerned parties who inquired about plaintiff's absence, including Campiv representatives and store owners who had received Ultimoda goods, that plaintiff had been arrested and was no longer selling for Ultimoda. Stern further avers that he notified customers of his belief that plaintiff was stealing merchandise from Ultimoda because he was trying to locate lost merchandise.

Defendants conclude that based upon the above facts, for the reasons hereinafter discussed, plaintiffs' third, fourth, sixth, seventh and eight causes of action should be dismissed.[4]

Plaintiff's Contentions

Plaintiff opposes this motion, arguing that Stern had no reason to believe that he stole any merchandise from Ultimoda and that Stern's action in having him arrested was motivated by the concern that plaintiff was selling Ultimoda merchandise in the area in which Marcy

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[4]Although defendants argue that plaintiffs interposed a claim seeking to recover damages premised upon harassment, plaintiffs assert that no such cause of action was pleaded.

Clothing operated, against Stern's wishes. More specifically, plaintiff alleges that he met Stern when defendants began purchasing boys' suits from Jem Group ("Jem"), where plaintiff was a vice president; at that time, plaintiff had worked in the clothing industry for approximately 20 years and had prepared specifications for boys' suits for Italian manufacturers. In the spring of 1995, when plaintiff advised Stern that Jem was having financial problems and might not be able to continue to import apparel from Campiv, Stern and plaintiff entered into the partnership agreement at issue herein; plaintiff claims that he introduced Stern to the representatives of Campiv. Plaintiff contends that it was agreed that Stern's mother-in-law would finance the business, that plaintiff would run it on a day-to-day basis, that Stern would be a silent partner, and that Stern and plaintiff would be 50/50 partners. Plaintiff also avers that he and Stern became close personal friends, that Ultimoda generated average sales of $60,000 per month and that Stern was unhappy that plaintiff was selling merchandise to other stores located in the same area as was Marcy.

With regard to his arrest, plaintiff asserts that over Columbus Day weekend in 1996, while he and his wife were out of town, plaintiff's daughter telephoned to tell him that Stern had been to plaintiff's home and left with some papers. The following Friday, Stern asked plaintiff to meet him at Marcy Clothing, where he was met by detectives, put in handcuffs and arrested. In connection with the arrest, the police searched plaintiff's home pursuant to a search warrant and took records and inventory that he kept there.

Plaintiff further explains that defendants' claim that he stole the merchandise that was shipped to Rosa Englander is unfounded. More particularly, since Ultimoda's factor would only agree to extend credit in the amount of $8,000 to Rosa Englander and the cost of the 299 items that were shipped was approximately $23,000, plaintiff agreed that Ultimoda would be responsible for collecting the difference unless Rosa Englander paid the invoice promptly, in which case the factor would accept responsibility for the additional $15,000. Hence, in accordance with this "split" transaction, which is evidenced by billing documents from the factor, the invoice for the additional units shipped to Rosa Englander would not be generated until the factor received payment on the original invoice. Significantly, plaintiff contends that he advised Stern of the details of this transaction at the time that it was entered into. Moreover, when Stern visited Rosa Englander on October 21, 1996, he picked up 89 units, 192 units were still in the store, and only 18 were missing or had been sold, so that almost all of the allegedly stolen 140 units were accounted for. Further, although Rosa Englander agreed to and paid Stern for all of the items, Stern still refused to withdraw his charges against plaintiff.

Plaintiff also argues that Stern made false statements to the police when he told the detective investigating the matter that plaintiff was an employee, and not a partner, which claim is supported by the fact that plaintiff did not receive a W-2 statement from Ultimoda. In addition, Stern's statements to the detective that he and plaintiff had agreed that only factored sales would be made, that Stern had questioned plaintiff about the sale of the

clothing to Rosa Englander, and that the two men had agreed that Ultimoda would not market merchandise in the area where Marcy Clothing did business were similarly false.

As a result of plaintiff's arrest, as premised upon defendants' false representations, plaintiff claims that he incurred legal fees of approximately $20,000 before the criminal charges against him were dismissed; he lost income in the amount of $40,000, without taking into account his entitlement to profits; his reputation was ruined, necessitating that he and his family move to California; much of the property that was taken from his home when the search warrant was executed has never been returned and the District Attorney's agent told plaintiff that the property had been given to Stern; and he incurred expenses for therapy for himself and his wife as a result of the trauma caused by the arrest.

Plaintiffs conclude that the above facts establish that they are entitled to recover damages premised upon the causes of action interposed in their complaint.

Defendants' Reliance upon Law of the Case

In arguing that Stern and plaintiff were not partners, defendants rely exclusively upon their contention that the court so determined in its previous decisions, so that this finding constitutes law of the case. Defendants' argument is lacking in merit.

Pursuant to the doctrine of law of the case, once a point is decided within a case, that point is binding upon all parties and upon all courts of coordinate jurisdiction (*Gee Tai Chong Realty v GA Ins. Co.*, 283 AD2d 295, 296 [2001], citing Siegel, NY Prac, § 488, at 680 [2nd ed]). Thus, where a party had a full and fair opportunity to litigate the propriety of

a determination, and the issue was resolved on the merits in a prior decision and order, the prior decision constitutes law of the case (*see Posin v Russo*, 294 AD2d 344 [2002]; *see generally Beresford v Waheed*, 302 AD2d 342 [2003]; *Palo v Latt*, 283 AD2d 624 [2001], *lv dismissed* 97 NY2d 700 [2002]).

In this action, however, the court never determined that the agreement between plaintiff and Stern did not create a partnership. To the contrary, in a decision dated July 21, 2003, which denied plaintiffs' motion to compel the production of additional documents, the court held that plaintiffs "have not established the existence of a partnership agreement, *at this stage of the proceedings*" (emphasis added). Similarly, in the decision dated January 17, 2004, in which the court denied plaintiffs' motion to reargue and/or renew the earlier decision, the court held that "in view of defendants' denial of the existence of a partnership, *plaintiff's testimony and assertions serve only to raise an issue of fact and do nothing to nothing to resolve the issue*" (emphasis added).

Thus, since the court's earlier decisions did not resolve the factual issue of whether Stern and plaintiff entered into a partnership agreement, plaintiffs are not precluded by law of the case from seeking to prove at trial that Stern and plaintiff were partners. Further, defendants offer no other evidence or proof to establish that Stern and plaintiff did not have a partnership agreement. "A dispute between two or more persons as to the existence of an oral partnership agreement generally presents issues of fact concerning, for example, the ownership of partnership assets, the sharing of partnership profits, the exercise of

management and control over the partnership" (*Lynn v Corcoran*, 219 AD2d 698, 699 [1995], citing *Olson v Smithtown Med. Specialists*, 197 AD2d 564, 565 [1993]; *Brodsky v Stadlen*, 138 AD2d 662 [1988]; *Ramirez v Goldberg*, 82 AD2d 850 [1981]; 15 NY Jur 2d, Business Relationships, §§ 1309-1320; *accord Bamira v Greenberg*, 256 AD2d 237, 239 [1998]). Accordingly, the dispute as to whether plaintiff was a partner or an employee involves issues of credibility that cannot be resolved on this motion (*see generally Glick & Dolleck v Tri-Pac Export*, 22 NY2d 439, 441 [1968]; *Hall Dickler Kent Goldstein & Wood v Coleman*, 306 AD2d 167 [2003]; *Glazer & Gottlieb v Nachman*, 233 AD2d 275 [1996]).

Breach of Contract[5]

In seeking dismissal of what defendants' characterize as plaintiffs' breach of contract claim, defendants argue that since plaintiff was an employee at-will who received compensation at the rate of $1,000 per week, as was agreed, his claim must fail.

In the first instance, as discussed above, defendants have failed to establish that plaintiff was an employee at-will and not a partner. Moreover, although defendants are correct in their assertion that absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at-will, terminable at any time by either party (*see e.g. Horn v New York Times*, 100 NY2d 85, 90-91 [2003]; *Sabetay v Sterling Drug*, 69 NY2d 329, 333 [1987]; *Marino v Oakwood Care Ctr.*, 5 AD3d 740 [1984]); *Oross*

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[5]Although plaintiffs do not specifically plead a cause of action sounding in breach of contract, all of their claims stem from defendants' alleged breach of the parties' agreement to create and operate Ultimoda.

v Good Samaritan Hosp., 300 AD2d 457 [2002]), an employee at-will can maintain an action for compensation earned during the period of employment (*see e.g. Wilmoth v Sandor*, 259 AD2d 252, 254 [1999]). Since defendants have failed to establish that plaintiff agreed to accept compensation in the amount of $1,000 per week, and plaintiff asserts that he was also entitled to receive 50% of the profits generated by Ultimoda, defendants have failed to make a prima facie showing of entitlement to summary judgment to the extent that plaintiffs' claim for damages is based upon breach of contract, even assuming, arguendo, that he was an employee at-will.

Breach of Fiduciary Duty

Defendants' contention that plaintiffs cannot succeed on their claim that defendants breached their fiduciary duty to him relies solely upon their assertion that plaintiff was an independent contractor.

In rejecting this contention, it is first noted that defendants off no proof whatsoever to establish that plaintiff was an independent contractor. Further, as a general rule, the question of whether a relationship is a fiduciary one is a question of fact for the jury (*see Langford v Roman Catholic Diocese*, 271 AD2d 494, 503 [2000]; *see generally Sonnenschein v Douglas Elliman-Gibbons & Ives*, 274 AD2d 244 [2000]), *affd* 96 NY2d 369 [2001]. As is argued by defendants, a fiduciary duty is not created by the fact that an employer may owe money to an independent contractor for compensation (*see e.g. Waldman v Englishtown Sportswear*, 92 AD2d 833 [1993]), or that a salesperson is owed a commission (*see e.g. Michnick v Parkell Prods.*, 215 AD2d 462 [1995]).

The law is equally well settled, however, that partners have a fiduciary duty to each other (*see e.g. Meinhard v Salmon*, 249 NY 458, 463-464 [1928]; *Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180 [2000]; *White Light Prods. v On the Scene Prods*, 231 AD2d 90 [1997]; *Drucker v Mige Assocs.*, 225 AD2d 427 [1996], *lv denied* 88 NY2d 807 [1996]; *Alizio v Perpignano*, 176 AD2d 279 [1991]). Hence, inasmuch as defendants have failed to make a prima facie showing that plaintiff was not a partner in Ultimoda, defendants are not entitled to summary judgment dismissing plaintiff's claim as it is premised upon breach of fiduciary duty owed to him as a partner of Ultimoda.

In the alternative, "[a] fiduciary relationship, whether formal or informal, 'is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another . . . [and] might be found to exist, in appropriate circumstances, between close friends" (*Apple Records v Capitol Records*, 137 AD2d 50, 57 [1988], citing *Cody v Gallows*, 28 Misc 2d 373 [1961]; *accord Penato v George*, 52 AD2d 939 [1976], *appeal dismissed* 42 NY2d 908 [1977]). Plaintiff's assertion that he and Stern were close friends accordingly raises an issue of fact as to whether a fiduciary relationship can be predicated upon the relationship between the two men; although this allegation is denied by Stern, these conflicting statements raise issues of fact that cannot be resolved on this motion for summary judgment.

Breach of the Implied Covenant of Good Faith and Fair Dealing

In support of their demand for dismissal of these claims, defendants argue that no covenant of good faith or fair dealing is implied in a contract creating an at-will employment.

"Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance" (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995], *lv dismissed* 85 NY2d 964 [1995], citing *Van Valkenburgh, Nooger & Neville v Hayden Publ. Co.*, 30 NY2d 34 [1995]). Similarly, a covenant of good faith and fair dealing is implicit in a partnership agreement (*see e.g. Sterling Fifth Assocs. v Carpentille*, 5 AD3d 328 [2004]; *AFBT-II v Country Village on Mooney Pond*, 305 AD2d 340 [2003]; *Stuart v Lane & Mittendorf*, 235 AD2d 294 [1997], *lv denied* 89 NY2d 811 [1997]). "For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff" (*Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 [1999]; *see generally Zuckerwise v Sorceron*, 289 AD2d 114 [2001][plaintiff's allegation that defendant withheld from her the intended benefits of the parties' agreement sufficiently stated a claim for breach of the implied covenant of good faith and fair dealing]). "The implied covenant of good faith encompasses 'any promises which a reasonable person in the position of the promisee would be justified in understanding were included' in the agreement, and prohibits either party from doing 'anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*1-10 Industry Assocs. v Trim*, 297 AD2d 630, 631 [2002][citations omitted]).

There is, however, "no implied obligation of good faith and fair dealing in an employment at will, as that would be incongruous to the legally recognized jural relationship in that kind of employment relationship" (*Ingle v Glamore Motor Sales*, 73 NY2d 183, 188 [1989][citation omitted]; *accord De Petris v Union Settlement Assoc.*, 86 NY2d 406 [1995]; *Robertazzi v Cunningham*, 294 AD2d 418 [2002]; *Riccardi v Cunningham*, 291 AD2d 547 [2002]; *see generally Thawley v Turtell*, 289 AD2d 169 [2001][in holding that there was no cause of action in tort for abusive or wrongful discharge of an at-will employee, the Court of Appeals has declined to allow a plaintiff to evade the employment at-will rule and relationship by recasting his cause of action in the garb of a tortious interference with his employment]).

Inasmuch as defendants have failed to establish that plaintiff is an at-will employee, dismissal of these claims is denied. Further, plaintiffs' assertions that defendants withheld the agreed upon compensation from him and had him arrested so that he could no longer sell Ultimoda merchandise to competitors of Marcy Clothing raise issues of fact regarding breach of the covenants of good faith and fair dealing that cannot be resolved on this motion for summary judgment.

Malicious Prosecution

In support of their demand for dismissal of plaintiffs' malicious prosecution claim, defendants argue that since they did no more than report plaintiff's alleged stealing to the police, plaintiffs cannot establish such a cause of action.

"In order to recover for malicious prosecution, a plaintiff must establish four elements: that a criminal proceeding was commenced; that it was terminated in favor of the accused; that it lacked probable cause; and that the proceeding was brought out of actual malice" (*Cantalino v Danner*, 96 NY2d 391, 394-395 [2001], citing *Smith-Hunter v Harvey*, 95 NY2d 191, 195 [2000]; *Broughton v State of New York*, 37 NY2d 451, 457 [1975], *cert denied sub nom Schanbarger v Kellogg*, 423 US 929 [1975]). "A criminal proceeding terminates favorably to the accused, for purposes of a malicious prosecution claim, when the final disposition of the proceeding involves the merits and indicates the accused's innocence" (*MacFawn v Kresler*, 88 NY2d 859, 860 [1996]).

It is also well settled "that a civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charges filed, will not be held liable for . . . malicious prosecution'' (*Paisley v Coin Device*, 5 AD3d 748, 748 [2004], quoting *Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 131 [1999]; *accord Brown v Sears Roebuck & Co.*, 297 AD2d 205 [2002][the actions of a civilian complainant in providing the police with information and signing a criminal complaint at the request of the police was insufficient to support a claim for malicious prosecution]; *Goddard v Daly*, 295 AD2d 314 [2002][seeking police assistance and furnishing certain information to law enforcement authorities by the respondent did not constitute a commencement or continuation of a criminal proceeding against the plaintiff sufficient to sustain a cause of

action for malicious prosecution]; *Grant v Barnes & Noble*, 284 AD2d 238 [2001][giving information to the police or encouraging others to do so is not actionable]). Stated differently, "[t]here is no liability for merely giving information to legal authorities, who are left entirely free to use their own judgment in effecting an arrest, or in swearing out a criminal complaint so that an arrest is legally authorized" (*Cobb v Willis*, 208 AD2d 1155, 1156 [1994]; *accord O'Connell v Luebs*, 264 AD2d 385 [1999]). Similarly, identifying plaintiff as the perpetrator of a crime, signing the summons or testifying at trial do not give rise to tort liability (*Du Chateau*, 253 AD2d at 131, citing *Collins v Brown*, 129 AD2d 902 [1987]; *Pugach v Borja*, 175 Misc 2d 683 [1998]).

A plaintiff, however, can refute a prima facie showing of entitlement to summary judgment dismissing a claim of malicious prosecution where he or she raises "a triable issue of fact as to whether the defendants 'played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act'" (*Kochis v Revco Pharmacy*, 9 AD3d 449, 449 [2004], quoting *Viza v Town of Greece*, 94 AD2d 965, 966 [1983]; *accord Brown*, 297 AD2d 205). In order to satisfy this burden, a plaintiff must show that "'the defendant must have affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer is not acting of his own volition'" (*Mesiti v Wegman*, 307 AD2d 339, 340 [2003], quoting 59 NY Jur 2d, False Imprisonment & Malicious Prosecution § 37).

In like fashion, a defendant can be held liable for malicious prosecution as a civilian complainant where there are triable issues of fact as to whether the defendant intentionally provided false evidence to the police resulting in the plaintiff's arrest and prosecution (*see e.g. Brown v Nassau County*, 306 AD2d 303 [2003]). In this regard, "New York law has long equated the civil defendant's failure to make a full and complete statement of the facts to the District Attorney or the court, or holding back information that might have affected the results, with that defendant's initiation of a malicious prosecution" (*Ramos v City of New York*, 285 AD2d 284, 299-300 [2001], citing *Hopkinson v Lehigh Valley R.R. Co.*, 249 NY 296, 300 [1928]). A malicious prosecution may be maintained even where an arrest is made, since the finding of probable cause to arrest does not entail a finding of probable cause to support the bringing of the charge, because "[w]ith respect to the claim for malicious prosecution, the critical issue is what defendant knew and reasonably believed when he made the sworn statement, not what the police reasonably believed in reliance on that statement" (*Heller v Ingber*, 134 AD2d 733, 734-735 [1997]; *see generally Stowe v Winston*, 201 AD2d 391 [1994][where an identification supplied probable cause for an arrest pursuant to a warrant, tort liability for malicious prosecution could be grounded upon defendant's knowledge and the absence of a reasonable basis for its belief in the accused's guilt when it made the identification, not what the police reasonably believed in reliance upon the identification]; *see generally Warner v Druckier*, 266 AD2d 2 [1999][plaintiff adequately stated a cause of action for unlawful arrest/imprisonment premised on his allegations that

defendant "instigated" his arrest with knowledge that there was no lawful basis therefor]; *cf. DeFilippo v County of Nassau*, 183 AD2d 695 [1992][it could not be said that the bank commenced the proceeding or instigated the arrest where the record was devoid of any evidence to prove that the bank's agents did not make a full and complete statement to the District Attorney of all the facts and information within their possession, nor was there any showing that the agents of the bank gave false information or that they kept back evidence which would affect the result]).

Herein, plaintiffs have raised sufficient factual issues to refute defendants' prima facie showing that they did nothing more than to report to the police their belief that a crime had been committed. In this regard, Stern does not deny that he entered plaintiff's residence while plaintiff was away for the purpose of obtaining documents and/or other evidence that he believed would substantiate his claim that plaintiff was stealing and that he then contacted the police to advise them that he believed that plaintiff was stealing. As is indicated by the arresting detective's affidavits, Stern also made at least one visit to the police station and at least one visit to the District Attorney's Office. Stern similarly does not deny that he asked plaintiff to meet him at Marcy Clothing, where plaintiff was met by detectives and arrested. In addition, Stern admits that he accompanied a detective to Rosa Englander and another store after plaintiff's arrest to further investigate his claims.

In so holding, the court notes that in a similar case, it was found that a jury could reasonably determine that the defendant instigated the plaintiff's arrest by going to the

plaintiff's place of business, telephoning the police, and identifying him on the spot in front of his customers *(Mesiti*, 307 AD2d at 341). Similarly, in the case of *Urbank v Big Scott Stores Corp.* (92 AD2d 665 [1983]), the court held that defendant and third-party defendant were not entitled to summary judgment dismissing plaintiff's cause of action for malicious prosecution where a salesman, at the direction of the store manager, went to the State Police barracks, where he made and signed a statement which described a credit card transaction and a forged signature. Therein, the court reasoned that the defendant did not establish, as a matter of law, that defendant was not responsible for the institution of criminal action against plaintiff, since there was no indication in the record that the State Police or any law enforcement agency either knew about the alleged crime or was investigating it (*id.* at 666). As further precedent, in the case of *Dempsey v Masto* (83 AD2d 725 [1981], *affd* 56 NY2d 665 [1982]), the court found that defendant, who undertook to visit the home of plaintiff and confronted him regarding the theft of a tapestry, and thereafter provided information to the police and named plaintiff as the perpetrator "did much more than report the commission of the crime fairly and truthfully and leave its prosecution entirely in the hands of law enforcement agents" (*id.* at 726). If plaintiffs' claims with regard to defendants' actions in this case are found to be true, their actions are at least as significant as those of the defendants in the above discussed cases, so that dismissal of plaintiffs' malicious prosecution at this stage of the of the proceeding is not appropriate.

In the alternative, plaintiffs have also raised an issue of fact as to whether defendants misrepresented the facts to or withheld information from the police. In this regard, as noted above, Stern told the police that plaintiff was an employee of Ultimoda and that he told plaintiff not to sell merchandise in the area in which Marcy Clothing was located; plaintiff contends that he is a partner and when questioned by Stern about the sale of Ultimoda merchandise in the area of Marcy Clothing, plaintiff explained why he believed that such sales were important and did not agree to stop marketing goods in the area.

Similarly, plaintiff has raised an issue of fact as to malice. To establish malice, plaintiff must "demonstrate that defendant 'commenced the prior criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served'" (*Du Chateau,* 253 AD2d at 132, quoting *Nardelli v Stamberg*, 44 NY2d 500, 503 [1978]). In this regard, plaintiff has alleged facts sufficient to raise an issue as to whether Stern was motivated by his desire to stop plaintiff from selling Ultimoda merchandise to competitors of Marcy Clothing, rather than his concern that justice be served.

Emotional Distress

In support of their demand for dismissal of this claim, defendants argue that the conduct complained of fails to rise to the level necessary to support such a cause of action.

"'One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress'" (*Fischer v Maloney*, 43 NY2d 553, 557 [1978], quoting Restatement, Torts 2d, § 42 [1]); the

conduct complained of must be """so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community""" (*Seltzer v Bayer*, 272 AD2d 263, 264 [2000], quoting *Fischer*, *id.* at 553, quoting Restatement of Torts § 46, comment d [2nd ed]).

As is also relevant here, the doctrine of liability for intentional infliction of extreme emotional distress should not be applicable where the conduct complained of falls within the ambit of other traditional tort liability as, for example, malicious prosecution or abuse of process (*see e.g. Fischer*, 43 NY2d at 558; *164 Mulberry St. v Columbia Univ.*, 4 AD3d 49 [2004], *lv dismissed Josephine v Columbia Univ.*, 2 NY3d 793 [2004]; *McIntyre v Manhattan Ford, Lincoln-Mercury*, 256 AD2d 269 [1998], *appeal dismissed* 93 NY2d 919, *lv denied* 94 NY2d 753 [1999]). Similarly, "[c]ommencement of litigation, even if alleged to be for the purpose of harassment and intimidation, is insufficient to support such a claim" (*Walentas v Johnes*, 257 AD2d 352, 353 [1999], *lv dismissed* 93 NY2d 958 [1999]). Further, a claim for the intentional infliction of emotional distress may not be maintained to the extent that the damages sought are duplicative of those sought in the defamation claim (*see generally Brancaleone v Mesagna*, 290 AD2d 467 [2002]; *Ghaly v Mardiros*, 204 AD2d 272 [1994]; *Sweeney v Prisoners' Legal Servs.*, 146 AD2d 1, 7 [1989]). In like fashion, a cause of action for intentional infliction of emotional distress cannot be maintained where plaintiff is an at-will employee terminable from his position at any time and for any reason (*see Abeles v Mellon Bank*, 298 AD2d 106 [2002], citing *Murphy v American Home Prods.*, 58 NY2d

293, 300, 303 [1983]). It is also beyond cavil that a plaintiff cannot, in an action for breach of contract, recover damages for emotional distress (*see e.g. Wehringer v Standard Security Life Ins. Co.*, 57 NY2d 757 [1982]; *Fleming v Allstate Ins. Co.*, 106 AD2d 426 [1984], *affd* 66 NY2d 838 [1985], *cert denied* 475 US 1096 [1986]). Inasmuch as it cannot be determined whether plaintiffs will succeed in establishing any of the above pleaded causes of action at trial, however, dismissal of their claims as premised upon the infliction of emotional distress would be premature.

Further, in a strikingly similarly case, the court held that:

> "we do not find the defendants' conduct in filing a police report *based upon a reasonable suspicion that plaintiff, an employee-at-will, was stealing store merchandise* so extreme, reckless or outrageous as to state a cause of action for intentional infliction of emotional distress (*see Priore v The New York Yankees*, 307 AD2d 67, *lv denied* 1 NY3d 504) or was sufficient to support a cause of action for negligent infliction of emotional distress."

(*Khan v Reade*, 7 AD3d 311, 311 [2004][emphasis added]; *see generally Priore* [a professional baseball team which dismissed an at-will employee on the basis of allegations of petty larceny was not liable for defamation and emotional distress under circumstances where the dismissed employee was found to have three dozen new baseballs and damaged bats in his personal work area without permission and he admitted that he gave team T-shirts to employees at a fast-food restaurant]; *Abeles*, 298 AD2d 106 [the court correctly held that defendants' conduct, which included conducting an investigation into the forged signatures of plaintiff's supervisor on plaintiff's expense reports, questioning plaintiff about the

forgeries, and thereafter terminating her employment and escorting her from the premises, was not so extreme and outrageous as to support a claim for intentional infliction of emotional distress]).

In contrast, however, in the case of *Levine v Gurner* (149 AD2d 473 [1989]), the court held that given the possible threat of imprisonment as a result of the charges of leaving the scene of an accident as filed by the defendant, the defendant's conduct may rise to the level of outrageous conduct if she were guilty of falsely accusing the plaintiff. Thus, as discussed above, since the court cannot determine on the papers now before it whether defendants had a "reasonable suspicion" that plaintiff was stealing, or whether their conduct was maliciously undertaken to prevent plaintiff from selling Ultimoda merchandise to competitors of Marcy Clothing, dismissal of this cause of action at stage of the proceeding is denied.

Unjust Enrichment

In support of their claim that they are entitled to summary judgment on the complaint as it is premised upon a claim of unjust enrichment, defendants argue that the cause of action may not be maintained because the parties' obligations are governed by an express oral agreement and plaintiff was paid $1,000 per week for the services that he rendered.

The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter, since a quasi-contract only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order

to prevent a party's unjust enrichment (*see generally Clark-Fitzpatrick v Long Island R. Co.*, 70 NY2d 382, 388 [1987]). Accordingly, in order "[t]o state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor" (*Nakamura v Fujii*, 253 AD2d 387, 390 [1998], citing *Tarrytown House Condominiums v Hainje*, 161 AD2d 310, 313 [1990]). "Where defendants have reaped such benefit, equity and good conscience require that they make restitution" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 114 [1998]).

Thus, if both parties fail in establishing the terms of the agreement that controlled their relationship and the creation of Ultimoda, since defendants do not deny that plaintiff performed services for them and plaintiff maintains that defendants retained the profits to which he was entitled, a triable issue of fact exists as to whether defendants were unjustly enriched (*see Ultramar Energy v Chase Manhattan Bank*, 179 AD2d 592 [1992]; *see generally MJM Advertising v Panasonic Indus. Co.*, 294 AD2d 265 [2002][a cause of action alleging that the client refused to pay commissions states a cause of action for unjust enrichment]). Plaintiff also alleges that defendants were unjustly enriched because his services bestowed upon them product recognition and good will, compensation for which may also be properly recovered premised upon a claim of unjust enrichment (*see e.g. Lake Erie Distribs. v Martlet Importing Co.*, 221 AD2d 954 [1995]).

Further, plaintiffs are not obligated to elect to proceed on either their contractual claim or their quasi-contract claim at this stage of the proceeding:

> "Where, as here, a bona fide dispute as to the existence or application of a contract is demonstrated, a plaintiff generally 'will not be required to elect his or her remedies' (*Joseph Sternberg, Inc. v Walber 36th St. Assocs.*, 187 AD2d 225, 228). Only at trial is the plaintiff required to make an election 'at a time within the discretion of the Trial Judge' (*Baratta v Kozlowski*, 94 AD2d 454, 464; *see also*, *Unisys Corp. v Hercules Inc.*, 224 AD2d 365, 367, *appeal withdrawn* 89 NY2d 1031). . . .
>
> "Significantly, this matter is before the Court upon review of defendants' motion for an order dismissing the complaint or, in the alternative, granting defendants summary judgment. Plaintiff has not sought summary judgment, and the existence or nonexistence of any oral promise to pay him incentive compensation at the asserted rate has not been established. Therefore, circumstances obliging plaintiff to elect between a contractual and an equitable basis of recovery are absent, and the breach of contract claim should be permitted to go forward together with the claims based upon quantum meruit."

(*Wilmoth*, 259 AD2d at 254; *see also Curtis Props. v Greif Cos.*, 236 AD2d 237 [1997][a party is not precluded from proceeding on both breach of contract and quasi-contract theories where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue]).

Defamation

In seeking dismissal of plaintiffs' defamation claims, defendants argue that their statements regarding plaintiff's arrest are not actionable because they are true, that their

statements regarding plaintiff's alleged stealing are protected by a qualified privilege, and plaintiff failed to plead special damages with regard to their statements alleging that he was an alcoholic and a compulsive gambler.

The Law

As a general rule, slander is not actionable unless the plaintiff suffers special damage, unless the complained of statements constitute "slander per se," *i.e.* "statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman" (*Liberman v Gelstein*, 80 NY2d 429, 434-435 [1992][citations omitted]). Special damages contemplate "'the loss of something having economic or pecuniary value'" (*id.*, quoting Restatement § 575, comment b). As is also significant, special damages "'must flow directly from the injury to reputation caused by the defamation, not from the effects of defamation'" (*Matherson v Marchello*, 100 AD2d 233, 235 [1984], quoting Sack, Libel, Slander and Related Problems, VII 2.2, 345-346).

In summary, succinctly stated:

> "Defamation has long been recognized to arise from 'the making of a false statement which tends to "expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society"' (*Foster v Churchill*, 87 NY2d 744, 751, quoting *Rinaldi v Holt, Rinehart, & Winston*, 42 NY2d 369, 379, *cert denied* 434 US 969, quoting *Sydney v MacFadden Newspaper Publishing Corp.*, 242 NY 208). The elements are a false statement, published without privilege or authorization to a third party,

> constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se (Restatement of Torts, Second § 558)."

(*Dillon v City of New York*, 261 AD2d 34, 37-38 [1999]).

Statements Concerning Plaintiff's Arrest

The court agrees that plaintiffs' claim, as premised upon defendants statements that plaintiff was arrested, do not constitute defamation, since truth is a complete defense to an action to recover damages for libel or slander (*see e.g. Diaz v Espada*, 8 AD3d 49 [2004]; *Kehm v Murtha*, 286 AD2d 421, 421 [2001]; *Carter v Visconti*, 233 AD2d 473 [1996], *lv denied* 89 NY2d 811 [1997]; *Dillon*, 261 AD2d at 39).

Statements that Plaintiff Stole Merchandise

In seeking summary judgment relating to those statements made to various business associates regarding plaintiff's alleged stealing, defendants argue that their comments were made in the discharge of a duty, regarding a matter in which the recipient of the statement had a corresponding interest or duty, so that the statements are subject to a qualified interest privilege.

As a threshold issue, the court recognizes that the charge that plaintiff was stealing, or larceny, charges plaintiff with a serious crime. Hence, if that statement is false, it is slanderous per se, so that plaintiff is not required to show special damages (*see Marcus v Bressler*, 277 AD2d 108, 109 [2000], citing *Liberman*, 80 NY2d at 435). The statement that plaintiff was stealing is similarly deemed to be defamatory per se because it accuses plaintiff

of, and imputes to his business, fraud, dishonesty, misconduct, and unfitness (*see Liberman*, *id.* at 436). It these statements are privileged, however, they are not actionable.

"A privileged communication is one which, but for the occasion on which it is uttered, would be defamatory and actionable" (*Park Knoll Assocs. v Schmidt*, 59 NY2d 205, 208 [1983], citing *Cheatum v Wehle*, 5 NY2d 585 [1959]; *Andrews v Gardiner*, 224 NY 440 [1918]). Under New York law, "good-`faith communications by a party having an interest in a subject, or a moral or societal duty to speak, are protected by a qualified privilege if made to a party having a corresponding interest" (*Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 258 [1995][citations omitted]).

> "Some examples of such a common interest warranting a qualified privilege have been found to exist between the employees of an organization or business entity (*Loughry v Lincoln First Bank, N.A.*, 67 NY2d 369), members of a faculty tenure committee (*Stukuls v State of New York*, 42 NY2d 272), the constituent physicians in a health care plan (*Shapiro v Health Ins. Plan of Greater NY*, 7 NY2d 56), tenant association members of an apartment complex (*Liberman v Gelstein, supra*), the head of New York State school for deaf mutes (*Hemmens v Nelson*, 138 NY 517), and to employees, as distinguished from board members, of a board of education (*Green v Kinsella*, 36 AD2d 677).

(*id.* at 259). As is also relevant here, there "is no general qualified privilege to issue generally a defamatory statement merely . . . because it may serve to protect a 'business interest'" (*Shenkman v O'Malley*, 2 AD2d 567, 577 [1956]; *accord Gompers v Weil*, 5 AD2d 861 [1958]).

Further, a qualified privilege is "conditioned on its proper exercise, and cannot shelter statements published with malice or with knowledge of their falsity or reckless disregard as to their truth or falsity . . . " (*Herlihy*, 214 AD2d at 259). Hence, the defense of qualified privilege will be defeated by demonstrating that a defendant spoke with malice (*see e.g. Foster*, 87 NY2d at 752-753 [1996]; *Liberman*, 80 NY2d at 437). More specifically, "the conditional or qualified privilege is inapplicable where the motivation for making such statements was spite or ill will (common-law malice) or where the 'statements [were] made with [a] high degree of awareness of their probable falsity (constitutional malice)'" (*Foster*, *id.*, 87 NY2d at 752, quoting *Liberman*, *id.* at 438). Hence, "[m]alice has now assumed a dual meaning, and we have recognized that the constitutional as well as the common-law standard will suffice to defeat a conditional privilege" (*Liberman*, *id.* at 438).

In the context of common law malice:

> "spite or ill will refers not to defendant's general feelings about plaintiff, but to the speaker's motivation for making the defamatory statements (*see*, Restatement § 603, and comment a; *Stukuls v State of New York*, 42 NY2d, at 281-282, *supra*; *Stillman v Ford*, 22 NY2d, at 53, *supra*). If the defendant's statements were made to further the interest protected by the privilege, it matters not that defendant also despised plaintiff. Thus, *a triable issue is raised only if a jury could reasonably conclude that 'malice was the one and only cause for the publication'* (*Stukuls v State of New York*, 42 NY2d, at 282, *supra*)."

(*id.* at 439 [emphasis added]; *accord Thanasoulis v National Assoc. for the Specialty Foods Trade*, 226 AD2d 227, 229 [1996]). In contrast, to support a finding of constitutional malice,

a plaintiff must set forth evidence to support the conclusion that defendants entertained serious doubts as to the truth of the statement (*see generally Present v Avon Prods.*, 253 AD2d 183 [1999], *lv dismissed* 93 NY2d 1032 [1999], citing *St. Amant v Thompson*, 390 US 727, 731 [1968]), or that they actually had a """high degree of awareness of [its] probable falsity""" (*Sweeney*, 84 NY2d 786, 793, quoting *Harte-Hanks Communications v Connaughton*, 491 US 657, 667 [1989], quoting *St. Amant*, 390 US at 731 and *Garrison v Louisiana*, 379 US 64, 74 [1964]).

In applying the above general principles to the facts herein, the court first notes that defendants point to no authority to support their claim that privilege should be extended to the customers of a wholesaler, a class that is likely to be much larger than those to which the privilege has already been held to apply. In addition, defendants' attempt to establish privilege by arguing that they shared a common interest with their business associates because they had to explain why plaintiff was no longer affiliated with Ultimoda is without merit. While inquiries may have been made, defendants certainly were not obligated to provide a reason for their decision to terminate their relationship with plaintiff, nor did the customers have a right to know. Similarly unpersuasive is defendants' claim that they had a common interest with their customers because the customers were potential victims of plaintiff's theft, since this assertion is purely speculative, with no support whatsoever. In like fashion, Stern's assertion that Ultimoda's customers had a need to know plaintiff was stealing from other customers, who accordingly may have been guilty of receiving stolen

goods, is also unpersuasive, since the claim is based solely upon a self-generated list of stores and quantities of merchandise allegedly stolen, without any documentation or explanation with regard to how Stern reached his conclusion.

More significantly, the facts, as alleged by plaintiff establish numerous issues of fact with regard to whether Stern made the statements that plaintiff had been stealing with constitutional malice, *i.e.* with a high degree of awareness that the statement was false or that he entertained serious doubts as to the truth of the statements. In this regard, it is relevant that the criminal charges against plaintiff were ultimately dismissed by the Kings County District Attorney, which indicates that plaintiff could not be convicted. Further, plaintiff contends that he explained the nature of the transaction with Rosa Englander prior to Stern's alleged "discovery" of the theft, so that Stern had no reason to believe that any items were stolen in the first instance. In addition, the billing statement from Ultimoda's factor supports plaintiff's explanation that the sale was a "split transaction" and Stern does not allege that he contacted the factor to verify his belief that the transaction was not factored, which inquiry may have corroborated plaintiff's version of the nature of the transaction. Also significant is Stern's explanation that the statements were made to customers because he was seeking to locate stolen merchandise, since the privilege does not extend to statements made to protect one's own business interests.

Thus, since defendants have failed to make a prima facie showing that the statements that plaintiff was stealing were not made with malice so as to be privileged, summary

judgment dismissing the cause of action on this ground is denied (*see generally Torres v Prime Realty Servs.*, 7 AD3d 343 [2004][accusations that plaintiff improperly credited tenants, misappropriated petty cash, fraudulently cashed tenants' checks to her own account, was a thief and sniffed cocaine, which statements were allegedly made without investigation or proof of any kind and without any opportunity given plaintiff to refute, even assuming the offending statements were protected by the common interest privilege, defendants' motion for partial summary judgment was properly denied as their submissions did not eliminate any issue of fact as to whether they uttered the statements without malice]).[6]

Statements that Plaintiff was an Alcoholic and a Compulsive Gambler

Defendants' statements that plaintiff was an alcoholic and/or a compulsive gambler do not constitute slander per se, as they do not fit into the above described categories. Plaintiffs claims as predicated upon these statements are accordingly dismissed, since plaintiff failed to plead special damages resulting from the alleged defamation.

In so holding, the court finds that although plaintiffs assert damages including lost wages, lost profits, attorneys' fees incurred in defending the criminal action, fees incurred for counseling, and the costs incurred in relocating himself and his family to California, these damages resulted from plaintiff's arrest and his inability to locate employment because Stern

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[6]Plaintiffs, however, cannot succeed in establishing common-law malice, since plaintiffs repeatedly alleges that defendants were not solely motivated by ill will, but were also motivated by a desire to end plaintiff's relationship with Ultimoda, so that no Ultimoda merchandise would be sold to competitors of Marcy Clothing. Thus, a finding that defendants' action were solely motivated by ill will is not supported by plaintiff's version of the facts and of defendants' motive.

was telling business associates that plaintiff had stolen from Ultimoda. Hence, plaintiff failed to establish a nexus between these damages and the alleged statements that he was an alcoholic and/or a compulsive gambler (*see e.g. Misek-Falkoff v Keller*, 153 AD2d 841 [1989][the cause of action for slander was properly dismissed, since plaintiff failed to show a direct pecuniary loss flowing from any injury to her reputation as a result of the alleged defamation]; *see generally Masterson v Marcel*, 100 AD2d 233; *Fine v Gordon, Kushnick & Gordon*, 238 AD2d 373 [1997], *lv denied* 90 NY2d 803 [1997]; *Tanenbaum v Anchor Sav. Bank*, 95 AD2d 827 [1983]).

Prima Facie Tort

Defendants argue that plaintiff's cause of action sounding in prima facie tort must be dismissed because they cannot prove disinterested malevolence, an essential element. The court agrees.

"The requisite elements of a cause of action sounding in prima facie tort include (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" (*Levy v Coates*, 286 AD2d 424, 424 [2001], citing *Freihofer v Hearst Corp.*, 65 NY2d 135 [1985]; *Curiano v Suozzi*, 63 NY2d 113 [1984]). To succeed on such a cause of action, the complaining party must establish that he or she suffered specific and measurable loss, which requires an allegation of special damages (*see generally Del Vecchio v Nelson*, 300 AD2d 277 [2002]). In addition, a plaintiff must also establish that the sole motivation for the

institution of criminal charges was disinterested malevolence (*see generally Avgush v Town of Yorktown*, 303 AD2d 340 [2003]), "by which is meant 'that the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another'" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983], quoting *Beardsley v Kilmer*, 236 NY 80, 90 [1923]). "Where there are other motives, *e.g.*, profit, self-interest, business advantage, there is no recovery under tort prima facie" (*Squire Records v Vanguard Rec. Socy.*, 25 AD2d 190 [1966], *affd* 19 NY2d 797 [1966], citing *Beardsley*, *id.* at 89-90 [1923]; *Benton v Kennedy-Van Saun Mfg. & Eng.*, 2 AD2d 27, 29 [1956]; *see also Bainton v Baran*, 287 AD2d 317 [2001]; *Hessel v Goldman, Sachs & Co.*, 281 AD2d 247 [2001], *lv to appeal dismissed in part, denied in part* 97 NY2d 625 [2001]; *American Preferred Prescription v Health Mgt.*, 252 AD2d 414 [1998]]; *see generally IBM Credit Fin. v Mazda Motor Mfg. (USA)*, 152 AD2d 451 [1989]; *Roberts v Pollack*, 92 AD2d 440 [1983]).

Accordingly, since plaintiff has repeatedly alleged that defendants conduct was motivated, at least in part, by a desire to stop him from selling Ultimoda products to competitors of Marcy Clothing, plaintiffs cannot establish that the sole motivation for the conduct complained of was disinterested malevolence. This cause of action sounding in prima facie tort is accordingly dismissed.

Conversion

In seeking dismissal of plaintiffs' claim of conversion, defendants argue that plaintiff cannot establish that he had a superior right of possession and that defendants exercised an

unauthorized dominion over the property that plaintiff alleges was converted.

In order to succeed on a cause of action sounding in conversion, plaintiff "must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question . . . to the exclusion of the plaintiff's rights" (*Fiorenti v Central Emergency Physicians*, 305 AD2d 453, 454-455 [2003], quoting *Independence Discount v Bressner*, 47 AD2d 756, 757 [1975][citations omitted]). Defendants have failed to sustain their burden of proof of this claim.

It is well established that "the 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film*, 3 NY2d 395, 404 [1957]). "On a motion for summary judgment, the movant bears the initial burden of making a prima facie showing of its entitlement of judgment as a matter of law" (*General Elec. Capital v Broadway Crescent Assocs.*, 200 AD2d 607, 607 [1994], citing *Holtz v Niagara Mohawk Power*, 147 AD2d 857, 858 [1989]). When the submissions of the moving party are insufficient to demonstrate entitlement to judgment as a matter of law, the motion for summary judgment should be denied, without regard to the sufficiency of the opposing papers (*see e.g. Scurlock v Boston*, 7 AD3d 778 [2004]; *St. Luke's-Roosevelt Hosp. v American Tr. Ins. Co.*, 274 AD2d 511

[2000]; *Rentz v Modell*, 262 AD2d 545 [1999]; *see also Brown v Aurora Sys.*, 251 AD2d 1040 [1998]).

Herein, defendants fail to make a prima facie showing that they had legal ownership or an immediate superior right of possession to the property that plaintiff claims was converted, including documents, personal effects, and clothing that he designed prior to his affiliation with Ultimoda. In like fashion, defendants fail to demonstrate that they did not exercise unauthorized dominion or control over the property. Instead, they rely upon their claim that plaintiff cannot succeed in proving his claim. Defendants, however, cannot carry their burden of proof merely by citing gaps in the plaintiff's case (*see e.g. O'Leary v Bravo Hylan*, 8 AD3d 542 [2004]; citing *Katz v PRO Form Fitness*, 3 AD3d 474 [2004]; *Saryian v Ramana*, 305 AD2d 400 [2003]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2003]).

Accordingly, dismissal of the conversion claim is denied.

Conclusion

Defendants motion is granted only to the extent of granting summary judgment dismissing the cause of action for defamation as it is predicated upon defendants' statements that plaintiff was an alcoholic and a compulsive gambler and the cause of action sounding in prima facie tort. All other relief requested is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.