SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN Justice

PART 12

Index Number : 109524/2011 E
FARINA, MARIA CARMELA
vs
BASTIANICH, LIDIA M.
Sequence Number : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/28/2012

_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED motion ☒ DENIED cross-mot. ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12
----------X

MARIA CARMELA FARINA

Plaintiff,

Index Number 109524/2011E
Mot. Seq. No. 001

-against-

LIDIA M. BASTIANICH, an individual, TANYA BASTIANICH MANUALI, an individual, LIDIA'S ENTERPRISE HOLDINGS LLC, d/b/a TAVOLA PRODUCTIONS, PASTA RESOURCES, INC., and 14-37 136 STREET LLC,

DECISION AND ORDER

Defendants.
----------X

Appearances:

For the Plaintiff:
Katsandonis, P.C.
By: Paul Catsandonis, Esq.
325 Broadway, ste. 404
New York, NY 10007
(917) 664-8029

For the Defendants:
Cozen O'Connor
By: Michael C. Schmidt, Esq.
277 Park Ave.
New York, NY 10172
(212) 453-3937

Efiled papers considered in review of this motion:	**NYSCEFS Document Numbers**:
Notice of motion to dismiss, Memorandum of Law, Schmidt affirmation and annexed exhibits A - F	4 - 6
Notice of cross motion, Catsandonis affirmation and annexed exhibits A - K	8 - 19
Defendants' reply memorandum of law	21
Defendants' memorandum of law in opposition to cross motion	22
Transcript of Oral Argument held April 18, 2012	24

PAUL G. FEINMAN, J.:

Defendants, Lidia M. Bastianich, Tanya Bastianich Manuali, Lidia's Enterprise Holdings LLC d/b/a Tavola Productions, Pasta Resources, Inc. and 14-37 136 Street LLC, move to dismiss the complaint in its entirety pursuant to CPLR 3211 (a) (5) and (a) (7). Plaintiff Maria Carmela Farina opposes and cross-moves for leave to amend the complaint pursuant to CPLR 3025 (b). For the reasons set forth below, the motion is granted in its entirety and the cross motion is denied.

BACKGROUND

The verified complaint alleges that in 2005 non-party Mario Picozzi, "an associate of [defendant] Bastianich, while in Venice, Italy, informed Ms. Farina that a position in the United States as a chef was available and that Ms. Bastianich was willing to sponsor her and employ her due to her twenty-seven (27) years of culinary experience as a chef ..." (Doc. 5-1, ex. A, Ver. compl. at ¶ 10). It further claims plaintiff "was to be employed as a chef ... managing and overseeing the kitchens and assisting in the creation and preparation of new recipes for both the television show of Ms. Bastianich and the Defendants' restaurants" (*id.* at ¶ 11). Pursuant to this purported contract, plaintiff was to receive "not less than six hundred dollars ($600.00) per week for forty hours of work" (*id.* at ¶ 12). However, the complaint alleges that in 2006 when plaintiff arrived in the United States, she was "immediately placed in the home of ... [an] elderly woman, Luigia Crespi, who in 2006 was 99 years old" (*id.* at ¶ 14). Instead of working as a chef, plaintiff "was told that she was to serve as the personal assistant of the elderly Mrs. Crespi," which involved cleaning Crespi's home, cooking her meals, gardening, shopping and bathing her. The verified complaint alleges that "[s]ix years passed, and [plaintiff] was only brought on one occasion to the [d]efendants' restaurants or television programs where she had expected to work as a creative chef" (*id.* at ¶ 16).

Plaintiff submits a copy of a letter dated August 31, 2006, written on the letterhead of defendant Tavola Productions and signed by defendant Lidia Bastianich, as Tavola's president, to the United States Citizen and Immigration Services in support of Tavola's petition to obtain an H-2B visa for plaintiff so Tavola could offer plaintiff "a temporary and one-time occurrence position of Test Kitchen and Menu Preparation Coordinator, at a salary of not less than $600.00 per week" (Doc. 9, ex. A, Aug. 2006 letter). In 2007, Tavola Productions LLC petitioned to have plaintiff's visa status converted from H-2B to H-1B. In support of the petition, Bastianich,

as president of Tavola, submitted a letter to the Department of Homeland Security in which she express Tavola's support for its petition for H-1B visa status so Tavola could employ plaintiff "for a temporary period as [Tavola's] Test Kitchen and Menu Preparation Operations Manager, at an annual salary of not less than $37,000" (Doc. 10, ex. B, 2007 letter). According to the verified complaint, this letter "misrepresented to the USCIS and the Department of Homeland Security that [plaintiff] was a full-time employee for the Defendants working as an executive chef in their test-kitchens for an annual salary of $37,000 [but t]his never happened (Doc. 5-1, ex. A, Ver. compl. at ¶ 19). Plaintiff's visa was converted to an H1-B visa that would expire September of 2010. When it expired, plaintiff was still serving as a "personal assistant" for Mrs. Crespi, who at that time was 105 years old (*id.* at ¶ 20). The verified complaint alleges that defendants "induced [plaintiff] to overstay her visa, thereby putting her in danger of deportation and thereby disabling her from seeking reparations in a court of law in the United States" (*id.*). However, plaintiff claims that she was told by defendant Tanya Bastianich Manuali, Lidia's daughter, at some unspecified time and place, that plaintiff's visa "automatically" renewed itself and that her green card was "close to being granted" (*id.* at ¶ 21).

Mrs. Crespi died in December of 2010. At that time, defendants allegedly approached plaintiff, who apparently had been living in Mrs. Crespi's home, and instructed her to remove all furniture from the house so it could be sold (*id.* at ¶ 23). In February of 2011, plaintiff claims defendant Manuali, Bastianich's daughter, "unexpectedly showed up on [plaintiff]'s doorstep with a one-way airline ticket to Venice, Italy [and] demanded that [plaintiff] leave immediately ..." (*id.* at ¶ 24). The verified complaint further alleges that plaintiff was also "informed that upon arriving in Italy she would be paid ten thousand dollars ($10,000.00) for unpaid wages ..." (*id.*), although none of her eleven causes of action seek damages in that amount. Plaintiff alleges that she received no compensation for the six years of services she provided to the defendants.

Moreover, in March of 2011, plaintiff claims that "[d]efendants, initiated an eviction proceeding against [plaintiff] knowing full well that [she] would be on the street, unable to speak English and with no money to survive" (*id.* at ¶ 25). Elsewhere in the verified complaint plaintiff explains that Mrs. Crespi deeded her house over to Bastianich after Mrs. Crespi's husband died in 1996 for consideration of $10.00, with Mrs. Crespi retaining a life estate in the home for "full use, control, income, and possession of the property ..." (*id.* at ¶ 6). As part of this claimed deal, ten years when later Mrs. Crespi could no longer take care of herself, Bastianich, "to avoid a scandal and risk tarnishing her image as a family woman and homemaker, proceeded to bring Maria Carmela Farina [plaintiff] to the United States with the sole intention of having her care for Mrs. Crespi" (*id.* at ¶ 9).

The verified complaint alleges that all of the defendants "jointly employed [plaintiff] at all relevant times ...," and "[e]ach [d]efendant has had substantial control over [p]laintiff's working conditions and over the unlawful practices and polices [*sic*] alleged herein" (Doc. 5-1, ex. A, Ver. compl. at ¶ 37). Defendants are said to be "part of a single integrated enterprise that jointly employed [p]laintiff at all relevant times" and "[d]efendants' operations are interrelated and unified" (*id.* at ¶¶ 38- 39). It alleges that Bastianich is the owner of defendant Pasta Resources, Inc., which is "the entity printed on [p]laintiff's health insurance cards and information" (*id.* at ¶ 46). It further claims upon information and belief that Bastianich has "had power over compensation at Pasta Resources, Lidia's Enterprise Holdings, LLC, d/b/a Tavola Productions, 14-37 136 Street LLC, Del Posto, Felidia, and Lidia's Italy, including the power to set employee pay and related benefits" (*id.* at ¶ 50).

In the section titled "Nature of the Action," the verified complaint states

> "[t]his lawsuit seeks to recover monies owed to [plaintiff] for her services as the personal assistant and 24-hours-a-day, seven-days-a-week home health caretaker of Mrs. Crespi, compensation for the emotional damage wrought upon [plaintiff] through the callousness

> of the [d]efendants' actions for the past six (6) years, damages to her health from the physically demanding work of being the sole caretaker to a woman larger than herself and for damages to her professional career"

(*id.* at ¶ 26).

The verified complaint asserts the following eleven causes of action: (1) fraud; (2) constructive fraud; (3) breach of oral contract; (4) quantum meruit; (5) detrimental reliance; (6) misrepresentation; (7) negligent misrepresentation; (8) unjust enrichment; (9) initial infliction of emotional distress; (10) negligent infliction of emotional distress; and (11) conspiracy to commit fraud. In addition to being "economically injured," plaintiff claims to have suffered physical injuries to her eyesight and emotional injuries because she was overworked for the six years she provided care to Mrs. Crespi. She further alleges that her immigration status has been placed in jeopardy by defendants' actions. Plaintiff demands relief on all counts in the amount of $5,000,000.00, treble damages and punitive damages, costs of this action including experts' fees, and pre-judgment and post-judgment interest (*id.* at 30). In lieu of serving an answer, defendants move to dismiss the verified complaint in its entirety for failing to state a cause of action (CPLR 3211 [a] [7]) and for asserting claims which are barred by the applicable statutes of limitations (CPLR 3211 [a] [5]).

ANALYSIS

1. GENERAL STANDARDS APPLICABLE TO MOTIONS TO DISMISS

"On review of a pre-answer motion to dismiss a complaint for failure to state a cause of action (CPLR 3211 [a] [7]), the court must accept all of the allegations in the complaint as true, and, drawing all inferences from those allegations in the light most favorable to the plaintiff, determine whether a cognizable cause of action can be discerned therein ..." (*Matlinpatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]; citing *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634, 636 [1976]). While the test is not whether a cause of

action has been properly stated, the complaint "must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory" (*id.* at 839 [*internal quotations omitted*]). Furthermore, the court need not accept as true "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence" (*Simkin v Blank*, 19 NY3d 46, 52 [2012] [*internal quotations omitted*]). When addressing a motion to dismiss a claim based on the applicable statute of limitations, to court "look[s] for the reality and the essence of the action and not its mere name" (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47-48 [1st Dept 2009]; quoting *Morrison v National Broadcasting Co.*, 19 NY2d 453, 459 [1967]; quoting *Brick v Cohn-Hall-Marx Co.*, 276 NY 259, 264 [1937].)

2. FRAUD AND CONSTRUCTIVE FRAUD CLAIMS

The essence of plaintiff's first and second causes of action for fraud and constructive fraud, respectively, is that plaintiff was approached by Mario Picozzi, a nonparty and the purported agent of defendants, in 2005 with an offer to come to the United States to be a chef, that plaintiff relied upon on this representation, sold everything she owned and moved to the United States in 2006 only to discover that she would not be working as a chef for Bastianich's restaurants or television show, but would be providing 24-hour care for Mrs. Crespi. She further alleges that as a result of her reliance on defendants' allegedly false statements, she was economically injured because she was not paid anything for the next six years for the care she gave to Mrs. Crespi, she was physically injured because "her eyesight began to deteriorate rapidly due to her being overworked and uncared for ...," she was "emotionally injured as she was made to forgo living her own life and seeing her family...," and her immigration status was placed in jeopardy because the defendants allegedly "repeatedly misrepresent[ed] the status of her green card and visa to her, the purpose of which was to force the [p]laintiff out of the United

States without the possibility of return, thereby depriving [p]laintiff of legal recourse to seek compensation for years of unpaid labor and damages" (Doc. 5-1, ex. A, Ver. compl. at ¶ 56).

In opposition to defendants' instant motion, plaintiff argues, solely through her attorney's affirmation, that her fraud causes of action are not merely a restatement of the breach of oral contract claim because the "fraud claim is not that [d]efendants conspiring together made a contract and later decided not to honor it. Rather it is that [d]efendants fraudulently induced [p]laintiff into a contract that at the time of contracting they knew they would not honor and that [d]efendants made material and collateral representations to [p]laintiff with knowledge of their falsity" (Doc. 8, Catsandonis affirm. at ¶ 43). However, plaintiff does not actually set out any of these claimed "material and collateral representations" with the requisite particularity (*see* CPLR 3016 [b]). Plaintiff argues that her claim may nonetheless be maintained, quoting *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 (1995), for the principle that "where a party has fraudulently induced the plaintiff to enter into a contract, it may be liable in tort." However, plaintiff overlooks the part of that decision where the Court of Appeals held that "[g]eneral allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support [a fraud] claim" (*id.* at 318). "Nor is a fraud claim supported by plaintiff's conclusory allegations that defendants were engaged in a scheme to receive [plaintiff's services] without giving any benefit in return" (*id.* at 319).

Plaintiff's fraud and misrepresentation claims simply allege that defendants misrepresented their future intent to perform under the alleged oral contract rather than claiming a misrepresentation of present fact, "which is not sustainable as a cause of action separate from breach of contract" (*Fin. Structures Ltd. v UBS AG*, 77 AD3d 417, 419 [1st Dept 2010]; citing *Metropolitan Transp. Auth. v Triumph Adv. Prods.*, 116 AD2d 526, 527-528 [1st Dept 1986]). The fraud claims, which arise from the same facts, seek identical damages and do not allege a

breach of any duty collateral to or independent of the parties' alleged agreement, are redundant of the verified complaint's breach of contract claim (*see Havell Capital Enhanced Mun. Income Fund, LP v Citibank, N.A.*, 84 AD3d 588, 589 [1st Dept 2011]; citing *Fin. Structures*, 77 AD3d at 419). Accordingly, the branch of defendants' motion which seeks dismissal of the verified complaint's first and second causes of action is granted pursuant to CPLR 3211 (a) (7). As such, the branch of defendants' motion seeking dismissal of these claims pursuant to CPLR 3211 (a) (5) is denied as academic.

3. BREACH OF CONTRACT

The verified complaint's third cause of action alleges that in 2006, plaintiff was offered a position as a chef in the United States for 40 hours a week at a salary of $37,000.00 per year, which she accepted (Doc. 5-1, ex. A, Ver. compl. at ¶¶ 65-66). It further alleges that this oral agreement was breached by defendants because upon her arrival into the United States -- which was facilitated by defendants obtaining an H2-B and H1-B visa on her behalf -- plaintiff was placed into the home of Mrs. Crespi by defendants to provide her with 24-hour care, which plaintiff allegedly did for six years without any compensation. As plaintiff clarifies in her attorney's opposition affirmation, the alleged breach occurred in 2006 (Doc. 8, Catsandonis affirm. at ¶ 46). Thus, the essence of plaintiff's contract claim is that defendants breached an agreement to employ her as a chef.

"The traditional American common-law rule undergirding employment relationships, which [the Court of Appeals] adopted in *Martin v New York Life Ins. Co.* (148 NY 117 [1895]), is the presumption that employment for an indefinite or unspecified term is at will and may be freely terminated by either party at any time without cause or notice" (*Horn v New York Times*, 100 NY2d 85, 90-91 [2003]). The verified complaint does not specifically allege that her purported oral employment contract with the defendants provided for a definite or specified

term. However, in opposition to defendants' motion to dismiss, plaintiff's attorney refers to an excerpt from a letter submitted by Bastianich, as president of Tavola Productions, in support of plaintiff's visa application, which states that plaintiff is to be offered a position from October 9, 2006 to July 31, 2007, with their company (Doc. 8, Catsandonis affirm. at ¶ 49). The verified complaint, on the other hand, expressly states that plaintiff "was not in privity of contract with [d]efendants in the USCIS [visa] application ..." (Doc. 5-1, ex. A, Ver. compl. at ¶ 112). Moreover, the terms from the newly asserted Bastianich letter are in conflict with those alleged in the verified complaint. The verified complaint alleges that plaintiff, relying on defendants' purported offer, sold her furniture in Italy and traveled to the United States "with the hopes of beginning a new and exciting life as a chef for Ms. Bastianich's television show and high-end New York restaurants" (*id.* at ¶ 55). No where in the verified complaint, especially in those sections in which plaintiff describes the purported terms of defendants' employment offer and representations to the United States Citizenship and Immigration Services, does plaintiff allege anything from which one could reasonably infer that her employment was to be for a definite and specific time. Additionally, another letter submitted by plaintiff in opposition from Bastianich, as president of Tavola Productions, to the Department of Homeland Security, indicates that Tavola anticipated needing plaintiff's services for an initial period of at least three years.

Having failed to give any indication in her verified complaint that her alleged employment contract was for a definite term, while asserting allegations which could only support that it was not for a finite period and claiming that she was "not in privity of contract with the [d]efendants in the USCIS application ...," plaintiff now seeks to use Tavola's submissions in support of her visa application to avoid the employment at-will presumption and save her breach of contract claim. Even on a motion to dismiss pursuant to CPLR 3211, the

court is not required to accept bare legal conclusions and factual claims which are inherently incredible (*see JFK Holding Co., LLC v City of N.Y.*, 68 AD3d 477, 477 [1st Dept 2009]). Moreover, the court is not required to accept the unsworn claims of plaintiff's attorney which are tailored to avoid dismissal where they are inconsistent with a complaint verified by plaintiff. The verified complaint does not allege the existence of an employment agreement that is for a definite time period. Thus, defendants were entitled to terminate such agreement at will without cause or notice.

Furthermore, plaintiff pleads damages which are not recoverable for a breach of contract. She claims defendants' breach caused her economic injury because she was not paid for her six years of work, but she also alleges that the work she performed was not part of the contract she claims defendants breached. She faults defendants for allegedly placing her immigration status in jeopardy, but she does not allege that defendants assumed a duty, contractual or otherwise, with respect to her immigration status. Even if plaintiff could show a breach of contract, the physical and emotional injuries she seeks as a remedy are not alleged to be "within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting" (*Banco Popular North America v Lieberman*, 75 AD3d 460, 463-464 [1st Dept 2010]; citing *Chapman v Fargo*, 223 NY 32, 36 [1918]). Finally, plaintiff's demand for punitive damages fails because she does not allege that defendants "engaged in egregious conduct that was part of a pattern of similar conduct directed at the public generally" (*HSH Nordbank AG v UBS AG*, 95 AD3d 185, 209 [1st Dept 2012]; quoting *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]).

Accordingly, the branch of defendants' motion which seeks dismissal of plaintiff's third cause of action for breach of an oral contract of employment is granted.

4. QUANTUM MERUIT

In support of the fourth cause of action, plaintiff alleges that she performed services for the defendants by taking care of Mrs. Crespi for six years, that these services were accepted by the defendants and she was "never compensated for her labors" (Doc. 5-1, ex. A, Ver. compl. at ¶ 82). Defendants' acceptance, she claims, is demonstrated by the fact that she received health insurance from Pasta Resources, Inc., a W-2 tax form was issued to her, and her name was placed on a joint bank account which also included the names of Mrs. Crespi and Bastianich (*id.* at ¶ 80). The W-2 Wage and Tax Statement for 2007 is annexed to plaintiff's opposition, which shows that plaintiff was paid "wages, salaries and tips" in the amount of $2,000.00 by "Tavola Productions LLC," an entity that is not specifically named as a party in this action (Doc. 12, ex. D, 2007 W-2 and Form 1040). In addition, she attaches a JPMorgan Chase Bank, N.A. checking account statement for the month of September 2010, addressed to "Luigia Crespi or Lidia Bastianich" (Doc. 19, ex. K, Statement), copies of her tax refund checks for the 2008 and 2009 tax years and a copy of what she describes as her insurance card issued by Pasta Resources, which is accompanied by an email, dated February 5, 2007, which refers to "Maria's #" (Doc. 14, ex. F, Card).

In moving to dismiss the fourth cause of action, defendants first argue that plaintiff cannot bring a quasi-contract action where there is an express contract covering the same subject matter (Doc. 6, Plaintiff's memo. at 20). However, this argument is unavailing given that defendants sharply dispute the existence of an express contract with plaintiff (*id.* at 17-19). Next, defendants contend that plaintiff does not plead sufficient facts to support each of the required elements of a quantum meruit claim (*id.*). To state a cause of action for quantum meruit, 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 (see *Soumayah v Minnelli*, 41 AD3d 390, 391 [1st

Dept 2007]). Defendants argue that plaintiff fails to plead facts related to second and fourth elements. As to the second element, defendants quote several passages from the verified complaint as demonstrating that plaintiff only provided services for Mrs. Crespi (Doc. 6, Plaintiff's memo. at 20-21). In opposition, plaintiff argues, through her attorney's affirmation, that defendants accepted her services by "continu[ing] to renew her visa application, plac[ing] her on [d]efendant Pasta's health insurance company, and apparently fil[ing] taxes on her behalf and attempt[ing] to file disability benefits as well" (Doc. 8, Catsandonis affirm. at ¶ 19). She further claims that "the fact that these [d]efendants are all intertwined in a conspiracy against [plaintiff] implicates each and every one of them in the acceptance of the services performed by [plaintiff] at their behest" (*id.*). Plaintiff argues that the third element -- an expectation of compensation -- is met because she "first expected monetary compensation and then upon not receiving such, demanded payment to which she was then told that the [d]efendants were applying for her green card and the cost for such was very costly ...," and they allegedly "also represented to her that they were placing money into a bank account for her" (*id.*). Finally, as to the fourth element -- the reasonable value of plaintiff's services -- plaintiff argues that because she "did not receive anything for her services[,] she is entitled to the reasonable value thereof [and i]t is not inconceivable that the cost of nursing home care can exceed tens of thousands of dollars per year" (*id.*). She contends that this "was a cost that Ms. Bastianich and the Defendants saved (not to mention their gain of $529,990.00 by [the] sale of the home) by using [p]laintiff ..." (*id.*).

The allegations which plaintiff offers on the element of acceptance are in direct conflict with her claim that she never received any compensation for her six years of work. Clearly, accepting the allegations in the verified complaint as true, she was given health insurance, a place to live (as evidenced by her allegation that defendants tried to evict her when Mrs. Crespi

died), food and basic necessities and assisted her with immigration matters. Furthermore, if the court were to nonetheless accept plaintiff's claim that she did not receive any compensation for six years, plaintiff's contention that had a reasonable expectation of compensation from each of the defendants is inherently incredible (*see JFK Holding Co., LLC*, 68 AD3d at 477). Her claim that she was told by defendants at some unspecified time that they were placing money into a bank account for her does not satisfy the reasonable expectation of compensation element since plaintiff also alleges that "this bank account or its existence is unknown to [her]" (Doc. 5-1, ex. A, Ver. compl. at ¶ 171) and she "was never given information regarding those bank accounts" (*id.* at ¶ 85).

Moreover, plaintiff fails to make any distinction among the defendants in her allegations (*see Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487, 489 [1st Dept 2009] [dismissal under CPLR 3211 (a) (7) should have been granted where plaintiff failed to differentiate the amounts allegedly owed by the individual defendant from those due from the corporate defendant]). To the extent she seeks to impose liability upon each defendant based on their role in an alleged civil conspiracy, plaintiff does not plead specific facts from which such a conspiracy could be implied. Moreover, "[a]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort," (*Alexander & Alexander of N.Y.*, 68 NY2d at 969), but quantum meruit is a quasi-contractual theory of liability and not an independent tort (*Balestriere PLLC v Banxcorp*, __AD3d__, 2012 NY Slip Op 04675 [1st Dept 2012, DeGrasse, J., dissenting in part] [stating "quantum meruit is not a theory of tort liability"]; *see also Riverbank Realty Co. v Koffman*, 179 AD2d 542, 543 [1st Dept 1992] [wrongful acts that were purportedly committed in furtherance of the alleged conspiracy did not constitute independent torts, but instead were dependent upon the existence and breach of an alleged contract]).

Accordingly, the branch of defendants' motion which seeks dismissal of the verified complaint's fourth cause of action sounding in quantum meruit is granted.

5. DETRIMENTAL RELIANCE AND MISREPRESENTATION

The verified complaint's fifth cause of action, labeled "detrimental reliance," and sixth cause of action, labeled "misrepresentation," each rely on essentially the same factual allegations and seek the damages as plaintiff's first and second causes of action for fraud. Each of these claims is based on plaintiff's contention that defendants made false representations to induce plaintiff to move to the United States and plaintiff relied upon these alleged misrepresentations to her detriment. Accordingly, the branch of defendants' motion seeking dismissal of the fifth and sixth causes of action is granted.

6. NEGLIGENT MISREPRESENTATION

Assuming arguendo that the seventh cause of action for negligent misrepresentation is not duplicative of plaintiff's fraud claims, plaintiff nonetheless fails to plead sufficient allegations to survive defendants' motion to dismiss. The elements of a claim of negligent misrepresentation are: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*Matlinpatterson ATA Holdings LLC*, 87 AD3d at 840; quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). In determining whether defendants had a duty running to plaintiff, the court examines: (1) whether the person making the representation held or appeared to hold unique or special expertise; (2) whether a special relationship of trust or confidence existed between the parties; and (3) "whether the speaker was aware of the use to which the information would be put and supplied it for that purpose" (*id.* at 840; quoting *Kimmell v Schaefer*, 89 NY2d 257 [1996]). In opposition to defendants' motion to dismiss, plaintiff argues, through her attorney's affirmation and without

elaboration, that "[t]he [v]erified [c]omplaint shows that a special relationship did exist between [p]laintiff and [d]efendants," adding that the existence of a special relationship is a question of fact and not appropriate for a motion pursuant to CPLR 3211 (Doc. 8, Catsandonis affirm. at ¶ 66; citing *Kimmel v Schaefer*, 89 NY2d 257 [1996]; *Braddock v Braddock*, 60 AD3d 84 [1st Dept 2009]).

However, plaintiff does not even attempt to set out any specific factual allegations that give rise to a "special relationship." The verified complaint is devoid of any factual allegations pertaining to the nature of the parties' relationship in 2005, when plaintiff claims to have been approached by nonparty Mario Picozzi, Bastianich's purported agent, with an offer to come to the United States to work as a chef for defendants (Doc. 5-1, ex. A, Ver. compl. at ¶ 181). In connection with the sixth cause of action for intentional misrepresentation, the verified complaint alleges, in a conclusory manner, that plaintiff was "injured as a result of the special relationship that existed between her and the [d]efendants ..., [that] was such that in morals and good conscience [plaintiff] had the right to rely upon the [d]efendants for information" (*id.* at 111). Elsewhere in the verified complaint, plaintiff suggests that she "trusted" Bastianich and "had no reason to expect that Ms. Bastianich, an acclaimed chef and TV persona, would deceive her" (*id.* at ¶ 181). These allegations are insufficient to give rise to the "special relationship," as the court is not required to accept unsupported legal conclusions. A defendant's culinary celebrity status does not, in itself, give rise to a special relationship.

Additionally, even if plaintiff had sufficiently plead a cause of action for negligent misrepresentation, such claim would be barred under the applicable three-year statute of limitations (*see Colon v Banco Popular North America*, 59 AD3d 300, 300-301 [1st Dept 2009]; citing CPLR 214). Plaintiff's claim would have accrued in either 2005 or 2006 -- the date of defendants' alleged misrepresentation (*see Fandy Corp. v Chen*, 262 AD2d 352, 353 [2d Dept

1999]). This action was not commenced until 2011, well beyond the statutory period. Plaintiff's contention that defendants are equitably estopped from asserting a statute of limitations defense because as recently as 2010, they "continually misrepresented the state of [p]laintiff's immigration status by stating that her green card was pending and that they were putting money away for her in a bank account ...," does not meet the particularity requirements of CPLR 3016. Moreover, those actions had nothing to do with the alleged misrepresentation that is the basis of plaintiff's negligent misrepresentation claim, which pertained to the nature of plaintiff's employment.

Accordingly, the branch of defendants' motion which seeks dismissal of the verified complaint's seventh cause of action is granted.

7. UNJUST ENRICHMENT

The eighth cause of action, labeled "unjust enrichment," relies on the same factual allegations and seeks the same damages as plaintiff's quantum meruit claim. Plaintiff's opposition even argues that the elements of an unjust enrichment cause of action are the same as a quantum meruit claim (Doc. 8, Catsandonis affirm. at ¶ 70). Accordingly, defendants' motion to dismiss the eighth cause of action is granted.

8. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The tort of intentional infliction of emotional distress has four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress (*see Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]; quoting *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]). The requirements are "rigorous, and difficult to satisfy" (*id.* at 122; quoting Prosser and Keeton, Torts § 12, at 60-61 [5th ed]; also citing *Murphy*, 58 NY2d at 303 [describing the standard as "strict"]). Liability has been

found only where the conduct is "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 civil community" (*id.*; quoting *Murphy*, 58 NY2d at 303).

The verified complaint alleges that defendants refused to renovate Mrs. Crespi's bathroom to widen the door so plaintiff could more easily bring Mrs. Crespi there to bathe her causing "a stressful and panicked moment as [plaintiff] had to somehow manage to lift a woman larger than herself and aid her in using the facilities" (Doc. 5-1, ex. A, Ver. compl. at ¶ 140). It further claims that defendants represented to plaintiff that she would have a car service available to her whenever she needed to buy supplies or groceries but "[d]efendants always refused to accommodate these requests" so that plaintiff "was forced to go out on her own, call taxis, request rides from neighbors and try to handle the day-to-day tasks of living in a foreign land where she did not have a working knowledge of the English language" (*id.* at ¶¶ 143-144). Plaintiff claims, upon information and belief, that she was "mocked and call '*il schiavo di lusso*' which roughly translated from Italian to English means 'the golden slave' or the 'fancy slave'" (*id.* at ¶ 145). As a result of defendants' refusal to accommodate plaintiff's requests and the mocking she allegedly endured, she claims to now suffer "from feelings of inadequacy, anxiety, humiliation, and depression" (*id.* at ¶ 146). She also claims that her work with Mrs. Crespi caused her to "los[e] a significant amount of vision in her eyes" (*id.* at ¶ 148).

If these allegations about defendants are true, they are, of course deeply disturbing, but even accepting them to be true, the alleged conduct does not rise to the level of outrageous, atrocious and utterly intolerable conduct required by the Court of Appeals (*Murphy*, 58 NY2d at 303). Implicit in the fact that plaintiff's allegation that she was referred to as a slave is made upon "information and belief" is that she was not called a slave by any of the defendants to her face, if at all. Even if plaintiff had alleged that a specific defendant referred to her as a slave,

that allegation combined with her claims that defendants refused to renovate the bathroom and provide her with a car service, simply do not meet the strict standard necessary to plead a cause of action for intentional infliction of emotional distress.

In addition, as the statute of limitations on an intentional tort is one year from the date of the tort, and plaintiff's claim is based on the conditions allegedly imposed upon her over the course of six years, the ninth cause of action for intentional infliction of emotional distress is barred by the statute of limitations. Accordingly, the branch of defendants' motion seeking dismissal of the verified complaint's ninth cause of action is granted.

9. . NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

A cause of action for negligent infliction of emotional distress "generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety" (*Bernstein v E. 51st St. Dev. Co., LLC*, 78 AD3d 590, 591 [1st Dept 2010]; quoting *Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004]). Moreover, the complaint's factual allegations must be sufficient to "imply that [plaintiff's] claims for emotional distress were 'genuine, substantial, and proximately caused by the defendant's conduct'" (*id.* at 591; quoting *Howard v Lecher*, 42 NY2d 109, 111-112 [1977]). Like a claim for intentional infliction of emotional distress, this claim must be supported by allegations of conduct by the defendants "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 civil community" (*Sheila C.*, 11 AD3d at 130-131; quoting *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]; Restatement [2d] of Torts § 46, Comment *d*]). Such "extreme and outrageous conduct must be clearly alleged in order for the complaint to survive a motion to dismiss" (*Dillon v City of N.Y.*, 261 AD2d 34, 41 [1st Dept 1999]).

The verified complaint, even if supplemented by the statements of plaintiff's attorney's affirmation, fails to sufficiently allege "extreme and outrageous" conduct. Accordingly, the branch of defendants' motion seeking dismissal of the verified complaint's tenth cause of action pursuant to CPLR 3211 (a) (7) is granted. Thus, the court need not determine whether this claim is time-barred.

10. CONSPIRACY TO COMMIT FRAUD

Civil conspiracy is not an independent cause of action in New York (*see e.g. Awoshiley v Beth Israel Medical Center*, 81 AD3d 517, 518 [1st Dept 2011]; *Abacus Fed. Savings Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]). Rather, "[a]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort" (*Abacus Fed. Savings Bank*, 75 AD3d at 474; quoting *Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 [1986]). Thus, to establish a claim for civil conspiracy, plaintiff is required to "demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in furtherance of a plan or purpose; and (4) resulting damage or injury" (*id.*; quoting *World Wrestling Fedn. Entertainment, Inc. v Bozell*, 142 F Supp 2d 514, 532 [SD NY 2001]). Because the claim is predicated on intentional wrongdoing by defendants, the one-year statute of limitations period is applicable (*see Della Villa v Constantino*, 246 AD2d 867, 868 [3d Dept 1998]; CPLR 215 [3]).

The verified complaint's eleventh cause of action, labeled "conspiracy to commit fraud," alleges that Bastianich, through her agents and/or personally, made material representations to plaintiff as to what her role would be when she arrived in the United States, knowing that these statements were false because they only intended to bring plaintiff to the United States to be "a 24-hour uncompensated home care attendant to Mrs. Crespi" (Doc. 5-1, ex. A, Ver. compl. at ¶

177). Plaintiff claims that she was solicited by Mario Picozzi, who was allegedly acting as Bastianich's agent, and whom plaintiff trusted (*id.* at ¶ 181). Furthermore, after noting that defendants initiated an eviction proceeding after Mrs. Crespi's death in order to coerce plaintiff to return to Italy, "knowing full well that she would not be able to return to the United States and demand compensation from the [d]efendants," the verified complaint alleges that defendants "collud[ed] to defraud [p]laintiff of her compensation" (*id.* at ¶¶ 182 - 183).

In opposition to defendants' motion, plaintiff claims that "[t]here are many overt acts which support the agreement of the [d]efendants to continually deceive [plaintiff]," (Doc. 8, Catsandonis affirm. at ¶ 36), including Bastianich's "formal offer in 2006," and the "signing of [plaintiff's] employment immigration applications by Ms. Bastianich on Tavola Productions' letterhead" (*id.*). Plaintiff contends that "these signed documents unequivocally evidence the [d]efendants['] larger scheme to defraud and deceive [p]laintiff, satisfying the second requirement of civil conspiracy" (*id.*).

To the extent plaintiff relies on the alleged actions of defendants prior to plaintiff's move to the United States - which occurred in either 2005 or 2006 - plaintiff's conspiracy claim would be untimely. Even if plaintiff's claim is not barred by the statute of limitations, plaintiff has failed to sufficiently plead the underlying fraud claim. Furthermore, she cites only two "overt acts," neither of which involve Manuali, Pasta Resources, Inc. or 14-37 136 Street LLC. There is nothing in the verified complaint to causally connect defendants' alleged actions to plaintiff's claimed physical and emotional injuries. In any case, even accepting plaintiff's non-conclusory allegations as true and liberally construing the verified complaint in her favor, plaintiff fails to plead all of required elements of her conspiracy to commit fraud claim.

11. PLAINTIFF'S CROSS MOTION FOR LEAVE TO AMEND

Plaintiff asks the court for leave to amend the complaint to cure any defects which the court might find in addressing defendants' motion to dismiss. Plaintiff does not submit a copy of a proposed amended complaint, but nonetheless claims that granting her cross motion would not cause any prejudice or surprise to defendants and the amendment would be neither palpably insufficient nor patently devoid of merit. Plaintiff's cross motion is denied because she fails to submit a copy of any proposed amendment or to demonstrate how amendment "would cure the fatal deficiencies of the existing one" (*Automobile Coverage, Inc. v American Intl. Group, Inc.*, 42 AD3d 405, 407 [1st Dept 2007]; citing *Seven Seventeen Corp. v JP Morgan Chase & Co.*, 32 AD3d 802 [1st Dept 2006]).

Accordingly, it is

ORDERED that defendants' motion to dismiss plaintiff's verified complaint in its entirety pursuant to CPLR 3211 (a) (7) and (a) (5) is granted, and the verified complaint is dismissed in its entirety and the Clerk is directed to enter judgment in favor of defendants dismissing this action, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of a bill of costs; and it is further

ORDERED that plaintiff's cross motion for leave to amend the verified complaint is denied.

This constitutes the decision and order of the court.

Dated: September 28, 2012
New York, New York

Paul G. Feinman
J.S.C

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